It was wonderful seeing so many of you at the 38th annual Forum on Franchising meeting in New Orleans. Our registration numbers set an all-time record, with 870 attendees from the United States and several other countries. We are excited about the continued growth of the Forum and look forward to beating this record at the 39th Forum on Franchising, which will be held in Miami November 2–4, 2016.

The New Orleans Forum had many highlights, including the plenary session featuring Richard Griffin, General Counsel for the National Labor Relations Board, and David Weil, Administrator of the Wage and Hour Division of the U.S. Department of Labor. This session highlighted the well-publicized tension that has surfaced between various aspects of employment law and franchise law and practice, and it showcased the thoughtful, substantive, and collegial dialogue that distinguishes the Forum and its annual meeting. Kudos go to Andrew Loewinger, Eric Karp, Jonathan Solish, and Deborah Coldwell for their outstanding work on this program. As always, our intensives, workshops, and plenaries on cutting-edge topics added value by offering tips and best practices from our distinguished faculty of Forum members.

Our events on Thursday night at the New Orleans Museum of Art and Friday night at the Presbytere were both lively and rich with good company, local music, and the best of New Orleans cuisine.

In addition to the educational sessions and networking events, there was Forum business to attend to. During the annual meeting, the Forum presented the following awards:

- The Rising Scholar Award to Mei Zhang, a 2015 graduate of Southern Methodist University, for her article International Franchising: Food Safety and Vicarious Liability in China, published in the Summer 2015 edition of the Franchise Law Journal (FLJ);
- The Future Leader Award to Trishanda L. Treadwell, a partner with Parker, Hudson, Rainer & Dobbs LLP and Associate Editor of the FLJ;
- The Chair’s Award for Substantial Written Work or Presentation to Keri A. McWilliams of Nixon Peabody LLP for her article PCI Compliance: What Franchisors Need to Know, published in the Fall 2014 edition of The Franchise Lawyer; and
- The Lewis G. Rudnick Award to W. Michael Garner of Garner & Ginsburg, PA. Michael is a former member of the Forum’s Governing Committee, has served an editor in chief of the FLJ, and is the editor of the Forum’s Franchise Desk Book.

In addition to these awards, the Forum
# Table of Contents

1. **Message from the Forum Chair**  
   Karen Satterlee

   Matthew J. Kreutzer

5. **California's New Franchise Act Has Unintended Consequences**  
   Rupert M. Barkoff

7. **Plenary with Griffin and Weil Looks at Joint Employer Liability**  
   Antonia Scholz

## MEMBER SPOTLIGHT

8. **ANDRA TERRELL**

9. **Ruling on Seattle Law Poses Big Threat to Small Businesses**  
   Rebekah Prince and Kanysha Burton

### CORPORATE COUNSEL CORNER

11. **Developing Your Expansion Plan, Addressing Encroachment Concerns**  
    Joe Lewis

14. **Australia's 'Small Business' Law Makes Fairness a Touchstone**  
    Penny Ward

16. **Do Payments of Fees Make Uber Drivers Franchisees?**  
    Brian H. Cole

19. **Message from the Editor-in-Chief**  
    Corby C. Anderson
California has recently amended its franchise law to regulate franchise agreements entered into or renewed after January 1, 2016, as well as franchises of an indefinite duration that may be terminated without cause.

The new law substantially amends the existing California Franchise Relations Act (CFRA), Cal. Bus. & Prof. Code §20000 et seq., and caps off a five-year effort by the legislature to implement additional protections for California franchisees against perceived franchisor abuses. The new law comes on the heels of a near miss in 2014, when the legislature passed the more rigorous Senate Bill 610, also intended to modify the CFRA. California Governor Jerry Brown vetoed SB 610, stating that he needed more proof that franchisors engage in “unacceptable or predatory practices” before he would sign off on a law that would “significantly impact California’s vast franchise industry.” Brown then stated that he would be open to amending the CFRA if legislators would take a more collaborative approach, including both sides of the industry.

The new law embodies that collaborative approach. The original version of the bill garnered early support from the Coalition of Franchisee Associations (CFA) and the Service Employees International Union (SEIU) but faced heavy opposition from the International Franchise Association (IFA). Mindful of Brown’s admonition and the political reality that a new law would likely be enacted, the IFA and CFA worked out a compromise, announced in June, that resulted in several amendments to the bill, which the SEIU also supported.

Franchise Terminations
The revised CFRA imposes additional limits on a franchisor’s ability to terminate its franchisees. Specifically, Section 20020 has been amended as follows: Under the new law, “good cause” for termination prior to expiration of the term is limited to a franchisee’s failure to substantially comply with the lawful requirements of the parties’ franchise agreement. This is less open-ended than the former version of the law, which stated that “good cause” included (but notably was not limited to) the failure of a franchisee to comply with any lawful requirement of the franchise agreement after being given notice and an opportunity to cure the failure. Litigation will determine the scope of “substantial” compliance.

The new law requires franchisors to give franchisees at least 60 days to cure a material default, measured from the date the franchisee is notified of its noncompliance. Previously, the CFRA did not set any minimum number of days for a franchisee to cure a material default, but stated that the cure period need not be more than 30 days. Oddly, the amended law also prohibits a franchisee’s cure period from exceeding 75 days, unless the parties otherwise agree to extend the time.

The new 60-day cure period will not apply to every type of default. Franchisors may continue to terminate franchisees upon ten or fewer days’ notice for certain time-sensitive material defaults, identified in Section 20021, including: failure to timely pay amounts due to the franchisor or its affiliate; abandonment of the business; conduct that reflects materially and unfavorably on the franchise system; failure to comply with laws or regulations; and repeated defaults.

Obligations After Termination, Non-Renewal
The most significant changes to the CFRA concern a franchisee’s rights, and a franchisor’s obligations, when the franchisor terminates or fails to renew. The CFRA’s new provisions (in new Section 20022 and replaced Section 20035) require the franchisor to provide value to a departing franchisee under many circumstances, even if the termination or non-renewal complies with the statute.

For example, a franchisor now must purchase from the franchisee “all inventory, supplies, equipment, fixtures, and furnishings purchased or paid for” by the franchisee if those purchases were
made in accordance with the requirements of the franchise agreement. To be covered by this provision, the franchisee, when it ceases operation, must still possess the asset and be able to give the franchisor clear title to it.

This repurchase requirement will not apply, however, where:

- The assets to be purchased were not “reasonably required to conduct the operation of the franchise business;”
- The franchisee cannot give the franchisor clear title to and possession of the assets;
- The franchisee declined an offer from the franchisor to renew the agreement;
- The franchisor does not prevent the franchisee from retaining control of the franchise business location after termination or nonrenewal;
- The franchisor’s termination or nonrenewal is based on a publicly-announced, nondiscriminatory decision to withdraw all franchise activity from the geographic market area where the franchisee is located; or
- The parties mutually agree in writing to terminate or not renew the franchise.

Critically, the franchisor may offset the purchase price of the assets against any money the franchisee owes to the company.

Sanctions for Failure to Comply
Under the new Section 20035, if a franchisor terminates or fails to renew a franchisee in violation of the CFRA, the aggrieved franchisee may recover from the franchisor “the fair market value of the franchised business and franchise assets,” as well as any other damages caused by the franchisor’s violation of the CFRA. Significantly, the newly-enacted statute also authorizes a court to grant preliminary and permanent injunctive relief for a franchisor’s violation (or threatened violation) of the statute.

Franchisee’s Right to Sell
Finally, the new law has created a new framework enabling franchisees to sell or transfer their businesses. Specifically, under the new law (enacted in new Section 20028), a franchisor may not prevent a franchisee from selling: the franchise; all or substantially all of the assets of the franchise business; or an interest in the franchise business or franchise business entity (whether controlling or noncontrolling) to another person. Exceptions are made where the buyer does not meet the franchisor’s then-existing standards for new or renewal franchisees or where the parties fail to comply with the transfer provisions specified in the franchise agreement.

The CFRA’s new Section 20029 requires a franchisee to notify its franchisor, in writing, of its intention to sell all or substantially all of the franchise. The notice must contain: the proposed buyer’s name and address; a copy of all agreements related to the sale; and the proposed buyer’s application to become a successor franchisee, which must include the forms, financial disclosures, and other information the franchisor generally uses in reviewing new prospective franchisees. If the franchisor’s then-existing standards for approving new franchisees are not generally available, the franchisor must provide those standards to the selling franchisee within 15 days of receiving the franchisee’s written notice.

Under new Section 20029, the franchisor must inform the selling franchisee of its approval or disapproval of the sale in writing within 60 days of receiving all required documentation from the franchisee. If the franchisor does not approve the sale, it must inform the franchisee in writing of the reasons for its disapproval. If the franchisor does not disapprove the sale within 60 days, then the sale will be deemed approved. The statute expressly authorizes a trier of fact to determine whether a franchisor’s disapproval of a sale was reasonable, considering all existing circumstances.

Importantly, a franchisor’s contractual right of first refusal will not be affected by any of the new provisions—except that for the right to be valid, the franchisor must offer the seller payment that is equal to or greater than the value offered by the third-party prospective buyer.

New Law Changes Landscape
This new law significantly changes the landscape for franchisee-franchisor relations in California. Franchisees and prospective franchisees will need to be mindful of how the law will affect their relationships going forward. The new law seems certain to generate litigation, and the franchise community as a whole will be closely watching for court decisions interpreting its provisions—including, in particular, the meaning of “substantial” compliance as it relates to termination. Franchisors should be especially cautious in terminating or refusing to renew franchisees, and mindful of the repurchase requirements they face under those circumstances. Finally, franchisors should consider reevaluating the disclosures made in California state-specific addenda to their Franchise Disclosure Documents to determine whether changes are necessary in view of the law.
The enactment of California’s new franchise relationship law, which amends the California Franchise Relations Act (CFRA), Cal. Bus. & Prof. Code §20000 et seq., is a monumental event in the history of franchise law for several reasons.

First, this is the first state relationship law enacted since Iowa adopted its relationship law in 1992—24 years ago. Most of the state franchise relationship laws (and most of the state franchise sales and disclosure laws) were in place by 1975, in the formative years of franchise law. Although franchisee advocates have made many attempts to enact relationship laws over the years, virtually all have failed. Thus, the regulatory scheme we have today is not that different from the one I saw when I began to practice franchise law back in the last century.

Second, the California legislation may be the first time when franchisor and franchisee advocates together decided to “reason” with each other regarding the enactment of franchise relationship legislation. The International Franchise Association (IFA) has historically adopted what I will call a scorched earth approach to new franchise legislation—that is, no concessions to the other side. This strategy was successful until 2015, when California Governor Jerry Brown made it clear that the success of the current legislation (unlike prior legislation that he vetoed the year before) depended on a more collaborative approach. This no doubt prompted the IFA to move closer to the middle of the relationship spectrum. (Some might argue that the enactment of Iowa’s relationship law was another exception to the scorched earth approach, but in that case, the franchisee interests propelling the legislation simply ambushed the IFA before it had enough time to gear up for battle.)

There is a third reason why the enactment of the California law is significant in franchise law history: Although it may be an aberration in the development of franchise legislation, it may also be a trendsetter.

**Does this End All Hope for an Overhaul?**

During my all-too-many years of practice, I have advocated that the franchise regulatory system in the United States needs to be overhauled, regardless of whether one is on the franchisor or franchisee side of the table. With the exception of the Federal Trade Commission’s (FTC’s) Franchise Rule, franchise law has been a creature under the control of the states. There are solid reasons for franchise law to be the product of the state legislatures; nevertheless, our system of franchise law and regulation has become a monster. In the franchise sales area, the laws of each state differ. The definition of a franchise differs from one state to another. The registration procedures also differ. Even today, what may be acceptable in California may be verboten in New York. And then, there is the challenge created by the examiners. Their philosophies about franchise regulation differ, as do their skills as examiners.

All this, added to the partial pre-emption of state law by the FTC’s Franchise Rule, has resulted in a patchwork of regulation, not only in the area of franchise sales, but also with respect to franchise relationships.

What is the solution? Complete pre-emption.

Interestingly, Australian franchise law is largely based on the U.S. experience, but Down Under they have avoided most of the pitfalls we have encountered in the United States, primarily by having, de facto, only federal legislation and no registration process. (Only one of Australia’s states has adopted franchise relationship legislation.) But can federal pre-emption become the law in this country? Federal legislation is now pending before the U.S. Congress, but it does nothing to eliminate the problem created by two levels of regulation. To the contrary, it
specifically provides that state law is not pre-empted—thus cementing the problem of two-level regulation. See H.R. 3559 (114th Congress, 1st Session (2015)) and H.R. 3196 (114th Congress, 1st Session (2015)); see also Himanshu M. Patel and Alaina B. Siminovsky, New Federal Franchise Bills Seek to Bring Balance to Relationship, The Franchise Lawyer, Fall 2015. Regardless of what one thinks about the substance of the pending federal legislation, it clearly suggests that federal pre-emption is not in the cards in the near future.

**CFRA: A Setback to Pre-Emption**

The California law represents a major setback to complete pre-emption because it may lead to a proliferation of state legislation. We should not be surprised to see similar laws adopted in numerous states in the next three to five years. This would make franchise regulation in the United States even more of a patchwork, and even more complex.

Beyond complexity, what are the effects of having two levels of regulation? First, it is an inefficient way to regulate. In several states, it now takes a minimum of two months to be able to offer franchises for sale. In other states, it might take even longer.

Second, having two levels of regulation is not cost effective. Again using Australia as an example, the cost to become a national franchisor Down Under is limited to the cost of preparing documents. In contrast, in the United States, a start-up franchisor will incur those same costs but will also have to pay registration fees ranging from $250 to $750 per state, renewal fees annually, and in most cases legal fees for handling the registration. And if a three-level franchise is involved (such as one with a franchisor, subfranchisor, and subfranchisee), these costs can easily double or triple.

Finally, the regulatory system in the United States may well affect the level of competition in some industries and in the franchise community. Both domestic and foreign franchisors, fearing our system, may decide to offer their franchises for sale in countries other than the United States. This reduces the number of franchise systems that are operating or want to operate here. Fewer franchisors likely means less competition.

Do not get me wrong. Nowhere have I suggested that the substance of the amended CFRA is “good” or “bad.” But is the lack of pre-emption, with franchising controlled by the state governments, good for the franchise community?

For us as lawyers, the current system may be good because it means more work. But for our clients, it is bad. Franchise regulation adds cost, inefficiency, and complexity to franchising. And, sad to say, most of the problems with the system could be easily resolved through complete pre-emption.

At a limited-invitation conference sponsored in 2012 by the Franchise Law Institute (a not-for-profit entity that I created to study and compare franchise regulation throughout the world), all stakeholders present—

including private-firm attorneys who represent franchisors, franchisees, or both, in-house attorneys, consultants, and regulators—all favored full pre-emption, except for one state regulator. The reasons for franchisor attorneys’ support are obvious. From the standpoint of franchisee lawyers, the current system makes it too expensive for their clients to prosecute wrongdoing through the courts or arbitration.

Despite the problems with our current patchwork of franchise regulation, however, absent a passionate advocate in Congress and strong and vocal support from the franchise community, I am likely to be drooling my Jell-o® at the old folks’ home by the time total pre-emption is seriously considered.
Plenary with Griffin and Weil Looks at Joint Employer Liability

By Antonia Scholz, Cheng Cohen LLC

The highlight of the 38th annual Forum on Franchising meeting in New Orleans for many attendees was the plenary session featuring Richard Griffin, General Counsel for the National Labor Relations Board (NLRB), and David Weil, Administrator of the Wage and Hour Division of the U.S. Department of Labor (DOL). This plenary session delved into the emerging tension between trademark law, which requires a franchisor to exercise substantial control over how its marks are being used, and a recent line of labor and employment cases and interpretive opinions, which have assigned joint employer liability to franchisors for exercising too much control over the operations of their franchisees.

The plenary, moderated by Jonathan Solish of Bryan Cave, and Eric Karp of Witmer, Karp, Warner & Ryan LLP, began with the question of why the franchise model is in the hot-seat on this emerging issue. Weil answered by identifying franchising as one business model, among others, that has a high rate of non-compliance with labor laws, as well as an increasingly “fissured” relationship between employees and the companies that dictate the terms of their employment. Griffin added that the NLRB’s focus on the franchise industry arose from a recent initiative to raise minimum wages among low-income workers, a high percentage of whom are employed by traditionally franchised businesses such as fast food restaurants.

Both Griffin and Weil stressed that they have no innate hostility toward the franchise model but are concerned with high levels of non-compliance in the franchise industry. Therefore, they stated, they are seeking to change the standard for joint employer liability to prevent further violations and protect workers from an increasingly disassociated workplace.

The speakers then moved on to clarify what the standard for joint employment liability is today. Griffin stated that the NLRB’s position is outlined in the advice memorandum issued for Freshii in April 2015, which provides that system standards issued by a franchisor for the purpose of protecting the brand are not, on their own, sufficient to create a joint employer relationship, even if they indirectly affect the franchisee’s relationship with its employees. See Karen Marchiano, Refreshing News for Franchisors: Freshii Found Not a Joint Employer, The Franchise Lawyer, Summer 2015.

Three Practices Put Franchisors at Risk of Liability

When pressed by the moderators for specifics, Weil and Griffin discussed three practices that may cause a franchisor to risk joint employer liability.

The first of these practices arose in the recent NLRB case against McDonalds, in which the NLRB gave weight to the fact that McDonalds, and not its franchisees, owned the real property on which the franchised businesses operated. Griffin focused on the fact that only McDonalds had the right to pursue complaints for trespass on those properties. From the perspective of the NLRB, the question of which party has the right to call the police is of particular importance in the context of a labor strike, because the party with control over the real property also maintains control over the labor force’s ability to take collective action.

The second practice discussed by the speakers was franchisor-owned technology used by franchisees for fundamental employer functions. Griffin stated that the use of such technology alone did not create joint employer liability. He cited the Freshii case, in which the NLRB held that franchisees could accept job applications submitted through the franchisor’s website without creating joint employer status. In his assessment, Griffin focused instead on whether the technology gives the franchisor control over the franchisee’s employment decisions.

For example, accepting job applications through the franchisor’s website does not affect the franchisee’s decision of whom to hire. On the other hand, a software system that tracks gross sales and staffing levels and then uses an algorithm for optimization of labor costs to prompt franchisees when to send workers home fundamentally affects the hiring and staffing decisions of the franchisee.
The last practice discussed by the speakers was the addition of the franchisor as an insured on the franchisee’s employment insurance policies. Griffin indicated that the NLRB would take a strong inference of joint employment from this practice, stating that franchisors “can’t have your cake and eat it, too.”

Cooling Effect on Franchisors’ Willingness to Provide Support

Finally, the speakers were asked to discuss the cooling effect that the risk of joint employer liability can have on a franchisor’s willingness to provide support to its franchisees in matters related to labor and employment. The moderators pointed out that although franchisors are typically sophisticated parties with significant insight into best practices, they will be less likely to share these insights with franchisees if doing so might trigger joint employer liability. Weil and Griffin offered no solution to this fundamental quandary, other than to state that their respective offices would be unlikely to pursue an enforcement action against a franchisor that was involving itself in its franchisees’ employment practices principally to assist the franchisees with compliance.

Weil gave the example of Subway, a franchisor that worked heavily with the DOL and its franchisees to correct labor violations that were discovered. But the examples cited, such as Subway’s decision to provide an educational booth at its annual franchisee convention, were not particularly controversial and did not provide meaningful clarity to the grey areas of joint employer status. In the end, although both speakers encouraged franchisors to openly involve themselves in promoting good labor practices with their franchisees, neither speaker could clearly delineate a standard that would prevent such actions from constituting control that might trigger a finding of joint employer liability, either with their respective agencies or under other employment laws.

Although this plenary session highlighted the uncertainties that have yet to be resolved in the evolving area of joint employer liability, it also gave attendees some insights into the policies and procedures of the agencies at the heart of this debate. The Forum thanks Weil and Griffin for sharing their views with Forum members at this event.

The author acknowledges Michael Molzberger of Schiff Harden LLP and Ari Stern of Witmer, Karp, Warner & Ryan LLP for their contributions to this article.

ANDRA TERRELL

Luxottica Group S.p.A. (Pearle Vision)

Office location: Mason, Ohio

Practice specialty: Handling all in-house franchise functions; providing practical legal advice and bringing franchisors and franchisees together

Favorite thing about the Forum: Getting together with other franchise lawyers and exchanging ideas

Hobbies: Yoga, singing (Top 40), playing piano, and doubles tennis

Best-loved song: Blackbird by the Beatles

Something people would be surprised to learn about you: I was a singer in a four-member Tracy Chapman-inspired folk band. We performed at coffee houses and student events in Baltimore
Challengers of Seattle’s minimum wage ordinance were dealt a second blow in September 2015, when the U.S. Court of Appeals for the Ninth Circuit rejected their arguments that the law’s classification of franchisees violates the Dormant Commerce Clause, the Equal Protection Clause, the First Amendment, the Lanham Act, and the Washington State Constitution.

The International Franchise Association (IFA) and a handful of local Seattle franchisees sued the City of Seattle seeking to enjoin enforcement of the ordinance, but their motion was denied for failure to show a likelihood of success on the merits.


The group of plaintiffs fared no better on appeal to the Ninth Circuit, which upheld the district court’s findings against the IFA’s arguments on every issue. The appellate court’s opinion reflected the often negative perception of franchises and revealed a view of the franchise business model that is far different from the business reality for franchisees.

The law, which seeks to raise the minimum wage to $15 per hour, went into effect April 1, 2015. It distinguishes between small and large employers. Businesses that employ 500 or fewer employees, or “small employers,” are given seven years to implement the increase, while businesses that employ more than 500 employees, or “large employers,” must implement the increase in three years. The law classifies franchisees as “large employers”—even though they employ less than 500 employees—based on the notion that they can accommodate the increase in labor costs better than other similarly situated small businesses can.

The effects of such a classification are themselves costly, and the differences in the implementation schedules are staggering. “Large employers” must implement $2 increases every year to meet the $15 requirement by 2017, but small employers are given a much longer, more manageable timeframe, allowing for 50-cent increases every year until the $15 minimum is reached in 2021. Effectively, two small, local businesses, one a franchise and the other a non-franchise, must compete in the same market for business with strikingly different labor costs.

The ordinance seeks to justify the two implementation schedules by acknowledging that “smaller businesses and not-for-profits would face particular challenges in implementing a higher minimum wage,” (Seattle, Washington, Ord. Pr. 5; Sec. 1(9)). The Ninth Circuit concluded this statement implies that franchisees, unlike other small businesses, do not face such difficulties. But franchisees are small businesses that are formed and operate as separate entities from the franchisor, paying for rent, supplies, and payroll, in addition to fees and royalties to the franchisor; thus, the assumption of economic benefit comes solely from the franchisee’s association with the franchisor’s marks and use of the franchisor’s business model.

The IFA argued that this classification of franchisees as “large employers” is discriminatory and unconstitutional and sought to enjoin the law. The Ninth Circuit disagreed.

**No Dormant Commerce Clause Violation**

The IFA argued that the ordinance discriminated against out-of-state businesses because franchisees are associated with a national network of other franchisees through use of the franchisor’s trademarks. The appellate court concluded the law does not discriminate against out-of-state businesses on its face, but instead relies on neutral classifications—the number of employees of the business and the business model. Interestingly, rather than compare similarly situated franchisees to non-franchisees to prove this point, the court stated that a franchisee with a network of franchisees in Washington state was treated the same as a franchisee with a network of franchisees outside of Washington state. It is difficult to understand how
a characteristic can be neutral when it applies to only one kind of business—franchises.

The court went on to state that the real problem with the IFA’s arguments was that the parties to the case and other Seattle franchise owners are in fact local businesses, not out-of-state businesses. Essentially, because their arguments focused on the harm to them as local businesses, they did not convince the court that the law harmed franchisees that were out of state and therefore burdened interstate commerce.

The IFA also presented emails from members of the city’s advisory council on the new law to show discriminatory purpose. These stated, for example, that “Franchises like Subway and McDonalds really are not very good for our local economy. They are economically extractive, culturally corrosive and culturally dilutive,” and that “National franchises . . . simply are not that beneficial to our city.” Id. at 15. The court was not persuaded. It acknowledged that the emails are persuasive evidence of the particular sender’s “anti-franchise views,” but it concluded that the IFA failed to demonstrate that Seattle franchisees are so “interstate” in character relative to non-franchisees that a distinction drawn on this basis interferes with interstate commerce. Id. at 16. Essentially, although the IFA could prove a bias against franchisees with smoking gun emails, it could not prove such a bias is based on an intent to interfere with interstate commerce, and thus it failed to make a persuasive argument under the Dormant Commerce Clause.

No Equal Protection Clause Violation
To succeed on a claim under the Equal Protection Clause, the IFA had to prove there was no rational basis for the law to classify franchisees as large employers. The Ninth Circuit quickly dashed any hopes of success for this argument, concluding that the facts support the classification based on “the economic benefits flowing to franchisees” and on franchisees’ ability to “handle the faster phase in schedule.” Id. at 26. Even if the relationship between the advantages enjoyed by franchisees and their ability to handle a faster phase-in schedule lacks strong support, the court stated, the city’s determination does not require empirical data, and the classification is entitled to a “strong presumption of validity.” Id.

No First Amendment Violation
In its First Amendment claim, the IFA argued that the law discriminates on the basis of protected speech because two of the criteria in the definition for franchises include operating under the marketing plan of the franchisor and using the franchisor’s marks. The Ninth Circuit quickly rejected these arguments, concluding that the law applies to a particular business model, not to any particular message that the business expresses.

The First Amendment does not prohibit restrictions on economic activity and non-expressive conduct, the court noted. It found that the decision of a franchisor and franchisee to form a business relationship and the business activities resulting from that relationship are not expressive activities. “Seattle’s minimum wage ordinance is plainly an economic regulation that does not target speech or expressive conduct,” the court concluded. Id. at 28.

No Lanham Act Pre-emption
The Ninth Circuit also made short shrift of the IFA’s Lanham Act preemption argument, holding that the Seattle law does not frustrate the purposes of the Act, namely, protecting the public from confusion from the use of a mark and protecting the mark owner’s investment against misappropriation. Moreover, the court concluded, the Lanham Act was never intended to pre-empt traditional state regulation of the payment of minimum wages to employees.

No Washington State Constitution Violation
To prove that the Seattle law violates the Washington State Constitution, the IFA had to show first that the law violates a privilege or immunity of citizens or corporations and second that there is a reasonable ground for granting the privilege or immunity. The Ninth Circuit agreed with the district court’s holding that simply treating similarly situated businesses differently does not constitute a violation. Id. at 32.

The appellate court nevertheless determined that the law’s classification of franchisees as large employers rested on a “natural, reasonable, and just relation to the subject matter of the act,” because “[t]he City determined that franchisees have material advantages over non-franchisees that affect their ability to absorb increases in the minimum wage—a distinction related to the ordinance’s subject matter.” Id. at 33. This determination meant no argument the IFA put forth could have overcome the view of franchisees as economic powerhouses of small business.
No Preliminary Injunction

To obtain a preliminary injunction, the IFA had to show that: it was likely to succeed on the merits of the case; franchisees would suffer irreparable harm without the injunction; the balance of hardships tipped in their favor; and the injunction would not be against the public interest. As for irreparable harm, the IFA argued that the ordinance would cause franchisees to suffer competitive injury and a loss of customers and goodwill. The Ninth Circuit held that the district court erred in rejecting the IFA’s evidence of competitive injury, but it concluded that the IFA did not show irreparable harm as a result of losing customers or goodwill.

Surprisingly, the Ninth Circuit also held that the district court erred in concluding the IFA failed to show that the balance of hardships tips in its favor. The appellate court pointed out that the inquiry is not between franchisees and workers, but between franchisees and the city (which did not make a persuasive showing that it would experience hardship if the injunction were granted).

But the Ninth Circuit held that the IFA was not likely to succeed on the merits of its case and did not prove that the public interest favors an injunction. The court emphasized that the entry of an injunction would mean that “Seattle voters would see part of a law passed as a result of an election enjoined.” And even though an injunction would simply place franchisees on the same schedule as other small businesses, not stop the minimum wage increase altogether, the court concluded it was not in the public interest.

Conclusion

The Ninth Circuit’s opinion affirmed more than the district court’s decision. It also affirmed the widely held, inaccurate notion that franchisees can absorb increased labor costs more easily than other small businesses because of the economic benefits they gain from their relationship with franchisors—even though they pay for those benefits in fees, royalties, and, far too often, a hit to their reputation. With new minimum wage laws on the books or on the drawing board in New York and at least 18 other states, the misperception of the franchise model seen in Seattle has the potential to change the way businesses operate nationwide.

Developing Your Expansion Plan, Addressing Encroachment

By Joe Lewis, Smoothie King Franchises, Inc.

For franchisors, one of the inherent conflicts in expanding your brand is the tension between optimizing your market penetration and maintaining strong relationships with your franchisees. Most franchisees want you to build brand awareness by opening new units in their market—until you open one in their “back yard.” Then your legal right to do so and your theoretical justifications for doing so go out the window, and all hell breaks loose. So how do you handle the conflicts in this situation?

Franchisors use many different approaches. But whatever approach you choose, you should start by making the commitment to develop a strategic plan and provide the time and resources to work through all of the variables affecting your particular expansion model. Executive leadership should make the project a priority and consider including a cross-functional department team, such as franchise development, legal, operations, and marketing, along with the Franchise Advisory Council (FAC) or a task force team of franchisees (within appropriate limits) so that each area can bring its perspective and expertise to the table.

One of the first considerations in developing your strategic plan is to examine the underlying assumptions of how you will develop your markets. Will you use single-franchise agreements only, area development agreements, or some other structure? What measurements will you use to determine the optimum number of units that can be established in each market? These usually include key demographics, such as population density, traffic patterns, geographic features, and other factors relevant to your concept. Strong analytical tools have been...
developed to help you understand your brand’s customer profile and provide this data. Many of these tools will also use this data to give you probabilities of impacts from the location of new stores.

Protected Territories
A critical decision in this process is whether you are going to establish a protected territory that prevents you, as the franchisor, from granting rights to others in the territory. Some concepts do not provide protected territories at all. The franchisee is granted the right to operate from an approved location, and the franchisor reserves its rights to locate a unit at any location, “as Franchisor, in its sole and exclusive discretion, deems appropriate.”

This approach gives you the most flexibility to address unique markets, such as high population density markets where units can literally be located across the street from each other. But the reservation of these rights requires the franchisee to have faith that you, as franchisor, will exercise your discretion to locate new units prudently, so as not to materially impact the franchisee’s sales. If the franchisee is not yet a believer, he or she may attempt to negotiate a protected territory.

Whether you allow a protected territory will depend on your commitment to core principles underlying your development plan and your negotiating leverage. Will you walk away from quality deals because of this? Or, will you change your plan to include a reasonable protected territory? This is a business decision leadership must make up-front based on its expansion plan; otherwise, the development team may be pressured to negotiate territories when a strong franchisee candidate insists on protection.

Many franchisors ultimately provide a protected territory. The next critical decision is how to define the territory you may grant. Territorial rights may differ depending, for example, on whether you are offering traditional units, non-traditional units, rights to sell and market products or services, or alternative channels of distribution. If you define these rights too broadly, you may limit the brand’s ability to optimize penetration of the market and take advantage of the full brand recognition and economies of scale that franchising provides. This can result in the loss of significant royalties over time. On the other hand, defining the protected territory too narrowly may cause the franchisee to be concerned about how his or her sales will be affected by other units—even units located outside the protected territory.

This is when it is worthwhile to confirm your underlying assumptions and the viewpoints of your team. Is your protected territory drawn in a way that will allow optimum expansion in the market? What factors affect that? Does your protected territory take into account changes in the market over the long term as your brand awareness and market share increase?

Your FAC will surely tell you where the objections (and possible claims) from your franchisees will arise. What, then, can you do to minimize those objections and risks to your franchisees prior to opening? What steps can you take if there is an unanticipated impact on sales after a new unit opens? Obtaining franchisee input and addressing these questions should minimize your and your franchisee’s risks and improve another critical element of your franchise growth plan: increased sales through positive franchisee validations to prospective new franchise candidates.

Development Outside Protected Territories
Once you have confirmed your assumptions and expansion plan into a market, consider whether you will allow development at any location outside the protected territory or reserve the right to disapprove a location even if it is outside the protected territory. Many lawyers recommend against having a formal policy; instead, they may advocate relying solely on the express terms of...
If you have planned properly prior to opening, the impact on existing locations should be immaterial or short term. However, what if this is not the case? If you have located a new unit outside the protected territory, in accordance with the language in your franchise agreement, you should have a strong legal basis for your actions. But your franchisee is not likely to care about that, particularly if it is losing money and sees that as your fault. In that case, the franchisee’s first question is likely to be: What are you going to do about it?

One option is to do nothing, because you have done nothing legally wrong. That is not likely to sit well with the franchisee, as you may have surmised. This is an emotional issue for the franchisee, and it may well lead to an adversarial relationship. This, in turn, can result in loss of time, diversion of resources, risks of litigation, and the intangible costs of having a bitter franchisee influencing new franchise candidates with negative validations.

Another option is to evaluate the impact on the franchisee and provide monetary or other assistance during the impact period. This may include, for example, matching the existing franchisee in marketing funds to build back sales more quickly, helping with remodeling efforts, or waiving a certain amount of royalties. Another option is to evaluate the existing franchisee’s trade area to determine whether relocation within that area might improve its prospects. Relocation options may be limited by whether the franchisee can afford to relocate (and what you may be willing to do to make relocation more affordable) and what the franchisee’s current lease obligations are.

**Oh Happy Day!**
After you devise a strategic plan to address the multitude of issues related to your development of markets and its impact on existing franchisees, your reward should be that more units are opened, more profits are made, and everyone lives happily ever after. But even if that happy day never comes, working with others to develop proactive ways to communicate and manage the economic, intangible, and relationship issues associated with expansion should help you grow your brand more effectively and establish greater trust in your franchise relationships.

Some of the views expressed in this article are the author’s own and may not necessarily include those of his employer.
A new Australian law designed to protect small businesses from onerous contractual terms is expected to affect franchise agreements from 2016 forward. The new law is aimed at all “small” business standard form contracts and is not specifically directed at franchising. Nevertheless, franchise agreements are expected to be impacted more than most. The Australian Competition and Consumer Commission (ACCC) has already announced that the franchising sector will be a priority for its compliance and enforcement activities under this new law.

In contrast with the existing law on good faith, this new law targets the terms of the agreement itself, not the manner of their exercise.

Extending Consumer Principles to Businesses

Australia’s Competition and Consumer Act 2010 currently includes provisions that void “unfair” terms in contracts for the supply of goods or services to individuals predominantly for their personal use or consumption. To date, the law has been limited to the “business to consumer” context, but political pressure has mounted in recent times to expand the protection from consumers to cover “small” business.

The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 passed through Parliament on October 20, 2015, and will extend the existing unfair terms provisions of the Competition and Consumer Act 2010 to “small” business contracts. It will apply to contracts entered into or renewed on or after November 12, 2016, and to all variations or extensions of agreements entered into before this date that will take effect after this date.

The new law’s coverage is broad. Even though it is described as applying to “small” businesses, that description is misleading. In many cases, it will apply to agreements between large businesses.

Which Agreements Are Covered?

The new business unfair terms laws will apply to a term of a contract if each of the following three elements is present:

1. The term is in a ‘standard form contract’.

A contract will be presumed to be “standard form” unless the party seeking to rely on its terms proves otherwise. “Standard form” is not defined. A court may take into account such factors as it thinks fit in making the standard form determination, but it also must consider whether:

- One party had most of the bargaining power;
- One party prepared the contract before discussions between the parties;
- One party was, in effect, required to either accept or reject the contract as presented, except for terms relating to scope or price;
- There was an effective opportunity to negotiate the contract terms; and
- The terms took into account the specific characteristics of the party or the particular transaction.

The negotiation of several terms only is unlikely to prevent a contract from being found to be “standard form.” Significantly, the fact that it may be in the interests of a franchise system that all franchisees enjoy the same terms will not be considered for this purpose.

2. One party has few employees.

At the time the contract is made, at least one party to it must be a business that employs fewer than 20 people. This limit excludes “casual” (infrequent) employees unless they are employed on a “regular and systematic basis.”

When contracting with a new franchisee in relation to a newly franchised business, one would expect this element to be readily satisfied. Few new businesses hire staff before they have secured the rights to trade.

Any party to the contract can satisfy this element, and only employees of a contracting party are counted. This could be the franchisor, in cases where the entity entering into the franchise agreement is not the employer within a corporate group.
3. The contract value will not exceed the threshold.

The total consideration payable for supplies or services under the contract does not exceed AUD 300,000 for contracts with a duration of 12 months or less, or AUD 1 million for contracts with a duration of more than 12 months. This includes all consideration for the supplies to be furnished or rights to be granted, where the consideration or its method of calculation is disclosed before the contract is made.

The ACCC has taken the position that unless the agreement contains an obligation for a party to make minimum payments that exceed the relevant threshold amount, a mere assumption that payments will reach that level will not take the contract outside the reach of the new law. The threshold must actually be met or exceeded to avoid the application of this law. The ACCC maintains that royalty payments based on sales cannot be included for this purpose. As a result, only upfront or ongoing fixed or specified minimum payments can initially be counted in determining whether the threshold for being deemed “small” is exceeded.

What Constitutes an ‘Unfair’ Term?

The new law provides that an “unfair” term in an agreement will be void. If the agreement can operate without the unfair term, the rest of its terms will remain in effect. A term will be deemed “unfair” if each of the following applies:

- It would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
- It is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

As for the second factor above, it is important to note that a term will be presumed not reasonably necessary to protect a franchisor’s legitimate interests unless the franchisor can prove otherwise. How many franchisors could currently produce a business case to justify the terms in their franchise agreement? They will need to be able to do so in the future.

In determining whether a term of a contract is unfair, a court may consider such matters as it deems relevant, but it must take into account the extent to which the term is “transparent” and the contract as a whole. This means that documents such as operations manuals or policies that form part of the contract must be examined, as well as obligations to comply with documents referenced in them.

Transparency requires that the term is expressed in reasonably plain language, is legible, is presented clearly, and is readily available to any party affected by it.

Certain terms will not be subjected to this “fairness” test, including:

- Terms that define the main subject matter of the contract and the consideration for them. (The consideration will be subject to challenge, however, if neither the consideration nor its method of calculation was clearly disclosed up front.); and
- Terms that are required or expressly permitted by law, such as by Australia’s Franchising Code.

‘Grey List’ of Clauses

The legislation includes a “grey list” of clauses that may be deemed unfair. These clauses are cited as examples only; unfairness must be judged in the context of each contract as a whole. Although these clauses are not prohibited, their inclusion in the grey list creates a presumption that they may be unfair.

Many of the clauses cited in the grey list are unilateral or uneven rights or restrictions, such as rights of termination or rights to vary terms of a contract without reference or notice to the other party. Variations made because of franchise system policies and manuals are expected to come under scrutiny. Other cited examples relate to restrictions on a party’s rights to enforce an agreement or a party’s liabilities under an agreement, such as broad indemnities that can make a small business party liable for things beyond its control and liquidated damages provisions that do not reflect actual losses.

Whether a term operates unfairly in practice will be irrelevant; if the term has the potential to operate unfairly, that will suffice to render it void. It is therefore critically important to consider modifying uneven or unilateral contract rights to include some constraints on the exercise of those rights.

What Should Franchisors Do?

Although the new law does not apply to standard form contracts entered into before November 12, 2016, it is important to note that it will also apply to any contract renewed, and to amendments made, after that time. As a result, franchisors should...
refrain from entering into agreements containing a renewal clause unless they are permitted to change the agreement terms at the time of renewal. If there is any risk of parties “holding over” under an expired agreement, the franchise agreement should be changed to avoid the risk that this will result in a new agreement.

Franchisors should review the level of negotiation they will be prepared to entertain, as well as the scope of changes they may need to make to their franchise agreements to ensure that provisions remain enforceable when the new law takes effect.

The consequences of running afoul of the new law are severe. Although including an “unfair” term in an agreement will not, in itself, result in the breach of any law or the imposition of any penalty, the affected provision will be automatically void.

Foreign franchisors will need to be wary of changes their local master franchisees must make to their local sub-franchise agreements. They should retain a right of veto over the agreements their master franchisees use and should take steps to ensure that their system franchise agreements remain enforceable in all respects.

---

**Do Fee Payments Make Uber Drivers Franchisees?**

By Brian H. Cole, Law Offices of Brian H. Cole

Are drivers for Uber Technologies, Inc. (Uber) employees of Uber? And if not, might they be deemed franchisees? These questions have drawn considerable attention, both in courtrooms and elsewhere.

Trial is set to begin on June 20, 2016, in a class action lawsuit asserting that Uber drivers are indeed employees. See O'Connor v. Uber Technologies Inc., ND Cal., Case No. CV 13-3826-EMC, filed Aug. 16, 2013. The O’Connor case was certified as a class for all individual Uber drivers in California between 2009 and June 2014.

Meanwhile, on June 3, 2015, the California Labor Commissioner issued a ruling in Berwick v. Uber Technologies, Inc., Case No. 11-46739-EK, holding that the plaintiff, an Uber driver, was an employee of Uber and entitled to reimbursement of her expenses. (She had already received her “wages.”) Uber has appealed that case to the California Superior Court for the County of San Francisco. Case No. CGC-15-546378, filed June 15, 2015.

If Uber succeeds in showing that its drivers are not employees, does Uber risk a claim that its drivers are franchisees, potentially subjecting the company to liability and civil and criminal penalties for failure to comply with franchise disclosure and relationship laws? Under state franchise relationship statutes that do not require a franchise fee—namely, the laws of Arkansas, Connecticut, Missouri, New Jersey, Rhode Island, and Wisconsin—it is possible that Uber’s drivers will be found to be franchisees. Under the FTC Rule and state disclosure and relationship statutes that do require payment of a franchise fee, the tentative answer appears to be “no,” given that drivers do not pay a franchise fee to Uber.

Although the precise language of federal and state definitions of “franchises” varies slightly, the definitions typically include three elements: a trademark, a community of interest/marking plan, and a franchise fee. (The franchise relationship statute definitions in Arkansas, Connecticut, Missouri, New Jersey, Rhode Island, and Wisconsin omit the third element.)

The relationship between Uber and its drivers likely satisfies the first two elements. The drivers’ activities are likely identified by or associated with Uber’s trademark (satisfying the first element). And Uber likely provides significant control or assistance, prescribes a marketing plan or system, or has a community of interest with its drivers (satisfying the second element).

The controversial question is whether the “fee” requirement (the third element) is satisfied. To answer that question, it is necessary to look at the amounts that may constitute a fee.

**Payment of Fee is Key**

Under the third element of most franchise laws, an arrangement is not a franchise unless the purported franchisee pays a fee of some sort to the franchisor.
or an affiliate of the franchisor. For example, the standard in the Illinois Franchise Disclosure Act (which is fairly typical of state franchise laws) is that "the person granted the right to engage in such business is required to pay to the franchisor or an affiliate of the franchisor, directly or indirectly, a franchise fee of $500 or more," 815 Ill. Cons. Stat. § 705/3(1)(c), with "franchise fee" defined as "any fee or charge that a franchisee is required to pay directly or indirectly for the right to enter into a business or sell, resell, or distribute goods, services or

or an affiliate of the franchisor. For example, the standard in the Illinois Franchise Disclosure Act (which is fairly typical of state franchise laws) is that "the person granted the right to engage in such business is required to pay to the franchisor or an affiliate of the franchisor, directly or indirectly, a franchise fee of $500 or more," 815 Ill. Cons. Stat. § 705/3(1)(c), with "franchise fee" defined as "any fee or charge that a franchisee is required to pay directly or indirectly for the right to enter into a business or sell, resell, or distribute goods, services or


According to the website on which potential new drivers apply to Uber, get.uber.com/drive/ (last accessed on Nov. 11, 2015), a potential Uber driver must have an automobile with four or more doors, from model year 2000 or later, that is not salvaged. If the potential driver does not have a car that meets those standards, the driver can apply to lease a car through Uber, starting at $99 per week with a $250 deposit. (The lease can be cancelled on two weeks’ notice and allows unlimited mileage.) In addition to having a car that meets these standards, the driver must have a smartphone (iPhone 4s or newer or Android 2013 or newer) that runs the Uber App. If the driver does not have a qualifying phone, the driver can rent one from Uber for $15 per week plus a refundable $200 deposit.

These requirements to own or lease a car and a phone, even if rented from Uber, should not constitute a “franchise fee.” See Thueson v. U-Haul Int'l, Inc., 144 Cal.App.4th 664 (2006) (payments to purported franchisor for use of computer and telephone line did not constitute payment of a franchise fee, because those were ordinary business expenses); RJM Sales & Marketing, Inc. v. Banfi Products Corp., 546 F.Supp. 1368 (D.Minn. 1982) (ordinary business expenses do not constitute a franchise fee).

The more controversial issue relates to the overall fee structure of the relationship between Uber and its drivers. Uber operates as a technology service. Drivers and customers install an App on their respective smartphones. When customers sign up for the service, they supply a credit card number, which will be charged for all rides they order. When customers need a ride, they enter on the App the location where they want to be picked up, and Uber sends a message to the nearest driver. If the driver “accepts” the assignment, the customer is notified that the driver is on the way. If the first driver declines, another driver is notified. The Uber App uses data from both the driver’s phone and the customer’s phone to determine when the customer has been picked up and to calculate the length and duration of the trip. At the end of the customer’s ride, the customer’s credit card is charged.

Periodically, drivers are paid for the rides they supply. The percentages have varied over time and markets, but this article will assume that the payment to the driver is 80% of the amount charged by Uber—with the remaining 20% representing reimbursement to Uber for services such as providing the technology platform that matched the driver and the customers.

From an economic perspective, there is no discernable difference to an Uber driver between the driver collecting $10 from a customer and remitting $2 to Uber, or Uber collecting $10 from the customer and remitting $8 to the driver. In both cases, the economic reality is that the driver ends up with $8 and Uber ends up with $2. The key question is whether this economic reality is a “hidden franchise fee” or an “indirect franchise fee.”

Other Franchise Claims Have Failed
Over the years, there have been multiple efforts—so far, unsuccessful—to establish that arrangements with some similarities to the Uber/driver model are “franchises.” For example, Communications Maintenance, Inc. v. Motorola, Inc., 761 F.2d 1202 (7th Cir. 1985) (applying Indiana law) involved sales and installation contracts. Specifically, Motorola sold radio systems, and had a contract with Communications Maintenance to install those radios for the customers. Customers paid Motorola a combined “sales and installation” fee, and Motorola then paid Communications Maintenance an amount less than what Motorola charged the customer for the installation. Following termination of the contract, Communications Maintenance sued, claiming that

“Under state franchise relationship statutes that do not require a franchise fee...it is possible that Uber’s drivers will be found to be franchisees.”

"Under state franchise relationship statutes that do not require a franchise fee...it is possible that Uber’s drivers will be found to be franchisees."
the markup Motorola received on the costs of the installation constituted a "hidden" or "indirect" franchise fee. The court held that the profit margins Motorola realized could not properly be characterized as a franchise fee. See, also, Corporate Resources, Inc. v. Eagle Hardware & Garden, Inc., 115 Wash. App. 343 (2003) (similar contract for installation of home-improvement products).

Other cases involved Avis Rent-A-Car’s “agency operator” model. For example, in Adees Corp. v. Avis Rent-A-Car Sys., Inc., 2003 US Dist. Lexis 26293 (CD Cal. 2003), aff’d 157 Fed. Appx. 2 (9th Cir. 2005), Avis held a concession to operate a rental car business at the Long Beach airport. Avis built out the facility, acquired the cars, and contracted with Adees to run the facility. All funds collected by Adees were held “in trust” for Avis and promptly deposited to an Avis-controlled bank account. Avis paid 10% of time and mileage collections to Adees, as well as 65% of refueling charges, but deducted $0.20 per day for each car on the lot that was not rented. (Adees had an option to return cars to a central facility, thereby avoiding this charge.) The contract allowed Avis to terminate on 30 days’ notice, without cause. Avis did so, specifically informing Adees that Adees was not in default, but that Avis had decided to terminate for its own business reasons. Adees sued, claiming that the contract was actually a franchise. The trademark and control elements were conceded by Avis, and the issue came down to whether the sums retained by Avis were hidden “franchise fees.” The court held that these funds were not franchise fees, whether calculated as a percentage of the amounts paid by the customers or as a monthly amount unrelated to revenues. For a similar outcome under similar facts but applying Washington law, see Jon K. Morrison, Inc. v. Avis Rent-A Car Sys., Inc., 2003 WL 23119903 (WD Wash. 2003).

Another attempt to characterize an arrangement similar to the Uber arrangement as a franchise proved unsuccessful in Atchley v. Pepperidge Farm, Inc., Case No. CV-04-0452-EFS (E.D. Wash., filed Nov. 29, 2004). In that case, Pepperidge Farm consigned product to a distributor that stocked the product at retailer facilities. (Although not expressly addressed in the opinion, it appears the distributor supplied the delivery vehicle.) When the products sold, the retailers paid Pepperidge Farm, which then paid a 20% concession to the distributors, less various deductions. After a bench trial, the court issued an opinion on December 6, 2012, in which it determined that the structure Pepperidge Farm used (which included both commissions on sales and deductions from those commissions) did not constitute a “franchise fee” because the distributors made no “unrecoverable investment” in the business.

Conclusion
The cases thus far have not been successful for franchisees. Nevertheless, there are non-frivolous arguments that courts should treat Uber drivers as franchisees and extend to them the protections of state franchise laws. Whether—or when—those arguments will succeed remains to be seen. As the economy evolves, new business models like Uber must continue to consider existing regulations, including the franchise laws.

Message from the Chair
Continued from front cover

announced the establishment of the American Bar Association Forum on Franchising Diversity Award. This award will be given to a Forum member who has demonstrated a substantial contribution to the diversity goals of the Forum by, for example, taking a leading role in activities sponsored by the Diversity Caucus, serving as a Steering Committee Member of the Diversity Caucus, mentoring diverse members of the Forum, writing articles for the Forum’s publications, or speaking at the Forum’s annual meeting on topics involving diversity in franchising. We will consider candidates for this award for the 2016 Miami Forum.

The Forum also recognized the loss of our colleagues Jack Dunham and John Baer in 2015. Jack Dunham served as Chair of the Forum from 2007–2009 and as a partner with Wiggin and Dana LLP. Jack was a great believer in what he termed the “opportunity culture” and helped develop the Forum’s culture of meritocracy. He was also a mentor and took a particular interest in helping young lawyers develop their legal writing skills. Therefore, the Governing Committee thought it fit to honor Jack’s memory by renaming the Rising Scholar Award to the Edward (Jack) Wood Dunham Rising Scholar Award. The first award in Jack’s honor will available at the Forum’s 2016 meeting in Miami.

John Baer was a highly respected franchise attorney practicing with Greensfelder, Henker & Gale, PC. John was a former member of the Governing Committee and the first recipient...
of the Lewis G. Rudnick Award. In the wake of John’s death, friends and family established a scholarship in John’s memory. The annual scholarship will be awarded for five years in John’s honor to a member of the Forum who exemplifies leadership and civility in the field of franchise law, with a special emphasis on international law. Applicants for this scholarship will be considered prior to the Forum’s 2016 meeting in Miami.

Speaking of Miami, the Forum Planning Committee, including program co-chairs David Oppenheim and Chris Bussert, is already hard at work developing what will be another stellar annual meeting. Mark your calendars and plan to join us November 2–4, 2016 at the Fontainebleau Hotel in downtown Miami. We will have more news about programs, workshops, and special events in the coming months.

As always, please do not hesitate to reach out to me directly with your suggestions for the Forum at the meeting or at Karen.Satterlee@Hilton.com.

Message from the Editor in Chief
By Corby C. Anderson, Nexsen Pruet, LLP

The ABA Forum on Franchising’s annual meeting in New Orleans gave us a great opportunity to make or renew friendships, learn about developments in our field, hear key decision makers’ views on issues that are important to the future of franchising, celebrate the lives of those who left us over the past year, recognize the accomplishments of colleagues, welcome newcomers to the Forum, and, of course, enjoy beignets!

To those of you who wrote for The Franchise Lawyer over the past year, I extend a huge and heartfelt thanks. Please continue to write for us and to send ideas for articles our way. A special congratulations to Keri McWilliams, of Nixon Peabody, who was honored in New Orleans with the Chair’s Award for Substantial Written Work for her article in The Franchise Lawyer on PCI Compliance: What Franchisors Need to Know.

What You Will Find in this Issue
In this issue of The Franchise Lawyer, you will read about California’s recently enacted amendment to its Franchise Relations Act, which grants substantial new rights to franchisees and changes the landscape for franchisor-franchisee relations in that state. Immediately following this article, a commentary considers some of the unintended consequences of the new California law — including, in particular, its effect on the prospects for federal pre-emption of the current patchwork of franchise regulation.

You will also read a summary of comments by Richard Griffin, General Counsel for the National Labor Relations Board, and David Weil, Administrator of the Labor Department’s Wage and Hour Division, on why the franchise model is “in the hot seat” when it comes to joint employer liability. This recap of the plenary session in New Orleans offers insights into the thinking of those who are at the heart of this debate.

In addition, you will read about the one-two punch that the courts have delivered to the International Franchise Association and Seattle franchisees who sought to enjoin enforcement of the city’s new minimum wage ordinance.

This issue’s Corporate Counsel Corner column offers insights for franchisors on developing an expansion plan and addressing encroachment concerns.

On the international front, you will read about a new Australian law aimed at protecting small businesses from onerous contract terms – including terms of franchise agreements, which appear to be squarely in the sights of the Australian Competition and Consumer Commission.

And you will read an analysis of whether drivers for Uber Technologies, Inc. are employees (as plaintiffs claim in a class action set to be tried in June) or whether they may be deemed franchisees under the laws of certain states.

New Feature: Member Spotlight
Finally, this issue introduces a new “Member Spotlight” feature, aimed at helping you get to know fellow Forum members better. Our first “Spotlight” features Andra Terrell of Luxottica Group S.p.A (Pearle Vision).

Do you have a comment? A question? A suggestion? We look forward to hearing from you.
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