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Keys for Successfully Mediating Franchise Disputes

By Charles S. Modell

Many franchise agreements now require the franchisor and franchisee to meet face-to-face, with an independent mediator, before any adversary proceeding is initiated between them. Even without such a provision, many practitioners advocate mediation as a means of settling franchisor-franchisee disputes.

Mediation offers many advantages to both parties, not the least of which is the opportunity to avoid hundreds of thousands of dollars in legal fees incurred in a lawsuit. Even for those who can afford the cost of a legal battle, mediation allows resolution of their own differences, rather than having someone who knows nothing about their business, *i.e.*, a judge, jury or arbitrator, decide for them.

As one who has represented franchisors in mediation, but also served as a mediator, I have seen first-hand the benefits of mediation. However, I have also seen situations in which one or both parties expect that it is a magic pill that will result in getting everything they wanted; after all, they are right and now the mediator will force the other side to do the right thing too! Unfortunately, successful mediations do not just happen; they take work, preparation, the right attitude, and often, the right mediator. This article discusses the elements of

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NLRB Changes Rules for Determining Joint Employers

Traditional Franchise Arrangements May Not be Affected

By Charles G. Miller

The long-awaited decision of the National Labor Relations Board (NLRB) in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (http://1.usa.gov/1UJOuCn) (*BFI*), was issued on Aug. 27, 2015. The decision set forth new guidelines under which a company could be determined to be a joint employer so that it would be subject to collective bargaining. The franchise community has kept an eye on *BFI* to determine whether it could divine from that ruling the possible outcome of the NLRB General Counsel's case against McDonalds Corporation, which has also been charged with being a joint employer with its franchisees. The decision in *BFI* was 50 pages in length, but a strong dissent by the two Republican members of the Board took up 30 of those pages. The majority of the Board found Browning-Ferris was a joint employer along with Leadpoint Business Services (Leadpoint), a business staffing agency, by employing a new test for determining joint employment that will be applied retroactively.

After requesting comments from the industry, which included the International Franchise Association (IFA; www.franchise.org) and various franchisors, the NLRB adopted a more expansive standard than currently in effect for determining joint employer status as follows:

> The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we shall consider the various ways in which joint employers may 'share' control over terms and conditions of employment

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In This Issue

Restaurant Chain Accuses CT BBQ Restaurant of Trademark Violation

By Michelle Tuccitto Sullo

A Bridgeport, CT, restaurant's use of a logo with the letters BBQ against a flame backdrop has an out-of-state restaurant chain fired up.

The family behind the well-known "Dallas BBQ" restaurants in New York City claims the eatery known as "CT BBQ" stole its trademark and is trying to use its reputation for profit. The Dallas BBQ trademark features a flame background with the words "Dallas BBQ," and "Ribs, Chicken, Steaks" underneath. The Connecticut BBQ logo also features a flame background, but with the words "CT BBQ" and it has the words "Ribs, Wings, Steak" underneath, along with a knife and fork.

The Case

H&G Franchising LLC, which has offices in New York City, sued Connecticut BBQ, LLC and its owner Paul Osakwe in federal court in August, claiming trademark infringement. The Connecticut restaurant opened this year. In May, the Dallas BBQ chain sent a cease and desist letter to CT BBQ, but the alleged trademark infringement continued, according to the lawsuit.

Court records did not show any attorney listed as representing Osakwe as of Sept. 2, and Osakwe could not be reached for comment. There was no answer at a phone number listed for his barbecue restaurant. It is unclear if Osakwe is still running the business. The Secretary of the State's office lists the business as having been registered in March 2015, though as of early September, its status was listed as "dissolved."

According to the lawsuit, for many years, the Wetanson family has used Dallas BBQ logos incorporating flame designs to advertise the "highly successful and well-known chain of Dallas BBQ restaurants." The plaintiff says it owns federal trademark registrations for the Dallas BBQ Red Flame Design. The lawsuit claims the defendants opened the barbecue restaurant in Bridgeport with signage on the building and on menus which are "an almost identical copy of the Dallas BBQ Flame logo marks."

It claims the defendants' use of the "near identical logo," coupled with storefront advertisements that asserted, "CT BBQ's now open. Bring NYC to BPT!" constituted a "deliberate attempt to confuse consumers" into believing there is a connection between the two.

"Defendants have deliberately sought to pass off their restaurant services as Dallas BBQ services and to trade off the name and reputation of the Dallas BBQ restaurants," the lawsuit claims.

'Unique Identifiers'

The litigation claims trademark infringement, unfair competition, and deceptive business practices in violation of the Connecticut Unfair Trade Practices Act. It seeks a permanent injunction against the defendants, barring them from using any similar logo or design, and seeks to have any similar signs with the flame logo or advertisements destroyed. It seeks unspecified compensatory and punitive damages.

Conclusion

With reputations on the line, similarities in restaurant names and menu items increasingly result in litigation. In recent years, a Connecticut restaurant featuring macaroni and cheese dishes filed a trade-secrets theft suit against an upstart competitor. In 2014, the Barcelona Restaurant and Wine Bar, which has locations around Connecticut, sued an unrelated business using the "Barcelona" name operating out of White Plains, NY, in 2014. In that case, a federal judge agreed that the similarity of names and geographic proximity would cause confusion, and she ordered the defendants to stop using the name.

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Michelle Tuccitto Sullo is managing editor of *The Connecticut Law Tribune*, an ALM sister publication of this newsletter in which this article also appeared.

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a successful franchise mediation from the perspective of one who has been a participant in dozens of mediations.

Who Should Attend?

The first question to consider is who should attend the mediation session, starting with whether the lawyers themselves should attend. If litigation has been initiated, then the lawyers need to be present. Even in the absence of litigation (or arbitration), if either party is getting input from a lawyer, it will be difficult to reach any resolution unless that lawyer is present. The same may be true for an accountant or consultant; if one party is relying heavily on the advice of another, unless that counselor is present, the best that may happen in the mediation is that you will get "close," and, in my experience, leaving a mediation when you are "close" to a settlement will leave both parties frustrated, as they will go home and start thinking of other issues (or their consultant will raise other issues), resulting in hard feelings and no resolution.

This leads to another point: All decision-makers should be present at the mediation. This includes both formal and informal decision-makers. If the franchisor representative attending the mediation answers to someone else in the organization who makes the types of decisions that will arise therein, the franchisee should insist that the senior person also be present. Mediations involving large national franchise companies do not

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Charles S. Modell is chair of the Franchise Practice Group at Larkin Hoffman Daly & Lindgren Ltd. in Minneapolis. A member of this newsletter's Board of Editors, he can be reached at cmodell@larkin hoffman.com.

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franchisor's right to inspect the premises or the operation.

A franchisor may well be tempted to bring to the attention of the franchisee employees who are noted to be doing things which could get them fired. In this example, the franchisor should carefully tread by showing what its inspection found, but clearly stating that the franchisee has the ultimate decision as to hiring and firing employees and the decision is the franchisee's alone. The General Counsel viewed favorably language in the franchise agreement in the *Freshii* case which restricted the franchisor's ability to take action.

Conclusion

The temporary placement industry is far different than the franchise industry, although one can see how someone may try and liken the franchise industry to the temporary employment industry. They will argue that the franchisee is just like a temporary agency and that it provides its employees to the franchisor just like a temporary agency. But when the facts in *BFI* are reviewed, there *is* a difference. The temporary agency's job is to provide *employees* to its customer. That cannot be said of a franchisee. In the end, it may take the decision in the pending McDonald's case before the Board to clarify the Board's new approach on the franchise industry.

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require attendance by the franchisor's CEO, but it is important that the franchisor representative be one who routinely makes decisions on the issues likely to be raised in the mediation. In terms of franchisee attendance, decision-makers are not always the signators to the contract. The most obvious example is in the case of a business owned by a husband and wife; regardless of whose name is on the contract, who is actually making the decisions? Spouses will often make joint decisions, and in those situations, both spouses should be present.

It Helps When Everyone Has Something to Lose

While one would expect that both parties to a dispute want to avoid litigation, the reality is that not everyone feels this way. Some franchisees see themselves as martyrs, and are willing to trade legal fees for "rock star status" (or so they perceive) among their peers. On the other side, franchisee attorneys have expressed concern to me that the cost of litigation is meaningless to the franchisor. In these situations, the mediator or the attorneys representing the parties must help them understand the value of their time, the damage that will be done to their business by protracted litigation, and the reality that the victor in litigation is not always the party that is right, and an unexpected loss can be more damaging than a slightly unbalanced settlement.

There are also disputes where the participants genuinely believe they have little to lose by simply "trying mediation." In those cases, it makes sense to hold the mediation at a neutral site. I have seen a number of mediations where both parties were convinced at the end of the first hour that there was no way to reach a settlement, but they had arrived by plane, they were stuck for the day, and so they stayed a couple more hours, during which a settlement was reached.

Preparation Is Important

Preparation does not mean simply preparing your side of the story. Preparation also means understanding the other side's position — something easier said than done when each party feels they are right. Preparation also means educating the mediator on the facts and your position.

To be fully prepared, the parties should understand both their "wants," and their "needs." At what point does it really make sense to walk away without a settlement? Understanding the other side's "needs" is also critical because if you cannot find a way to satisfy the "needs" of the other side (which sometimes may be as little as finding a way for them to save face), it will be difficult to reach an agreement.

Above all else, preparation means managing expectations. The parties often do not understand that the mediator is not there to tell them they are right and convince the other side to capitulate. They must understand that the mediator is there to help them reach an agreement that is better for them than the risk of litigation. In doing so, the mediator will often point out deficiencies in their case. The mediator is likely doing the same thing in the other room. At the end of the day, most successful mediations will leave both parties less than thrilled, but happy to be able to move on.

The Right Mediator Is Important

There is no one-size-fits-all mediator. In some cases, you will want a mediator who is evaluative and not afraid to tell both sides what he or she thinks. In others, you may prefer someone who will not inject their own opinions into the process. There are mediators who will continually push both sides to move toward the middle, while others look for more creative solutions outside the original box. Know what you are looking for in a mediator for each particular case, and if possible, interview the mediator before selecting that person. Satisfy yourself that your mediator knows how to negotiate agreements, and is committed to helping you reach a settlement. Your client will be making a significant investment in litigation, and a failed mediation is rarely in anyone's interest. It is therefore inconceivable to me that when parties have the ability to select a mediator, they sometimes focus primarily on who has the most flexible calendar or the lowest hourly rate.

Mediation is more common in family, employment and construction law than it is in franchising. Many traditional mediators are therefore skilled in one or more of these areas but do not understand franchising. If the relationship has been terminated,

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and all of the issues relate to money, these mediators probably have the experience you need to bridge monetary gaps. However, if the issues go beyond money, or you are trying to preserve the relationship, these mediators are less likely to be able to suggest creative solutions than an attorney experienced in franchising.

Assuming you seek someone with franchise experience, you may have to decide between a mediator with a franchisor orientation and one with a franchisee orientation. In the case of an arbitrator, everyone wants a decision-maker who will be sympathetic to their position. The opposite may be true for mediation; when I represent a franchisor with a strong case, and I have a lawyer on the other side who is not experienced in franchising, I prefer having a franchisee attorney serve as mediator because they are more likely to get through to the franchisee.

Getting to a Decision

Many skilled negotiators will wait for the other side to make the first offer, and try to keep from going anywhere near their final offer as long as possible. That game should not be necessary in mediation, because you should trust your mediator to help you reach an acceptable resolution. The mediator cannot do that if you withhold information from her. Nevertheless, this game is played, and the real negotiation often starts an hour before everyone had expected to go home. For that reason, it is best to keep travel and personal schedules flexible, including that of the mediator, so that if and when the momentum toward a settlement begins, people are not packing their belongings. Too often, I have seen parties finally get close, have to leave, agree to talk again in a few days, and before they meet again, one or both parties has materially changed their position. If you are making progress, keep everyone at the table until: 1) a resolution is reached; 2) everyone agrees there can be no resolution; or 3) just before someone starts backpedaling out of frustration.

When possible, each party should bring a proposed settlement template to the mediation. The ultimate resolution may look nothing like that template, but if you have a basic form for an agreement, it is easier to document the agreement at the mediation. In a perfect world, the documentation would be a formal, binding agreement. If you are signing a binding agreement, take the time to review it carefully, because that agreement is enforceable to the same extent as one prepared over a week's time. If it is not possible to work through a binding agreement, at least try to sign a term sheet or letter of understanding containing as many key points as the parties can put on paper before leaving the mediation.

Conclusion

Not every mediation will result in an agreement. In some cases, it is simply not possible to meet everyone's "needs," and a judge will have to make a decision for them. On the other hand, if you select the right mediator, have the right people in attendance, properly prepare, and explain to your clients the mediation process and the risks of not reaching an agreement, mediation can be a very helpful way of putting proposals on the table that parties may be uncomfortable making on their own, and ultimately reaching agreements that could never have been reached without the assistance of an independent third person.

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