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

Nearly 800 Forum members and associates (799, to be exact!) attended the 37th Annual Forum on Franchising meeting in Seattle this past October. The intensives, workshops, and plenaries covered thought-provoking and practical topics and were wonderfully executed by our talented and accomplished speakers. We dined together at some of Seattle’s best restaurants during a new event on Wednesday night – Restaurant Rounds. The Thursday and Friday social events took us to some of the best venues in Seattle – the Experience Music Project (EMP) Museum and Chihuly Garden and Glass. We gave back to the Seattle community by helping plant 700 trees in Lake Sammamish State Park for our Community Service event. Our thanks go to program co-chairs Jim Goniea and Will Woods for a magnificent job.

During the annual meeting the Forum handed out three awards:

• The Rising Scholar Award to Eric D. Stolze of Paul Hastings in Atlanta for his article: A Billion Dollar Franchise Fee? Tesla Motors’ Battle for Direct Sales: State Dealer Franchise Law & Politics;
• The Chair’s Award for Substantial Written Work or Presentation to Elliot Reed Ginsburg, a partner and shareholder at Michael Garner PA in Minneapolis, who last Fall co-authored with Michael Garner an article titled Nailing the Blob of Mercury: Goodwill in Franchising for the Franchise Law Journal; and
• The Lewis G. Rudnick Award to the late Dennis E. Wieczorek, former DLA Piper partner and former Chair of the Forum, whose wife Marla Weiner and children accepted on his behalf.

The Forum planning committee, including Tami McKnew and Andrew Loewinger, program co-chairs for New Orleans, are already hard at work developing what promises to be a great Annual Meeting in the Big Easy. The meeting will be held October 14-16, 2015, at the Sheraton Hotel in downtown New Orleans. Mark your calendars and plan to join us next October.

We also have a new venue and new dates for the 2016 Forum. It will be held at the Fontainebleau Hotel, November 2-4, in Miami.

I am pleased to report that the Forum expects to go to print with a new edition of Fundamentals of Franchising in the next few months. This book is a practical guide to the basics of franchise law. Since

Continued on page 17
Table of Contents

1  Message from the Chair
   Deborah S. Coldwell

3  IFA, Seattle Franchisees Seek to Enjoin Minimum Wage Law
   Paul D. Clement and H. Christopher Bartolomucci

5  State Regulators Circumvent Venue Clauses for Arbitration
   Sawan S. Patel and Susan E. Tegt

LITIGATOR’S CORNER

8  Strategies for Enforcing Preliminary Injunctions
   Matthew J. Meyer and Tyler J. Derr

10  Key Issues, Decision Points for International Expansion
    Lee Plave with Donald Wray, Michael Fink, and Kenneth Levinson

15  California’s Statute of Limitations: a Lesson from Mark Twain’s Cat
    Brian H. Cole

FORUM NEWS & EVENTS

17  Message from the Editor-in-Chief
    Corby C. Anderson

18  Rising Scholar Award Call for Authors

18  Seattle Community Service Event
In June 2014, Seattle became the first city in the United States to adopt a $15.00 per hour minimum wage law and the first to impose a higher minimum wage on small franchise businesses than on other small businesses. Whether such discrimination against franchises is lawful is the question at the heart of a lawsuit brought by the International Franchise Association (“IFA”) and a number of Seattle franchisees challenging the new law. International Franchise Ass’n v. City of Seattle, No. C14-848RAJ (W.D. Wash).

Seattle’s new minimum wage law phases in a $15.00 per hour minimum wage according to various schedules, with the first minimum wage hikes slated to take effect on April 1, 2015. A key feature of the law is that the minimum wage hikes come more quickly for large employers than for small employers.

Seattle’s law defines “large” employers as those that employ more than 500 employees anywhere in the United States. A “small” employer is defined as one that employs 500 or fewer employees. In its findings section, the Seattle law explains that “a benchmark of 500 employees is appropriate in distinguishing between large and smaller employers in recognition that smaller businesses and not-for-profits would face particular challenges in implementing a higher minimum wage.”

Seattle’s decision to single out small franchise businesses for uniquely unfavorable treatment and to favor local businesses...crossed the constitutional line.

But Seattle’s law proceeds to disregard this finding when it comes to small franchise businesses. The law defines a small, independently owned and operated franchisee as a “large” employer—no matter how few workers the small franchisee actually employs—if the separate franchisees in the relevant national franchise network collectively employ more than 500 workers.

As a result of this definition, the Seattle law phases in the $15.00 minimum wage much faster for small franchisees than for other small businesses. As of April 1, 2015, businesses defined as “large” employers, including small franchisees, must pay their employees $11.00 per hour. On January 1, 2016, the minimum wage for such employers rises to $13.00. On January 1, 2017, the $15.00 minimum wage takes effect for them. On January 1, 2018, and annually thereafter, the minimum wage that such employers must pay increases annually on a percentage basis to reflect the rate of inflation.

By contrast, the minimum wage increases for “small” employers are phased in much more slowly, on the following schedule: $10.00 in 2015, $10.50 in 2016, $11.00 in 2017, $11.50 in 2018, $12.00 in 2019, $13.50 in 2020, and $15.00 in 2021. Differences in the adjustments for inflation will perpetuate the discriminatory treatment well beyond 2021. Only in January 1, 2025, does the law contemplate an equal minimum wage that is the same for all employers. Until then a small franchise business will have to pay its workers substantially more than the otherwise identical local business across the street. Even though the two businesses have the same number of employees and offer the same product, and their workers do the same work, one may pay its workers less because it is not part of a franchise network. The discrimination against the franchise model, and in favor of the local, unaffiliated business, could hardly be clearer.

Lawsuit Filed by IFA, Franchisees

The lawsuit is brought by the IFA and a handful of local Seattle franchisees associated with the AlphaGraphics, BrightStar Care, Comfort Inn, and Holiday Inn Express franchise systems. The plaintiffs contend that Seattle’s discrimination against franchisees under its new minimum wage law...
violates several federal constitutional provisions and statutes, including the Commerce Clause and the Equal Protection Clause, and is preempted by the Lanham Act and ERISA pursuant to the Supremacy Clause. The eight-count complaint also alleges that the law violates the First Amendment freedoms of speech and association, the Washington State Constitution and Washington State Corporation Law.

**The Commerce Clause**

Under the Commerce Clause, local laws that discriminate against interstate commerce are considered virtually *per se* invalid. The plaintiffs contend that Seattle’s ordinance discriminates against interstate commerce because small franchise businesses operating in Seattle—even businesses with only a handful of employees—are treated much more harshly than non-franchise businesses simply because they have opted to affiliate themselves with out-of-state entities and interstate franchise networks.

Of the 623 franchises operating in Seattle, 600—or 96.3%—have out-of-state franchisors. And the 23 franchisees with in-state franchisors are all affiliated with franchisees in other states through the operation of their franchise networks. For these small businesses, the penalty for affiliating with an interstate franchise network is severe. Small franchisees are required to pay their employees a higher minimum wage than their similarly situated competitors that lack the same interstate ties—as much as $1.00 more in 2015, $2.50 more in 2016, and $4.00 more in 2017.

**The Equal Protection Clause:**
The IFA also argues that the Seattle law violates the constitutional guarantee of equal protection. As the United States Supreme Court has explained, laws that intentionally treat similarly situated entities differently violate the Equal Protection clause if “there is no rational basis for the difference in treatment.” *Village of Willbrook v. Olech*, 528 U.S. 562, 564 (2000). Seattle’s treatment of small franchisees, the plaintiffs maintain, is arbitrary and irrational. Seattle’s law finds and declares that “a benchmark of 500 employees is appropriate in distinguishing between larger and smaller employees in recognition that smaller businesses … would face particular challenges in implementing a higher minimum wage.” But the law then goes on to define small franchisees as “large” employers not by virtue of their employee counts but simply by virtue of their ties to interstate franchise networks. The law’s finding regarding the 500-employee benchmark cannot be reconciled with its subsequent treatment of small franchised businesses with far fewer than 500 employees of their own. Having made the employee count the relevant dividing line between large and small businesses, the complaint asserts that there is no rational basis for treating small franchisees and their similarly situated non-franchised competitors differently when it comes to the minimum wage those businesses must pay.

**The Lanham Act:**

Under the Supremacy Clause of the Constitution, U.S. Const., art. VI, cl. 2, a local law is preempted when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The plaintiffs contend that Seattle’s minimum wage law discriminates against franchisees and franchisors who exercise their federally protected rights to obtain and use trademarks. A local law disfavoring a class of employers defined in significant part by their use of a shared trademark frustrates the objectives of the Lanham Act and is preempted by the Act.

“A local law disfavoring a class of employers defined in significant part by their use of a shared trademark frustrates the objectives of the Lanham Act and is preempted by the Act.”


Seattle’s minimum wage law interferes with federally registered trademarks and frustrates the purposes of the Lanham Act. Under Seattle’s law, one
of the critical attributes of a small business counted as a franchise is that “[t]he operation of its business is substantially associated with a trademark, service mark, [or] trade name ... designating, owned by, or licensed by the grantor or its affiliate.” Furthermore, a small business deemed to be a franchise because it substantially associates with a trademark suffers dramatically negative consequences. Seattle’s law operates no differently than a $4.00 per hour tax on small businesses that associate with a federally protected trademark. Plaintiffs contend that such a penalty on exercising the rights to obtain and use trademarks directly interferes with the federal Lanham Act and is preempted by it.

Motion for Preliminary Injunction

The plaintiffs have filed a motion for a preliminary injunction, now pending. This motion asks the court to enjoin those provisions of the minimum wage law that discriminate against small franchise businesses. Under the proposed preliminary injunction, small franchise businesses would pay the same minimum wage as other small businesses.

The motion for an injunction quotes correspondence from members of a committee formed to advise Seattle officials on the new law as saying that “franchises like Subway and McDonalds really are not very good for our local economy. They are economically extractive, civically corrosive and culturally dilutive.” The motion asserts that the franchise-related provision of the law was added at the behest of the Service Employees International Union, which expressed a desire to “break the franchise model” so that unions could organize employees at franchise businesses.

Conclusion

Although raising the minimum wage is often controversial, minimum wage hikes seldom give rise to significant legal challenges. But Seattle’s minimum wage law and its discriminatory treatment of franchise businesses is different. As the plaintiffs assert in their motion for a preliminary injunction: “Somewhere in its deliberations about whether to raise the minimum wage and whether to do so uniformly among businesses, Seattle took a wrong turn and made a decision to single out small franchise businesses for uniquely unfavorable treatment and to favor local businesses. That discriminatory decision crossed the constitutional line.”

State Regulators Circumvent Venue Clauses for Arbitration

By Sawan S. Patel, Larkin Hoffman Daly & Lindgren Ltd. and Susan E. Tegt, Anytime Fitness, LLC

Franchise laws in several states prohibit the enforcement of venue selection clauses in franchise agreements. To the extent these laws purport to apply to venue selection clauses in the arbitration provisions of franchise agreements, courts have held that they are preempted by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (“FAA”), which provides that contracting parties’ arbitration provisions in interstate commerce are “valid, irrevocable and enforceable.” 9 U.S.C. § 2; Southland Corp. v. Keating, 465 U.S. 1 (1984). Nonetheless, some state regulators still require franchisors to remove out-of-state venue clauses from their arbitration provisions as a condition to approving the registration of their franchise offerings. This forces franchisors to consent to in-state arbitration under the preempted state laws or risk denial of their applications for registration. This article considers the constitutionality of regulators’ essentially forcing adherence to state statutes that are preempted by federal law.

Federal Preemption

Many franchise agreements contain provisions requiring the arbitration of disputes in a particular state, such as the home state of the franchisor. Franchisors have an interest in funneling dispute resolution to a particular jurisdiction rather than having to travel to every state where a dispute with a franchisee may arise. These contractual provisions may conflict with state franchisee protection laws, but courts have found that the FAA preempts these state laws, rendering the arbitration provisions enforceable.

Outside the franchise context, courts have likewise held that state laws cannot prohibit out-of-state arbitration of disputes under the FAA. For instance, a Louisiana law rendered unenforceable clauses in construction contracts that required resolution of disputes in a forum outside Louisiana. This law was held preempted by the FAA. OPE Int’l LP v. Chet Morrison Contractors, 258 F.3d 443 (5th Cir. 2001).

**State Laws Barring Out-of-State Arbitration**

Many states have franchise laws that restrict a franchisor’s ability to mandate an out-of-state venue for arbitration, litigation, or other forms of dispute resolution. These state-law restrictions take various forms, examined below.

Michigan’s Franchise Investment Law declares void and unenforceable any provision in a franchise agreement or other document relating to a franchise “requiring that arbitration or litigation be conducted outside this state.” Mich. Stat. § 445.1527. Washington’s State Securities Administrator, interpreting the Washington Franchise Investment Protection Act, Wash. Rev. Code § 19.100.180, concluded “it is not in good faith, reasonable or a fair act and practice for a franchisor to require an arbitration clause in a franchise agreement that unfairly and non-negotiably sets the site of arbitration in a state other than the State of Washington.” Wash. Franchise Act Interpretive Statement FIS-04, January 1, 1991. North Dakota’s Securities Commission held that franchise agreements providing for “the arbitration of disputes at a location that is remote from the site of the franchisee’s business” are unfair, unjust, or inequitable to North Dakota franchisees under N.D. Code. § 51-19-09.

Other states, such as California and Rhode Island, prohibit requiring an out-of-state venue for any type of dispute resolution. See, e.g., Cal. Bus. & Prof. Code § 20040.5 (“A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state”); R.I. Stat. § 19-28.1-14 (“A provision in a franchise agreement restricting jurisdiction or venue to a forum outside this state . . . is void with respect to a claim otherwise enforceable under this act”).

These provisions of the laws of Michigan, Washington, North Dakota, California, and Rhode Island run afoul of the FAA, to the extent they restrict parties’ rights to select the venue for arbitration by contract.

A number of states have recognized the supremacy of federal law and have permitted arbitration of disputes outside their borders, notwithstanding their bias against out-of-state venue clauses. For example, the Illinois Franchise Disclosure Act of 1987 provides that “[a]ny provision in a franchise agreement that designates jurisdiction or venue in a forum outside of this State is void provided that a franchise agreement may provide for arbitration in a forum outside of this State.” Ill. Stat. 815 § 705/4. Similarly, the South Dakota Franchise Investment statute tracks in substance Section 2 of the FAA and adds that “any condition, stipulation, or provision requiring a franchisee to waive compliance with or relieving a person of a duty or liability imposed by or a right provided by this Act or a rule or order under this Act is void.” S.D. Code § 37-5B-21.

**Considerations for Registration, Disclosure**

Franchisors that are exempt from registration and disclosure under state law can mandate an out-of-state venue for arbitration, relying on the FAA, but they may still find themselves having to defend against a franchisee’s motion for removal or dismissal, or an administrative action by a state attorney general. Franchisors that are not exempt
are not so lucky. They must choose between a bad option and a worse option, due to state regulators’ enforcement of their state laws during registration. If the franchisor relies on the FAA’s preemptive effect and ignores the state law’s venue restriction, it risks non-approval or delay of its registration as it responds to a comment letter, which in turn delays or prevents it from offering and selling franchises in the state. Theoretically, the franchisor could bring an administrative action against the state regulator, but no franchisor wants its registration held up for months while it incurs the cost and delay that come with challenging the constitutionality of a state regulator’s position. As a practical matter, one can see that these state law venue restrictions on arbitration have the greatest impact on small franchisors, which are not usually exempt and thus must comply with the preempted laws.

**Recommendations for Franchisors**

A franchisor intending to require out-of-state arbitration in the face of contradictory state laws should carefully negotiate and draft its franchise disclosure document (“FDD”) and franchise agreement to avoid giving franchisees any ground to challenge the enforceability of the contract and to ensure that the arbitration clause does not inadvertently become subject to state law, resulting in a waiver of the right to assert FAA preemption.

First, the franchisor should ensure that its arbitration and other related provisions are consistent among the franchise agreement, the FDD, and any state addenda. For example, in *Great Earth Cos. v. Simons*, a federal court in New York invalidated an arbitration clause in a franchise agreement that provided for arbitration in New York because the FDD explicitly assured the franchisee that, under Michigan law, clauses requiring arbitration outside of Michigan were void even if the Michigan law was preempted by the FAA. No. 00 Civ. 0967 (NRB), 2000 U.S. Dist. LEXIS 3772 (S.D.N.Y. March 24, 2000). The court in *Great Earth Cos.* held that the franchisor fraudulently induced the franchisee to agree to an out-of-state arbitration provision by failing to disclose its intent to enforce the arbitration clause in its franchise agreement despite its statements in the FDD. The lesson learned: A franchisor relying on the FAA notwithstanding state laws to the contrary should verify that its FDD and any state addenda do not contradict any arbitration or venue clause in its franchise agreement.

Second, the arbitration provision in the franchise agreement should clearly specify the location for the arbitration, which will typically be the franchisor’s home state. The parties should also consider adding language to clarify that the FAA preempts any state law barring out-of-state arbitration, similar to the following:

The parties intend and agree that any state laws attempting to prohibit arbitration or void out-of-state forums for arbitration are preempted by the Federal Arbitration Act and that arbitration shall be held as provided in this section.

Third, so long as the preempted state laws remain on the books, the franchisor should be prepared to support its argument that the FAA preempts state laws barring out-of-state arbitration and enforces the parties’ right to contract for an out-of-state venue for arbitration. Moreover, the franchisor must keep in mind that even if a state regulator ultimately accepts this argument, choosing not to comply with the state law in an initial filing may delay the ability to register and offer franchises in the state while the franchisor responds to a comment letter from the state.

**Recommendations for States**

States should amend their franchise laws to make them consistent with the FAA. Specifically, because the FAA permits the parties to a contract (including a franchise agreement) to agree to out-of-state arbitration, state laws should not prohibit arbitration or restrict the location of arbitration, and state regulators should not prohibit the registration of franchises requiring out-of-state arbitration. States should ensure that their laws, regulations, and other requirements are consistent with the FAA or provide an exception to allow compliance with the FAA (as Illinois did with its Franchise Disclosure Act), or, simpler yet, should delete their restrictions on arbitration entirely, given that such restrictions are not likely to hold up in court.

In the meantime, given that legislative change can be slow, state regulators reviewing franchise applications should recognize the unconstitutionality of these state laws (as state attorneys general have done for years in the area of civil rights), and should stop trying to enforce them by requiring franchisors to modify their arbitration provisions as a condition to achieving registration in the state.

---

Winter 2015 7 The Franchise Lawyer
They Are Violating the Injunction, Now What? Enforcement

By Matthew J. Meyer and Tyler J. Derr, Ansa Assuncao, LLP

Perhaps this scenario sounds familiar: Your phone rings and your client, who is noticeably upset, needs assistance enforcing a restrictive covenant in its franchise agreement. Your investigation reveals that a terminated franchisee subject to a post-term non-competition provision has opened a competing business just down the street from its former location. After hours of work preparing the verified complaint, motion for preliminary injunctive relief, and related briefs and evidentiary materials, you present your client’s case at the injunction hearing and the court grants your motion. The terminated franchisee is now enjoined from competitive misconduct. Victory!

But what happens when this same former franchisee violates the injunction? Perhaps the franchisee’s spouse comes in and starts to operate the competitive business. What options are available to the franchisor to stop this violation, and how will a court likely resolve the situation? Obtaining an injunction is an essential first step to enforcing a restrictive covenant, but obtaining the injunction and enforcing it are quite different concepts.

Contempt Proceedings

Injunction violations are enforced through contempt proceedings, which can be either criminal or civil. In most instances, civil contempt proceedings will apply to enforce injunctions entered in non-competition cases, so only civil contempt will be addressed in this article. Civil contempt proceedings are governed by the Federal Rules of Civil Procedure and the common law, which gives a court the inherent authority to enforce its own orders.

The first step in establishing civil contempt is moving the court to issue an order to show cause why the defendant should not be adjudged in contempt. “On a contempt motion, the movant bears the initial burden of proving, by clear and convincing evidence, the defendant’s noncompliance with a court order. After the movant satisfies this burden, the burden shifts to the alleged contemnor to explain his noncompliance at a show cause hearing.” Thomas v. Blue Cross and Blue Shield Assoc., 594 F.3d 814, 821 (11th Cir.2010); see also F.T.C. v. Trudeau, 579 F.3d 754, 776 (7th Cir.2009). The franchisor must, by clear and convincing evidence, establish that the underlying order allegedly violated was valid and lawful; the underlying order was clear, definite, and unambiguous; and the contemnor had the ability to comply with the underlying order. U.S. v. Koblitz, 803 F.2d 1523, 1527 (11th Cir.1986); see also Jones v. Brown, 425 Fed.Appx. 93, 95 (3rd. Cir.2011); Prima Tek II, L.L.C. v. Klek’s Plastic Industries, B.V., 525 F.3d 533, 542 (7th Cir.2008).

It is important that a franchisor’s motion cite the specific language of the injunction at issue and provide specific evidence establishing how the defendant has violated the injunction.

Assuming the franchisor meets its burden, the court will set a hearing requiring the franchisee to show cause why it should not be held in contempt. If found in civil contempt, the violator may be required to compensate those injured by the contempt. Furthermore, courts have wide latitude in fashioning a remedy for civil contempt. The purpose of sanctions in civil contempt proceedings is to coerce the contemnor to comply or to compensate a plaintiff for losses suffered due to the contempt. Thus, the first step in supporting a motion to show cause is to collect new evidence not only to establish that violations have occurred, but also to support the franchisor’s request for certain remedies.

Evidence of Violations

Evidence in the form of agreements, affidavits, photographs, maps, driving distances, social media posts, and the like, may have been filed in support of the motion for a preliminary injunction. But the mission now is to marshal new evidence that shows the violation of the injunction. Such evidence may include photographs, videos, documents, and other materials and information gathered by “secret shoppers” or investigators. Additional evidence may also be gathered through the discovery process, including depositions, requests for production, interrogatories, and subpoenas.

At the conclusion of your investigation, you should have a good sense of whether a legitimate claim for civil contempt exists by applying the factors set forth above. If the violation does not require immediate judicial intervention, consider sending the franchisee a cease and desist letter that will serve as a supporting exhibit to any
The cease and desist letter serves another important function as well: it provides notice and an opportunity to stop the violation without requiring additional motion practice before the court.

**Arguments Against Alleged Violations**

Arguments typically asserted by franchisees in response to an alleged violation of a preliminary injunction include substantial compliance, lack of intent to violate the order, lack of notice, and disagreement regarding the intended meaning, effect, and scope of the injunction. Franchisees have also attempted to thwart injunctions by arguing that the order improperly references the complaint or another document, in violation of Federal Rule of Civil Procedure 65(d)(1)(C), which requires an injunction to state its terms without reference to a separate document.

Sometimes, defendants will seek to avoid the preliminary injunction (and the franchisor’s other claims) by filing a bankruptcy petition. This generally triggers an automatic stay and thereby halts civil contempt proceedings until a franchisor files a motion with the bankruptcy court requesting that the stay be lifted.

If the court grants the motion for civil contempt, it may also impose other sanctions, such as awarding fees and costs associated with the violation, extending the duration of the injunction in place, and revising the language of the injunction to make it more restrictive. The case of New Horizons Computer Learning Centers, Inc. v. Silicon Valley Training Partners, Inc., No. 2:02CV459, 2003 WL 23654790 (M.D. Fla. Nov. 12, 2003), illustrates these principles in practice when a franchisor continues to police the enforcement of its injunction by bringing a motion for civil contempt. In this case, New Horizons sent default notices to its computer training franchisee Silicon Valley Training Partners, Inc. (“SVP”) for failure to make timely royalty payments and provide financial reports. Id. at *3. During the time when these notices were sent and prior to termination of the SVP’s franchise agreement, an SVP co-founder filed the fictitious name Innovative Technology Institutes (“ITI”) and advised former SVP clients that ITI would honor SVP’s training commitments. Id.

New Horizons terminated the franchise agreement, reminded SVP of the non-competition covenant, and ultimately obtained a preliminary injunction against SVP. Id. at *4. Unbeknownst to the New Horizons, ITI’s competing business was already fully operational. Upon discovering this, New Horizons filed an amended complaint. On the eve of a scheduled show cause hearing, SVP filed for bankruptcy, causing the litigation to be stayed. Id. After the franchisor successfully moved the bankruptcy court to lift the stay, the court held a show cause hearing and found that the franchisee had violated its injunction. Id. at *5-8. The court concluded the franchisee was in civil contempt, awarded fees and costs, and extended the duration of the injunction. Id. at *10.

**Remedies Appropriate to the Circumstances**

It is also important to consider what specific remedies are appropriate to the circumstances presented. For example, if there are legitimate concerns regarding ongoing or future violations, it is appropriate to request that the court include monitoring or reporting provisions in the order of civil contempt. In Bunzl Distrih Northeast, LLC v. Born, Civ. No. 07-3706, 2008 WL 43995, (D.N.J. Jan. 2, 2008), the court issued an injunction prohibiting, among other things, “(c)ausing or attempting to cause any company listed on [a list of Bunzl customers] to divert, terminate, limit, or in any manner modify or fail to enter into any actual or potential business relationship with Bunzl.” Id. at *1. After the defendant admittedly violated the injunction, the plaintiff filed a motion for contempt. Id. In opposing the motion, the defendant argued that although he did sell to customers on the list in violation of the court’s injunction, that was inadequate grounds for contempt because “[f]or a salesman who sold approximately $9 million of product…during
the last full year...the sale of product producing a profit of less than $5,000 cannot be deemed substantial or contemptuous.” Id. at *2. The court disagreed, stating that “‘[s]ubstantial compliance’ is not measured by a ratio of sales to profits, but is determined by whether the party took ‘all reasonable steps’ to comply with the order.” Id.

In finding the defendant in civil contempt for violating its order, the court went further than imposing the routine remedies of extending the injunction and requiring the defendant to pay fees and costs. It also ordered the defendant to produce records relating to Bunzl’s customers, for purposes of determining whether additional violations existed, and it ordered the defendant to file monthly certificates of compliance with the injunction, subject to the penalty of perjury. Id. at *6.

As Bunzl teaches, it is key to identify how the injunction is being violated, what harm such violations are causing, and what remedy would alleviate the harm. In doing so, franchisors should advance pragmatic remedies that courts can easily enforce and monitor.

Having restrictive covenants that franchisors can rely on is critical to protecting the franchise system. Many franchisors are willing to pursue an injunction for a franchisee’s breach of a restrictive covenant, but the hard truth is that obtaining the injunction can be just the beginning. To make the injunction meaningful and set precedent within the franchise system, franchisors must monitor compliance with injunctions and institute contempt proceedings when violations occur.

---

**Key Issues, Decision Points For International Expansion**

Lee Plave with Donald Wray, Michael Fink, and Kenneth Levinson

Editor’s Note: The Forum’s International Division held a panel discussion on international expansion at the annual meeting in Seattle last October, featuring Donald Wray, of Little Caesar Enterprises, Inc.; Michael Fink, of Starbucks Coffee Co.; and Kenneth Levinson, of Faegre Baker Daniels. Program moderator Lee Plave, of Plave Koch PLC, conducted a follow-up interview with the panelists concerning key issues and decision points. The text of that interview is excerpted below. Thanks to Meg Loveless of Plave Koch PLC, who played an invaluable role in preparing the notes of the panelists’ interview.

**Plave:** The threshold question for many franchisors is whether to establish a separate entity for international expansion or simply use the domestic franchisor. What issues does that present?

**Levinson:** A franchisor expanding internationally through a U.S.-based, wholly-owned entity would generally face the same type of risks and issues as franchising directly. However, using a U.S.-based specially established subfranchisor entity (a special purpose vehicle, or “SPV”) interposes additional limited liability protections for the “parent” U.S. franchisor. The franchisor could use this SPV as its structural “international subfranchisor” entity going forward, thus simplifying its life substantially by consolidating international expertise, personnel, licensing/franchising documentation, even IP/ TM rights, and other administrative and systemic programs and policies into a single entity. The franchisor should ensure that the SPV is part of the “consolidated” U.S. tax return with its parent entity or otherwise as a flow-through entity (such as an LLC) for overall U.S. tax efficiency.

**Plave:** If the franchisor opts for a separate international franchising entity, should that entity be domestic (U.S.) or international? What financial and corporate considerations stem from whether the franchisor establishes a separate entity or expands from the domestic entity?

**Levinson:** A franchisor could consider expanding internationally through a wholly-owned foreign subsidiary as its subfranchisor. In this case, the local (foreign) subfranchisor entity would be required to meet any regulatory requirements and make all other locally-required disclosures, recordings and filings. It would insulate the “parent” U.S. franchisor from legal liability locally, although in some countries it may be necessary for the disclosure document to use the financials or other business history of the U.S. “parent” anyway.
Two key differences with this structure are worth noting. First, the local subfranchisor entity would constitute a controlled foreign corporation (“CFC”) for U.S. tax purposes, meaning that the U.S. parent franchisor will have to report the fact that it owns that CFC and confront various U.S. tax rules on whether the types of income earned by that CFC are subject to “deemed taxation” in the U.S. to that parent entity. Further, there would likely be foreign bank account reporting (“FBARs,” now filed electronically in the U.S. on FinCEN 114), and other required forms, by both the U.S. parent entity and various officers and directors of that entity.

The second key difference is that the relationship between the U.S. parent and the CFC will be subject to transfer pricing scrutiny, potentially by both the IRS and local-country tax authorities. Because these entities would be related, they would be expected to deal with each other at arm’s length. Hence, any intercompany transactions or documents would need to adhere to transfer pricing guidelines and may require contemporaneous documentation to be made available at the time of filing or disclosed on tax returns.

Plave: Where should the franchisor expand? Selecting a base country involves more than tossing a dart at a map! What political considerations and legal issues may the franchisor face?

Wray: Geographic preferences are usually driven by business considerations and the anticipated operational synergies offered by a particular country or region. But it’s important to remember that what makes sense to the business team may be flatly prohibited under U.S. or other law. For example, the U.S. Treasury Office of Foreign Assets Control (“OFAC”) sanctions lists – the list of specially designated nationals (“SDNs”) – may prohibit doing business in the target country or with certain individuals. The risk is particularly acute in perceived hot markets where U.S. government restrictions may recently have been relaxed (such as Myanmar). Foreign Corrupt Practices Act (“FCPA”) risks are particularly thorny where local partners are likely to be state-owned enterprises or have government affiliation, as is often the case in China. Recent U.S. Justice Department investigations indicate that even U.S. companies’ recruiting of local talent may present FCPA risks. And of course local anti-corruption laws must be taken into account.

The franchisor also may need to consider whether export controls or U.S. anti-boycott laws might obstruct entry into the target country, limit key actions (such as trademark registration), or otherwise compromise the financial and operational model. In short, considering the possible extra-territorial impact of U.S. law as it may apply to the franchisor’s business should be an important first step in any analysis of a potential base country.

Franchisors also are wise to conduct a sober, high-level assessment of the geopolitics of the target country or region. Despite the commercial peace of mind that may be afforded by a free trade agreement or tax treaty, local or regional political instability can quickly disrupt the franchisor’s operations in unanticipated ways. For example, while the Middle East continues to be fertile commercial ground for U.S. franchise systems, the Arab Spring turmoil prompted many regional governments to tighten visa and immigration restrictions, severely limiting the mobility of expat employees.

In other parts of the world, a particular country’s affinity for U.S. brands may be threatened by the local government itself if the government has a history of using heightened regulatory scrutiny as an instrument of foreign (and domestic) policy. Consultation with the U.S. Embassy and U.S. Commercial Service in a particular country is often a good starting point for assessing such risks.

Of course, many legal and cultural considerations at the local level may argue for locating in one country over another. The brand identity for any franchise system is embodied in its trademarks, and it is vital to know whether a franchisor’s trademarks are likely to qualify for registration in a particular country. (In some countries, many well-known U.S. marks are considered too generic or descriptive to be eligible for registration.) It also is essential to know whether a particular trademark (or transliteration, as in China) has negative connotations in the country or is being infringed by a prominent and politically-connected local operator.

It will be important to know whether the target country’s legal system will reliably, transparently, and promptly enforce contracts and facilitate the pursuit and enforcement of legal remedies that U.S. companies may take for granted. Key components of this analysis are surveying all treaties to which the local country is a signatory and consulting with experienced local counsel.

Plave: What are some of the issues to consider in establishing company-owned units in the local target market?
**Levinson:** Sometimes the franchisor must decide whether it should open its own stores first in the country to establish, for example, brand awareness and proof of concept. Key points to consider regarding this strategy include the following:

- There may be franchise disclosure and registration issues if the intention is to sell franchises over time.
- The franchisor cannot escape liability with respect to local operations or employees by directly operating businesses in the local country, even if it uses a U.S. SPV.
- From a tax perspective, a franchisor operating local stores will be deemed doing business in that country, under either local law or the standard tax treaty provisions relating to having a permanent establishment ("PE"). This would result in a local tax nexus and corporate tax reporting and tax payment requirements for the franchisor.
- The franchisor would be directly subject to compliance with local labor and employment laws and employer/employee wage and social welfare withholding.
- Local activities may expose the franchisor to double taxation, at the local country level and in the U.S. This triggers a separate tax issue: planning for and using U.S. foreign tax credits.

A different international expansion pattern, seen often in the more populous foreign locations, involves franchisors proceeding with multiple franchisees in a country or territory. But these multiple-franchisee structures create additional stresses, paperwork, and administrative complexities for the franchisor. For example, multiple-franchisees structures entail multiple franchise fee collection and accounting requirements. Franchisors also must work with each franchisee on filing required tax-treaty forms, so that each franchisee’s separate fee payments are qualified for the tax treaty’s reduced withholding tax rates. Then there are multiple administrative efforts to secure separate tax and foreign exchange clearances so that each franchisee may actually remit fee payments from the foreign country.

These multi-franchisee structures also require more management, training, and servicing by the franchisor. The needs of separate franchisees and the activities of the franchisor’s employees locally can, in turn, increase tax risks to the franchisor itself. Tax treaties and local laws may provide that the frequent or elapsed presence in-country of a franchisor’s employees or agents may generate a finding that the franchisor is “doing business” or having a PE locally. That may trigger direct corporate tax liability for the franchisor, as well as risks of personal taxation to the franchisor’s employees dispatched to that country.

**Plave:** What are the key issues and decision points to consider when establishing operations in the base country? Are there wage and employment requirements?

**Fink:** Depending on the type of business operations and the products and services provided, the franchisor may want to consider entering into intercompany services agreements. If the scope of services to be provided in country will require leveraging resources and support from a related or affiliated company, and if that company will be compensated for the services provided, the details must be spelled out in order to address and support transfer pricing challenges.

The franchisor must conduct a thorough due diligence analysis of the country’s local employment and wage and hour regulations before entering the market. Almost every other country lacks the familiar U.S. concept of at-will employment. Many jurisdictions have laws and regulations that make it difficult, costly, and time consuming to terminate employees. Many countries have legal formulae for compensating terminated employees – often based on tenure and/or age. Almost all of the franchisor’s employment manuals and policies will need to be rewritten and tailored to local laws, regulations, and customs.

Some countries, such as Australia, have strict and costly overtime rules that can seriously affect the profitability of a franchisor’s typical business model. If a franchisor plans to have key employees sign non-competes, it must be aware that in many countries these covenants are not enforceable, and in others, they are enforceable only if the employee is paid additional compensation. If the franchisor plans to transfer employees into the market, it must analyze the country’s immigration policies and rules, which are flexible in some countries and restrictive in others.

Many countries (particularly in continental Europe) mandate “works councils” when a company has a certain number of employees. Understanding whether a works council should
be national, regional, or local, and understanding which workplace issues require approval by the works council are important, because those questions may have a significant impact on operations. Also, in some markets, unions are required, while in others, companies must negotiate with specified unions, and in still others, companies must join a particular industry group that negotiates with a union on behalf of everyone in that industry. It is critical to understand the landscape before entering a market.

The FCPA risks of operating in a country through a wholly-owned subsidiary are much greater than when operating through a licensee or franchisee (or even a non-controlled joint venture). Countries that pose particular risk include the “BRIC” markets – Brazil, Russia, India, and China. Areas of particular heightened concern include businesses that sell products to the government, that must procure many permits and licenses from government agencies, or that import or export products through customs.

**Plave: Are there special cross-border considerations?**

**Fink:** The franchisor should analyze the target country’s customs and duties as part of its due diligence. Some countries impose tight restrictions and high tariffs on imports. This can have a significant impact on the cost of goods and the profitability of the franchisor and its franchisees alike. The franchisor should research the availability of local suppliers as an alternative source of key products – both from a cost perspective and as a back-up source of supply in case key products cannot get cleared through customs.

**Plave: What do you consider when it comes to the financial aspects of choosing a “base country”? Is the local currency stable? Are there any issues with regard to exchange or repatriation of funds? Are there banking or accounting standards that should be considered? What about geopolitical issues that are inevitably a part of international operations?**

**Wray:** These are among the most critical elements of any target country analysis. Much will depend on what organizational model the U.S. franchisor chooses and whether the franchisor’s goals favor deferral and deployment of funds and capital offshore or, alternatively, swift repatriation of funds to the U.S. Also relevant are the franchisor’s level of sophistication and its tolerance for foreign currency exchange risk.

A good starting point is a straightforward examination of how difficult it is to repatriate funds from the target country. Although the number of countries with oppressive exchange controls has decreased in recent years, certain bureaucratic requirements and obstacles (such as central bank filings and tax certificates and caps on remittances) remain in all corners of the globe. Some U.S. franchisors may find such requirements incompatible with their business model. Another consideration is whether differences in accounting standards between the U.S. and the target country will necessitate adjustments to the franchisor’s business model or increase its administrative expenses and professional fees.

The geopolitical assessment of the target country should consider the effect of political instability and economic volatility on exchange rates, capital markets, and the likelihood of adverse government intervention. If swings in the exchange rate beyond a certain point would have an unacceptable impact on operations and earnings, the franchisor obviously may want to consider alternative locations. Similarly, the prospect of a government lockdown on remittances (as occurred recently in Venezuela) should be taken into consideration when the target country has a history of such instability. Careful drafting of relevant agreements with local partners (to include, for example, a termination provision in the event of adverse government intervention) can help mitigate such risks.

**Plave: Are there other tax or foreign exchange considerations that must be taken into account?**

**Levinson:** Repatriation of funds to the franchisor is a key issue. And, it extends not only to the question of whether and how the funds get remitted, but also when. Many foreign countries have some form of pre-approval or foreign exchange conversion requirements in order to remit funds. In some countries, such as China, there is a two-step process: a required tax clearance (to ensure proper accounting and withholding tax payments) and a separately required foreign exchange conversion and remittance approval (to control the amount of hard currency being remitted and the conversion
at what may be a government-controlled exchange rate). The franchisor must consider whether it, or the local franchisee, will have the obligation (and cost responsibility) of securing all such required approvals. Further, the franchisor must consider how the local country’s required processes may affect the conventional provisions in franchise agreements relating to timeliness of payments and late fees or penalties.

**Plave:** What other considerations affect the franchisor’s choice of a vehicle for international expansion?

**Fink:** The final considerations for a franchisor’s international expansion should be concurrent review of: the franchisor’s culture and the nature of its product or service; the ability to commit resources and make capital investments; and the characteristics of the target country. If the franchisor’s concept is resource-intensive, it will face serious challenges expanding into a country where those resources are not available and tight import restrictions exist. If the franchisor’s core product or service is repugnant to a target country’s cultural or religious beliefs, the franchisor might need to throw the dart at the map again. If the franchisor’s system favors franchisor control over operations, such as supply chain/distribution, training, and advertising, it may face issues with the PE status (and resulting tax liabilities), visa and work permits, and vicarious liability-type issues that may arise as franchisors become more and more involved in franchisee operations. A “turn-key” franchise concept would be ideal, but successful international franchising might require intensive training and close monitoring of local operations. In that case, the franchisor should consider the target market’s geographic proximity, as well as the franchisor’s ability to commit sufficient resources to the concept.

Regarding financial resources, a franchisor must first research whether local commercial considerations disfavor, impede, or flatly prevent direct investment, and whether local parties enjoy preferential treatment. And, because showing a profit from international expansion may take longer than a franchisor’s shareholders are willing to wait, the return-on-investment timeframe must be clearly understood and spelled out from the start. The more complex the franchising relationship – whether the company will have one master franchisee/area developer in a target country, or several operators covering several countries – will all depend on how much capital and time the franchisor can commit to fully research the expansion opportunity and implications, but also to administer the system once there.

Finally, although everyone hopes the international franchising expansion will be successful and long-lived, the franchisor should consider and prepare an exit strategy.

**Editor’s Note:** As this issue went to press, the White House announced that the United States will take steps toward normalizing relations with Cuba. How will this affect U.S. franchisors’ plans for international expansion?

**Plave:** There will be significant challenges, both legally and commercially. Beyond assessing the market for U.S. franchise concepts in a country where we have neither conducted regular trade nor had commercial influence for more than half a century, franchisors must consider nuts-and-bolts questions of how to comply with laws and regulations under a markedly different form of government and legal system as well as how to determine the tax implications of doing business in Cuba.

President Obama’s announcement heralds a significant change in diplomacy, but the White House is limited in what it can do under current law. The Administration may revisit past Executive Orders and examine the possibilities for changing regulations such as the 1963-vintage Cuban Asset Control Regulations and the OFAC regulations. But it is up to Congress to reconsider the statutes that impact U.S.-Cuban relations, such as the Helms-Burton “Libertad” Act of 1996, the Cuban Democracy Act of 1992, the Trade Sanctions Reform and Export Enhancement Act of 2000, and the Trading with the Enemy Act of 1917. Congressional action will likely take time given the significant political implications involved.

It remains to be seen how law and policy in the U.S. and Cuba will change over the short- and long-term, whether the grant of licenses for the use of trademarks and know how (at the core of franchising) will be permitted, and which U.S. franchisors will find there is a viable market for their concepts in Cuba.

**Levinson:** From a tax perspective, normalization of relations with Cuba, including expanded opportunities for trade, services, licensing, and franchising, will result in more revenue
“We should be careful to get out of an experience only the wisdom that is in it—and stop there; lest we be like the cat that sits down on a hot stove-lid. She will never sit down on a hot stove-lid again—and that is well; but also she will never sit down on a cold one any more.”

—Mark Twain

California was home to 82,739 franchised outlets in 2007—nearly 10% of all units in the United States, according to the International Franchise Association’s Economic Impact of Franchised Businesses. Given these numbers, the odds are strong that most franchise lawyers will be involved in transactions governed by the California Franchise Investment Law (“CFIL”), Cal. Corp. Code § 31000, et seq. This article looks at the statutes of limitations for violations of the law and the lessons to be learned from them.

The CFIL has a complex series of limitations periods—from 90 days to four years—that vary depending on the nature of the violation, whether the franchisor has given notice to the franchisee of the existence of the violation, and whether the franchisee has discovered the facts constituting the violation. Lawyers representing franchisors want as short a limitations period as possible. Sometimes, however, lawyers behave like Mark Twain’s cat, learning too much from a limited number of reported cases and assuming that a one-year limitations period should always apply.

Sources of Liability Under CFIL

The CFIL imposes civil liability on the franchisor for the unregistered offer or sale of a franchise and for making untrue or misleading statements in connection with franchise sales (see, generally, CFIL §§ 31200-31202 and 31300-31302). The limitations periods for these violations of the CFIL are composed of three parts. The first part is the “standard” limitations period—either two years or four years after the act constituting the violation (see CFIL §§ 31303 and 31304). The final portion is an accelerated 90-day limitations period if the franchisor discloses a violation of the CFIL to the franchisee (using a form of notice approved by the Department of Business Oversight). Id.

Calculation of Limitations Periods

In a case under the CFIL alleging damage from an untrue statement of a material fact in the franchise disclosure document (“FDD”), a private right of action would not accrue until the plaintiff has both purchased a franchise and suffered damages from the untrue statement. See: Neel v. Magana, Olney, Cathcart & Gelfand, 6 Cal. 3d 176, 187 (1971) (“In ordinary ... actions, the statute of limitations... begins to run upon the occurrence of the last element essential to the cause of action”). See, also: Budd v. Nixen, 6 Cal. 3d 195 (1971) (if damages is an element of claim, plaintiff must have suffered appreciable harm for a cause of action to accrue).
An exception to the rule that the limitations period begins to run as soon as the cause of action has accrued exists when the statute of limitations contains a “discovery” provision. When a discovery rule applies, it is not enough that all elements of the cause of action exist. The “discovery rule . . . postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” Norgart, 21 Cal. 4th at 397. One of the critical facts necessary to start the statute of limitations based on discovery is “a suspicion of wrongdoing and therefore an incentive to sue.” Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1110-11 (1988). The discovery rule does not require that plaintiffs grasp all of the nuances of the claim—merely that they have reason to suspect (in a lay sense) that some wrong has been done to them. Norgart, 21 Cal. 4th at 397-398.

**Application of the Discovery Rule**

The “discovery rule” portion of the CFIL’s limitations periods has been applied in a few reported cases from federal courts in California and state and federal courts in other states. Although these courts generally have applied the discovery rule correctly, they often fail to fully explain their reasoning. Thus, lawyers often fail to fully understand the implications of their rulings.

One of the most-cited cases addressing the discovery rule is Powell v. Coffee Beanery, Ltd., 932 F. Supp. 985 (E.D. Mich. 1996). The court in Coffee Beanery stated that the franchisee was asserting a violation of CFIL § 31119 (which prohibits sale of a franchise without prior delivery of a disclosure document) because the franchisor “did not provide [the franchisee] with a copy of [an FDD] before accepting payment for the franchise.” That appears to be somewhat misleading shorthand for saying that the franchisee asserted a violation because the franchisor sold a franchise without providing a copy of the FDD at least 14 days before accepting payment for the franchise. The violation was not (simply) the acceptance of a payment—it was the sale of the franchise. The cause of action accrued only when the sale was complete (in this case, at the same time when payment was made, which may explain the confusion).

Many franchise attorneys appear to make the same mistake as Mark Twain’s cat, with respect to the Coffee Beanery case, by learning more from that case than the wisdom that is in it. The plaintiff in Coffee Beanery was buying a second franchise; it had (apparently) properly received an FDD before buying the first franchise. On those facts, when the plaintiff bought the second franchise without being furnished an FDD, the court could easily have found that the plaintiff should have at least suspected that a new FDD should have been delivered before the sale. A suspicion that something is wrong is enough to start the discovery-based statute of limitations running.

Even though the court in Coffee Beanery failed to specify why the plaintiff-franchisee should have suspected a violation of the CFIL, that has not stopped attorneys from jumping to conclusions. Many seem to believe that, because the statute of limitations began running as soon as the franchise was sold, the discovery-based statutes of limitations always start running as soon as a franchise is sold.

Other reported cases may be less likely to lead attorneys astray. For example, in Perez v. McDonald’s Corp., 60 F. Supp. 2d 1030 (E.D. Cal. 1998), the franchisee submitted four different potential buyers to McDonald’s for approval, each one rejected for failure to previously complete the franchisor’s required training for new franchisees. When the franchisee claimed McDonald’s violated the CFIL by failing to disclose this restriction on resale in its offering circular before the franchisee purchased its franchise, the court said the franchisee should have discovered the inaccuracy (or non-disclosure) the first time McDonald’s declined to approve a sale—not when the franchise was first sold. See also: Athletes Foot Marketing Assoc., Inc. v. Inner Reach Corp., Bus. Franchise Guide (CCH) ¶12,349 (N.D. Ga. 2002), franchisee claiming that franchisor had understated opening costs in its disclosures should have discovered these higher costs at the time of opening or shortly thereafter; California Bagel Co. 18, LLC v. American Bagel Co., Bus. Franchise Guide (CCH) ¶11,880 (C.D. Cal. 2000) (unpublished) (claim based on inaccurate earnings claims did not accrue until after “ramp-up” period following store opening).

**Avoid the Cat’s Ultimate Mistake**

To avoid the ultimate mistake that Mark Twain’s cat made, remember that no limitations period begins to run until the associated cause of action is complete in all of its aspects, and that limitations periods based on discovery require that plaintiffs at least suspect the factual basis of a claim, even if they do not understand the legal basis of the claim.

The discovery rule is seldom satisfied by the fact that the plaintiff bought a franchise or knew that money was paid or signed a franchise agreement. The plaintiff must also have at least a suspicion of wrongdoing in connection with that sale. When a material inaccuracy is at issue, a franchisee is not necessarily likely to suspect that inaccuracy merely because the franchisee was provided an FDD and later purchased a franchise.
Message from the Editor-in-Chief
By Corby Anderson, Nexsen Pruet, LLP

The first issue of a new year presents an opportunity to look back as well as forward. The events of 2014 will play out in 2015 and beyond. Many would say – and have said -- that government and union forces placed the franchise model “in the crosshairs” in 2014. As this issue went to press, on December 19, 2014, the National Labor Relations Board’s Office of General Counsel issued 13 complaints, involving 78 charges, against franchisor McDonald’s and its franchisees as joint employers, alleging that their actions against employees who participated in union organizing and a nationwide protest seeking higher wages violated the National Labor Relations Act. In the Summer 2014 issue, The Franchise Lawyer reported on the early stages of the NLRB’s General Counsel’s initiative, asking whether Chicken Little would consider it “an asteroid or just an acorn.” In 2015, we will begin to learn the answer.

On a related note, in this issue of The Franchise Lawyer, you will read about a lawsuit challenging a minimum wage law enacted by the City of Seattle in 2014, alleging that it discriminates against franchisees. The new law imposes accelerated wage hikes on large employers (defined as businesses with more than 500 workers), and deems any franchisee, no matter how small, a large employer if the franchise system to which it belongs employs more than 500 workers. The plaintiffs’ motion seeking to enjoin this provision quotes proponents of the new law as saying that franchises are “economically extractive, civically corrosive and culturally dilutive.” It asserts that union interests backed the law’s franchise-related provision as part of an effort to “break the franchise model” and organize employees of franchise systems. The Franchise Lawyer will follow this litigation as it unfolds in 2015.

Data privacy and security issues cropped up repeatedly in 2014. In the Spring 2014 issue, The Franchise Lawyer reported on a federal court’s refusal to dismiss the Federal Trade Commission’s data security complaint against Wyndham Worldwide Corporation, causing franchisors to evaluate their obligations to ensure proper handling of data on franchisee-controlled systems that connect to franchisor-controlled or shared networks. That case is now on appeal. In the Fall 2014 issue, The Franchise Lawyer reported on payment card industry (“PCI”) compliance, on Canada’s new anti-spam and anti-spyware law, reputed to be the most onerous of its kind in the world, and on franchisor compliance with the privacy and security mandates of the Health Insurance Portability & Accountability Act (“HIPAA”). With data privacy and security issues in the headlines daily as this issue went to press, we are certain to revisit these issues in 2015.

In other articles in this issue of The Franchise Lawyer, you will read about state regulators’ actions to circumvent venue provisions of arbitration clauses in franchise agreements -- even though the United States Supreme Court and other federal and state courts have consistently held that the Federal Arbitration Act preempts states’ invalidation of contract clauses mandating the venue for arbitration. In the Litigator’s Corner, you will get practical advice on how to enforce preliminary injunctions. You will also learn what Mark Twain’s cat can teach you concerning the statutes of limitations in the California Franchise Investment Law. On the heels of President Obama’s move to normalize U.S. relations with Cuba, you will learn what experts have to say about the do’s and don’ts of international expansion for franchisors there and elsewhere. Close, or no cigar? Finally, you will read about the Forum’s community service event in Seattle and the call for submissions for the Forum’s Rising Scholar Award.

A special thanks to those who wrote about these and other developments for The Franchise Lawyer in 2014 – and to those who are writing, and will write, in 2015.

publication of the first edition in 1997, Fundamentals has served as both a primer for lawyers new to franchise law and a basic reference guide for veteran practitioners. Andy Selden and Rupert Barkoff, who edited the first three editions, are collaborating on this fourth edition with editors Ron Gardner and Joe Fittante. Ron and Joe will then take the editing reins for future tomes of this great Forum resource.

Please start making plans for the Annual Forum in New Orleans in October. We will have more news about programs, workshops, and special events in the coming months!
The deadline for submitting an article for the 2015 Rising Scholar Award program is July 13, 2015. To be eligible for the competition, entrants must be members of the ABA Forum on Franchising and must have graduated from law school within the past four years.

Articles should be prepared according to Franchise Law Journal’s author guidelines, available at____. Submissions will be judged by current and former members of the editorial boards of the Franchise Law Journal and The Franchise Lawyer. The current Forum chair will also be consulted and will provide input on the selection of the winning article. The winning article will be considered for publication in a future edition of the Franchise Law Journal.

The author will be recognized and presented with a plaque at the Forum on Franchising’s annual meeting, scheduled for October 14-16, 2015 in New Orleans. The author also will receive a small financial award as partial reimbursement for the expenses of traveling to the meeting for the award presentation and will have his or her registration fee waived.

Articles must be submitted to Bethany L. Appleby, Editor-in-Chief of the Franchise Law Journal, by Monday, July 13, 2015, to be considered in this year’s competition. All inquiries about the competition should be directed to: bappleby@wiggin.com.

On October 18, 2014, more than 30 volunteers planted hundreds of trees in Lake Sammamish State Park at the Forum’s annual community service event, hosted by the Women’s Caucus, the Corporate Counsel Division, and the Diversity Caucus. Participants braved the Seattle drizzle and mud to work with the Mountains to Sound Greenway Trust, planting trees where invasive species had stifled the park’s habitat. Through this rewarding event, the Forum once again demonstrated its commitment to giving back.
SAVE THE DATE

38th Annual Forum on Franchising
October 14 – 16, 2015

Sheraton Hotel
New Orleans, LA
Collateral Issues in Franchising: Beyond Registration and Disclosure
Edited by Kenneth R. Costello

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

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

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

List Price $135.95
Forum on Franchising Member Price $108.76
opportunities for each country, and hence, more taxes. There is no current tax treaty between the United States and Cuba, but in time, one would expect that to be considered. Until then, the rules on taxation will be strictly subject to local law.

In general, Cuba will impose tax on income earned from Cuban sources by businesses and individuals. For example, parties who sell goods and services in Cuba are subject to a monthly 10% income tax, and there are no special tax benefits for capital gains, which are subject to regular tax rates. U.S. citizens who travel to Cuba (such as trainers or management personnel sent by franchisors) will be subject to Cuban income tax personally if they are present for 180 days in-country during the tax year, regardless of their “tax residency” status. And their days in Cuba do not count for purposes of the U.S. “foreign earned income exclusion” rules.

The normalization process for U.S. relations will undoubtedly have a far-reaching effect on Cuban law, society, and commerce, including the evolution of its rules concerning franchising and taxes.