As I began thinking about drafting my first column for The Franchise Lawyer, I thought back to my first Annual Meeting in October 1998. As a new franchise lawyer, I had no idea that this singular event was the first step in a journey that would fundamentally change both my personal and professional lives and culminate in the honor and responsibility of serving as Chair of the Forum. Participation in the life of the Forum has afforded me the highest quality education in franchise law. The Forum has also given me the opportunity to network and develop friendships with the brightest and most collegial group of professionals in the industry. I owe a deep debt of gratitude to each of the in-house counsel that came before me and served as my role models, including past Chairs Steve Goldman, Jeff Brimer, Kathy Kotel, and Rich Kolman. I would also like to thank Susan Gruenberg, Rick Asbill, Andy Selden, Ron Gardner, Joe Fittante, and Deb Coldwell, all past Chairs of the Forum, for their mentoring and friendship.

As Chair, one of my responsibilities is to ensure that the Forum continues to flourish. Organizations flourish when their members are actively and continually engaged in the life of the organization. To promote member engagement, the Forum has created opportunities for each member to get involved, including the International Division, the Litigation and Dispute Resolution Division, and the Corporate Counsel Division. There are also opportunities for leadership in the Women’s Caucus and the Diversity Caucus. Further, in response to member feedback, the Forum created a set of more targeted committees based on interests, including publications, technology, marketing, programming, membership, solo and small firm practitioners, franchise administrators and paralegals, law school professors, and young lawyers.

The Governing Committee has conducted a sequential review of each Division and Caucus to ensure that its mission statement is still relevant and that it is meeting the needs of the Forum’s ever-changing constituency. We will continue this process of self-evaluation going forward. The Forum has also undertaken a review of current outreach efforts to new members of the franchise bar to see whether we are providing educational materials, events, and other professional development opportunities that are effective with this changing demographic. Finally, our Diversity Caucus, through the efforts of its steering committee members, Kaari Gagnon, Mark Cloutatre, Andra Terrell, Tanya Walker, Dawn Diaz, and Van Lam, is doing an excellent job of promoting diversity within the Forum, with programming such as its live webcast of civil rights leader Fred Gray and its program at the...
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Two bills introduced in Congress on July 23, 2015, aim to give franchisees “more information and more say in the businesses they run,” according to the bills’ sponsor, Rep. Keith Ellison (D-MN). The Small Business Administration Franchise Loan Transparency Act (H.R. 3195) and the Fair Franchise Act (H.R. 3196) would require franchisors to provide more accurate financial information before a franchisee invests, as well as more transparency in business operations and more protections against unfair practices. The bills offer the potential for a federal standard for franchise agreements, establishing baselines for renewals, transfers, and terminations.

If passed, the SBA Franchise Loan Transparency Act and the Fair Franchise Act would change the way franchising operates. In this article, we consider the implications of each Act and assert that both represent a step in the right direction because they seek to balance the scales that have for so long weighed in franchisors’ favor.

The full text of each bill is available through the Library of Congress at http://thomas.loc.gov.

**SBA Loan Transparency Act**
The SBA Franchise Loan Transparency Act would set “minimum standards of disclosure” by franchisors whose franchisees use loans guaranteed by the SBA. H.R. 3915 § 2(b). The Act would ensure transparency in the loan process, reduce fees and rates charged to franchisee borrowers, help ensure lower default rates, and prohibit “hidden” discussions between franchisors and lenders. Id. § 2(b)(1)–(4). Franchisors (other than those in the lodging sector) would be required to disclose the average first-year revenue of each franchise location for the preceding five years of operation; the number of franchise locations that went out of business or were sold by franchisees during the first year of operation for each of the preceding five years; and average revenues for all locations for each of the preceding five years, aggregated to show the top 25 percent, middle 50 percent, and bottom 25 percent of revenue. Id. § 3(a) (1)–(3). In addition, franchisors would have to give franchisees any financial information relating to the performance of any location provided to the lender for purposes of qualifying for the loan. Id. § 3(b).

To explain the need for such measures, the Act cited a study by the U.S. Government Accountability Office (GAO) showing that in the decade from 2003 to 2012, of 32,323 SBA loans to franchisees, totaling $10.6 billion, 28 percent required guarantee payments, totaling $1.5 billion. Id. § 2(a)(6) (citing GAO, Review of 7(a) Guaranteed Loans to Select Franchisees, GAO-13-759). The report concluded that potential franchisees should include first-year revenue estimates in their SBA applications but noted that “this information is not necessarily available to potential franchisees” in the FDD. Id. Further, citing audit reports by the SBA Office of Inspector General, the Act noted that certain franchise brands had “exceptionally high default rates,” id. § 2(a)(5) (citing Report No. 13-7), and that first year revenue projections for Huntington Learning Center franchisees have been “significantly inflated.” Id at § 2(a)(4) (citing Report No. 11-16). The type of financial disclosures required by the Act may indeed reduce litigation over misleading or misstated financial representations, in that the misleading statements commonly relate to initial profitability and the potential for an immediate return on investment.

The requirements of the Transparency Act are consistent with a franchisor’s obligations under the Amended FTC Rule with respect to the dissemination of financial performance representations. In our experience, however, franchisors, through their sales representatives, frequently make additional representations that are inconsistent with the limited information provided in Item 19 and do not strictly comply with the disclosure requirements. Given the lack of a private right of action available to franchisees and the use of merger and integration and disclaimer clauses to bar actions based on oral financial performance representations, these franchisors have been able to sidestep the disclosure requirements of the Amended FTC Rule. If passed, the Act would reinforce franchisors’ current obligations and permit franchisees a viable cause of action where franchisors fail to comply with the statute. Franchisors may claim that requiring such financial

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By Himanshu M. Patel and Alaina B. Siminovsky, Zarco Einhorn Salkowski & Brito, P.A.

Himanshu M. Patel
Zarco Einhorn Salkowski & Brito, P.A.

Alaina B. Siminovsky
Zarco Einhorn Salkowski & Brito, P.A.
disclosures is impractical because they do not have access to revenue data. But the SBA Loan Transparency Act correctly notes that “franchise companies most often collect royalties based on gross revenue; therefore, revenue data on each franchise outlet is readily available.” H.R. 3195 § 2(a)(7).

**Fair Franchise Act**

The Fair Franchise Act is intended to rectify “a profound imbalance of contractual power in favor of the franchisor.” H.R. 3196, § 2(a)(5). The legislation focuses on three areas of concern: franchise sales and pre-sale disclosures; unfair practices; and renewal, transfer, and termination.

**Franchise Sales and Pre-Sale Disclosures:** Numerous franchisees have sued franchisors over false or misleading financial performance representations made during the sales process. Some lawsuits have been defeated by franchisors based on merger and integration clauses in the franchise agreements. See, e.g. Steak n Shake Enters., Inc. v. Globex Co., LLC et al., 2015 WL 3883590 (D. Colo. June 23, 2015).

The Fair Franchise Act would prohibit franchisors and their agents from failing to provide a franchisee with historical financial performance data, including sales, expenses, and profitability, and from making oral or written statements that are inconsistent with the FDD. H.R. 3196, § 3(a)(2)(C). The Act would give franchisees a statutory cause of action against franchisors that use such sales tactics and would reduce or eliminate the effectiveness of merger and integration clauses as a means to avoid liability for false or misleading representations. Id. § 5(c).

**Unfair Trade and Business Practices:** The Fair Franchise Act would identify and prohibit deceptive and discriminatory practices already prohibited by some state laws. Id. § 3(b). Among other things, the legislation would bar franchisors from:

- Prohibiting, or penalizing franchisees for forming or participating in, franchise associations;
- Discriminating against franchisees by imposing conditions on some franchisees but not others;
- Imposing unreasonable and excessive renewal fees;
- Enforcing mandatory arbitration clauses or prohibiting class or mass actions;
- Terminating, cancelling, or refusing to renew franchise agreements based on franchisees’ failure to participate in promotional campaigns, sell services and products at a specific price, or meet sales quotas;
- Collecting liquidated damages in excess of average monthly royalties for the previous calendar year multiplied by six months or the number of months remaining in the franchise agreement, whichever is less; and
- Refusing to provide, free of charge, physical copies of all records and accountings of marketing, rewards programs, advertising funds, and fees paid by franchisees for suppliers.

Id. §§ 3(b), 5(b).

The Act expressly acknowledges that franchise agreements impose duties of good faith and due care on franchisors, id. § 4(a)-(b), and would give franchisees a statutory cause of action against franchisors that violate those duties. Id. § 5. The Act also would prohibit franchisors from obtaining non-disparagement clauses as part of a waiver or release. Id. § 5(a)(3).

**Renewal, Transfer, and Termination:** Franchisees make a substantial investment when they purchase a franchise. To protect this investment, the Fair Franchise Act contemplates a statutory regime for transfer, renewal, and termination of franchise agreements. Id. §§ 6–9.

For example, the Act would allow franchisors to condition a transfer upon completion of a training program, payment of a transfer fee, and payment of all amounts then due. Id. § 6(d). But it would not allow franchisors to condition the transfer upon the transferee making capital improvements greater than those required under the current franchise agreement. Id. § 6(e). The Act would permit franchisees to transfer time remaining on their franchise agreements and would not allow franchisors to require a transferee to enter into a franchise agreement on terms materially different than those in the current agreement. Id. § 6(f).

Finally, the Act would prohibit franchisors from enforcing covenants not to compete against a transferor, although it would not limit franchisors’ ability to enforce covenants against exploiting trade secrets or trade dress and other intellectual property rights. Id. § 6(j).

The Fair Franchise Act would also set standards governing renewal and termination, including specific notice and cure periods, and a requirement that a franchisor compensate a franchisee for the fair market value of the franchise assets upon termination or waive the covenant not to compete. Id. §§ 7, 8. The Act would grant franchisees a statutory right to terminate their franchise agreements for good cause. Id. § 8(g). Good cause could include the imposition of any substantial change to the franchise business that causes a financial hardship on the franchisee. Id. Thus, franchisees would not have to accede to unreasonable

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Franchisors continue to diversify their organizations. As a result, they need to be more mindful than ever of the federal antidiscrimination law popularly known as Section 1981 and ensure that their employees are properly trained to follow the law in all of its particulars. Section 1981, 42 U.S.C. § 1981, prohibits intentional discrimination based upon race in making and enforcing both private and public contracts. Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987). Although the statute is most commonly applied to employment discrimination cases, it has been applied to franchise relationships as well. Because the franchise relationship is contractual in nature, it implicates Section 1981.

Section 1981 provides that “all persons . . . shall have the same right . . . to make and enforce contracts as is enjoyed by white citizens . . . .” § 1981(a). The statute applies broadly to include “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” § 1981(b).

Section 1981 was enacted after the Civil War to protect the rights of newly freed slaves to enter into contracts and enforce their contractual rights. Since then, Section 1981 has been extended to protect groups such as Hispanics and other protected classes.

For franchisors, Section 1981 has important brand and legal implications. As franchisors know all too well, allegations of discrimination by those affiliated with a brand can create negative publicity that spreads quickly and easily through news and social media outlets. The damage associated with such allegations can be difficult to repair.

When the allegations rise to the level of legal action, they come with increased exposure and expense. Cases of discrimination under Section 1981 are fact-intensive. As a result, courts are reluctant to summarily dismiss well-drafted complaints that plead the basic elements and the circumstances giving rise to a plausible inference of racially discriminatory intent. Instead, courts frequently allow such cases to proceed, giving plaintiffs the opportunity to prove their claims.

**Types of Claims Against Franchisors**

Section 1981 discrimination claims against franchisors generally involve one of three fact patterns. The first type of claim involves the enforcement (or selective enforcement) of a franchise agreement or the award of a franchise. These types of discrimination cases generally arise when a franchisor has decided to deny a transfer of a franchise agreement or to terminate or not renew an agreement involving a member of a protected group. These cases also can arise, despite the best of intentions, when a franchisor decides to put in place a remedial affirmative action plan to try to increase minority ownership of franchises. The opinion issued in Southern Motors Chevrolet, Inc. v. General Motors, LLC, No. CV414-152, 2015 WL 1508412 (S.D. Ga. Mar. 31, 2015) provides a recent example.

In Southern Motors Chevrolet, a prospective dealer sued GM after GM exercised its right of first refusal on a purchase contract that he had negotiated with an existing dealer. The plaintiff alleged that GM exercised its right for the purpose of selling the dealership to a minority applicant and that he was the victim of reverse discrimination under Section 1981. The plaintiff sought reimbursement from GM for the expenses he incurred in trying to purchase the franchise. He sued GM after it denied his request.

GM moved to dismiss the complaint and argued that the plaintiff could not prove intentional discrimination. The court denied the motion to dismiss because the plaintiff’s complaint alleged GM’s executives had made statements that GM intended to increase the number of minority-owned dealers by “snagging” stores through the exercise of the right of first refusal. Thus, the plaintiff claimed, GM’s decision to deny his application and exercise the right of first refusal was likely made for...
discriminatory reasons. On a motion to dismiss, all facts alleged in the complaint are taken as true, and the court held that the plaintiff had alleged facts which, if proven, could suffice to show a violation of Section 1981.

The second type of discrimination case against franchisors involves claims generally made by a franchisee’s customers under the theory of apparent authority. In these cases, courts weigh a number of factors to determine whether the franchisor represented to third parties that the franchisee was its agent, and the plaintiff, in reasonable reliance upon such representations, dealt with the franchisee. An example of this type of case is Thomas v. Freeway Foods, Inc., 406 F. Supp. 2d 610 (M.D.N.C. 2005).

In Freeway Foods, Inc., three African American patrons sued Waffle House and its franchisee alleging racial discrimination under Section 1981. They alleged that they visited a particular Waffle House restaurant three times and were denied service each time. They further alleged that they would not have visited the restaurant had it not been associated with the Waffle House brand. The franchisor filed a motion for summary judgment, asserting that it had no control over the franchisee’s premises. The franchisor relied on a small sign on the premises stating that the restaurant was owned by the franchisee. The franchisor also presented evidence that the plaintiffs were not refused service and that other African American customers were present, seated, and served during the plaintiffs’ visits. The court denied the motion because there were too many facts in dispute on the issue of apparent authority. The case went to trial, and a jury decided in favor of Waffle House and the franchisee.

The third type of Section 1981 discrimination case involves allegations that the franchisor is a joint employer of the franchisee’s employees and, therefore, is liable for the franchisee’s employment practices. In these cases, the court analyzes whether the franchisor exercises sufficient control over its franchisee’s employment-related decisions, such as the hiring, firing, or disciplining of the franchisee’s employees. These cases often have been unsuccessful for plaintiffs because they have been unable to show sufficient franchisor control over franchisees’ employment practices.

In recent months, however, this type of case has attracted increasing attention. In a widely publicized joint-employer liability lawsuit, Betts v. McDonald’s Corp., Case No. 4:15-cv-00002 (W.D. Va. filed Jan. 22, 2015), ten employees sued McDonald’s and its franchisee alleging that the franchisee discriminated against, harassed, and fired African American and Hispanic employees because of their race or ethnicity. In their complaint, the plaintiffs asserted claims for wrongful termination, constructive discharge, and racial harassment in violation of Section 1981, as well as claims of violations of Title VII, 42 U.S.C. § 2000e-2(a)(1).

The plaintiffs alleged that McDonald’s “exercises control through its franchise agreement with franchisees; policies and manuals governing every aspect of restaurant operations; continual oversight by corporate representatives and in-store computer systems; mandatory computer systems generating employees’ schedules and assignments; comprehensive training of all restaurant employees, from general managers to cooks; and involvement with hiring decisions.” Betts, Complaint ¶ 2, citing ¶¶ 28-112.

The Betts lawsuit followed close behind complaints filed by the National Labor Relations Board (NLRB) Office of General Counsel (OGC) in December 2014, alleging a total of seventy-eight labor violations under the National Labor Relations Act. On August 14, 2015, the NLRB upheld a January 2015 decision by an administrative law judge denying McDonald’s motion for a bill of particulars or, in the alternative, motion to strike the joint employer allegations and dismiss the complaint. McDonald’s USA, LLC, a joint employer, et al., Cases 02–CA–093893, et al. (NLRB Aug. 14, 2015). Two weeks later, the NLRB found in Browning-Ferris Industries that two or more employers are joint employers if they “share the essential terms of employment.” Browning-Ferris Indus., Case 32–RC–109684 (NLRB Aug. 27, 2015).
Curbing Section 1981 Claims

Franchisors may have the greatest ability to curtail their risk of liability for Section 1981 discrimination claims when they award a franchise or enforce a franchise contract. The starting point for this risk mitigation should be ensuring that the franchisor’s employees are properly trained to follow the law. An effective training program explains not only Section 1981, but other discrimination laws applicable to franchisors at the state and local levels, which mirror Section 1981.

Some of these state laws are vaguely or broadly worded and, importantly, some encompass the franchise relationship. To cite but two examples, California’s Unruh Civil Rights Act, which applies to business establishments, prohibits all types of arbitrary discrimination, not just discrimination based on sex, race, color, religion, ancestry, national origin, age, disability, or medical condition. See Cal. Civil Code § 51(b). Iowa’s Franchise Law prohibits a franchisor from discriminating “against a proposed transferee of a franchise on the basis of race, color, national origin, religion, sex, or disability.” Iowa Code § 537A.10.5.f.

Franchisors should also make sure their policies and procedures are carefully written and applied even-handedly by their employees. As much as possible, franchisors should assess the business justifications for the requirements they impose and should convey those justifications, preferably in writing, to employees and prospective and current franchisees alike. Training employees on the uniform application of the franchisor’s policies and procedures will help them better manage the relationship with franchisees, particularly with those who are members of a protected group.

Franchisors may have the greatest difficulty curtailing their risk of liability for Section 1981 discrimination claims in situations where franchisor liability is imputed from actions taken by franchisees or employees of franchisees. In these cases, the franchisor’s franchise agreements should make clear to franchisees that they must abide by discrimination laws and are accountable for training their employees. For their part, franchisees should properly train their employees regarding compliance with discrimination laws.

To the extent possible, franchisors should make sure their franchisees are insured and can indemnify them in the event of a discrimination claim. Franchisors also should be careful in taking any action that may be interpreted as controlling the daily operations of their franchisees and thereby subjecting themselves to claims on the basis of joint-employer liability.

In sum, in a sector that is attracting more diverse franchisees and customers alike, franchise systems risk both business and legal repercussions if they ignore the antidiscrimination laws and, in particular, Section 1981.

The Five Essential Parts Of a Franchisee Bankruptcy

By Eric C. Peterson, Spencer, Fane, Britt & Browne, LLP

A franchisee’s filing of a bankruptcy case presents outsized financial risks for franchisors because it introduces not only the prospect of a failing franchise, but also the potential for court fines, missed collection opportunities, and even the transfer of franchisee operations without the franchisor’s consent.

This article sets out five protocols that franchisors can establish to reduce the financial risks and legal expenses associated with franchisees’ bankruptcy filings and improve the predictability of bankruptcy outcomes. These protocols include case intake, preparation and filing of proofs of claim, case monitoring to ensure performance of franchise agreement terms, termination and stay relief, and plan confirmations and franchise transfers.

Case Intake

Confusion, typically leading to panic or denial, often strikes when a franchisee makes a bankruptcy filing. A franchisee in bankruptcy may ignore performance obligations under the franchise agreement. At the same time, the non-performing franchisee becomes cloaked in federal court protections against enforcement of the terms of the franchise agreement. The first step in

Eric C. Peterson
Spencer, Fane, Britt & Browne, LLP
avoiding confusion and uncertainty is to have an effective case intake protocol. Franchisors that get case intake right can find that almost everything in a franchisee bankruptcy flows more smoothly thereafter.

Case intake is an administrative process, but it is peculiar to bankruptcy. Pursuant to Section 362 of Title 11 of the Bankruptcy Code, the filing of a bankruptcy case creates a nationally enforceable federal court injunction, known as the automatic stay, against all creditors of the bankrupt debtor. It is critical to appreciate the significance of this feature of bankruptcy law. The mere filing of the case creates the injunction. A franchisor is subject to the injunction regardless of whether it knows there has been a filing, whether it is located in the judicial district where the case is commenced, or whether it has been listed as a creditor. No court action is needed. This is why the automatic stay is called “automatic.”

The stay, set forth at 11 U.S.C. § 362, prohibits, among other things, any activity directed at collecting debts that existed at the time of the bankruptcy filing. Violations of the stay can lead to financial penalties, including monetary sanctions and the payment of some of the debtor-franchisee’s attorney fees. If the debtor is an individual and the stay is willfully violated, the court can also order the violator to pay actual and punitive damages. 11 U.S.C. § 362(k)(1).

For franchisors, this means that automated, computerized withdrawals of funds from the debtor’s account for unpaid monthly franchise fees must stop. Even withdrawals based on a longstanding agreement with the debtor can be a stay violation and can lead to monetary sanctions against a franchisor.

Bankruptcy courts expect franchisors to have bankruptcy protocols in place, and case intake is critical to avoid the significant risk associated with stay violations. This means that franchisors, starting with the mail room and reaching throughout the company, need to know what a notice of bankruptcy filing looks like and what to do with it.

The bankruptcy notice contains three key pieces of information: the name of the debtor, the date and place of the bankruptcy filing, and the chapter of the Bankruptcy Code under which the debtor filed its case. All three must be logged into the system used to administer franchise operations and the franchisor’s internal accounting department.

1. Who is the debtor? Looking at the name of the debtor allows the franchisor to determine whether the debtor is, in fact, a valid franchisee. For instance, it is not uncommon for individuals who have been granted a franchise to operate their business through a limited liability company (LLC). If the LLC filed for bankruptcy protection but the individual is the franchisee, there is no stay. Thus, as long as no action is taken against the bankrupt entity, the franchisor may terminate the franchise or may collect, evict, foreclose, sue, debit, enforce guarantees, or take other action as warranted against the non-bankrupt franchisee. The debtor’s counsel may complain, and for this reason it may be wise to seek a prophylactic court order before taking action. But where the actual franchisee has failed to file for bankruptcy protection, its objections to stay relief are unlikely to succeed.

2. When and where was the filing made? The date and place of the bankruptcy filing indicate when the stay went into effect and where the franchisor must file a proof of claim, together with any motions or other papers that may be needed. The place of filing also indicates the jurisdiction in which counsel may be needed to appear. A franchisor early on should identify an attorney able to appear in the court in which a bankruptcy is filed. Even if the franchisor does not engage the local counsel at that point, it needs to position itself to act quickly if active participation in the bankruptcy case becomes necessary.

3. Under which chapter is the case filed? The chapter of the bankruptcy case is critical to understanding how the case will proceed and how quickly the franchisor should act. The inquiry at this stage is binary. Is this a Chapter 7 bankruptcy? If so, the case is probably a non-operating liquidation of assets. Accordingly, the franchisor should contact the Chapter 7 trustee (identified in the notice) and arrange for an organized termination of the franchise or such other steps as the franchisor might wish to take.

If it is not a Chapter 7 bankruptcy, then it will be either a Chapter 11 or Chapter 13 case. Chapter 11 cases are for LLCs or, in rare instances, for individuals. Chapter 13 cases are for individuals only. A critical distinction between these two chapters must be recognized at the intake stage. In Chapter 13 cases, a franchisor should act quickly. The debtor early on will file a three- or five-year payment plan. This plan, if approved by the court, can modify the franchisor’s rights under the franchise agreement. If the debtor is seeking to “assume” the franchise agreement and the franchisor does
not consent to the plan’s treatment of the franchisor’s rights, the franchisor should file a timely objection to the assumption.

In Chapter 11 cases, a reorganization plan is also filed with the court, but confirmation (court approval) of the plan typically takes longer. This means the franchisor normally can address the plan after the intake phase.

Prepare and File a Proof of Claim

The franchisor’s next step, also administrative, is to prepare and file with the court a proof of claim, unless otherwise directed in the bankruptcy notice. Claim filing is simple and can be done in-house. Creditors, including franchisors, use a Form B 10 for this process.

To prepare the claim, the franchisor must calculate how much the debtor owed when the bankruptcy case was filed and enter that amount on the claim form. The franchisor should also indicate whether the claim is secured. A claim is secured if the franchisor has been granted rights to any collateral (such as equipment, signage, accounts receivable, or anything else) as security for payment.

The franchisor should attach to the proof of claim the franchise agreement and a spreadsheet or invoice reflecting its calculations. The claim may be filed electronically by an attorney. Alternatively, copies of the claim may be sent to the court by mail, along with a self-addressed, stamped envelope for the return of a file-stamped copy.

Tracking, Post-Petition Performance

Case tracking proceeds fairly automatically once a claim is filed. If the case is a Chapter 7 proceeding, there will be little to do beyond winding down the franchise. If the case is a Chapter 13 proceeding, the actions taken at the case intake phase to protect franchisor’s rights under the franchise agreement will already be under way. Chapter 11 cases require more ongoing attention. Franchisors periodically will receive mailings of court notices, as well as court papers required to be sent to creditors. Bankruptcy is a paper-intensive process, and the volume of paper can be surprising.

For franchisors, the key to effective case tracking is to be alert to any effort by the debtor to terminate, assign, transfer, or modify the franchise agreement or related agreements. Such efforts will be addressed in a motion—which should indicate in its title that the franchise agreement (perhaps along with other agreements) will be affected—or in papers dealing with plans of reorganization and the “disclosure statement” preceding the confirmation of a plan of reorganization.

Where any such motions are identified, they should be reviewed with counsel. Most other filings in a bankruptcy case will implicate matters ancillary or unrelated to the franchise agreement. These are less likely to require action by the franchisor.

Termination, Stay Relief

Terminating a franchise in bankruptcy requires the assistance of counsel. Before any action may be taken to terminate, a motion must be filed with the court, and the debtor must be afforded an opportunity to respond. In the motion, the franchisor will request, among other things, the right to terminate the franchise pursuant to the termination procedures set forth in the franchise agreement. In effect, the motion is a request to proceed with termination as if there were no bankruptcy case pending.

“Franchisors, starting with the mail room and reaching throughout the company, need to know what a notice of bankruptcy filing looks like and what to do with it.”

Typically, courts will not enter orders terminating a franchise. But if there is little or no prospect of an effective reorganization of an operating business, the courts may permit the franchisor to conclude the relationship through contractual termination provisions and pursuant to state law.

Plan Confirmations, Sales/Transfers

After a bankruptcy filing, a franchise may survive on a go-forward basis only through plan confirmation or through transfer of the franchise. For the franchisor, a central question for each of these alternatives is the same: has the debtor established a sufficient basis to ensure future performance of
the franchise agreement? The franchisor is entitled to assurance not only that all financial and other curable defaults under the agreement will be rectified—whether arising pre- or post-petition—but also that the terms of the franchise agreement will be honored in the future.

The franchisor must be active at the plan confirmation or transfer stage of the bankruptcy proceedings and must file with the court any objections it may have. The bankruptcy court may deem the franchisor’s failure to file an objection to indicate its consent to a proposed plan or transfer. Consequently, franchisors must assert their rights at this stage of the proceeding.

Debtors may seek to negotiate terms to win the franchisor’s advance consent to a plan confirmation or transfer. In that case, there may be no need for local counsel. But if any question arises regarding whether and how defaults will be cured and future performance ensured, the franchisor may need to engage counsel to actively represent it in court. Indeed, this may be the only stage of the bankruptcy process in which the need for active participation of the franchisor and its counsel is critical.

**Conclusion**

Most franchisors can manage the five essential components of a franchisee bankruptcy in-house or with limited involvement by outside counsel. An effective case intake process can clarify how the many issues that arise in franchisee bankruptcy filings should be handled. By adopting and following such a process, franchisors can bring order and efficiency to what otherwise can seem like a chaotic and disjointed legal proceeding.

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**Avoiding Antitrust Risks at Times of Distribution Change**

By Quentin R. Wittrock, Gray Plant Mooty, Mooty & Bennett, P.A.

The word “antitrust” usually draws keen interest among franchise and distribution lawyers. We all know that antitrust law poses risks and that those risks are serious. Manufacturers and other suppliers, in particular, face both legal and business risks when they change the way they get their products to market. Termination of a dealer, distributor, or independent sales representative leads to most distribution disputes and litigation. Although most such disputes focus on the contract rights between the parties, it is in times of change that many antitrust claims are asserted as well. Indeed, antitrust law—over and above the contract between the parties—poses an entirely separate, but equally important, set of risks that generally do not get mentioned by distributors or dealers until termination is imminent. This article reviews those antitrust risks and steps manufacturers and other suppliers can take to ameliorate them.

**Price Discrimination**

Pricing is the most frequent topic of antitrust concern as companies wrestle with how to avoid “price discrimination” in selling to their customers. It is common knowledge in business that suppliers do not charge all buyers the same price. Yet federal antitrust law (the Robinson–Patman Act) on its face seems to require that all customers be treated equally, not only in price but in promotional support—at least to the extent these customers compete against each other in reselling products. Given these dueling realities, there is plenty of room for misunderstandings to turn into legal claims, particularly when termination occurs due to failure of the dealer’s business.

The key to avoiding or defeating price discrimination claims is to understand and apply the exceptions to the requirement of equal pricing. For example, the law allows companies to have “programs” in place that allow for greater discounts to customers that meet published criteria, such as growth, loyalty, or volume. The availability of such programs can insulate the seller from liability as long as the programs are reasonably attainable and will not destroy competition by significantly favoring only one buyer or a handful of buyers. Programs like this also can be effective tools to motivate dealers and distributors to sell the manufacturer’s products instead of competitors’ brands. Other legally permitted exceptions to the law prohibiting price discrimination, such as “meeting competition,” also can allow the manufacturer flexibility to increase sales while obeying the law.
Resale Price Control
Another distribution-related antitrust issue is control of resale pricing. For a century, suppliers were strictly forbidden from agreeing with their dealers and distributors as to resale prices down the distribution chain. That has changed in recent years, at least under federal law in the United States. Now, the more important question is the state or country in which resale control is sought to be exerted, as state and country laws vary. The economic effects and the reasons for the control also matter.

Given these nuances, companies increasingly are adopting Minimum Advertised Price (MAP) programs. The rise of Internet resellers has fed this practice. Indeed, some companies call their programs “iMAP” policies and limit them to control of price advertising on the Internet. A decision to terminate often is linked to the topic of resale pricing generally and MAP programs specifically, as termination might be a dealer’s or distributor’s punishment for not following the manufacturer’s resale pricing requirements or policy on price advertising.

Exclusive Dealing
A third common legal concern for manufacturers that sell through independent distribution is exclusivity. Exclusive dealing arrangements run the gamut, from the traditional practice of granting exclusive territories to the practice of requiring dealers not to sell competing lines. The latter option provides a form of exclusivity to the manufacturer. Like challenges regarding pricing parity and controls on pricing and advertising, disputes about whether exclusivity requirements are being followed often arise when the parties are nearing the end of their relationship.

Collusion
The most serious form of antitrust risk—“go to jail” serious—is collusion with competitors. Certain forms of collusion, such as bid rigging and price fixing, are criminal offenses. Individuals may receive prison sentences when they engage in such conduct on behalf of their companies. The more common forms of collusion are much closer to the line that divides legal collaboration from illegal “conspiracy” to restrain trade. Trade association activity, although generally legal, can lead to trouble when competitors work together too closely. Risks arise, for example, when competitors discuss a merger or acquisition. How soon can they start presenting a unified face to customers on central terms such as pricing and who deals with whom? Joint ventures by their nature involve competitors cooperating; thus, the risk of collusion needs to be watched closely in all joint venture discussions. What about bid situations? When a customer wants to use a manufacturer’s product but needs multiple bids, what involvement can the manufacturer have in working with potential bidders or in submitting a factory-direct bid itself? Further, when a competitor is also a customer or supplier for certain components or in a particular geographic area, it can be tricky to separate the cooperation needed in any buyer-seller relationship from the collusion generally forbidden among competitors.

Perhaps the most common antitrust “collusion” problem for manufacturers occurs when independent dealers conspire among themselves to rig bids or fix prices and then attempt to draw the manufacturer into their illegal arrangement. In this scenario, some dealers may complain about other dealers and may ask the manufacturer to “police” their anticompetitive agreement. They also may ask the manufacturer to participate directly by agreeing that its company-owned distribution outlets or direct sales activities will be curtailed to facilitate the dealers’ arrangement. These situations pose vexing issues for manufacturers that want to do the right thing legally, yet also see to it that their valued dealers are kept profitable and happy.

Preventive Measures
Prevention is the best cure for antitrust problems in all of the above scenarios. This can be accomplished through review, training, and drafting.

Manufacturers should review their compliance with antitrust laws by formally gathering and scrutinizing all of their pricing programs, sales policies, competitor communications, and customer agreements, among other documents, to uncover and defuse landmines. Sales leaders and other executives should be interviewed regarding their interactions with customers and, most importantly, their interactions with competitors with which the company has contacts. Top management should receive a report of this compliance review.
Training on avoiding antitrust risks should be provided to all involved. This can be accomplished through sessions presented at company-wide sales meetings and through mandatory online training modules for all employees who deal with customers or competitors.

Careful drafting of documents can also avoid legal liability before terminations occur and claims arise. Having clear contracts, policies, and programs in place should avoid most disputes about termination, pricing, and resale controls. Moreover, having clear documentation of what is and is not a part of the relationship with competitors is crucial in avoiding collusion.

**Conclusion**
Changes in distribution always leave some former distribution partners or would-be competitors on the outside looking in. In these situations, disputes, threats, and even litigation can result. Manufacturers will be best equipped to handle the risks that arise in these situations if they have understood and followed the rules relating to pricing, exclusivity, and termination, and if they have clear documentation in their files, legal compliance programs in place, and employees trained in how to steer clear of violating antitrust laws and other legal boundaries.

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**New Federal Franchise Legislation**
Continued from page 4

**Private Rights of Action, Prospective Application:** The Act would give franchisees a private right of action for any statutory violation within the federal court where the franchisee is located, with the right to recover attorney fees and costs. Id. § 11. For example, if a franchisor attempted to manufacture a default to thwart or penalize a franchisee for joining a franchise association, the franchisee could sue the franchisor under the statute to enjoin the termination and recover attorney fees.

The Act would apply prospectively for the most part. Id. § 12(a). But Section 3, which relates to unfair trade practices, would take effect ninety days after enactment and would apply to all practices, disclosures, and statements that occur on or after the ninety-day period expires. Franchisors and franchisees alike should pay particular attention to Section 3, because it may be used to challenge certain provisions in franchise agreements, such as mandatory arbitration provisions, and to defend against unfair termination or non-renewal for reasons such as refusal to participate in a franchisor’s promotional campaigns. Id. §§ 3(b)(6), (7)(A).

**The Time Is Right for Change**
Franchising as an industry is getting more national attention than ever before, much of it critical of franchisors. The National Labor Relations Board has issued rulings threatening franchisors with joint employer liability. The Service Employees International Union has petitioned the Federal Trade Commission to investigate “the existence and extent of abusive and predatory practices by franchisors toward franchisees.” Even though franchisors and their defenders still suggest there is little to nothing wrong with the legal framework of franchising, the unfettered right of franchisors to use one-sided, take-it-or-leave-it franchise agreements has increasingly come under fire.

For years, franchisees and franchise associations have sought basic fairness protections on these very issues. See, e.g., Asian American Hotel Owners Association’s Points of Fair Franchising, available at http://www.aahoa.org. The SBA Loan Transparency Act and the Fair Franchise Act would provide such protections. The bills have garnered the support of the Coalition of Franchisee Associations (CFA), the Edible Arrangements Independent Franchise Association, the Independent Organization of Little Caesar Franchisees, the International Association of Kumon Franchisees, the Meineke Dealers Association, the North American Association of Subway Franchisees, and the Service Station Franchisee Association, among others.

The International Franchise Association has proclaimed concern that franchise growth will be crippled by paternalistic governmental intervention—even though it has projected for five years running that franchised businesses will grow faster and create more jobs than any other business sector.

But the SBA Loan Transparency Act and the Fair Franchise Act are likely to encourage franchise growth, not discourage it, because they would bring a level of fairness to the franchisor-franchisee relationship. By protecting the investment of small business owners, they are likely to spur further investment in the franchise sector.

With an election year on the horizon, congressional leaders are eager to shore up support from the small business community. Some manner of franchise reform would allow them to do just that.
Imagine the following: After months of planning, diligence, meetings, and conference calls, you have just “signed up” a franchisee in the hot jurisdiction du jour. You are understandably overjoyed and ready to leave the office early to celebrate. But what if you learned that your skillfully negotiated, artfully worded agreement is unenforceable because the franchisee does not have sufficient corporate purpose to operate the franchised business or the agreement is in the wrong language? Your happy hour might not be so happy then.

Certain extracontractual formalities may affect the enforceability of an international franchise agreement. Because these types of formalities do not typically arise when doing business in the United States, many domestic franchisors may be unaware of their importance in cross-border deals. This article addresses extracontractual formalities germane to international franchise transactions and offers tips on how best to comply with them. It also includes a chart summarizing the formalities applicable in twenty key jurisdictions.

It must be noted that, like the United States, many foreign jurisdictions impose franchise-specific obligations, such as registration and disclosure, that also affect the enforceability of franchise agreements. These obligations are not discussed in this article.

**Sufficient Corporate Purpose**

If you have ever formed an entity in the United States, you have likely come across the phrase “any and all lawful purposes” or something similar. It is relatively commonplace for U.S. entities to be authorized to carry out any activity under the sun as long as that activity is lawful. But formation documents for non-U.S. entities typically include a narrow, fixed purpose. And activities outside of that purpose, known as ultra vires activities, may invite trouble from minority owners, competitors, or regulators. By contrast, most U.S. states no longer allow an ultra vires defense to avoid complying with an agreement’s obligations.

For example, in an international transaction, a franchisor with a movie theater concept in which patrons may order food and drinks during the movie should confirm that a prospective franchisee’s corporate purpose includes both operating a movie theater and selling food and beverages. Otherwise, the franchisor may discover that the franchisee cannot open its theater on time because local authorities refuse to issue the required operating permits. And in some cases, such a franchisee may attempt to avoid its obligations to the franchisor by claiming it did not have sufficient corporate purpose to enter the franchise agreement.

**Actual Versus Apparent Authority**

When entering into a domestic franchise agreement in the United States, there typically is little risk in relying on the fact that the person signing on behalf of a party has authority to bind that party, as long as the reliance is reasonable (if, for example, the person’s title or representations indicate that he or she has authority). This is because the United States recognizes the principle of apparent authority. In other words, even if a franchisee’s agent or representative signing the agreement did not have actual authority to bind the franchisee, the franchisee is nonetheless bound by the agent’s or representative’s actions if it was reasonable for the franchisor to believe under the circumstances that the person had authority to act for the franchisee.

Outside the United States, however, many jurisdictions (particularly civil law jurisdictions) do not recognize this principle and instead require that a signatory have actual authority (via power of attorney, board resolution, or otherwise) to bind a party. Some jurisdictions even require that the basis of the signatory’s actual authority be specifically referenced in the agreement itself. Thus, even if the CEO of a prospective franchisee in Mexico claims to have authority to sign the franchise agreement, it would be advisable to confirm the CEO’s actual authority. If not, at the first sign of trouble, the franchisee may argue that the obligations of the agreement are not enforceable because the CEO did not have the specific...

Continued on page 16
## EXTRACONTRACTUAL FORMALITIES

<table>
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<tr>
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<th>Are original signatures required, other than for use as evidence or for registration with local authorities?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Yes, but acts by a company beyond its corporate purpose are not void if duly authorized by the company</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
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<td>Brazil</td>
<td>Yes</td>
<td>Generally, no</td>
<td>No</td>
<td>No, but the parties should initial the bottom of each page</td>
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<td>Canada</td>
<td>Generally, only in Quebec, Nova Scotia, and Prince Edward Island, but acts by a company beyond its corporate purpose are not void if duly authorized by the company</td>
<td>Generally, yes; except in Quebec until February 14, 2016</td>
<td>No</td>
<td>No</td>
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<td>China</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Colombia</td>
<td>Yes, but a local simplified shares company may engage in all lawful activities</td>
<td>Generally, no</td>
<td>No</td>
<td>No, but the parties must initial the bottom of each page</td>
</tr>
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<td>Dominican Republic</td>
<td>Yes, but acts by a company beyond its corporate purpose are not void if duly authorized by the company</td>
<td>No</td>
<td>Yes, notarization is required for franchise agreements executed outside of the Dominican Republic</td>
<td>No, but the parties should initial the bottom of each page</td>
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<tr>
<td>Germany</td>
<td>Yes</td>
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<td>No</td>
<td>No</td>
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<tr>
<td>Hong Kong</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
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<tr>
<td>India</td>
<td>Yes</td>
<td>Generally, no</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Korea</td>
<td>Generally, yes; but acts are rarely deemed void for lack of sufficient purpose</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
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<td>Kuwait</td>
<td>Yes</td>
<td>No</td>
<td>No, avoid notarization and legalization to prevent registration under Commercial Agency law</td>
<td>Yes</td>
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<tr>
<td>Mexico</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No, but the parties must initial the bottom of each page</td>
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<td>Russia</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<td>Saudi Arabia</td>
<td>Yes</td>
<td>No</td>
<td>No, avoid notarization and legalization to prevent registration under Commercial Agency law</td>
<td>No</td>
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<td>Singapore</td>
<td>Yes</td>
<td>Generally, yes</td>
<td>No</td>
<td>No</td>
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<td>Is execution in counterparts allowed?</td>
<td>Must the franchise agreement be executed by witnesses?</td>
<td>Must the parties pay stamp taxes on the value of the franchise agreement?</td>
<td>Is translation into the local language required, other than for use as evidence or for registration with local authorities?</td>
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<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Not applicable</td>
<td></td>
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<tr>
<td>Yes</td>
<td>Yes, the franchise agreement should be executed by two witnesses to facilitate its enforceability</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Generally, no; except agreements executed and performed in Quebec must be in French</td>
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<tr>
<td>Yes</td>
<td>No</td>
<td>Generally, yes; the current rate is between 0.03% – 0.05%</td>
<td>No</td>
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<tr>
<td>Yes, if the agreement specifically allows for execution in counterparts</td>
<td>No</td>
<td>No</td>
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<td>Yes</td>
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<td>No</td>
<td>No</td>
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<tr>
<td>Yes</td>
<td>No</td>
<td>Generally, yes; the rate varies depending on the state where the agreement is executed</td>
<td>No</td>
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<tr>
<td>Yes</td>
<td>No</td>
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<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No, avoid translation to prevent registration under Commercial Agency law</td>
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<td>Yes</td>
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<td>South Africa</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Turkey</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>Yes</td>
<td>No</td>
<td>No, avoid notarization and legalization to prevent registration under Commercial Agency law</td>
<td>No</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Vietnam</td>
<td>Yes</td>
<td>Generally, yes</td>
<td>No</td>
<td>No, but the parties should initial the bottom of each page or the agreement should bear the franchisee’s cross-chop</td>
</tr>
</tbody>
</table>

**International Agreements**

Continued from page 13

authority to sign contracts on behalf of the company and thus could not bind it.

**Notarization and Legalization**

Notarization is largely unnecessary for domestic agreements in the United States, except, perhaps, for certain real estate documents. The same is true in many other jurisdictions from a purely legal perspective. A franchisor should be able to enforce its franchise agreement against the franchisee even if the franchisor’s signature on the agreement has not been notarized or legalized. (Legalization may occur through apostille, a process in which a stamp is used to certify authenticity, or, for countries that are not members of the Hague Convention, through consularization, a process in which an original document is endorsed and registered by a foreign consulate in the United States.)

But there may be practical hurdles to enforceability. For example, a recently signed Brazilian franchisee may be delinquent on its royalty fee payments simply because it cannot file the franchise agreement with the Brazilian Patent and Trademark Office or Central Bank without your signature being notarized and legalized through a Brazilian consulate.

As a side note, in some instances it may be advisable for a franchisor to refrain from notarizing or legalizing a franchise agreement. One reason to refrain from doing so is to avoid the unintended application of commercial agency laws that are prevalent throughout the Middle East. These laws may grant franchisees additional protections against termination.

**Translation**

Translation typically is not an issue with domestic franchise agreements but may present an issue with international franchise agreements covering non-English-speaking jurisdictions. Although translation of an agreement is not usually required for the agreement to be enforceable between the parties, it is almost always necessary if the agreement is to be filed with any governmental authority (as in the above example of the Brazilian Patent and Trademark Office) or relied on as evidence in a foreign court.

Imagine that a franchisor decides to pursue an injunction in a Kuwaiti court to force a Kuwaiti franchisee to cease misusing its trademarks. The franchise agreement is in English and does not specifically address the protocol for foreign-language translations. If the franchisee has translated the agreement into Arabic, the franchisor may find itself between a rock and a hard place: does the franchisor trust that the franchisee’s translation has accurately captured the meaning and intent of the original English version? Or does the franchisor commission its own translation, which could take several weeks and cost more than expected?

Notably, Vietnam, Indonesia, and Russia are exceptions to the rule because their respective franchise laws mandate that franchise agreements be executed in the local language. Russia also requires translation for filing with the local trademark office.
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</thead>
<tbody>
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<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Yes, but local tax authorities may deem each counterpart a separate agreement subject to stamp tax</td>
<td>No</td>
<td>Yes. The current rate is 0.948% of the highest stated amount in the agreement</td>
<td>No</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No, avoid translation to prevent registration under Commercial Agency law</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Yes, but in practice the parties usually sign on the same page</td>
<td>No</td>
<td>No</td>
<td>Yes, the agreement must be executed in both English and Vietnamese</td>
</tr>
</tbody>
</table>

**Originals, Counterparts, Witnesses**

In an era when virtually all devices (even some kitchen appliances!) come equipped with Wi-Fi and videoconferencing capabilities, it is becoming rare for parties to sit down across the table from each other to sign an agreement. The physical distances that may be involved in an international deal make this even less likely.

Instead, most parties opt to exchange scanned signature pages, and agreements have evolved to include the concept of counterparts. Although scanned signatures on counterparts will likely suffice for enforceability between the parties, they may not be enough if the agreement is to be filed with any governmental authority or relied on as evidence in a foreign court. Thus, with the possible exception of Turkey (discussed below in the section on stamp taxes), the best practice is for parties to first exchange scanned signature pages and follow up with fully executed originals.

As far as full execution, in addition to signing at the end, in some jurisdictions it is advisable for the parties to initial each page of the agreement. Some jurisdictions may also require the parties to sign or initial specific obligations, such as guarantees or noncompetes, or to have witnesses sign the agreement.

**Stamp Taxes**

Certain jurisdictions, including Turkey, India, and China, impose a stamp tax on agreements that will be used or benefitted from in those jurisdictions. For example, if a franchise agreement grants a franchisee the right to develop and operate the franchised business in Turkey, there is an argument that the franchisee is benefitting from the agreement in Turkey. As a result, the agreement may be subject to the Turkish stamp tax.

Failure to pay an applicable stamp tax may not affect enforceability of an agreement between the parties, but it will likely impede the parties’ ability to rely on the agreement as evidence in a local court or file it with governmental authorities.

In the case of the Turkish stamp tax, there is a risk that local tax authorities will deem each counterpart a separate agreement subject to the stamp tax. Thus, the parties should consider executing only one copy and revising any language that references counterparts accordingly.

The authors wish to thank all who contributed to this article. From Baker & McKenzie: Michael Santa Maria, Kevin Maher, Will Woods, Uanna Alves, Brett Moore, Arlan Gates, Ricard Pochkhanovula, Sergio Ligorreta Gonzalez, Carlos Davila Peniche, Flavía Rebello, Alejandro Mesa, Charlotte Harrington, Doris Myles, Julia Wendler, Tim Schwartz, Hatem Ozan Guner, Ismail Esin, ManhHung Trun, Hai Hoang Nguyen, Penny Ward, Kelvin Poo, Jolyn Ang, Ying Chen, Margaretia Divina, Mohamed Barakat, Tom Thnya, and Willy du Plessis. From correspondent firms: Luis Miguel Peryna (Peryna & Asociados), Sun Chang and Jae Hoon Kim (Lee & Ko), Bhuvana Verunagovan (AZB & Partners) and David Walker (ASAR – Al Ruwayeh & Partners).
Annual Meeting’s Diversity Lunch with Yan Kim, president of Smoothie King.

The Governing Committee and Senior Leadership also will continue to ensure that we advance the Forum’s mission to “be the preeminent forum to study and discuss the legal aspects of franchising,” particularly in the area of technology. We are taking steps to enable our members to stay connected with the Forum and with each other year round through the Forum’s “evergreen app.” We have expanded our Annual meeting app to be live 365 days a year, providing you with daily updates on our live programming, webinars, and teleconferences, links to our social media pages, to our ABA publications page, and to the Franchise Law Journal and The Franchise Lawyer. We continue our work on the Forum’s searchable database, which will allow us to research a wide range of topics in our Annual Meeting materials and other Forum publications. We also appreciate the necessity of staying connected to home and office through the Internet (as well as to review all of your Annual Meeting papers and PowerPoints), and we are taking steps to ensure that Forum members stay connected during our Annual Meeting. I offer a huge thank you to Joe Fittante for his foresight in establishing the Projects and Initiatives Committee, which, along with the Governing Committee, made these initiatives possible.

Please do not hesitate to reach out to me directly with your suggestions for the Forum by e-mail at Karen.Satterlee@Hilton.com or in person when we gather at the 38th Annual Forum on Franchising in New Orleans on October 14–16, 2015. I look forward to seeing you all!

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**LITIGATOR’S CORNER**

‘Collect Releases Like You Collected Baseball Cards’

By Charles S. Modell, Larkin Hoffman Daly & Lindgren Ltd.

Editor’s Note: In litigation, as in baseball, a strong defense can make all the difference. Litigators working to provide a strong defense for their franchisor clients may want to pitch this tip to their transactional colleagues.

“Collect releases like you collected baseball cards.” A franchisor client once gave me that advice. Whenever he gave anything to a franchisee, he routinely required the franchisee to sign a general release. I asked why he needed several releases a year from the same franchisee. His theory, he told me, was that a franchisee could argue that a single release was invalid for any number of reasons, but a mountain of releases would be hard to explain away.

Franchisee advocates will point out that any release given without consideration is invalid. Thus, it would likely be futile to collect releases when providing routine assistance to franchisees or providing any other consideration that is already required under the franchise agreement. There are, however, situations where a franchisee may need help dealing with a problem. If the problem was caused by the franchisor and the assistance was intended to remedy the improper action of the franchisor, certainly one would expect the franchisee to provide a release of the claim in exchange for the bargained-for assistance.

Why should a release only be appropriate when assistance is given to remedy a problem caused by the franchisor? If you help someone address a problem you did not cause, why would it be inappropriate to expect the party receiving your help to not sue you?

Franchisors provide many types of assistance to franchisees. The assistance, for example, might be temporary royalty relief, additional time to cure a default, additional training at no cost to the franchisee, the opportunity to participate in a new product test, advertising expenditures or reimbursements intended to directly benefit a franchisee’s outlet, financing of overdue amounts owed to the franchisor, financing of an expansion or remodeling, or even the grant of a new franchise. In each of these cases, if the franchisee had been threatening action against the franchisor, the franchisor would expect to receive a release in consideration for its assistance. Why should it be different if the franchisee failed to disclose it had claims it intended to pursue?

**Adopt a Uniform Policy**

Thus, it seems prudent for franchisors to adopt a policy that whenever they provide assistance or concessions to a franchisee beyond what they are obligated to provide, they seek some consideration...
for their efforts. Franchisees receiving such assistance may not be in a position to pay for it, so consideration could take the form of a release instead.

For the release to have value, it must be carefully drafted. For example, is the release intended to cover a specific claim, or all claims of any kind or nature? Is it intended to release only claims related to one franchise or to all franchises between the franchisor and franchisee? Generally, franchisors expect a release to be all-inclusive. They do not expect to assist a franchisee with one issue, only to learn the next day that the franchisee expects more assistance with the same issue under another franchise agreement or with an entirely new issue.

In some states, the release must clearly specify that it covers both known and unknown claims if the latter are intended to be released. And it is important to note that in California, additional statutory language is necessary for a release of unknown claims to be effective.

For many years, I have taken the advice I received from our client and have passed it along to others (whether the analogy is to baseball cards or to any other treasures). In my experience, a franchisee attorney will not stand down from a fight when faced with a single release. But I have never seen a franchisee attorney faced with half a dozen releases agree to take her client’s case on a contingency basis.

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

What a difference one season makes! Several articles in our Summer issue seemed to have a common thread regarding the franchise model: “If it ain’t broke, don’t fix it.” But as our Fall issue goes to print, those intent on fixing what they deem to be a broken model are having their day. The National Labor Relations Board (NLRB) delivered a one-two punch in August, first by denying franchisor McDonald’s appeal of joint employer allegations against it, McDonald’s USA, LLC, a joint employer, et al., Cases 02–CA–093893, et al. (NLRB Aug. 14, 2015), and then by issuing a new definition of “joint employer” widely viewed as ominous for franchisors. Browning-Ferris Indus. of Cal., Case 32–RC–109684 (NLRB Aug. 27, 2015).

In addition, as you will read in this issue, federal legislation was introduced in July with the express purpose of rectifying “a profound imbalance of contractual power” in favor of franchisors and imposing new duties and safeguards combatting “unfair” and “misleading” practices. H.R. 3195, H.R. 3196.

Also in this issue, you will read about the legal and business reasons for complying with the federal antidiscrimination law known as Section 1981, 42 U.S.C. § 1981.

An article on franchisee bankruptcy sets out five protocols franchisors can follow to reduce the financial risks and legal expenses associated with bankruptcy filings and improve the predictability of bankruptcy outcomes.

In the Litigator’s Corner, you will read about a tip on collecting releases. An article focused on the distribution side of franchise and distribution law looks at ways to avoid risks of antitrust violations.

Finally, a must-read article for lawyers who handle international transactions outlines the extracontractual formalities that must be followed to ensure that agreements can be enforced.

Goodbye and Hello
This issue marks two significant transitions. First, we salute and thank Deborah Coldwell, of Haynes and Boone, LLP, who ended her term as Chair of the Forum and wrote her last Chair’s column this summer. And we welcome Karen Satterlee, of Hilton Hotels, the Forum’s new Chair and the author of the first message that will greet you with each issue.

We also say goodbye and thank you to Himanshu Patel, of Zarco Einhorn Salkowski & Brito, PA, who has retired as an Associate Editor of The Franchise Lawyer after three years of great service. And we say hello and welcome to Keri McWilliams, of Nixon Peabody LLP, our new Associate Editor.

Author! Author!
Each issue of The Franchise Lawyer is only as good as our authors make it. If you would like to write for us, raise your hand! Call or email us—contact information appears on page 2—or speak with us in person at the Forum’s annual meeting in New Orleans. We look forward to hearing from you!
Know the Essential Franchise Issues

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.

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