FUNDAMENTALS OF HOSPITALITY LAW: FRANCHISE AND MANAGEMENT AGREEMENTS

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Presented by
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"Franchise Agreements" are an integral part of the *hospitality industry*. A basic understanding of the issues will go long way in assisting counsel in guiding their clients through the quagmire of land mines in the franchise field. The discussion below identifies some of the more significant issues in this field.

I. WHAT IS A FRANCHISE ?

A. The Federal Trade Commission Act empowers the Federal Trade Commission ("FTC") to regulate unfair or deceptive business practices. The Commission issued a trade regulation entitled "Disclosure Requirements" and Prohibitions Concerning Franchising Business and Opportunity Ventures. 16 CFR 436 (1978) ("FTC Rule").

Under the Rule, a franchise is defined as "an arrangement in which the owner of a trademark or copyright licenses others, under specified conditions or limitations, to use the owner's trademark, trade name or copyright in purveying goods or services."

B. The label the parties place on the agreement is not controlling. Under the FTC rule, a franchise exists when the following three elements are present:

a. Right to use seller's trademark to offer, sell or distribute service;

b. Seller offers significant assistance to the buyer in it's operations and reserves the right to control operations; and

c. The payment of a fee of $500 or more.

II. FRANCHISE AGREEMENTS DO'S AND DON'TS

A. Territorial Encroachment

The franchisee's territorial rights are one of the most coveted assets that a franchisee acquires when entering into a Franchise Agreement.

How the franchisor defines the territory determines the true value of that territory. Thus, it is important to look at the franchisor's rights with respect to the defined territory. For example, is the franchisor prohibited from establishing another franchise within four blocks from the franchisee's location? Is the franchisor prohibited from offering the same products within close proximity to the franchisee?

The issues arise here in interpreting the Franchise Agreement ordinarily based on the ambiguity of the definition of the territory. The interests of the franchisee and franchisor are in opposite as a franchisee will desire the largest territory possible while the franchisor wishes to maximize its customer base and profit potential.

Historically, before 1991, the courts looked to the language of the Franchise Agreement to determine these rights. The courts have held that a franchisee's encroachment claim failed because the contract granted that franchisee a non-exclusive license to operate a certain franchise and a certain location while the franchisor retained its rights to construct another franchise at any other location. The Domed Stadium Hotel v. Holiday Inns, Inc. 732 F.2d 480 (5th Cir. 1984).

Similarly, another court held that a franchisor was not prohibited from building a similar franchise within one mile of the plaintiff's location. The court found that there was no breach of an implied covenant of good faith and fair dealing because of the contract's expressed language authorizing the franchisor to operate other locations in the vicinity of the franchise. Patel v. Dunkin' Donuts of America, Inc. 146 Ill.App.3d 233; 496 N.E.2d 1159 (1986).

However, in 1992, the Florida District Court approved the breach of the implied covenant of good faith and fair dealing in a Franchise Contract in the matter of Scheck v. Burger King Corp. 798 Fed.Supp. 692 (S.D. Fla. 1992). In this landmark case, a Howard Johnson restaurant was converted to a Burger King franchise and was approximately two miles from an existing Burger King franchise location. The existing franchise sued Burger King Corp., for breach of the covenant of good faith and fair dealing.

The court rejected the argument that the implied covenant of good faith and fair dealing cannot be implied and given the expressed terms of the contract, granted non-exclusive rights to the existing franchisee. However, the court held that despite the Franchise Agreement's expressed language, the franchisor could not act at will without consideration of the existing franchisee's contract expectations and that the franchisee had a right to expect that Burger King would not infringe on his right to enjoy the fruits of his labor.

Obviously, this caused franchisees to rely on the breach of covenant of good faith and fair dealing in any territorial dispute. However, shortly after the Scheck case, a plethora of cases were decided rejecting Scheck.

Orlando Plaza Suite Hotel Ltd., v. Embassy Suites, Inc. Bus. Franchise Guide (CCH ¶10, 457) (1993): The implied covenant of good faith argument was rejected due to the expressed right to license a franchise at any location other than on the site of the franchisee's or plaintiff's location.

Clark v. America's Favorite Chicken Co. 110 F.3d. 295 (5th Cir. 1997): The franchisor, America's Favorite Chicken Co. ("AFC"), granted a franchisee an exclusive right for the development of Popeye's franchises in a certain territory. The restaurants were open in proximity to existing Church's Chicken restaurants. America's Favorite Chicken then acquired Church's restaurants and plaintiff Popeye franchisee alleged that America's Favorite Chicken Co., the franchisor, was now in direct competition with him. Again, the court looked to the specific expressed language in the contract allowing AFC the right to develop other brands within that territory.

Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp., ITT 139 F.3d 1396 (11thCir. 1998): Franchisor Sheraton licensed Camp Creek rights to establish and operate a Sheraton Inn in a particular territory. The territory granted was non-exclusive and was expressly stated that Sheraton could license to other franchisees outside of Camp Creek's location. An existing Hyatt Hotel was obtained by Sheraton which began operating the hotel as a Sheraton Hotel. Camp Creek Hospitality alleged that even though Sheraton was not violating the expressed language of the agreement, it was still violating the covenant of good faith and fair dealing.

Camp Creek utilized the Sheck argument with respect to Sheraton prohibiting Camp Creek from enjoying the fruits of its labor in contract. In this case, the court held that the non-exclusivity language spoke directly to Sheraton opening other franchises at any location but not operating company owned locations in direct competition with Camp Creek. The court relied heavily on contract language that had been deleted from the contract by the parties thereby permitting Sheraton to compete directly against the franchisee.

This case is an excellent example of an ambiguous contract failing to clearly set forth the rights of the franchisor with regard to the territory. Thus, it would appear that ambiguous language in the description of the territory and the rights with respect to the territory may result in a successful claim by the franchisee for breach of the covenant of good faith and fair dealing.

B. Significant Contract Provisions

______ 1. *Merger and Integration Clauses*:

Any verbal promises, agreements or representations not contained in the Franchise Agreement are generally not enforceable. The significance of the merger integration clause is really a significant and dangerous clause for the franchisee. A typical merger integration clause may read as follows:

> "This agreement and the documents provided hereto contained herein contain the entire agreement of the parties hereto with the respect to the subject matter of hereof and supercede all prior negotiations, agreements and understandings with the respect thereto. This Agreement may only be amended by a written document duly executed by all parties hereto."

This means, of course, that any verbal representations, promises, affirmations and the like are unenforceable as they are not included within the written agreement.

Typically, a franchisee will claim that during negotiations, the franchisor promised that the franchisee would have an exclusive territory and that the franchisor would not allow any other franchisee to operate a similar business in that territory. Later, the franchisor license another franchisee in the same territory. The courts routinely held that a franchisee should not have relied on the franchisor's oral representation regarding exclusive territory because the agreement stated there was a non-exclusive license.

2. *Choice of Law*

Most Franchise Agreements set forth that in the event of a dispute, the laws of a certain state will govern.

Obviously, the law or forum in which the dispute is heard will have significant impact on the outcome. California is one state that protects franchises operated within that state. California Business and Professions Code §20040.5 specifically states as follows:

> "A provision in a Franchise Agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a Franchise Agreement involving a franchise business operating within this state."

This code section ensures that California franchisees may litigate disputes regarding their Franchise Agreement in California courts. This section clearly sets forth a strong public policy of the State of California to protect its franchisees from expenses, inconvenience and possible prejudice by forcing them to litigate their disputes outside the State of California. See Jones v. GNC Franchising, Inc. 211 F.3d 495 (9th Cir. 2000).

III. FRANCHISOR'S VICARIOUS LIABILITY TO THIRD PARTIES

In order for liability to be imposed against a franchisor, there must be either an actual or apparent agency relationship between the franchisor and franchisee. In determining whether an agency relationship exists, the courts look to several factors.

As to "actual agency," the courts examine the degree of control exerted by the franchisor over the franchisee's day-to-day operations. As to "apparent agency," the plaintiff must establish that the franchisor made a representation that the franchisee was indeed its agent, and that the plaintiff reasonably relied upon this representation to the plaintiff's detriment.

A. Actual Agency

1. "Means and Manner"

Historically, the courts have determined whether or not an actual agency exists by utilizing the test of "whether the alleged principal has the right to control the "manner and method" in which the work is carried out by the alleged agent."

Martin v. Goodies Distribution 695 So.2d 1175, 1177 (Ala. 1997): Under this test, agency is established by the mere existence of the right to control and not necessarily by the franchisor exercising that right. However, only control of the "means and manner in which the result is achieved" will result in an actual agency relationship (Id., at 54.) This is known as a "Means and Manner" test that usually reflects the day-to-day operations.

In Ortega v. General Motors Corp. 392 So.2d. 40 (Fla.App. 1980), the plaintiff argued that the provisions in the Franchise Agreement established the required amount of control to establish agency as follows:

a. Right to approve location and design of dealership;

b. Requiring the franchisee to remain open on certain days and times and display certain signage;

c. Prescribing a minimum owned and networking capital;

d. Establishing standards as to sales and customer service;

e. Providing warranty service;

f. Providing training; and

g. Prohibiting fraud in the franchisee's dealings with customers.

The court found that based on the franchisee's independent ownership of the franchise and its control of the hiring, firing and supervision of its employees accompanied by a right to negotiate prices with its customers and responsibility for the successful operation of the franchise and as a matter of law the franchisee controls the "method or mode of the operation of its business" that no agency existed.

Nichols v. Arthur Murray, Inc. 248 Cal.App.2d 610; 56 Cal.Rptr. 610 (1967): The court deemed that there was an agency relationship based on the right to control as evidenced by 14 requirements established by the franchisor over the day-to-day operation of the franchisee's business, including, but not limited to, its control over the following:

a. Handle every aspect of employment;

b. To determine rates to be charged;

c. Whether returns were given;

d. Power to choose lenders for pupil's financing;

e. Control and/or approval of all advertising;

f. Right to compel franchisee to accept or honor unused dance lessons;

g. Right to cancel agreement if franchisee is not conducting business in accordance with franchisor's policies.

The court found that "the controls conferred were not related in any way to the protection of the defendants trade name."

2. "Injury-Causing Activity" as Control

___________Under this theory, the plaintiff must demonstrate that the franchisor exerted control over a "specific aspect" of the franchisee's business "that is alleged to have caused the harm." Control can be evidenced by an expressed provision in the contract, signing control or, absent any express provisions, actual control.

Kerl v. Rasmussen 273 Wis.2d 106; 682 N.W.2d 328, 341, (2004): The court looked to whether or not the franchisor controlled the "specific aspect" of the business "that is alleged to have caused the harm." Specifically, in Kerl a work inmate left the premises without permission and shot his girlfriend and her ex fiancé. (Id., at 342.) The court stated that "marketing, quality, and operational standards commonly found in Franchise Agreements (and likely sufficient under the 'means and manner' test for a finding of liability) are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship." (Id., at 332.)

Allen v. Choice Hotels Int.'l 942 So.2d 817, 823 (Miss. Ct. App.2006): A "franchisor should be held vicariously liable only when it had the right to control the specific instrumentality or aspect of the business that was alleged to have caused to harm."

A hotel intruder caused personal injuries to the plaintiff and her husband. The plaintiff argued that the Franchise Agreement and rules enacted by the franchisor created vicarious liability for the franchisee's negligence. The court disagreed and opined that franchisors would be unfairly penalized if a franchisor was found to be vicariously liable for the control of day-to-day operations that were intended to protect the trademark and protect any "good will value of the . . . trademark associated with the business." (Id., at 826.)

VanDeMark v. McDonald's Corporation 153 N.H. 753; 904 A.2d 627 (2006): Plaintiff was injured when he was attacked on the job by two assailants. Plaintiff alleged that the franchisor should be held vicariously liable for his injuries, because the operation's manual and a "Play Book" addressed a number of safety and security issues. (Id., at 631.)

The court held that "although the defendant maintained authority to ensure the uniformity and standardization of product and services by the franchisee. . . such authority did not extend its control of security operations because there was no specific requirement for the franchisee to enforce or implement these procedures. The court found that this was not sufficient control to create an agency relationship.

Papa John's Int.'l v. McCoy 244 S.W.3d 44 (Ky. 2008): With respect to a franchisee's employee's tortious acts, the franchisee's pizza delivery driver allegedly made false statements to the police regarding events that occurred during a pizza delivery. The driver alleged that he was falsely imprisoned by the plaintiff. The court refused to hold the franchisor vicariously liable, because it had no control over the pizza deliverer's intentional or tortious conduct.

Chelkova v. Southland Corporation, 771 N.E.2d 1100 (2002); the court held that security recommendations made by Southland Corporation to the franchisee that were not enforced or mandatory were insufficient to establish an agency relationship.

B. Apparent Agency

___________The courts find apparent agency when it is established that the guest, patron or customer reasonably believes that he or she is being served by that particular franchisor. The courts evaluate the claims for apparent agency based on the franchisor's, not the franchisee's, action or inaction.

It is common to find an apparent agency relationship when a principal franchisor "makes objective manifestations leading a third person to believe the wrongdoer is an agent of the principal." DLS v. Maybin 130 Wash.App. 94; 121 P.3d 1210, 1213 (2005).

Coldwell Banker Real Estate Corp. v. DeGraft-Hanson 569 S.E.2d 408 (Ga. 2004): Plaintiffs alleged that the franchisee utilized listing agreements and advertisements "which failed to clearly state the franchisee's independent status" and thus alleged violations of the Fair Housing Act resulting in emotional distress in an apparent agency situation. The court found no apparent agency, because there were no representations by the franchisor upon which plaintiff relied. Further, the plaintiffs had no contact with the franchisor at any time.

Loyle v. Hertz Corp. 940 A.2d 401 (Pa. Super. 2007): Contrary to Coldwell Banker, the Loyle court found that "manifestations of the principal. . . made to the community by signs or advertising," were sufficient for a finding of apparent authority if the plaintiff relied on those "indicia of authority originated by the principal." (Id., at 407.) (Citing Restatement Second of Agency Section 8, 8B, 27 (1957)). A loaded gun was found in a rental car which was returned by the plaintiff who rented the car in Canada by calling the United States reservation line. Plaintiff was mistakenly arrested.

Oliveira-Brooks v. Re/Max Int.'l, Inc. 372 Ill. App.3d 127; 865 N.E.2d 252 (2007): Even where a real estate agent "mentions Re/Max's clients to draw upon the big name and credibility of [the franchisor], wears a Re/Max pin, and has a sticker with a Re/Max logo on his car", that such evidence was not sufficient to find apparent authority absent plaintiff's reliance on the relationship. (Id., at 260-61.)

In summary, the use of logos and advertisements will most likely create an issue of fact as to whether or not the franchisor held the franchisee out as its agent, and whether or not the plaintiff has relied upon that misrepresentation. See, Kaplan v. Coldwell Banker, 59 Cal.App.4th (1997). However, the second prong of the test must still be met which is that plaintiff must rely on the representation to his or her detriment. If the plaintiff satisfies the first prong of the analysis, a motion for summary judgment may be denied.

Utilizing the franchisor's name and mark on the business may cause plaintiffs to claim that they believe that they were dealing directly with the franchisor. However, in the case of Mobil Oil Corp., v. Bransford 648 So.2d 119, 121 (Fla.1995), the court held as follows:

> "In today's world, it is well understood that the mere use of

> franchise logos and related advertisements does not necessarily indicate that the franchisor has actual or apparent control over any substantial aspect of the franchisee's business or employment decisions."

However, this holding does not make franchisors immune from liability on an apparent agency basis but instead will likely create an issue of fact as to whether or not the franchisor held the franchisee out as its agent, and whether or not plaintiff relied upon that representation. Again, the second prong to create liability is that of reliance. It is not enough that the representation could entice a person to rely on utilizing that franchise. The plaintiff must show that he or she actually did rely upon that representation in utilizing the franchise.

It may be helpful to franchisors to display on any marketing materials, contract invoices, advertising or the like that the offices are "independently owned and operated" and specifically identify the franchisee as the local owner.

C. Performance Requirements Versus Specific Procedural Requirements

___________Generally speaking, operational requirements set forth by the franchisor are more likely to lead to the imposition of vicarious liability on the franchisor than are discretionary recommendations. This issue becomes particularly troublesome in reviewing a franchisor's operation and procedure's manuals provided to the franchisee and required to be followed by the franchisor.

Specific step-by-step requirements that the franchisee must follow in numerous areas could lead to liability being imposed upon the franchisor. The Operation's Manual can be used to provide advice on ways to achieve that required goal.

However, in matters of the health and safety of the customer, the courts generally hold that there must be specific requirements to ensure the health and safety of the customers.

Townsend v. Goodyear Tire & Rubber Co. 249 Fed. App.'x. 327 (5th Cir. 2007): A franchisee's employee was fatally injured while installing tires on a customer's motor home. Plaintiff alleged that the franchisor was contractually liable to the employee and vicariously liable for the franchisee's negligence based on both the Franchise Agreement and the Trademark License Agreement.

The court stated that "merely exercising or retaining a general right to recommend a safe manner for the independent contractor's employees to perform their work is not enough to establish liability." (Id., at 329.) The court further noted that the agreements referred to did not provide the "supervision of the specific methods and means" of the operation of the franchisee which would be necessary to establish the franchisor's liability.

D. Standards and Quality Assurance Programs

___________The courts have held "retaining certain rights such as the right to enforce standards, the right to terminate the agreement for failure to meet standards, the right to inspect the premises, the right to require that franchisees undergo certain training, or the mere making of suggestions and recommendations does not amount to sufficient control" to give rise to liability.

Hunter v. Ramada Worldwide, Inc. (2005) WL1490053, *6 (E.D. Mo. 2005). Along the same lines, requiring a franchisee's employees to "attend certain orientation seminars does not amount to control over the hotel employee's activities." The court in Hunter specifically held that the purpose of inspection rights or training is simply to maintain uniformity throughout the franchise system without any showings of any day-to-day control.

IV. AMERICANS WITH DISABILITIES ACT

With regard to franchisors, generally the ADA has been held not to apply to a franchisor who does not exercise sufficient control over the operation, design or construction of a place of public accommodation. See Neff v. American Dairy Queen Corporation, 58 F.3rd 1063 (5th Cir. TX 1995). However, it has been held at least by one court that a franchisor may be a proper defendant to a claim for the failure to design and construct facilities in accordance with the requirements of the ADA under 42 USC §12183 (a)(1). See United States of America v. Day's Inns of America, Inc., et al., 151 F.3rd 822 (8th Cir.SD 1998).

Section 12183 authorizes a cause of action for:

> "A failure to design and construct facilities ... that are readily accessible to and useable by individual with disabilities except where an entity can demonstrate that it is structurally impractical to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued by this Title ..."

In United States of America v. Day's Inn of America, Inc., et al., the Court held that because of the licensing agreement that the franchisor retain significant control over the franchisee's construction of the hotel. The franchisor's licensing agreement required that the hotel be built in accordance with all applicable laws and regulations including the Americans With Disabilities Act. The agreement also allowed the franchisor to terminate the Franchise Agreement if the franchisee failed to comply with the standards and, the franchisor established "elaborate mechanisms" for enforcing its design and construction standards. Specially, the franchisor:

> "Required franchisees to submit architectural and design plans for review, to allow inspection of construction sites, to obtain a written certification from DIA [Franchisor] that their hotels met the DIA's standards to permit DIA to inspect the hotels after they opened for business. Thus, the licensing agreement provided DIA with a significant amount of authority (power to terminate franchise) which would have enabled DIA to insured ADA compliance."

While the court did not find that the franchisor was an operator of the Day's Inn as defined under §12182, the court reversed the granting of summary judgment in favor of the franchisor indicating that there was a triable issue as to whether or not the franchisor knew or should have knows that the franchisee did not construct the hotel as required under the Franchise Agreement and construction manuals. The court stated:

> "If DIA had such knowledge, it would be liable for the violations inasmuch as it retained ample power to require compliance with the ADA. Without such actual knowledge, however, it would not have 'failed to design and construct' the proposed wall Day's Inn in compliance of the accessability requirements of the ADA."

It is thus important to determine what the franchisors require in the Franchise Agreements and any construction documents and what follow-up including making sure that the franchisee either designs or constructs the facility in accordance with the ADA. To do nothing when there are procedures in place that require ADA compliance and the franchisor fails to enforce the compliance, then an argument can be made that the franchisor should have knows of the violations and may be held liable for the violations under the Act.

In Neff v. American Dairy Queen Corp., supra, the argument made by the plaintiff was that because the Franchise Agreement allowed the company sufficient control over each location, and that they were a joint operator. However, the court concluded that control of accounting, uniform requirements and the like was not an essential element of operating the facilities for the purposes of Title 3.

Instead, the court looked to whether or not the franchisor controlled "modifications" and the degree to which it could enforce ADA compliance. There were three areas of franchise relationship which the court examined and concluded as follows:

1. The Franchise Agreement required the franchisor's approval of any reconstruction replacement modification, but that this was insufficient to support a holding that the franchise was operated by the franchisor.
2. General maintenance schedules and requirements for replacing obsolete and/or broken equipment did not classify as operating the franchise. Further, the franchisor was not

directing the franchisee to use non-compliant equipment that affected the franchisee's ability to comply with the ADA.

The locations at issue were built before the passage of the ADA and had not undergone significant modification since that time. Therefore, any obligation to construct or equip the facility in accordance with franchisor's approved specification standards for building design was not relevant to determining the operator's status. However, the court recognized that if the locations had been built after the ADA was enacted, then a different result may have occurred.

V. HOTEL MANAGEMENT AGREEMENTS

Universal Contract Principals of Agency and Principal apply to management ownership contracts. These concepts have been specifically applied to operators in the hotel management agreement context.

Wooley v. Embassy Suites, Inc. 227 Cal.App.3d 1520; 278 Cal.Rptr. 719 (1991): The managing general partners of Partnerships Owning Hotels brought an action against the hotel manager for breach of contract, negligence, fraud and other wrongdoing. The plaintiffs also sought a judicial declaration that the management contracts between the parties could be terminated. The defendant applied for injunctive relief barring termination of the contracts pending the outcome of the arbitration. The trial court granted the injunctive relief and the court of appeal reversed based in part that granting the preliminary injunction violated the principle of agency law that the principal always retains the power to revoke the agency.

The court also recognized that when an agency is coupled with an interest is not subject to revocation. However, for an agency to be coupled with an interest the agent must have a specific, present and co-existing beneficial interest in the subject matter of the agency. The court found that the defendant's only interest in the contracts was the management fee and compensation which does not create an interest in the hotel.

Pacific Landmark Hotel, Ltd. V. Marriott Hotels, Inc. 19 Cal.App.4th 615; 23 Cal.Rptr.2d 555 (1993). The trial court denied a preliminary injunction to terminate a Management Agreement with the corporation. The Appellate Court reversed and denied the preliminary injunction allowing termination, because the corporation did not have an agency coupled with an interest in the Management Agreements between the parties and as a result the hotel owners were not precluded from revoking the agency and terminating the agreement.

The Pacific Landmark Hotel case cited Boehm v. Spreckels 183 Cal. 239, 248-249 (1920) stating "there is a distinction between the *power* to revoke and the right *to revoke an agency*. Except where the agent's power is coupled with an interest, the power to revoke always exists, but the right to revoke without liability for damages depends on the circumstances. If the right does not exist, the principal will be liable for damages upon a revocation." Thus, even though a management contract can be terminated based on agency law, the principal may still be liable for the resulting damages.

Following the series of cases, it appears that future court decisions involving hotel owner management contracts will not hesitate to apply the traditional agency law imposing a fiduciary duty of a hotel operator in accordance with the Restatement Second of Agency (1958).

As a matter of law, an agent is a fiduciary who owes the duty of utmost loyalty to its principal. An agent is prohibited from self-dealing in transactions with the principal, making undisclosed profits in transactions appropriating property of the principal for the benefit of itself and being in competition with the principal.

2660 Woodly Road Joint Venture v. ITT Sheraton Corp. 369 F.2d 732 (3rd Cir. 2004). Sheraton suffered a large loss as a result of a jury verdict. Sheraton sought to set aside the verdict or mitigate the $37,000,500 punitive damages award based on Sheraton's breach of fiduciary duties to the owner. The court opined that by performing the acts listed below, the agent was "failing to act as owner's agent" and "putting their interest above that of their principal":

1. Improper receipt of purchasing kickbacks;
2. Failure to disclose receipt of kickbacks and the cost to the owner;
3. Intentional and negligent misrepresentation in providing false and misleading information to the owner;
4. Charging the owner higher prices for goods and services than were charged to Sheraton owned hotels; and
5. Violating anti-trust laws (by virtue of being in the same business as the owner) to the detriment of the owner.

In Town Hotels Limited Partnership v. Marriott International, Inc. 246 F.Supp.2d 469 (S.D.W.Va. 2003): two affiliates of In Town brought suit against Marriott and Avendra Purchasing alleging breach of contract, breach of fiduciary duty, negligence and fraud arising out of Marriott's management of the plaintiff's hotel.

Marriott had managed the plaintiff's hotels for approximately 20 years and was granted an unfettered authority to manage and control the hotel under the terms of the contract. That contract purported to create an agency relationship between the two entities whereby Marriott was under fiduciary duty to operate the hotel solely for the benefit of the owners. Marriott's compensation for its services consisted only of its management fees.

Plaintiffs alleged that Marriott entered into exclusive and preferred contracts with vendors to provide goods to the hotel and that, with Avendra, solicited and received payments and rebates in the course of selling. These rebates and payments were retained by Marriott and Avendra without disclosing this fact to the owners.

The court denied Avendra's motion to dismiss the complaint on the ground that there was no breach of contract or of any fiduciary duty. However, the court stressed that the contract specifically set forth that Marriott's only compensation was to be management fees without any mention of kickbacks or rebates. This case was settled in 2003.