The Governing Committee, Senior Leadership, and our ABA staff have been working diligently on improving our web pages on the ABA website, so I want to share some of the information available there with you. As you will see, many exciting things are happening in 2015.

Our ABA Web Pages
If you visit our landing page at http://www.americanbar.org/groups/franchising.html, you will find information about the many benefits and opportunities the Forum provides to our members, including the Chair’s message and links to vital information about the Forum.

We outline our Pathways to Leadership, including involvement opportunities. See http://www.americanbar.org/content/dam/aba/administrative/franchising/pathways2leadership.authcheckdam.pdf.

We post our 2015 membership and program calendar, which lets you know what is happening in the Forum on a monthly basis. See http://www.americanbar.org/content/dam/aba/administrative/franchising/fr-membershipcalendar.authcheckdam.pdf.

We proudly display our comprehensive lists of publications, from two quarterly publications (The Franchise Lawyer and the Franchise Law Journal) to terrific in-depth monographs and books on the legal aspects of franchising. See http://www.americanbar.org/groups/franchising/publications.html.

We describe our tremendous CLE programs, including webinars, teleconferences, and seminars. See http://www.americanbar.org/groups/franchising/events_cle.html.

We describe each of our Divisions (Corporate Counsel, Litigation and Alternative Dispute Resolution, and International) and our Caucuses (Women’s Caucus and Diversity Caucus), with links identifying the chairs of each division or caucus, the steering committee members, and the specific work done by the division or caucus. See http://www.americanbar.org/groups/franchising/divisions.html.

We describe our unparalleled Annual Meeting, held for three days each fall. The Annual Meeting presents a perfect opportunity to meet our members, attend our workshops, and reach out to the Governing Committee, Senior Leadership, Steering Committee Directors and Members, Annual Meeting speakers, and editorial staff of the Franchise Law Journal and The Franchise Lawyer. All are eager to talk with you about ways to become more involved in the Forum.

Continued on page 18

In This Issue

3 LOST FUTURE ROYALTIES
5 CORPORATE COUNSEL: DRAFTING A DREAM TEAM
6 IN MEMORIAM: JOHN R. F. BAER
7 DIVERSITY DIALOGUE: OPPORTUNITY IN MWBEs
11 QUALIFICATION TO FRANCHISE ACROSS STATES
13 FRANCHISING IN THE UAE
15 WHO OWNS GOODWILL?
Table of Contents

1 Message from the Chair
Deborah S. Coldwell

3 Recovery of Lost Future Royalties Upon Termination by Franchisor
John Jett

CORPORATE COUNSEL CORNER

5 Drafting a Dream Team: Working with Outside Counsel
Jennifer E. Constantinou

6 In Memoriam: John R. F. Baer
Leonard Vines and Beata Krakus

DIVERSITY DIALOGUE

7 MWBEs Provide Opportunity to Tap Emerging U.S. Markets
Trishanda L. Treadwell

11 Is Qualification Necessary to Franchise Across State Lines?
Thomas M. Pitegoff and Kelly A. Krug

13 Franchising in the UAE: Agency Law’s Powerful Protections
Ayesha Karim

15 Who Owns the Goodwill in Franchise Relationships?
Nicole Micklich

FORUM NEWS & EVENTS

16 Forum on Franchising Announces 2015 Nominating Committee Members

19 Message from the Editor-in-Chief
Corby C. Anderson
The Once and Future Royalty: Recovery of Lost Future Royalties Upon Termination by Franchisor

By John Jett, Kilpatrick Townsend & Stockton LLP

A recent decision from the Georgia Court of Appeals is significant both for what it adds to the nationwide debate about whether a franchisor who terminates a franchise agreement may recover lost future royalties, and for its explanation of what a franchisor must do to prove lost future royalty damages.

Can a Franchisor Who Terminates Recover Lost Future Royalties?

Few challenge the proposition that a franchisor may recover lost future royalties from a franchisee who terminates a franchise relationship. But the past 15 years have seen a nationwide debate unfold over whether a franchisor may recover lost future royalties when the franchisor has terminated the franchise agreement. Courts across the country have split on this latter question and generally have adopted one of two rationales.

One group of courts, led by the California Court of Appeals in Postal Instant Press, Inc. v. Sealy, 43 Cal. App. 4th 1704 (Cal. Ct. App. 1996), have adopted a proximate cause analysis and have viewed the franchisor’s injury (that is, not obtaining the future royalties) as stemming from the franchisor’s own decision to terminate the franchise agreement, rather than from the franchisee’s failure to make timely royalty payments. Courts following Sealy generally have not allowed a franchisor to recover lost future royalties after terminating the franchise agreement.

Another group of courts, in a competing line of cases, have applied a traditional benefit-of-the-bargain analysis. Those courts have attempted to place a franchisor that terminates a franchise agreement because of a franchisee’s breach in the same position that the franchisor would have occupied if the franchisee had not breached. A typical example of the latter camp appears in Progressive Child Care Systems, Inc. v. Kids’ R’ Kids Int’l, Inc., No. 2-07-127, 2008 Tex. App. LEXIS 8416 (Tex. App. Nov. 6, 2008). There, applying Georgia law, the Texas Court of Appeals refused to follow Sealy’s proximate cause analysis. Instead, the Texas appellate court predicted that a Georgia court would seek to place an aggrieved franchisor “in nearly the same position that it would have occupied had there been no breach” by the franchisee.

In Legacy Academy, Georgia Joins The Benefit-of-the-Bargain Camp

The Georgia Court of Appeals’ recent decision in Legacy Academy, Inc. v. JLK, Inc., 765 S.E.2d 472 (Ga. Ct. App. 2014), reconsidered (Dec. 15, 2014), vindicated the Texas court’s view of Georgia law. In Legacy Academy, the Georgia appellate court cited Progressive Child Care with approval, expressly rejected Sealy, and recognized that under Georgia law “the policy behind a damages award is to place the injured party in the position it would have been in had the contract been fully performed.”

Legacy Academy presents a familiar fact pattern. The parties entered into a franchise agreement with a 20-year term under which the franchisee would pay the franchisor a percentage of gross monthly revenue as a royalty. After only eight and one-half years, the franchisee sent the franchisor a letter stating that the franchisee intended to terminate the franchise relationship effective January 1, 2011 and to de-identify its affiliation with the franchisor at that time. The franchisee did not make royalty payments to the franchisor for November or December 2010, even though the franchisee continued to use the franchisor’s marks and name during that time.

The franchisor sued the franchisee, seeking two months of accrued royalties, as well as unaccrued lost future royalties for the franchise agreement’s full term – a period spanning January 2011 through July 2022. The trial court awarded the franchisor royalty fees for the period when the franchisee continued to use the franchisor’s name and marks (November and December 2010) but did not award the franchisor any royalties for the remainder of the franchise agreement’s term (January 2011 through July 2022). Even though the trial court did not directly address the split in authority as to proximate cause versus benefit of the bargain, it implicitly followed Sealy in determining that the franchisor, as the party that
terminated the franchise agreement, could not recover lost future profits.

On appeal, the franchisee expressly advanced Sealy and its progeny, arguing that the franchisor proximately caused the loss of future royalties by terminating the franchise agreement after the franchisee’s breach. But the Georgia Court of Appeals noted that the “Sealy decision has been roundly criticized for its abandonment of traditional contract principles.” Choosing instead to apply contract principles found in longstanding

“In the trial court, the Legacy Academy franchisor offered the testimony of its chief financial officer to prove its damages. The officer testified that the franchisor would reap “pretty minimal” cost savings as a result of no longer being required to serve the franchisee. Although the officer offered oral testimony regarding specific savings in website hosting, the appellate court observed that “[i]nstead of this, she provided no specifics or data as to the savings associated with other [franchisee]-related expenses, which she testified included training, meetings, curriculum updates, other corporate services, and conferences.” The officer also testified that the franchisor had done nothing to quantify overheads and general administrative services attributable to an individual franchisee leaving the system.

The Court of Appeals found the officer’s testimony — which lacked detail and supporting records — “insufficient.” The court cited authority calling into question the value of oral testimony in a lost profits analysis where the proponent does not offer past or present business records detailing revenues and expenses. Although the appellate court appeared to leave open the possibility that a trial court might have found the franchisor’s evidence sufficient, the appellate court ultimately affirmed, given the standard of review on appeal. Specifically, the appellate court concluded that evidence existed in the record to support the trial court’s finding that the franchisor had failed to make a sufficiently detailed showing to support recovery of lost profits.

Conclusion
Franchisors should view Legacy Academy as both a positive development and a cautionary tale. The decision’s clear repudiation of Sealy in favor of traditional contract principles will buttress franchisor arguments for lost future royalties everywhere. Likewise, franchisors should embrace the roadmap Legacy Academy provides for franchisors seeking to recover lost future royalties. Although the necessary evidentiary showing will require substantial detail (and therefore substantial effort), franchisors going forward will benefit from Legacy Academy’s guidance in obtaining a category of damages that often constitutes a large (if not the largest) portion of a franchisor’s recovery.

Ultimately, the franchisor’s failure to provide sufficient evidence of lost net profits made Legacy Academy a case of a franchisor winning the causation battle, while losing the damages war.”

Georgia law, the Court of Appeals reversed the trial court and concluded that the franchisor “was entitled to seek recovery of lost future royalties that it would have received if [franchisee’s] breach had not prompted [franchisor’s] termination of the franchise agreement prior to the completion of its original 20-year term.”

Evidentiary Showing Needed to Recover Lost Future Royalties
The Court of Appeals then turned to the critically important question of whether the franchisor had made a showing sufficient to recover lost future royalties. On this point, the appellate court affirmed the trial court’s conclusion that the franchisor had failed to make a sufficient evidentiary showing. The franchisor had in effect presented evidence of its lost gross revenue, whereas Georgia law requires an established business to provide detailed evidence of its lost net profits. That shortcoming proved fatal to the franchisor’s claim.
Drafting a Dream Team:
Working with Outside Counsel

By Jennifer E. Constantinou, Wyndham Hotel Group

“The way a team plays as a whole determines its success. You may have the greatest bunch of individual stars in the world, but if they don’t play together, the club won’t be worth a dime.” – Babe Ruth.

Corporate litigation is a team sport, and the King of Crash captured the precise relationship needed between in-house and outside counsel to drive success. The ideal relationship is an alliance – one built not simply on outstanding legal acumen, but on trust, open channels of communication, clear objectives, set expectations, efficacy, and above all, teamwork.

The first step in cultivating this relationship is effective communication. Outside counsel must thoroughly understand, and in-house counsel must comprehensively convey, the operations of the business, the company’s overriding initiatives, core values, and culture, and its long- and short-term goals. As the relationship develops, this knowledge will enable outside counsel to become a co-captain with in-house counsel, providing sound guidance and measured judgment. In viewing these joined forces as one team, outside and in-house counsel can craft strategic plays tailored to the company’s key objectives.

The cornerstones of such a relationship are well-reasoned advice, equanimity, and candor. Instances will invariably arise when a matter becomes protracted, seemingly irremediable, or when a preselected strategy is no longer viable. Rather than mollify the client, stand pat, or hastily upset the applecart, outside counsel will gain in-house counsel’s trust by being direct, exploring all options and perspectives, and assessing the most pragmatic and judicious course. An outside counsel sensitive to and keenly aware of the company’s needs and goals may be able to throw a proverbial haymaker which swiftly concludes an issue in the best interests of the client.

The most trusted outside counsel are accessible and responsive. They must be able tacticians when an urgent matter arises, ready to tackle the issue or corral and refocus a matter that has become peripatetic. In-house counsel too must stay open for the assist, be sedulous in gathering information for outside counsel, available for discussion, and equally industrious. Huddling up at various points is critical to ensuring success; a periodic reevaluation of the field leverages foresight of anticipated issues while always keeping the end game in sight.

In the corporate legal setting, cost-effectiveness is also of paramount importance. The assiduous outside counsel will gain the trust and appreciation of their in-house clients by proactively recognizing and offering suggestions on how to curtail expenditure and remain cost-effective throughout the life of a matter.

“Forging a longstanding and trusted alliance with outside counsel built on solid teamwork drives efficiency and success.”

Partnerships with outside counsel can become all the more deep-seated by expanding the relationship outside of the business setting, while remaining professional. Outside and in-house counsel should take full advantage of opportunities to work together on pro bono matters and participate in team-building activities to foster the team dynamic and fortify the rapport.

Forging a longstanding and trusted alliance with outside counsel built on solid teamwork drives efficiency and success. Team members should be encouraged to pass on what they have learned by working together, as such collaboration dramatically increases the likelihood of achieving the best possible results. Open communication and transparency will enable outside counsel to become almost an extension of the in-house legal department and a trusted and steadfast crusader for the company’s interests for years to come.

Jennifer E. Constantinou
Wyndham Hotel Group
The Forum and the franchise community lost a treasure when John R. F. Baer passed away on January 29, 2015, after a long and valiant battle with cancer. John’s numerous contributions to the Forum, along with his professionalism, decency, and collegiality, made him the easy and logical choice as the first recipient of the prestigious Lewis Rudnick award for lifetime achievement in October 2009.

John devoted countless hours to the Forum, serving as Editor in Chief of The Franchise Lawyer, Associate Editor of the Franchise Law Journal, and member and Publications Officer of the Governing Committee. He was Chair of the Illinois Attorney General’s Franchise Advisory Board; Editor of the CCH Sales Representative Law Guide; a member of the Industry Advisory Committee to the North American Securities Administrators Association (NASAA) Franchise Project Group; Chair of the International Franchising Committee of the International Bar Association’s International Sales, Franchising and Product Law Section; and Vice President of the Franchising Committee of the Union Internationale des Avocats.

After graduating from the University of Illinois School of Law, John began practicing at the now-dissolved Keck, Mahen and Kate law firm. He then moved to Sonnenschein, Nath, and Rosenthal (now Dentons). He ended his career at the offices of Greensfelder, Hemker & Gale, where he had been managing officer of the firm’s Chicago office.

As busy as John was, everyone knew that if they ever needed someone they could depend on to write an article, speak at a seminar, chair a committee, or contribute a chapter to a book, they could always count on him to accept graciously and make an outstanding contribution. Although John was often in the limelight, he never sought it. He derived pleasure from helping others advance their careers and was generous with his assistance. He delighted most in sharing his vast knowledge, wisdom, and common sense with others. John was truly a “lawyer’s lawyer.” He always found time to patiently mentor others and give them his undivided attention. No matter how naïve a question might be, he never made anyone feel embarrassed to ask it.

His devotion to his clients and his work ethic were both enviable and an inspiration to others. John believed firmly that a lawyer must prove his value to his clients every day, and he lived by that motto. He enjoyed helping clients with their problems and was especially intrigued by those legal issues that required thorough analysis where the right answer was not always obvious. He continuously strived to do right by his clients and to deliver the best possible solutions to them.

John was also an outstanding athlete. Right up to the time he was diagnosed with cancer, he drove miles and miles to the suburbs to play in a softball league. He was also an avid Chicago White Sox fan and loved to suit up in his Sox uniform.

Although John achieved extraordinary professional success and recognition both nationally and internationally, his biggest success was as a human being. He was a truly caring, passionate, and humble person—the authentic measures of a man and a life well lived. He cared about his family; he cared about his career; he cared about his clients; and he cared about his colleagues and staff. He cared about people.

John was happily married for more than 50 years to Linda, who frequently accompanied him to seminars and franchise meetings all over the world. He was the proud father of Deborah, an
accomplished entertainment writer and editor who has published several books, and Brett, an Emmy Award-winning television producer and screenwriter. He was also a devoted grandfather to three grandchildren.

Few people knew how serious John’s illness was, and many did not know he was ill at all. He did not want anyone to feel sorry for him, and he never complained. When he finally realized that his advancing cancer would prevent him from continuing to practice law, he commented that the pain of giving up his career was worse for him than the pain of his illness. The tributes posted on the Forum Listserv by so many following his death conveyed a common theme: not only was John a great lawyer, he was a great person, and he led the kind of life to which we should all aspire. He will be sorely missed, but never forgotten.

MWBEs Provide Opportunity To Tap Emerging U.S. Markets

By Trishanda L. Treadwell, Parker, Hudson, Rainer & Dobbs, LLP

Editor's Note: With this article, The Franchise Lawyer launches a new feature, the DIVERSITY DIALOGUE. (Read more about this special feature in the Message from the Editor-in-Chief at the end of this issue.)

As franchises look to emerging markets in India, China, and Africa, they should not ignore untapped emerging markets with a “Made in America” tag. Lucrative public contracts are available to franchise systems in areas such as state university food services, airport eateries and kiosks, military base vendors, government building cleaning services, hospital staffing, and other services.

Many of these public contracts require that some portion of the work be granted to minority- or women-owned business enterprises (MWBEs). In addition, many private companies have diversity programs that require the inclusion of MWBEs on the short list for any outside suppliers. These public and private programs may also provide inroads for franchise systems that are not minority- or women-owned themselves but have qualifying franchisees. Strategically planned system diversification is not only an important goal in its own right, but an economic imperative, considering the changing face of the American consumer.

MWBEs are generally for-profit businesses that are at least 51 percent owned, operated, and controlled by U.S. citizens who are Asian, Black, Hispanic, Native American, or women. Those MWBE owners must manage or control the daily operation of the business. See 49 C.F.R. § 26.67(a); http://www.mwbe.com/cert/certification.htm.

The franchise model lends itself to diversification through MWBEs. The turnkey operations and specific operational and system standards characteristic of franchising can help minorities and women who might lack industry exposure or experience overcome barriers to entry into a particular industry. But how does a savvy, diversity-minded franchisor make this happen? Is there a downside?

A number of franchise systems offer financial and other incentive programs to attract MWBEs. Importantly, MWBEs may also benefit from financial support and business education and development programs offered by sources other than franchisors. This article addresses some of the key considerations for franchise systems...
contemplating how to increase the race and gender diversity of their franchisees.

**Diversify First**

Franchisors should not wait until a public contract or other opportunity presents itself to seek out franchisees that may qualify for MWBE certification. The certification process ensures that a business is in fact owned, operated, and controlled by women or traditionally underrepresented racial or ethnic minorities.

Requirements for certification may range from completion of a simple application to a more thorough, multi-stage process with cumbersome documentation demands. See [http://www.mwbe.com/cert/agencies.htm](http://www.mwbe.com/cert/agencies.htm) (listing certifying agencies by state). The certification process can take time, depending on the certifying organization, and this can stall the application and bidding for contracts. Franchise systems that already have MWBE-certified franchisees will have a head start on the competition.

**Be the Resource Franchisees Need**

Franchisors are limited in the financial disclosures, individual concessions, and support representations they can make. But they can provide access to information offered by others, such as a brochure or webpage that lists MWBE resources. Providing access to such resources—which is valuable, yet virtually free—can make franchisors more attractive to prospective minority franchisees.

Resources franchisors should be aware of include:

**MWBE Certification**

MWBE certification can arise from a particular company or from a government-run program. Franchisors can assist potential franchisees by directing them to websites or contacts relevant to a particular state, city, or industry, and by helping them through the certification process. Such assistance not only fosters a commitment to diversity, but also garners goodwill and loyalty from franchisees. A franchisor’s business or diversity consultant, or franchisee counsel, can assist simply by advising that a franchisee can qualify for certification by making one or more minority or female owners a 51 percent owner and operator of the franchise.

**U.S. SBA Programs**

The U.S. Small Business Administration (SBA), created under the Small Business Act, 15 U.S.C. § 632 et seq. (2014), provides initial funding for many franchise owners. It also provides significant resources and services to aid MWBEs. One example is the Business Development Program governed by § 8(a) of the Act and its related regulations. This program assists small businesses owned and controlled at least 51 percent by socially and economically disadvantaged individuals, which automatically presumes the inclusion of certain historically underrepresented minority and ethnic groups. See [https://www.sba.gov/content/disadvantaged-businesses](https://www.sba.gov/content/disadvantaged-businesses). Business Development Program participants can receive sole-source federal contracts worth millions of dollars. Participants may also take advantage of mentoring programs, annual reviews, business planning assistance, counseling, marketing assistance, and access to federally backed small business loans.

The SBA also administers the Historically Underserved Business Zone Program (HUBZone) in distressed urban and rural areas. To participate, businesses must be headquartered in a HUBZone, and at least 35 percent of their employees must reside in a HUBZone. See [https://www.sba.gov/content/understanding-hubzone-program](https://www.sba.gov/content/understanding-hubzone-program). Participants receive access to federal contracting and subcontracting opportunities, competitive and sole-source contracts, and a pricing preference during public contract bidding.

The National Minority Supplier Development Council provides a direct link between corporate America and minority-owned businesses for the purpose of increasing procurement and business opportunities for minority businesses. See [http://www.nmsdc.org](http://www.nmsdc.org).

The Office of Women's Business Ownership oversees a comprehensive network of training, education, and counseling services, including technical and management assistance programs and access to credit, capital, and federal contracts for women business owners, particularly those who are economically or socially disadvantaged. See [https://www.sba.gov/content/women-owned-small-business-program](https://www.sba.gov/content/women-owned-small-business-program).

The Franchise Registry is a national online listing of franchise systems whose franchisees receive expedited loan processing when applying for loan assistance from the SBA. See [http://www.franchiseregistry.com](http://www.franchiseregistry.com). When a franchise system participates in the Franchise Registry, the SBA will accept a single nationwide review of its franchise agreement and will make consistent eligibility decisions, reduce red tape, and speed access to financial assistance.
National Minority Franchising Initiative

Formed in 2000, the National Minority Franchising Initiative (NMFI) provides information resources to minority franchisee applicants and serves as a direct channel between franchisors and potential franchisees regarding franchising opportunities. See http://www.worldfranchising.com; http://www.franchising.com/howtofranchiseguide/minorities_in_franchising.html. The NMFI's annual Minority Franchising Guide lists more than 500 franchisors that are committed to increasing minority representation within their systems and that support the NMFI's objectives. The Minority Franchising Guide lists franchisors free of charge. The NMFI also holds franchise seminars across the United States to educate minorities about franchising and to introduce participants to sponsoring franchisors.

IFA and DiversityFran

DiversityFran is a franchisee education and recruitment program sponsored by the International Franchise Association (IFA). DiversityFran is designed to help IFA members increase diversity and to educate prospective franchisees about opportunities in franchising. See http://www.franchise.org/industrysecondary.aspx?id=40970. The program works with national and regional organizations to establish connections and to promote franchising as a workable model for business ownership. As of late 2014, DiversityFran had more than 100 participating franchise systems, and 40 percent of those systems provided special incentives for MWBEs. Id. DiversityFran and the IFA also host educational seminars that address financing and the franchise model and provide information about interested franchise systems.

Local Government Initiatives

Franchisors can provide information regarding local incentives, particularly for federally designated distressed areas. See https://www.sba.gov/category/navigation-structure/contracting/contracting-support-small-businesses/small-business-cert-0. Locally sponsored initiatives often suffer, however, from a lack of significant support beyond a franchisee’s first six months to one year. See Kathryn M. Kotel, James Meaney & Kendal Tyre, Embracing Diversity in Franchise Systems—and Managing Associated Legal Risks, at 17-18, ABA 29th Annual Forum on Franchising (2006).

Other Resources

Franchisors can reach out to organizations serving racial and ethnic minorities and women to publicize their interest in increasing the diversity of their franchise systems. For example, franchisors can promote their systems to underrepresented populations by identifying and targeting minority-directed publications such as Ebony, Jet, Hispanic Business, Black Enterprise, Black Professional, Minority Business Entrepreneur, and Korea Daily (as well as similarly directed websites). See id.

Franchisors can also reach out by attending or presenting at meetings for organizations such as the NAACP, the Urban League, historically black colleges and universities, diverse chambers of commerce, community and religious groups, and African-American fraternities and sororities.

Lowering Financial Barriers

To attract MWBE candidates, franchisors may need to find ways to lower financial and informational barriers to becoming a franchisee. See Kotel, Meaney & Tyre at 17 (citing Susan P. Kezios, Women and Minorities in Franchising, The Franchising Handbook 456 (Andrew J. Sherman, ed., 1993) (identifying financing suggestions to assist underfinanced minority franchisees)). Among the incentives offered by franchisors are “scholarships,” reduced royalty fees, initial franchise fee waivers, mentoring, training, and business education. See Robert J. Nobile, Affirmative Action Obligations and Responsibilities, Human Resources Guide § 2:144.

Courts have held, however, that “simply desiring a diverse workforce or franchise network that reflects the racial composition in the population is insufficient to justify the affirmative action component of a diversity program.” Carla Wong McMillian, Kelly J. Baker, Discrimination Claims and Diversity Initiatives: What’s A Franchisor to Do?, 28 Franchise L.J. 71, 75 (2008). Accordingly, a franchisor must take care to implement an MWBE assistance program in a lawful and nondiscriminatory manner.

Discrimination Claims Under § 1981

It seems counter-intuitive that a program designed to increase the number of minority franchisees must be race neutral. But § 1981 of the Civil Rights Act provides a cause of action for race discrimination in the formation and execution of contracts. 42 U.S.C. § 1981 (2014). In the few reported decisions examining this issue in the franchise context, courts have applied the standard set forth in Johnson v. Transportation Agency, 480 U.S. 616, 626-27 (1987) and United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979) to a franchise system’s affirmative action plan.
Johnson and its progeny hold that programs designed to increase the number of minorities must be justified by a “manifest” or “conspicuous imbalance” in a “traditionally segregated job category” and must not “unnecessarily trammel the rights of the non-minority.” Frost v. Chrysler Motors Corp., 826 F. Supp. 1290, 1296-97 (W.D. Okla. 1993). Thus, a franchisor may need to analyze the qualified franchisee population to determine whether a “manifest” or “conspicuous imbalance” exists. If so, the franchisor must determine the financial or other obstacles that are creating the imbalance and “craft its financial incentive or other program so that the program is offered to a group of qualified individuals that likely will include a significant proportion of minority franchisees or applicants.” Kotel, Meaney & Tyre at 25.

In Frost, the court held that Chrysler’s affirmative action plan was invalid because Chrysler failed to provide sufficient evidence regarding the percentage of African Americans qualified to become Chrysler dealers in order to show a manifest imbalance. Frost, 826 F. Supp. at 1296. Chrysler should have produced evidence that “among those persons who are otherwise qualified to own dealerships, a racial imbalance exists with respect to financial resources, or the ability to obtain the necessary capital to acquire dealerships.” McMillian & Baker at 76 (quoting Frost, 826 F. Supp. at 1296).

On the other hand, in Rabbani v. General Motors Corp., No. 3:98cv425/RV (N.D. Fla. July 26, 2000), the court approved the minority-owned dealership program that GM supported with its expert’s calculation of the statistically significant disparity between the expected and actual number of minority-owned GM dealerships. McMillian & Baker at 76 (citing Rabbani Order, No. 3:98cv425/RV). See also Southern Motors Chevrolet, Inc. v. General Motors, LLC, No. 4:14-cv-00152, 2014 WL 5644089 at *2 (S.D. Ga. Nov. 4, 2014) (order denying motion to stay discovery because motion to dismiss discrimination claim based on GM’s selection of African-American instead of white applicant to operate dealership was not clearly merituous).

In addition to making a statistically valid showing of a manifest imbalance, a franchisor must show that the plan does not “unnecessarily trammel the interests” of others by, for example, displacing expected or vested contract or property rights or setting aside franchise locations without any ability of nonminority candidates to qualify. Moreover, the plan must be limited in time and scope. Denial of the contract or property right cannot unsettle a “legitimate, firmly rooted expectation on the part of” the complainant. Id. at 76-77 (quoting Johnson, 480 U.S. at 638-39 and Weber, 443 U.S. at 208). A legitimate affirmative action plan must seek to right an imbalance, and once righted, to end.

**Redlining Risk**

Diversity initiatives can also create risks related to “redlining,” the practice of granting or denying a franchise in a particular location on the basis of race alone. Id. at 73 (citing Robert W. Emerson, Franchise Selection & Retention: Discrimination Claims and Affirmative Action Programs, 40 Ariz. L. Rev. 511, 560-61 (1998)); Kotel, Meaney & Tyre at 16 n. 53 (discussing Howard v. BP Oil Co., 32 F.3d 520 (11th Cir. 1994) and Harper v. BP Exploration & Oil Co., 896 F. Supp. 743 (M.D.Tenn. 1995)).

For example, in an effort to broaden its customer base, a franchisor may seek to expand into a new territory in a heavily minority-populated area, such as a HUBZone. The franchisor cannot simply place MWBE franchisees in those areas based on their race because they may assert a discrimination claim for being placed in a location that might have a significantly lower success rate due to lessened brand awareness, minimal marketing, and a customer base with less disposable income. Kotel, Meaney & Tyre at 16. On the other hand, non-MWBE franchisees may assert a discrimination claim for being excluded from the opportunity in the new territory based solely on race. To minimize both types of risk, the reasoning for allocating territories should be carefully assessed, and legitimate, non-discriminatory bases should be documented.

**Required FDD Disclosures**

Supplemental development and training programs may not have to be included in a franchisor’s Franchise Disclosure Document, but Item 10 requires the disclosure of financing agreements, which likely will include financial incentive programs.

The franchisor should clearly explain any financing or other financial incentives and the qualifications for participation. This means that a franchisor cannot offer these programs on an ad hoc basis, but must commit to the programs and fully integrate them into its business.

**Best Practices**

Franchise systems that ignore the opportunities diversity presents may find themselves facing gaping holes
in their bases of franchisees and customers, as well as competitive disadvantages. Such systems may also be vulnerable to claims of race- and gender-based discrimination if they seem manifestly imbalanced.

But diversity initiatives should not be pursued as a knee-jerk reaction. They must be carefully implemented to avoid legal and business risks.

Some best practices for implementing diversity plans follow:
- Enforce franchise agreements, policies, and brand standards in a consistent and fair way.
- Make agreements, site selection approvals, and terminations in a consistent and fair way.
- Express in writing, orally, and through action the system’s commitment to diversity and to fairness.
- Select franchisees based on an analysis of the applicant without regard to race, but make serious efforts to diversify the applicant pool by reaching out to organizations, chambers of commerce, publications, places of worship, and schools in target communities.
- Keep affirmative action plans narrowly-tailored and time-limited.
- Develop incentive plans only after a statistical analysis of the qualified population shows a manifest imbalance and after receiving a legal opinion.
- Leverage the resources provided by the SBA, the IFA, and other local and state agencies.

Is Qualification Necessary To Franchise Across State Lines?

By Thomas M. Pitegoff and Kelly A. Krug, LeclairRyan

When a franchisor in one state sells a franchise in another state, must the franchisor qualify to do business in the franchisee’s state? Does franchising, by itself, constitute “doing business” or “transacting business” in the franchisee’s state? This article looks at these and other questions of qualification under state entity laws.

A corporation or limited liability company is a creature of the state in which it is formed. When an entity formed in one state establishes an office in another state or otherwise engages in intra-state business in the other state, the corporate law or limited liability company law of the other state requires the entity to “qualify” to do business there.

An entity “qualifies” by filing a simple application for authority to transact business in a state and paying a small fee. Section 15.01(a) of the Model Business Corporation Act (3d ed. 1984) (the Model Act) provides that “[a] foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state.” The entity must also pay applicable state fees and taxes and file annual or biennial reports to remain qualified in the state.

With one exception, state corporate laws view interstate franchising, by itself, as business done in interstate commerce that does not require qualification in the franchisee’s state. See, e.g., Snelling & Snelling, Inc. v. Watson, 254 S.E.2d 785, 792 (N.C. 1979); Ommani v. Doctor’s Associates, Inc., 789 F.2d 298 (5th Cir. 1986) (Texas law). The anomaly is a “registration” requirement in Maryland for corporations conducting interstate business. But the Court of Appeals of Maryland has made it clear that a state cannot bar a corporation from maintaining a suit in a court in the state when the corporation is engaged in wholly interstate or foreign commerce. Yangming Marine Transp. Corp. v. Revon Prods. U.S.A., Inc., 536 A.2d 633 (Md 1988).

The conclusion should be the same for limited liability companies, which became a popular form of business entity in the 1990s for franchisors and other businesses. The qualification provisions of the limited liability statutes essentially mirror those of the corporation laws. Section 802 of the Revised Uniform Limited Liability Company Act (2006) (the LLC Act) provides that a foreign limited liability company may not transact business in the subject state until it obtains a certificate of authority from the secretary of state.

Local Jurisdiction, Taxation

Corporation laws and limited liability company laws are not the only laws that deal with the concept of “doing business” or “transacting business.”
This concept also comes into play in questions of local jurisdiction and taxation. Generally speaking, a much greater degree of in-state activity is required for qualification purposes than for either jurisdictional or taxation purposes. In other words, an entity may be subject to the jurisdiction of courts in the franchisee’s state and subject to taxation by the franchisee’s state, yet may not be required to qualify to do business there.

Qualification under the state entity laws ensures that the out-of-state entity will pay taxes in the other state and will be subject to the jurisdiction of the local courts. Qualification makes it easier for state authorities or private entities to bring a lawsuit or enforce local laws against the entity and to tax the entity. But the entity can be subject to local taxation and jurisdiction without being required to qualify to do business under the corporation law or the limited liability company law.

What Is ‘Doing Business’?

Most corporation and limited liability company qualification laws do not positively define the terms “doing business” or “transacting business.” Rather, many of these laws give guidance by listing examples of activities that do not constitute transacting or doing intrastate business. Exceptions under § 803 of the LLC Act, like those under § 15.01(a) of the Model Act, include, for example: maintaining, defending, or settling a proceeding; holding meetings of the board of directors or shareholders; maintaining bank accounts; selling through independent contractors; soliciting or obtaining orders if the orders require acceptance outside the state before they become contracts; owning real or personal property; conducting an isolated transaction that is completed within 30 days; and transacting business in interstate commerce. None of these activities requires qualification under the corporation laws or the limited liability company laws.

Although franchising is not listed as a specific statutory exemption, it is generally viewed as interstate commerce and thus not intrastate activity that requires qualification, as explained above.

Activities that do require qualification under the corporation laws and limited liability company laws might include, for example, establishing an office with employees in the franchisee’s state or placing a warehouse in the franchisee’s state.

By contrast, a state might find that a company has “nexus” for sales tax purposes or income tax purposes (which have differing factors) just by delivering goods into a state or attending trade shows in the state, even though the company has no physical assets or employees maintained in the state. Similarly, a foreign corporation may be subject to state court jurisdiction, even if it is not physically present in the state, if it has continuing obligations and a course of dealing with a resident of that state.

Consequences of Not Qualifying

What is the consequence of not qualifying under the corporation or limited liability company laws in a state in which a company is engaged in business within the scope of those laws? Most states require the company to pay taxes and monetary penalties for the years the entity failed to qualify. The company may also be barred from bringing a lawsuit until it has obtained the appropriate certificate of authority. But most states will allow an entity that brought a lawsuit before it qualified to do business to remedy its failure by complying with the qualification requirements and paying any penalties before litigation begins. Many states allow this remedy even after litigation has begun.

In a minority of the states, including Alabama, Arkansas, California, Indiana, Kansas, Louisiana, Maine, Maryland, Mississippi, New Jersey, Ohio, Oklahoma, South Carolina, Vermont, and Virginia, the penalties for failure to qualify appear to be more severe, ranging from unenforceability of contracts to potential criminal liability. But these more stringent sanctions do not appear to be vigorously enforced.

While the state laws appear to be consistent in viewing franchising as an interstate activity that does not require qualification, one recent development that could threaten the well-established status quo. That development comes from the unexpected field of labor law. Who could have predicted just a year ago that the National Labor Relations Board General Counsel would take the position that franchisors and franchisees are joint employers of the franchisee’s employees? Would this mean that a franchisor would have to qualify to do business in each state in which it franchises? We shudder to consider the consequences.

Franchising in the UAE: Agency Law’s Strong Protections

By Ayesha Karim, Ayesha Karim Legal Consultancy, FZE, RAK FZ

The United Arab Emirates (UAE) often serves as a hub from which U.S. companies conduct business in the Middle East and North Africa. More than 1,000 U.S. firms have a presence in this business-friendly country, from Bechtel, General Motors, and ExxonMobil to Starbucks, Pizza Hut, and Cold Stone Creamery.

The UAE was the largest export market in the Middle East for the United States in 2012, a distinction held for the fourth year in a row. See http://www.uae-embassy.org/business-trade/trade-export. And from 2011 to 2012, total trade volume between the UAE and the United States rose to more than $24.5 billion, an increase from $16.8 in 2011. Id.

In November 2014, the Abu Dhabi Chamber of Commerce and Industry and the Commercial Section of the American Embassy in Abu Dhabi sponsored a 2nd International Franchise Conference to increase awareness of franchising, offer a broad range of U.S. franchise opportunities, help develop new UAE commercial opportunities, and promote the latest technology and worldwide franchising standards. More than 160 organizations from 17 countries participated.

Foreign companies normally sell their products in the UAE market through joint ventures or agency and franchise agreements. This article outlines the basic tenets of UAE Agency Law, which governs franchise and distribution relationships.

UAE Agency Law


As discussed below, the Agency Law gives registered agents legal advantages that can make them more effective than non-registered agents at blocking parallel imports by unauthorized parties at the customs entry point, and at taking action against counterfeit products in the market. The Agency Law also affords registered agents powerful legal protections. The accepted rationale for these protections is that agents may be more willing to promote products and invest in infrastructure if they know that an agency cannot be terminated at the will of the principal, and that their investment in the agency is secure.

How the Agency Law Works

The Agency Law applies only to agency agreements registered with the UAE Federal Ministry of Economy and Commerce in its Register of Commercial Agents (the Register). See Abu Dhabi Court of Cassation decision of 10 September 2009, Case No 875 of Judicial Year 3. The general civil and commercial laws would apply to an unregistered agency agreement, but the Agency Law would not apply.

To qualify for registration, an agency relationship must meet certain requirements, including that:

- The agency must be owned by a natural person who is a citizen of the UAE, or a juridical person owned fully by UAE natural persons. See Article 2;
- The agent must be exclusive for a product in a defined area. See Article 5;
- The agency must be a result of a direct written and ratified agreement between the principal and the agent. See Article 4.

An application to record the agency in the Register must include: the agent’s name, address, and nationality; the goods and services that are the subject matter of agency; the agent’s area of activity; and the beginning and end dates of the agency. If the application for registration is accepted, the agent will be issued a registration certificate. The decision approving registration will be published in the Official Gazette, and notice will be given to the municipality departments, Customs, the Federal Chambers of Commerce and Industry, and the Chambers of Commerce and Industry in the state of registration of the agency. It is important for principals to check...
with the Ministry before signing any contract with an agent, to determine whether any prior registered agency exists.

The Agency Law provides that an agent is entitled to commission on sales in any area where it is appointed exclusive agent, even if the agent is not involved in the sales. See Article 7. Moreover, goods, materials, and other assets that are the subject of a registered agency may be imported for purposes of trade only by the registered agents. See Article 23. Agents must provide all spare parts, materials, tools, supplements, and accessories needed to maintain the durable goods they import. See Article 21.

If an unauthorized person imports goods, materials, and other assets that are the subject of a registered agency, the registered agent may apply to the Ministry for an order authorizing Customs or other authorities to seize and impound the disputed goods until the dispute is resolved. See Article 23.

**Termination Rights Are Restricted**

The Agency Law’s termination provisions are perhaps its most important feature. The law provides that an agency contract may be terminated only by mutual consent of the parties, by the Commercial Agencies Committee, or by an order of court. As a result, a principal cannot unilaterally terminate an agency contract – even if the contract has a defined term – or appoint a new agent unless the principal can establish a valid reason for doing so. See Article 8.

“Valid reason” is not defined in the Agency Law and is open to interpretation by the Commercial Agencies Committee or the courts, depending on the facts of each case. See Union Supreme Court in Case 405 of Judicial Year 24 537 dated 08 March 2005 (the right to terminate is subject to restrictions); see also Union Supreme Court in Case 261 of Judicial Year 27 310 by judgment dated 10 February 2010 (an agency will remain in force unless removed from the register of commercial agents by the Ministry, where cause for removal is established).

If either party is harmed by termination of the agency contract, it may demand compensation. See Article 9. The amount of compensation normally would depend on the length of the agency relationship, the type of product involved, and the investment made by the party claiming compensation. The general principles of UAE law regarding the quantum of compensation would apply.

**Disputes Are Resolved in the UAE**

Although foreign principals sometimes assume that the termination and dispute resolution provisions of their franchise agreements will be enforced as agreed by the parties, this assumption is incorrect in the UAE.

UAE courts have exclusive jurisdiction over any disputes related to registered commercial agent contracts, and any contract provision to the contrary, including an arbitration clause, will be void. See Union Supreme Court in Case No 99 of Judicial Year 20 by judgment dated 25 June 2000 (citing Articles 3 and 6). Moreover, all such disputes are governed by UAE law. See Article 6.

Disputes between an agent and principal are heard first by the Commercial Agencies Committee appointed under the provisions of the Agency Law. An appeal from the decision of the Commercial Agency Committee lies to the UAE courts. See Article 28.

“Agents may be more willing to promote products and invest in infrastructure if they know that an agency cannot be terminated at the will of the principal.”

Decisions of the UAE’s highest courts (whether the Union Supreme Court or the Cassation Courts, as the highest courts of any emirate are called) normally have strong persuasive value and are quoted and relied upon in pleadings and judgments. But the system of stare decisis, or binding precedent, is not followed in the UAE.

The UAE laws and cases referred to in this article are written and reported in Arabic. The author gratefully acknowledges that research in English for this document was conducted with the assistance of Thomson Reuters Westlaw Gulf Services and in Arabic with Mr. Majdy Kamal, Senior Legal Consultant with Al Gurg & Al Matrooshi Advocates and Legal Consultants, Dubai.
Who Owns the Goodwill in Franchise Relationships?

By Nicole Micklich, Garcia & Milas, P.C.

At the end of a franchise relationship, who owns the goodwill? For franchisors, the answer to this question can affect an entire system and hundreds of agreements. For franchisees, it can be worth millions of hard-earned dollars. This article looks at the competing views of franchisors and franchisees and at how courts and legislatures have addressed the issue. In the end, it suggests that both franchisors and franchisees can protect their interests in goodwill through the franchise contract at the outset of the relationship.

The notion that customer goodwill provides value to a trademark has been a tenet of trademark law for more than 50 years. See Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942). To be valid, a trademark assignment must include an assignment of the goodwill associated with the mark. The trademark provides assurance to consumers, who purchase goods or services in reliance on that assurance. Thus, the right to use the franchisor’s marks is a critical element of the modern franchise agreement. Franchisors have characterized the right as a license, a lease, or a loan. Franchisees often view the right as an opportunity, the foundation for an investment, and a tool through which equity is accrued, business developed, and relationships built.

It is when the franchisor and franchisee part ways that these different views become problematic. Franchisors argue that provisions in the franchise agreement that require a terminated franchisee to assign its lease to the franchisor, impose covenants not to compete, and permit termination without compensation for goodwill are necessary to protect the franchise system, the marks and, indeed, the goodwill. Franchisees counter that those provisions steal the local and personal goodwill franchisees develop over many years of investing effort and resources in a business and deprive them of their livelihood. For years, post-termination obligations in the franchise relationship have provided fodder for litigation and legislation.

Personal and Local Goodwill

Franchisees often argue that by developing customer loyalty, they have developed their own goodwill. But definitions of basic goodwill, including the definition provided by Black’s Law Dictionary (9th ed.), do not include the word, or even concept, of loyalty. Instead “goodwill” is defined as “A business’s reputation, patronage and other intangible assets that are considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets.”

“The franchise agreement can protect the franchisor’s goodwill attributable to the system and its marks, as well as the local and personal goodwill of the franchisee.”

That said, however, Black’s also recognizes the concept of “Personal Goodwill,” which it defines as the “goodwill attributable to an individual’s skills, knowledge, efforts, training or reputation in making a business successful.” Black’s (9th ed.)

This definition, like the concept of local goodwill, provides an opening for franchisees to claim ownership interest in the personal goodwill they develop at the franchised location and to demand compensation for that goodwill when the franchisor takes it over, or sells it to another franchisee at the end of the franchise relationship.

Courts have recognized the risks to franchisees when franchisors are allowed to capture all of the goodwill established during the term of a franchise relationship without any compensation to the franchisee. In 1983, the Appellate Division of the New Jersey Superior Court recognized that:
Once a franchisee has succeeded by his efforts and capital in establishing a local reputation for the franchise name, he is vulnerable to termination of the franchise, forfeiture of the business good will and the inability to realize the benefits of his business by selling it to another franchisee. Thus, the reputation and good will of the network, created primarily by the efforts of each of the individual franchisees, passes back to the franchisor without compensation to the franchisee.


Courts have acknowledged the concept of “local goodwill” established by franchisees. For example, in LeGuardia Assoc. v. Holiday Hospitality Franchising, Inc., 92 F. Supp. 2d 119, 125 (E.D.N.Y. 2000), the court observed that the “hallmark of a franchise relationship” is the exchange of goodwill: “By authorizing the franchisee to use its trademarks and to sell its products or services, the franchisor is essentially lending its national goodwill to the franchisee. …The franchisee—by investing his or her time, effort and capital—generates local goodwill, further bolstering the reputation of the national product or service.” Id. (internal citations omitted). In LeGuardia, the court granted a permanent injunction barring the termination of two airport hotel franchise agreements and held that the franchisees had established that they would sustain irreparable injury if the injunction did not enter. Id. at 131.

The court in Am. Standard, Inc. v. Mehan, 517 F. Supp. 2d 976, 989 (N.D. Ohio 2007) also recognized the personal goodwill established by a franchisee of American Standard’s Trane brand. Even though the court refused to enjoin American Standard from terminating the franchisee because of the slight likelihood that the franchisee could succeed on the merits, the court concluded that on the issue of irreparable harm, the balance tipped in the franchisee’s favor. The court observed that the franchisee “has been operating a Trane franchise since 1971…has invested considerable money, time and effort and has established goodwill for both himself and Trane.” If terminated, the franchisee “would suffer loss of customer goodwill…[that] could not readily be recouped and is mostly non-compensable,” the court found. Id.

Some courts have refused to enjoin restrictive covenants based at least in part on a recognition of the local goodwill developed by the franchisee. In Prosperity Sys., Inc. v. Ali, No. CIV. CCB-10-2024, 2010 WL 5174939, at *5 (D. Md. Dec. 15, 2010), the court required a terminated franchisee to stop using the franchisor’s marks but permitted him to operate under his own name at the location of the former franchised business—-even though that violated the covenant in the franchise agreement. The court found that:

If the court enjoins [the former franchisee] from operating his restaurant under his own name, he will likely lose his business and be unable, at least for some period of time, to support himself or his family. Further, he has been operating a pizza restaurant at that location for many years, arguably establishing his own goodwill with customers.

Id. at 6.

Traditionally, Courts Hold Franchisor Owns Goodwill

Most franchise agreements provide that the equity and goodwill belong to the franchisor, just like anything else the franchisee develops in connection with the franchised business. Nearly 20 years ago, in Dunkin’ Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 185, 495 A.2d 66, 76 (1985), the New Jersey Supreme Court enforced a provision in the franchise agreement requiring the franchisee to assign its lease to the franchisor upon termination and reversed the part of the lower court’s decision that would have forced the franchisor to compensate the terminated franchisee for the value of its franchises. Neither the lower court nor the Supreme Court distinguished clearly between the goodwill associated with the trademark, the franchisor’s goodwill, and the local goodwill or the goodwill personal to the terminated franchisee. Id.

State Laws Protect Franchisee’s Goodwill

Recognizing the need to protect franchisees against potential abuses and significant losses at the end of the franchise relationship, Arkansas, California, Connecticut, Hawaii, Iowa, North Dakota, Washington, and Wisconsin have enacted legislation providing for franchisees to receive fair and reasonable compensation for inventory upon termination. Specifically:

- Arkansas provides that for termination without good cause, a franchisor must repurchase certain inventory, supplies, equipment, and furnishings. See Ark. Code Ann. § 4-72-209.
- In California, for termination or wrongful failure to renew, a franchisor must offer to repurchase certain inventory but may offset sums owed. See Cal. Bus. & Prof. Code § 20035.
- Connecticut provides that upon termination, a franchisor must offer fair and reasonable compensation for certain inventory, supplies, equipment, and furnishings. See Conn. Gen. Stat. § 42-133(f).
- In Hawaii, for termination, a franchisor must offer fair market value of certain inventory, supplies, equipment, and furnishings. For takeover of the premises of the franchised business, the franchisor must compensate for goodwill. Compensation may offset by money owed and costs of removing inventory. See Haw. Rev. Stat. § 482E-6(3).
- Iowa requires a franchisor to repurchase of assets from franchisees, but excludes from that requirement assets the franchisee did not purchase from the franchisor or its agents. Iowa also provides that a franchisor may not prohibit a former franchisee from engaging in any lawful business unless that business relies on a substantially similar marketing program or the franchisor offers to purchase the assets of the franchised business for fair market value. See Iowa Code Ann. § 523H.11; 537A.
- North Dakota provides that a franchisee upon termination is entitled to the net cost of new and unused merchandise and a percentage of the cost of parts held at the time, plus the costs of their return. See N.D. Cent. Code Ann. §§ 51-07-01, 51-20.1-02, 51-20.2-02.
- In Washington, a franchisor cannot refuse to renew a franchise without compensating the franchisee for the fair market value of inventory, supplies, equipment, and furnishings purchased from the franchisor, and goodwill. But the franchisor is specifically excused from compensating a franchisee for goodwill if it gives the franchisee a year’s notice of non-renewal and agrees not to enforce covenants against competition. The franchisor also may offset amounts owed by the franchisee. See Wash. Rev. Code § 19.100.180(2)(i).
- In Wisconsin, a franchisor must repurchase from a terminated franchisee at fair wholesale market value all inventory sold to the franchisee for resale that bears the franchisor’s name, mark, or label. See Wis. Stat. Ann. § 135.045.

In recent years, however, legislation that would have required franchisors to compensate franchisees for personal or local goodwill, similar to the Washington act, was defeated in Massachusetts, New Hampshire, and Maine. See 2011 MA S.B. 73; 2011 MA S.B. 1843; 2011 MA S.B. 1828; 2013 NH H.B. 1215; 2013 ME H.B. 1043. Earlier acts failed at both the state and federal level. See e.g. H.R. 4841, 107th Cong. (1998); 1997 GA S.B. 264, Sec. 10-1-912; 1997 SC S.B. 717, Sec. 38-75-150.

Agreements Can Protect Both Franchisors and Franchisees

If franchisors and franchisees can agree that there is goodwill associated with the franchisor’s marks, owned by the franchisor, and that there is also goodwill developed by and personal to the franchisee and the location in which the franchisee operates the franchised business, then, perhaps franchise agreements can provide for compensation for the franchisee’s personal or local goodwill at the end of the relationship. At present, it appears that a few franchise agreements provide the franchisor with the option to purchase all of the franchisee’s assets, including local or personal goodwill, if the franchise agreement expires. However, far more franchise agreements expressly provide that the franchisor will not be liable for payment to the franchisee for licenses, permits, customer information, or goodwill.

From the outset of the relationship, the franchise agreement can protect the franchisor’s goodwill attributable to the system and its marks, as well as the local and personal goodwill of the franchisee. Franchisees then might choose to invest in franchises that permit them to establish and retain the value of personal and local goodwill. Nevertheless, if the case law, legislation, and dictionary definitions are any indication, it seems safe to predict years of work for litigators and valuation experts.
Forum on Franchising Announces Nominating Committee Members

In accordance with the Forum’s By-Laws, the annual Governing Committee election process begins with the appointment of a Nominating Committee by the Forum Chair. The Nominating Committee, which is headed by the Immediate Past Chair, is responsible for recommending candidates to fill open positions on the Governing Committee.

Deborah S. Coldwell, Chair of the Forum, is pleased to announce the appointment of the following members to the 2015 Nominating Committee:

Joseph J. Fittante, Jr.
Larkin Hoffman Daly & Lindgren, Ltd.

Steven M. Goldman
Quarles and Brady, LP

Leslie Smith
Foley & Lardner, LLP

Nicole Micklich
Garcia & Milas, PC

Tao Xu
DLA Piper

This year’s Nominating Committee will recommend candidates for four Member-at-Large positions on the Governing Committee, all beginning August 2016, when Governing Committee members Christopher Bussert, Leslie Curran, Andrew Loewinger, and David Oppenheim complete their terms.

An election to fill these positions will take place at the Forum’s Annual Business Meeting, held in conjunction with the 38th Annual Forum on Franchising. This meeting will take place on Thursday or Friday, October 15th or 16th, 2015, in New Orleans, Louisiana. Forum members wishing to recommend candidates to fill these positions should convey their comments to Joe Fittante no later than May 15, 2015. Joe’s email address is JFittante@larkinhoffman.com.

Next Annual Meeting, in New Orleans

Speaking of the Annual Meeting, the 2015 Forum will be held October 14 through 16, 2015, in New Orleans. This year’s co-chairs, Tami McKnew and Andrew Loewinger, with help from their friends and colleagues, have developed a truly first-class program.

Three intensives

This year’s annual meeting begins on Wednesday with three exciting intensive programs. First, the Forum’s comprehensive intensive Fundamentals of Franchising® program is expanded to include an hour devoted to international issues. Attendees will also receive a copy of the newly published Fundamentals of Franchising, Fourth Edition. A second intensive program, International Franchising 201, will provide an interactive forum for discussing the most salient issues faced by franchisors in their international expansion. Participants in this intensive will be invited to an attendee-only dinner on Tuesday night prior to the Forum. A third intensive program, the Corporate Counsel Summit: Managing the Franchise System, is open only to in-house counsel for franchise companies. This intensive will focus on topics central to management of a franchise system from the inside—managing outside counsel, using electronic systems in franchise management, juggling business and legal obligations, best practices for regulatory and legal compliance, ethics issues, and other topics of keen interest to in-house counsel.

Plenaries

At press time, Richard Griffin, General Counsel, U.S. National Labor Relations Board, and Dr. David Weil, U.S. Department of Labor Wage and Hour Administrator, had accepted our invitations to join us for our plenary session on Friday October 16. Mr. Griffin and Dr. Weil will participate in a panel discussion on Franchising Reconsidered: Will the NLRB Fundamentally Change the Franchise Industry? Jon Solish and Eric Karp have agreed to moderate this plenary. Stay tuned to learn more about this exciting event in the coming months.

On Thursday, we present our Annual Franchise and Distribution Law Developments plenary program, in which
Ric Cohen and Peter Lagarias will discuss the seminal cases from this past year.

Workshops
On Thursday and Friday, there will be 24 workshops exploring current legal and business challenges facing franchising. These workshops range from basic to advanced levels. They cover a wide array of subjects, such as how to help your client handle a data breach, how to address challenges that arise from franchising to large and sophisticated franchisees, and how to comply with international disclosure laws, to name just a few. There is truly something for every practitioner at these workshops.

Please visit our web pages, write for one of our publications, participate in an upcoming webinar, and make plans to join us in New Orleans in October. We look forward to sharing a beignet (or two) with you.

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

This issue introduces an exciting new feature of The Franchise Lawyer, a DIVERSITY DIALOGUE column. In the first article in this series, Trish Treadwell, of Parker, Hudson, Rainer & Dobbs, writes about opportunities for minority- and women-owned business enterprises to tap into lucrative public and private contract programs that require some portion of the work to be awarded to MWBEs or that otherwise encourage diversity. As this article shows, diversity “is not only an important goal in its own right, but an economic imperative, considering the changing face of the American consumer.”

The DIVERSITY DIALOGUE feature was conceived by the Forum’s Diversity Caucus. The mission of the Diversity Caucus is to increase the number of diverse members in the Forum; grow representation of diverse members in the Forum’s divisions and committees; continue developing a strong base of diverse writers and speakers for the Forum; create a growing pool of diverse members ready to assume leadership positions in the Forum; and raise awareness of the value of diversity in our profession.

A DIVERSITY DIALOGUE column will run in every other issue of The Franchise Lawyer, so look for the next article in our Fall 2015 issue. The Diversity Caucus is actively soliciting articles for the column, so if you are interested in writing, please contact Trish Treadwell or one of the members of the Steering Committee: Adam Aberra at Five Guys Enterprises, Jane Cohen at the Law Offices of Jane Cohen, Andrea Terrell at Luxottica Group/Pearle Vision, Maral Kilejian at Mullin Russ Kilejian, Mark Clouatre at Wheeler Trigg O’Donnell, and Kaari-Lynn Gagnon at Zarco Einhorn Salkowski & Brito. You can find their contact information at http://www.americanbar.org/groups/franchising/divisions/diversity_caucus.html.

From Future Royalties to Franchising in the UAE
Other articles in this issue of The Franchise Lawyer cover a broad spectrum: John Jett of Kilpatrick Townsend & Stockton writes about a new decision on recovery of lost future royalties, with a useful discussion on proving such damages. Thomas Pitegoff and Kelly Krug of LeclairRyan discuss whether and when state entity laws require a franchisor to qualify to do business in a franchisee’s state. Ayesha Karim of Ayesha Karim Legal Consultancy explains legal requirements for franchising in the United Arab Emirates, a hub for U.S. companies conducting business in the Middle East and North Africa.

In our CORPORATE COUNSEL CORNER column, Jennifer Constantinou of Wyndham Hotel Group explains how to cultivate successful relationships with outside counsel. Nicole Micklich of Garcia & Milas, looks at goodwill from the perspectives of franchisors and franchisees and suggests how their conflicting views can be reconciled. And finally, Leonard Vines and Beata Krakus of Greensfelder, Hemker & Gale offer a moving memoriam for a leader of the Forum and of the franchise bar, John Baer.

What issues would you like to read about — or write about — in the next issue of The Franchise Lawyer? Let us hear from you.

Corby Anderson
Nexsen Pruet, LLP
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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