

Message from the Chair

Continued from front cover

Annual Meeting's Diversity Lunch with Yan Kim, president of Smoothie King.

The Governing Committee and Senior Leadership also will continue to ensure that we advance the Forum's mission to "be the preeminent forum to study and discuss the legal aspects of franchising," particularly in the area of technology. We are taking steps to enable our members to stay connected with the Forum and with each other year round through the Forum's "evergreen app." We have expanded our Annual meeting app to be live 365 days a year, providing you with daily updates on our live programming, webinars, and teleconferences, links to our social media pages, to our ABA publications page, and to the *Franchise Law Journal* and *The Franchise Lawyer*. We continue our work on the Forum's searchable database, which will allow us to research a wide range

of topics in our Annual Meeting materials and other Forum publications. We also appreciate the necessity of staying connected to home and office through the Internet (as well as to review all of your Annual Meeting papers and PowerPoints), and we are taking steps to ensure that Forum members stay connected during our Annual Meeting. I offer a huge thank you to Joe Fittante for his foresight in establishing the Projects and Initiatives Committee, which, along with the Governing Committee, made these initiatives possible.

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

LITIGATOR'S CORNER

'Collect Releases Like You Collected Baseball Cards'

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

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

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

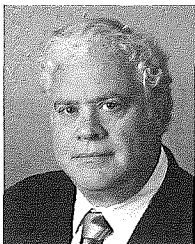
Franchisee advocates will point out that any release given without consideration is invalid. Thus, it would likely be futile to collect releases when providing routine assistance to franchisees or providing any other consideration that is already required under the franchise agreement. There are, however,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

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

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

Adopt a Uniform Policy

Thus, it seems prudent for franchisors to adopt a policy that whenever they provide assistance or concessions to a franchisee beyond what they are obligated to provide, they seek some consideration



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for their efforts. Franchisees receiving such assistance may not be in a position to pay for it, so consideration could take the form of a release instead.

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

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

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

Message from the Editor-in-Chief

By Corby C. Anderson, Nexsen Pruet, LLP

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

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

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

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

In the Litigator's Corner, you will read about a

tip on collecting releases.

An article focused on the distribution side of franchise and distribution law looks at ways to avoid risks of antitrust violations.

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

Goodbye and Hello

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

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

Author! Author!

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



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