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Zarco Einhorn Salkowski & Brito, P.A. is internationally renowned for providing the highest caliber of legal services, expertise and professionalism in the areas of hotel and restaurant franchisor/franchisee, manufacturer/distributor, automobile, truck and equipment dealers' disputes and complex commercial law including litigation, arbitration and mediation in the United States federal and state courts. The firm has achieved national and international recognition in the area of franchise law by representing clients throughout the world, including Mexico, France, Holland, Germany, Australia, New Zealand, Argentina, Uruguay, England and the Caribbean in disputes involving major franchise systems.

The firm's senior partner, Mr. Robert Zarco, is a graduate of Harvard University with a degree in economics, as well as a graduate of the University of Miami Law School. He is recognized as one of the top franchise lawyers and legal experts in the world and has provided expert testimony before various state legislatures including California ("Why Venue Provisions in Franchise Agreements Must be Void as a Matter of Law"), Maryland ("The Way to Bring Fairness to Franchising"), Arizona ("The Necessity of Franchise Legislation"), Connecticut ("The Benefits of Enacting Franchise Legislation") and New York ("From Litigation to Legislation - Leveling the Playing Field Between Franchisees and Franchisors"). Additionally, Mr. Zarco has traveled worldwide presenting lectures on topics vital to franchisees such as the 7-11 Independent Franchisees, The American Franchisee Association Annual Convention, The Florida Restaurant Franchisee Association, The Kentucky Fried Chicken Independent Franchisees, The Radio Shack Dealer's Association, The White Conference on Small Business Delegates, The Denny's Franchisee Association, The Little Caesars Franchisee Association, The Baskin Robbins Franchisee Association and the Asian American Hotel Owner's Association. Mr. Zarco has appeared on radio and television programs, such as CNBC "Minding Your Business," CNBC "How to Succeed in Business," PBS "Nightly Business Report," "Your Financial Future with Jonathan Pond," "The Judy Jarvis Show," and CBS "Eye to Eye with Connie Chung" to provide expert commentary on specific franchise cases and franchising in general. In addition, Mr. Zarco is consistently recognized as one of the top franchise lawyers in both local, regional and national publications.

Zarco Einhorn Salkowski & Brito, P.A. has been in the forefront of important franchise law issues, such as encroachment/cannibalization, breach of the implied covenant of good faith and fair dealing, fraud in the inducement, fraudulent concealment and breach of contract, in addition to statutory violations of state and federal franchise laws. The firm has earned significant victories for franchisees and established well-heeled legal principles and precedents which are paving the way for other courts in interpreting complex franchise agreements.

Zarco Einhorn Salkowski & Brito, P.A. represents franchisees in disputes against major franchise systems primarily in the hotel, restaurant and service industries. Past and present clients include franchisees of Arby's, Baskin-Robbins, Best Western, Blimpie, Bonanza, Burger King Corporation, Checkers, Choice Hotels, Coca-Cola, Comfort Inn, Days Inn, Decorating Den, Denny's, Dunkin Donuts, Econo Lodge, Fat Tuesdays, Haagen Dazs, Hard Rock Café, Hilton, Holiday Inn, Howard Johnson, Jack-in-the-Box, Johnny Rockets, Kenny Rogers Roasters, Kentucky Fried Chicken, Little Caesars, Manhattan Bagel, McDonald's Corporation, Miami Subs, Oil Express, Papa John's, PepsiCo, Pizza Hut, Quality Inn, Quizno's, Rally's, Ramada Inn, Schlotzsky's Deli, ServoPro Industries, 7-Eleven, Shoney's Inn, Subway, Swisher, T.C.B.Y.,

TGI Friday's, Tony Roma's, and Wendy's, among many others in over three hundred (300) different franchise systems.

Both Mr. Zarco and the law firm have in the past and/or currently represent several franchise associations such as Johnny Rockets, Little Caesars, Denny's, T.C.B.Y., Wood You Furniture, Dunkin' Donuts of South Florida and Kenny Rogers Roasters. Mr. Zarco has also published several articles including, but not limited to, "Making QARS Work For You", "Fairness and Good Faith and McDonald's Remodeling Requirements," "The Top Ten Issues Facing Hotel Counsel," "Five of the Most Dangerous Contract Clauses Which May Exist in Your Franchise Agreement," "Franchise Issues for the New Millennium" and "Tips for the Franchisee in Pursuit of the American Dream."

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Andrew P. Loewinger is a Partner in the Washington, D.C. office of the national law firm of Nixon Peabody LLP with offices in 15 cities. He is an internationally recognized expert in franchise law, and has represented numerous U.S. and non-U.S. companies in the United States and has worked with clients on transactions in over 75 countries. He is co-chair of the firm's Franchise and Distribution Practice Group.

Mr. Loewinger and the firm's Franchise and Distribution Practice Group have represented numerous hospitality companies on a variety of franchise and non-franchise matters, including acquisition of national and international franchise systems; development of franchise programs; vicarious liability, encroachment, fraud, RICO, wrongful death, and racial discrimination claims; and commercial real estate transactions and litigation.

Mr. Loewinger is recognized as one of the top franchise lawyers in the United States and internationally in *Who's Who Legal, An International Who's Who of Business Franchise Lawyers* (2nd ed.). In 2004, Mr. Loewinger was appointed to be the first Director of the International Franchise and Distribution Division of the American Bar Association's Forum on

Franchising. He was named as one of the "Twenty to Watch" in the January 2005 edition of *Franchise Times*.

Mr. Loewinger is the author and editor of numerous articles on franchise law. In 2004, he presented the "Judicial Update" keynote speech at the International Franchise Association's 2004 Annual Legal Symposium and also presented a District of Columbia Bar program with Steven Toporoff on the August 2004 Staff Report on the Proposed Revised FTC Franchise Rule. Mr. Loewinger is a frequent contributor to franchise publications and a frequent speaker at franchise programs held by the American Bar Association's Forum Committee on Franchising, the International Bar Association Franchising Committee, and the International Franchise Association. Mr. Loewinger has also served as Articles and Notes Editor to the Franchise Law Journal. He is the editor of the *International Franchise Law Bibliography*, published by Kluwer Publishers. His publications include the "Franchising" chapter in *Doing Business in the United States* (Matthew Bender 2001); and the Introduction to *International Franchising Law* (Matthew Bender 2001).

Mr. Loewinger was graduated from Colorado College (magna cum laude; Phi Beta Kappa) in 1975; received a master's degree in international affairs from Columbia University in 1980; and was graduated from Georgetown University Law Center with his J.D. in 1983.

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I. INTRODUCTION

The franchise relationship between the franchisor and franchisee revolves around and is governed primarily by a franchise agreement and applicable statutory laws. A franchise agreement is not your typical contract. Rather, it is a long-term and usually one-sided agreement heavily favoring the franchisor with extensive protections and rights while restricting the franchisee's entrepreneurial freedom and providing few rights and privileges. It allows one side--the franchisor--to use the franchisee's money and labor to develop, expand and build its brand and at the same time, control and set the fees to be paid to the franchisor by the franchisee. It allows the other side--the franchisee--to benefit from the franchisor's brand, knowledge and experience as well as other benefits (i.e., central reservations) of being part of a large organized system without having to re-invent the wheel.

In recent years, franchise relationships have evolved to match the sophistication of the various industries in which they function due to increasingly competitive market landscapes. This means that the franchise relationships have become increasingly complex. Management on the franchisor's part is typically more sophisticated than it once was -- executives tend to be better trained and employ more objective financial standards and short term goals as benchmarks of corporate success. As corporate interests have become increasingly fixated on objective profit indications due to growth of the brand, franchisors tend to focus on financial figures, and sometimes, the perception by the franchisee is that the franchisor has excluded the human element of the franchise relationship. As such, franchise agreements have become arguably more comprehensive, onerous and restrictive. The upside for franchisees from this advent in franchising sophistication is that the courts have taken steps to protect franchisee interests, as well as franchisor interests, in franchise relationships.

Much like franchisors, franchisees are also more educated and sophisticated than franchisees of old, and with good reason. It costs much more to buy into a franchise system today than it has in the past. As more money is at stake, franchisees are required to confer with attorneys, accountants and financial consultants with more frequency than before. Further, franchisees are slowly but surely becoming aware of their legal rights as set by modern franchise law precedent, thus, franchisees have become more demanding and less tolerant of oppressive franchisors.

This increasing sophistication on both sides of the bargaining table has lead to obstinate and contentious dispute resolution, with both franchisors and franchisees seeking to take advantage of their rights and obligations under the terms of the franchise agreements. To improve increasingly litigious relations, franchisors and franchisees should alter their perception of the relationship. Franchisors should try to stimulate a sense of family between themselves and their respective franchisees, earning the franchisees' trust and loyalty through open and honest communications, fair dealing and by putting promises in writing. On the other hand, franchisees should understand that they are not totally independent, that they voluntarily joined a franchise system and must act within the rules of that system. It is imperative that franchisees earn the trust and loyalty of their franchisor by communicating openly and honestly, accurately reporting all sales to franchisors, using only approved products to uphold corporate goodwill and by following all other protocol without cutting corners.

Due to the changes in the industry based largely in part on the sophistication of both parties, this paper focuses on how to improve and enhance the relationship between franchisors and the franchisees. A brief overview is provided of the most common and frequent areas which are the source of dispute between franchisors and franchisees and then a discussion is provided as to what each party can do to reduce the risk of future disputes.

Moderator's Comments:

Franchise Regulation. Franchising is regulated at the federal and state levels.

Federal Level: The Federal Trade Commission has jurisdiction in the United States over the franchise sales process (under Section 5 of the FTC Act), but not over franchise relationships. The Franchise Rule currently requires franchisors to provide prospective franchisees with information about the franchisor, the franchise business, and the terms of the franchise agreement to be signed. Additional information must be provided if the franchisor makes any claim about actual or potential earnings, either in advertising or to the prospective franchisee. All disclosures must be made by means of disclosure documents given to prospective franchisees. The Franchise Rule prescribes a format for the disclosure document and the timing for provision of the document to the prospect before signing an agreement or paying any money. State Level: Franchising sales practices are regulated at the state level in 14 states under franchise sales laws. Most states have 'franchise relationship laws' that regulate many aspects of the franchise relationship, such as franchise termination, franchisee transfers, franchisee associations, franchisees' right to freely associate, and franchisor encroachment and discrimination issues. In addition, a number of states have laws that apply to franchise relationships within a particular industry – e.g., petroleum marketing or alcoholic beverages.

II. ONEROUS ISSUES AND/OR CONTRACT CLAUSES

A. Franchise Associations

Franchise associations are typically formed when multiple franchisees enduring similar benefits or hardships within a particular franchise system band together to present a unified voice that will interact effectively with a common franchisor. From the franchisee's perspective, these organizations level the playing field in interactions between franchisors and franchisees, providing franchisees with leverage that comes along with an allied effort and aiding franchisors by offering a singular representative organization with the power to speak for its membership. From the franchisor's perspective, franchisee associations can ultimately benefit the franchisor and franchisee, because common interests and disagreements can be resolved for the benefit of the brand. But sometimes, franchisee associations can be disruptive to the brand due to "an unhappy franchisee making waves over minor matters." All too often disagreements between franchisors and franchise associations are counter-productive, and cause both parties to lose sight of the purpose of their relationship, which is to make their businesses as profitable as possible.

Solution: In order to maintain a level playing field, franchisors should embrace franchise associations and maintain an amicable and active working relationship in order to build trust and loyalty with the association and its members, as well as engender a sense of teamwork. They should keep in mind that associations provide a sounding board for new corporate policy ideas

and present franchisors with the opportunity to get associations to endorse programs, assist in information gathering to gain market insight, and assist franchisors in implementing new programs in test markets. Further, associations can be used as a conduit for getting out the corporate message.

Franchisees are encouraged to associate to align their common interests to bargain more efficiently and effectively with franchisors. However, for an association to achieve its goals, it is essential that it represent the majority interest to resolve issues for the greater common good of its membership. Additionally, associations should be self-governing and self-policing -- instituting internal alternative dispute resolution procedures will calm rebel members and prevent disputes between members from becoming public knowledge and tarnishing the public perception of the company and hurting the brand. At all times, it is important that both franchise associations and franchisors remain credible and earn each other's trust. Both parties should bear in mind that the franchise relationship is symbiotic, and that success grows out of cooperation.

<u>Moderator's Comments</u>:

A "franchisee association" is a group – most typically within the same franchise system – that voluntarily organizes independent of the franchisor. Such associations have become increasingly common in most large franchise systems since the 1990s, due to a variety of factors: the long-term and symbiotic nature of the franchise relationship; the many contentious issues affecting franchising; and the desire to attempt to "level the playing field" and to promote franchisor/franchisee communication.

One of the changes to the Franchise Rule that the FTC Staff mandated in 2009 concerns the inclusion of information in the disclosure document about independent franchisee associations, including their full contact details. This is intended to provide an additional source of information for prospective franchisees about the particular franchise system. Associations of franchisees operating under the same brand – whether comprised of participants selected by the franchisor or elected by the other franchisees – are a relatively new development.

The FTC requires that the disclosure document include a list of those franchisee organizations endorsed or sponsored by the franchisor, to the extent of its knowledge of their existence and a request by the association is made. If an incorporated association (i.e., not an informal group) is not specifically endorsed by the franchisor but requests to be listed in the disclosure document, the franchisor would be required to include it. The association would need to renew its request annually.

Encroachment

One of the most disputed issues within the franchise relationship is encroachment -- where a franchisor seeks to develop and saturate a particular geographic market with its brand. The franchisee, however, may perceive the placement of a new and competing business within such close proximity to an existing franchise as a threat to the success of the existing franchise due to the negative impact on sales and potential diversion of traffic caused by the new operation. The franchisee ordinarily seeks the highest possible sales and highest possible profits

per unit, and has a significant stake in the success or failure of a single unit that his franchisor may regard it as “one among many” -- some of which may be expected to just break even, or even operate at a loss. A mature franchise system, in particular, strives toward the ultimate goal of market penetration to increase its overall sales and royalty base, to minimize competition and increase brand recognition - - and thereby, the value of its trademarks.

From a franchisee’s perspective, although franchisors typically assert that the increased value of the trademark which market saturation produces will benefit the entire system, a franchisor’s gains vastly outweigh whatever minimal return an individual franchisee may obtain. The franchisor’s point of view overlooks the franchisee’s justifiable expectations of success in the market and his enduring obligations to pay royalty fees and other fees originally agreed to in the franchise agreement for the full term of the franchise agreement regardless of any financial decline resulting from the competing franchisees and, thus, has ample incentive to saturate the market without regard for the effect on any individual franchisee.

***Solution*:** It is absolutely critical that a franchisor be clear and upfront in the both the Franchise Disclosure Document Franchise Disclosure Documentand the franchise agreement that it has the unfettered discretion to place competing units in close proximity to existing franchisees. From the franchisee's perspective, a franchisor should also implement an impact policy -- which should be incorporated into the express terms of the franchise agreement -- for the benefit of existing franchisees. Moreover, from a franchisee’s perspective, in order to reduce the impact on the existing franchisee when a new unit is opened, a franchisor who is going to benefit from the additional gross sales generated by the new competing unit through increased royalty and advertising fees, as well as additional trademark and goodwill exposure, should share in the diminution of profits being sustained by the existing franchisee. This can be accomplished through a direct financial contribution being made by the franchisor over a period of time, taking into account the franchisee’s historic and expected growth rate. Alternatively, a franchisor may reduce the existing franchisee’s royalty fees to soften the blow or have the new franchisee pay a portion of his royalty fees directly or indirectly to the impacted franchisee.

An existing franchisee would clearly prefer that no growth occur within the existing franchisee’s territory. However, from the franchisor's perspective, the existing franchisee must understand that he is part of a much larger system and that overall growth in the system is also going to benefit him from greater brand recognition and also from additional advertising dollars. Nonetheless, if there is going to be growth in the system, the franchisee who is closest proximity to the new unit should be given a right of first refusal to obtain the new unit provided that the franchisee satisfy the franchisor's criteria for expansion. Objectivity in this regard is an absolute necessity because many franchisors often use subjective criteria in evaluating franchisees in order to exclude deserving franchisees from expanding.

Virtually all hotel franchise agreements contain clauses on this subject with varying disclaimers as to the franchisee’s geographic territory. A word to the wise – if the express terms of a franchise agreement address territorial protection, courts are reluctant to use the implied covenant of good faith and fair dealing to disturb those express terms by implying protections, rights or duties where the agreement is clear that none were intended. In instances where the franchisor has implemented an impact policy, this renders the impact policy as a hollow promise to the franchisee since the franchisee, in reality, is not being granted any rights to the extent that

such terms are not expressly incorporated into the language contained in the franchise agreements. To that end, before investing in a franchise, a franchisee should seek the advice of an experienced franchise attorney to help balance the scales and to seek to implement contractual safeguards against any prospective over-reaching on the part of the franchisor.

Moderator's Comments:

"Encroachment" and "dual distribution" issues have increasingly become "hot button" issues in franchising. "Encroachment" issues typically arise when a franchisor places a franchised business of the same brand in proximity to an existing franchised business. "Dual distribution" issues typically arise when a franchisor either (1) places an outlet of a competitive brand in proximity to an existing franchised business (e.g., Ramada near Howard Johnson) or (2) seeks to sell the product or service sold by a franchisee through an alternative method of distribution (e.g., selling Haagen-Dazs ice cream in supermarkets).

Encroachment issues are typically very fact-specific and highly charged for franchisees. They may demand a variety of solutions, depending on the circumstances, including clear contract language disclosing any "exclusivity," clear pre-sale disclosure; an internal franchisor policy to avoid encroachment issues; "impact policies"; clear franchisor-franchisee communication; and litigation.

B. Merger And Integration Clause

It is virtually impossible to overstate the drastic effects of the merger and integration clause. It usually reads as follows:

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

In its simplest terms, the merger and integration clause means that any of the franchisor's verbal promises, agreements or representations which are not contained in the final franchise agreement, i.e., in writing, will almost never be enforceable.

Solution: First and foremost, it is imperative that a franchisee never trust or unjustifiably rely upon any oral representations made by any franchisor representatives. Second, in order to avoid being a victim of the merger and integration clause, always have the franchisor representative put the oral representation in writing and have it expressly incorporated into the terms of the franchise agreement. This practice will benefit both the franchisor and franchisee. Last, it is crucial for the franchisee to ensure that the written promise is being made by an authorized representative of the franchisor; otherwise, the promise, even if written, will in all likelihood not be enforced by the courts.

On the other end of the spectrum, franchisors should instruct their representatives not to make any oral representations. The safe practice is to reduce to writing any commitments the franchisor may make in response to a request from a franchisee. On the other hand, if the

franchisor representatives make oral representations to prospective franchisees in order to induce the franchisee to enter into a franchise agreement, then the franchisor should live by such representations. The franchisor should not attempt to avoid fulfillment of its oral representations by relying on legal technicalities such as the merger and integration clause. Further, in order to prevent disputes with franchisees over oral representations, all franchisors must fully train and warn its representatives not to make any oral promises and advise them of the inherent problems that arise in the franchisor/franchisee relationship because of oral promises. In order to deter representatives from making oral promises to franchisees, franchisors should reprimand and/or punish individuals who make promises despite being warned to refrain from making such promises.

Moderator's Comments:

Merger and integration clauses typically do not protect franchisors against fraudulent misrepresentations that they or their representatives make, and there are ample cases in the franchise context on point. There are a variety of "best practices" that franchisors employ to avoid salespersons' misrepresentations in franchise sales activities. These include, for example, (1) establishing extensive salesperson training and compliance programs to protect – as much as possible – against salespersons' misrepresentations and (2) requiring, as a condition of closing, that franchisees complete an extensive questionnaire as to the occurrence or non-occurrence of a variety of potential misrepresentations that a franchisor's salesperson may have made.

C. Site Selection

Many franchise agreements include a clause which states that the franchisor will provide assistance to the franchisee in the selection of a suitable site for the development and operation of the franchised business. On the surface, this seems like a great promise by the franchisor. After all, who better than the franchisor knows what site is suitable for the operation of its own franchise? A word to the wise -- be careful to read the exculpatory language that is also included in this clause and states the franchisor does not guarantee that the site will be successful and it is ultimately the franchisee's responsibility to conduct its own independent investigation. The exculpatory language generally states that the "approval of a site by the franchisor does not constitute an assurance, representation or warranty of any kind, express or implied, as to the successfully operation of the franchised business, or for any other purpose." Unfortunately, this language is a major source of litigation between franchisors and franchisees.

Solution: From the franchisee's perspective, in order to reduce the number of disputes over this issue, it is absolutely critical to the success of a new franchisee that a franchisor not approve sites which do not even meet its own internal criteria. In another words, a franchisor must not take advantage of the exculpatory language and simply approve sites in order to saturate the market and satisfy the Wall Street analysts. Therefore, franchisees believe that franchisors should make a conscious and good faith effort to employ competent individuals as part of their real estate department, who have ample knowledge regarding site selection and prospects for success at certain locations.

On the other hand, even assuming that the franchisor has a competent and well-qualified real estate division, a franchisee should never solely rely on the franchisor for site selection.

After all, from the franchisee's perspective, the franchisor's ultimate goal is to approve as many sites as possible in order to aggressively grow the franchise system. To that end, a franchisee must always conduct its own due diligence, which should be encouraged by the franchisor. By doing so, the franchisee is protecting his interest should a dispute arise between the parties. Part of this due diligence process should encompass speaking with existing franchisees and obtaining their perspective on how to select an adequate site and what factors should be considered prior to acquiring a site. To the extent that franchisees do rely on the franchisor's site selection process, franchisees should take an aggressive approach and question the franchisor as to why and what factors make a particular site attractive for the operation of the franchise.

D. Supplier Control

Virtually all franchisors require franchisees to purchase certain proprietary items available only from approved suppliers. This is done to maintain brand standards systemwide. The franchisor will also "allow" a franchisee to purchase other items for the facility from any other source, subject to the item either meeting or exceeding the system's standards. However, the caveat here is that the franchisor retains sole discretion as to whether a franchisee can purchase from other non-approved suppliers. Franchisees should also be aware that some franchisors receive "kickbacks," "rebates," or other favors from suppliers that the franchisor has designated, which on its face is not illegal provided that such arrangement is properly disclosed in the Franchise Disclosure Document Franchise Disclosure Documentand the franchise agreement. It is difficult to prove and attack this type of arrangement because the franchisor typically retains enough discretion to designate certain approved suppliers.

Solution: In order to bridge the gap in this area, both the franchisor and franchisee must give in to a certain extent. A franchisor must only require franchisees to purchase products from pre-approved suppliers if the product is truly proprietary. At the same time, a franchisor must have some flexibility and permit franchisees to obtain such proprietary products from similar vendors if it is more cost effective, provided that brand standards are not sacrificed. In addition, it is incumbent upon the franchisor to actively seek out alternative suppliers in order to find the most economically feasible supplier for franchisees. And most important and of great concern to franchisees is the franchisor's receipt of kickbacks from its suppliers. In order to gain the trust of franchisees and form a mutually satisfactory relationship, a franchisor should not receive kickbacks, rebates or other favors from suppliers that the franchisor has designated unless otherwise fully disclosed in the Franchise Disclosure Document and/or in the franchise agreement.

On the other hand, franchisees must earn the trust of their franchisor by only purchasing products from the list of suppliers designated by the franchisor. This is to ensure that the products being used by the franchisee meet the franchisor's minimum standards and specifications. It is critical that franchisees absolutely refrain from the purchase of unapproved products and/or purchase products from unapproved suppliers. In the event that franchisees are considering the purchase of products from a non-approved supplier, it is imperative to always obtain the prior, written consent of the franchisor. As to kickbacks and rebates, franchisees should never permit a franchisor to receive such items from suppliers unless such kickbacks and rebates are directly put into a Brand Building Fund, which is for the benefit for the franchise system as a whole. From the franchisee's perspective, when franchisees permit a franchisor to

receive kickbacks and rebates, it is at the expense of the franchisee as the franchisee is required to pay significantly higher costs for proprietary products. From the franchisor's perspective, the receipt of the alleged "rebates" is used to offset its costs in order to implement such programs, resulting in no "windfall" to the franchisor.

Moderator's Comments:

Supplier rebates are another hotly debated issue between franchisors and franchisees. Rebates are based on payments or discounts a franchisor receives in relation to the total volume purchases by its franchisees. The franchisees' position is that those payments or price differences should not only be disclosed but should also be passed along to them. The courts have generally disagreed that franchisees have a right to rebates, particularly if the franchise agreement is silent on this issue. While not necessarily analogous to franchising, hotel owners have successfully sued their management companies for rebates those companies receive. The management company in *2660 Woodley Road Joint Venture v. ITT Sheraton* Corp, 2002 – 1 Trade Cas. (CCH) ¶ 73,601 (D. Del. 2002) was determined to be an agent in a principal/agency relationship, and therefore it had violated its fiduciary duties when it did not disclose and pass along the payments it received from suppliers. In addition, the jury in that case decided that the management company had breached the Robinson-Patman Act, the federal legislation addressing price discrimination.

E. Advertising/Marketing Fund

All franchise agreements contain extensive promises regarding advertising programs that the franchisor currently has in effect or intends to implement in the near future. Yet, despite making a host of promises to franchisees, franchisors always incorporate language stating the franchisor "will provide advertising as it deems necessary," or that it has "sole discretion" as to the types and amount of advertising that it implements. Specifically, franchisors often incorporate the following language into franchise agreements:

> The content of all activities of the fund, including, without limitation, the media selected and employed, as well as the area and units to be targeted for such activities, shall be at the sole discretion of the Franchisor. Franchisor undertakes no obligation to make expenditures for Franchisee which are equivalent or proportionate to contributions paid under this agreement or to insure that Franchisee benefits directly or on a pro-rata basis from activities of the advertising fund, if any. Upon request, Franchisor will provide Franchisee a statement of receipts and disbursements for any fund to which Franchisee contributes under the terms of this agreement.

If the agreement permits the franchisor to decide how much and what type of advertising the system needs, it does not matter that the franchisees believe that the advertising program is poor. Remember, if a conflict arises, the written word *always* wins out. If the franchisor is within the parameters of what is written, the franchisee has no right to complain nor will he prevail in the event that he decides to initiate litigation.

Solution: In order to minimize conflicts, a franchisor should agree to provide franchisees with a benefit proportionate to the amount of advertising monies contributed by the respective franchisees. From the franchisee's perspective, the exculpatory language, as highlighted above, is more often than not abused by franchisors as franchisors routinely like to spend advertising dollars in the major corporate markets which are clearly more favorable than the small markets. This, in turn, deprives the franchisees of their contribution as they receive no benefit for their dollars. Franchisors should also agree not to spend franchisees' contributions towards satisfaction of their administration expenses. At a bare minimum, franchise agreements should contain mandatory language requiring the franchisor to provide a semi-annual accounting to all franchisees in the system.

Conversely, franchisees should always pay their respective advertising fees and make all efforts to disseminate new ideas to the franchisor regarding its advertising efforts. Franchisees should strive to come up with new innovate ideas, which will not only help the franchisees but promote the brand as a whole. This is a win-win situation for both the franchisor and franchisees through the generation of more revenues.

In order to prevent franchisor abuse of advertising dollars, franchisees should also closely monitor the advertising expenses incurred by the franchisor and in what market the majority of the advertising is conducted. If such advertising is not being conducted in a reasonable manner and in a way that is beneficial to the franchise system as a whole, franchisees should promptly voice their concerns and request an accounting to analyze the advertising expenses. This is not to say that franchisees are given the unfettered right to dictate all advertising done by the franchisor. To the contrary, the franchisor must be given some discretion to conduct the advertising so that it benefits the brand as a whole.

Moderator's Comments:

Advertising funds have increasingly become lightning rod issues in franchisor/franchisee disputes due to perceived – and sometimes real – abuses in how franchisors handle the monies in such funds. Advertising funds are typically used by franchisors to build the franchisor's brand. As such, many franchisors' and franchisees' expectations for, and perceived benefits to be derived from, such funds are often at variance. Best practices for franchisors include: clear pre-sale disclosure and up-to-date contract provisions as to precisely what types of expenses, generally, are chargeable to the advertising fund; clear articulation as to what types of charges the franchisor or its affiliated companies may make to reimburse them for their advertising fund activities; a periodic accounting to franchisees; franchisee representation and input on an advertising council or on the advertising fund; and a proper alignment of both parties' expectations.

This solution suggested above of providing a franchisee with a benefit proportionate to its financial contribution could be very difficult to implement. How will the "benefit" be calculated? If one franchisee contributes 3% of the total advertising fund and another contributes 3.5%, how will the extra half a percent of "benefit" be conferred on the second franchisee? A television broadcast will spill over into markets outside the second franchisee's territory, perhaps to the further benefit of the first franchisee. Electronic advertising knows no geographic bounds. Instead of thinking of an advertising fund as being principally for advertising it may be better to

think of it as a Brand Fund, the primary goal of which is to create a specific brand awareness and identity and not principally for advertising.

F. Reservations System

All hotel franchise agreements state that the franchisees' property will be linked to the franchisor's central reservations system. What this means is that the franchisee is granted the right to participate and receive reservations from the franchisor's central reservation system. Notwithstanding the franchisees' participation in the reservations system, this is a problematic issue because the franchisor also reserves the right to suspend the franchisee's right to receive reservations in the event that the franchisee is in default. In these instances, the franchisor reserves in itself discretion to divert the franchisee's previously made reservations to other facilities of the franchisor's choosing. Yet, in a situation where the franchisee is already experiencing difficulty in timely making royalty and advertising payments, this action would most certainly be fatal to the franchisee's business. While this is the type of clause that the franchisee should seek to have removed, a franchisor will never agree to modify and/or remove this clause from the franchise agreement.

Solution: From the franchisee's perspective, franchisors often use this clause as a weapon to punish non-complying franchisees. In the bests interests of both the franchisor and franchisee, the franchisor should agree to only suspend the franchisee's right to the reservation system in the event of operations defaults which are likely to cause damage to the brand's marks and goodwill. A monetary default should not warrant the suspension of the franchisee's rights to the reservations system since, more often than not, the lack of reservations and business is the cause of a monetary default. Franchisors should also direct customers and reservations to legitimate locations, not simply to corporate-owned properties and/or certain "preferred" franchisees. In cases where a particular franchisee is not receiving sufficient reservations, a franchisor should be pro-active and determine the cause of a lack of reservations and do everything within its power to improve such situation.

From the franchisor's perspective, franchisees must also do their part if they expect to receive reservations from the franchisor's central system. It is imperative that a franchisee always be in compliance with the express terms of the franchise agreement, including the payment of monetary obligations, such as royalty payments, marketing and sales fees and reservation system fees. Franchisees should not engage in conduct which will be in violation of the franchise agreement and lead to a default, which will ultimately lead the franchisor to suspend reservation rights. Franchisees should also be pro-active and track the number of reservations they receive from the franchisor on a month to month basis. If such number is either constant or in steady decline, the franchisee should contact the franchisor and attempt to discuss the root of the problem and a potential resolution.

G. Jurisdiction/Venue Clause

All franchisors include a jurisdiction/venue clause in the franchise agreement. Typically, such clause states that in the event of a dispute with the franchisor, such dispute must be resolved in a court of competent jurisdiction in the city and state where the franchisor's headquarters are located. From the franchisee's perspective, a provision like this is designed to make litigation

expensive for the franchisee because the franchisee has to travel to the franchisor's home state to resolve any controversy. This provision is also favorable to the franchisor because typically the franchisor knows its local judges and other members of the community. To that end and in order to protect their residents, many states have enacted various disclosure and relationship laws which prohibit the enforcement of venue clauses that require a franchisee to litigate in any venue that is outside of the franchisee's home state.

Solution: The solution to this issue is not that simple. From the franchisee's perspective, franchisors should permit franchisees to initiate litigation in their own home state. On the other hand, the court of competent jurisdiction should be in the franchisor's home state, because it would be unfair to require the franchisor to file and/or defend lawsuits in all 50 states. After all, the franchisee can elect not to become part of system, rather than attempting to challenge the bargained for jurisdiction/venue clause. Yet, at the same time, both franchisors and franchisees should be mindful of the disclosure and relationships enacted by various states which prohibit the enforcement of venue clauses that require a franchisee to litigate outside of his home state.

Moderator's Comments:

Franchisors have an interest in the predictable and efficient resolution of franchise disputes in their system. Accordingly, franchisors typically include law and venue provisions in their Franchise Agreements. The U.S. Supreme Court has upheld the use of forum selection choice in franchise agreements in 1985 in the case of *Burger King Corp. v. Rudzewicz*, 471 U.S. 462. Challenges to venue and choice of law clauses have been actively litigated by franchisees based on state law requirements (see *e.g.*, *My Café-CCC, Ltd. et al. v. Lunchstop, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,587 (Tex. App. – Dallas [5th Dist.] June 18, 2003 and *American Top English, Inc. v. Golden Gate Capital, L.P.*, Bus. Franchise Guide (CCH) ¶ 12,770 (N.D. Ill. February 25, 2004).

H. Arbitration Clause

Virtually all franchisors, not just hotel franchisors, prefer arbitration as opposed to litigation. On the surface, arbitration sounds friendlier, simpler and less threatening. Yet, from the franchisee's perspective, nothing could be further from the truth. Arbitration is easier if you are the franchisor. The rest of the bad news is that once you have signed the franchise agreement agreeing to arbitrate your disputes, it is almost impossible to avoid arbitration and instead, go straight to court.

Franchisees typically are disadvantaged in arbitration for a host of reasons. First, in a litigation proceeding, a franchisee can obtain a jury trial assuming that it has not been waived elsewhere in the agreement. Having a dispute resolved a jury of your peers is a valuable right which should not be underestimated. On the other hand, arbitrators are usually lawyers or retired judges. They may be friendly with the franchisor or its attorneys since arbitration clauses typically require arbitration to be conducted in the city where the franchisor's headquarters are located.

Second, most franchisees as well as some franchisors have the misconception that arbitration is less expensive compared to litigation. Yet, unlike state and federal courts where

the judges are compensated by the taxpayers' dollars, an arbitrator must be paid by the hour typically in the range of three hundred to five hundred dollars per hour. In addition, arbitration is also more expensive because there are significant filing and administrative fees that are required as part of the arbitration process.

Third, the discovery process - - during which the franchisor and franchisee gather their respective evidence (i.e., depositions and written documents) for trial - - is very limited. This aspect significantly impacts both the franchisor and the franchisee to their detriment depending on the respective parties' "burden of proof."

Fourth, the normal rules of evidence and procedure do not apply the same way as they would in state or federal court, which could be beneficial to each side. Rather, the law affords the arbitrator a great deal of flexibility and discretion in conducting an arbitration proceeding and a reviewing federal court will rarely, if ever, reverse the arbitrator's decision, even if it is factually and/or legally incorrect.

Solution: The arbitration clause should be removed from all franchise agreements since it is expensive for both parties, especially the franchisee. Notwithstanding such, most franchisors will want the arbitration clause to avoid a large jury verdict. In contrast, franchisees should demand that a provision be included in the franchise agreement which imposes a procedure in the event that there is a dispute between the parties. Such procedure should entail having a business meeting and subsequently going to an informal mediation. In the event that the dispute is not resolved during mediation, then the last alternative for the parties should be to litigate their dispute in a court of competent jurisdiction, rather than going to arbitration. This way, both parties can avoid the unnecessary and significant fees associated with arbitration proceedings.

I. Non-Competition Clause

Most franchise agreements contain a "non-competition clause," which restricts a franchisee from competing with the franchisor's business both during and subsequent to the franchise relationship. This impact of this one-sided provision, depending on the precise language, is that a franchisee may not operate a similar business with a competing brand. The franchisor may also prohibit a franchisee from hiring or continuing to employ individuals who worked for the franchisee in a managerial capacity when the franchisee was part of the system.

In-term non-compete clauses are usually less problematic than the post-term non-compete clauses which affect a departing franchisee's business subsequent to the termination or expiration of the franchise agreement. Frequently, the post-term non-compete clause will prevent a former franchisee from engaging in a similar business for a specified period of time and in a specified area. The various states use different criteria to determine the "reasonableness" of the post-term non-compete clause in deciding whether such clause is legally enforceable. If the prohibition is for a long period of time or covers too large of a geographic area, courts may either refuse to enforce the clause or simply re-write the clause to conform with local law. Due to the uncertainty of the court's actions, it is more prudent to attempt to negotiate such language prior to execution of the franchise agreement in an attempt to narrow the number of years and reduce the geographic scope of the restriction.

Solution: In order to reconcile the difference between the franchisor's position and franchisee's position and reduce the risk of disputes, a franchisor could agree to enforce a non-compete clause only for the same and/or similar business (i.e., fast food hamburger, rotisserie chicken, etc.). In addition, a franchisor should not seek to implement a non-compete clause which is greater than two (2) years in duration and covers no more than a maximum of a ten (10) mile radius. Most importantly, a franchisor should only seek to enforce a non-compete clause provided that the franchisor's brand remains in the marketplace.

Conversely, if franchisees want to avoid being trapped by a non-compete clause, they should not attempt to steal any of the franchisor's proprietary items, products and trade secrets or any other aspect of the franchise system. If franchisees would agree to such a restriction and actually live by their words, then a franchisor would not have reason to vigorously attempt to enforce non-compete clauses. In addition, a non-compete clause creates a disincentive to leave the franchise system and go join another competing franchise system. As such, it is the best interests for franchisees to not attempt to steal the franchisor's system so that they are not bound by a non-compete clause in the future upon their departure from the franchise system. At the same time, franchisees must also be reasonable and understand that it is acceptable for a franchisor to enforce a non-compete clause in a situation that involves the sale of a business.

Moderator's Comments:

Standard hotel industry franchise practice is not to utilize non-competition clauses in franchise agreements and liquidated damages provisions are typically utilized instead. In the hotel industry, non-competition clauses are unrealistic because most hotel properties cannot be utilized for any purpose other than as a hotel, and enforcement of a non-competition clause would be unduly restrictive

J. Jury Waiver Clause

The "no jury clause" requires that the franchisee waive what would, otherwise, be his constitutional right to a trial by jury. Jurors are regular "laymen," who are typically thought to be "sympathetic" to a franchisee who has been mistreated. As such, franchisors typically include a provision stating that the franchisee has agreed to waive his right to a jury trial.

Solution: From the franchisee's perspective, franchisors need to realize that they are depriving franchisees of a basic constitutional right by including a jury trial waiver provision in the franchise agreement. It is recommended to have a jury as jurors are typically intelligent and less emotional in commercial business disputes. As such, a franchisor need not worry that a juror will automatically feel sympathetic to a franchisee.

Franchisees should absolutely never unknowingly forfeit this option when entering into a franchise agreement. As such, it is crucial that franchisees read the entire franchise agreement very carefully to ensure that this provision is not included. In the event that a jury trial waiver clause is included, it is imperative for a franchisee to retain franchise counsel to learn of the potential ramifications of this language prior to executing the franchise agreement. At a bare minimum, a franchisee should be the one to decide whether he ultimately wants to present his case to a jury.

Of course, franchisors seek to incorporate a jury waiver clause in order to prevent "runaway" judgments against the franchisor that could otherwise be resolved through mediation and/or arbitration. Franchisors also believe that the franchisee's decision to enter the system is completely voluntary, and therefore, the franchisee should not challenge the jury clause provision.

Moderator's Comments:

It was argued earlier that arbitration should not be the mandatory mode of dispute resolution because it is too expensive for both parties. However, the costs of a jury trial will exceed those for a case decided by a judge.

In addition, it may be inaccurate to generalize that jurors will not be more sympathetic to a franchisee. In fact, it may be more likely that a jury would be biased against a "deep pockets" franchisor in favor of a franchisee.

K. General Release

Franchisors are notorious in attempting to obtain a general release from franchisees at every turn of the corner in order to absolve themselves of all potential liability to the respective franchisees. A general release typically reads as follows:

> The undersigned hereby releases franchisor and its agents and employees, from any and all claims, demands, agreements and liabilities of every description whatsoever, which the undersigned ever had, now has or hereafter may have, against the franchisor and its agents and employees by reason of any matter, cause or thing occurring prior to the date of this agreement.

By executing a general release, franchisees are forever barred from bringing any claims against a franchisor that either exist or may exist and whether known or unknown from the beginning of time until the date of execution of the general release. On the other hand, releases are beginning to work both ways - the release applies to the franchisor and franchisee, absent gross negligence or willful misconduct by the other party.

Solution: In order to minimize the risk of dispute, a franchisor should only require franchisees to execute a general release if they are either renewing or seeking an extension of their franchise agreement. At no other time should a franchisor be justified in seeking to obtain a general release.

Franchisees should always carefully read every line of each document that their franchisor requires them to sign. In the event that franchisees are presented with a document incorporating a general release, it is imperative that such document not be executed without first obtaining the assistance of legal counsel. On the other hand, if the franchisee is seeking to renew or extend the terms of his franchise agreement, it is reasonable for the franchisor to require the franchisee to execute a general release. In such circumstances, franchisees should not refrain from the execution of documents incorporating a general release.

On the other hand, franchisors always insist on a general release from the franchisee because it is the franchisee that operates and controls the asset on a daily basis. Therefore, absent gross negligence or willful misconduct by the franchisor, the franchisee should agree to the general release.

<u>Moderator's Comments</u>:

Releases are another "hot button" issue in franchising. When they must be executed, and whether they must be mutual, are two of the most contentious issues. Franchisors typically require a complete franchisee release on renewal or transfer, and some systems will require a release at additional times – *e.g.*¸ on relocation. The AAFD recommends execution of mutual releases.

L. Remodel And Renovation Requirements

Issues regarding the franchisee's remodel and requirements under the terms of the franchise agreement frequently arise in the franchisor/franchise relationship in the lodging sector. Hotel franchise agreements typically permit the franchisor to require that the franchisee complete certain franchisor-identified improvements to the property by a specified date, to maintain the integrity of the brand. These improvements may be necessary because of normal wear and tear to the property, inadequate maintenance by the previous hotel owner or the effects of a natural disaster (i.e., hurricane, earthquake, etc.).

This issue is a major source of contention because the franchisor usually retains complete discretion when to require the franchisee to remodel and renovate the property as well as the scope and extent of the remodel. The franchisor usually dictates how much the franchisee is to spend on the remodel. The old adage "it is easy to spend someone else's money" rings true on this issue. While some franchisors are willing to give the franchisee more time if requested, the decision whether to grant additional time is the franchisors, not the franchisees. If the franchisor agrees to provide additional time to complete the remodeling, it is imperative that both sides reduce the agreement to writing, and preferably before the initial deadline has lapsed. The scope and extent of the remodel is extremely important. The financial burden placed on the franchisee must be related to the increased returns the franchisee is to receive form such significant investment.

Solution: In order to minimize the disputes that arise over this clause, the franchisor must be reasonable when requiring franchisees to renovate and remodel the property. The franchisor must be careful not to go overbroad in its remodel requirements as "it is easy to spend someone else's money." Second, the franchisor should only require renovations that the brand warrants. In another words, a Super 8 Motel should be not be required to do renovations which are typically required of a Hyatt quality hotel. Third, a novel idea is for the franchisor to consider the rate of return on the franchisee's investment. For example, is it reasonable for the franchisor to require a franchisee to expend one hundred thousand dollars ($100,000.00) in remodeling expenses when only two (2) years remain on the term of the franchise agreement, and only forty thousand dollars ($40,000.00) of additional gross revenues are expected to be generated by the improvements to the property? Thus, there is real merit to considering the rate of return analysis in the context of remodel and renovation requirements.

Meanwhile, in order to ensure that the franchisee is not imposed with an unreasonable renovation punch list, franchisees should always strive to maintain the property in accordance with the franchisor's standards. When a remodel is required, franchisees should agree to fully remodel the property to the extent that the remodel satisfies the brand image. If the franchisor requires remodel which is of a much higher brand image, the franchisee should challenge the excess remodeling requirements which the franchisor seeks to impose. In challenging such requirements, franchisees should be prepared to discuss the rate of return of return analysis with the franchisor.

Moderator's Comments:

Reasonableness and balancing of interests should be the touchstone when addressing remodeling and renovation requirements. Both the franchisor and franchisees have legitimate interests that may be accommodated. Franchisors wish properties to fully comply with applicable standards and to protect the reputation of the Brand. Franchisees wish to protect against arbitrary, onerous, and inappropriate upgrade requirements. Reasonable compromise can typically be achieved in this area.

M. Liquidated Damages

A liquidated damages clause provides the amount of, or formula for computing monetary damages in the event that one party (i.e., usually the franchisee) breaches the contract. Instead of having a judge or jury calculate the amount of damages the injured party has suffered, the franchise agreement itself will dictate the sum of money the breaching party must pay to the other (non-breaching) party. In the hotel industry, the liquidated damages "formula" is often a function of the number of rooms in a particular property -- the larger the hotel, the greater the liquidated damages.

Typically, hotel franchisors favor the inclusion of a liquidated damages clause because it provides the exact figure which a franchisee will be required to pay to the franchisor in the event of a premature termination of the franchise agreement. Hotel franchisors also favor the inclusion of a liquidated damages clause in franchise agreements in an attempt to deter franchisees from terminating their franchise agreement prior to its expiration and go join another franchise system. On the other hand, franchisees view the liquidated damages clause as a penalty because the amount of liquidated damages is in many instances not a true measure of the actual damages that a hotel franchisor suffers and results in a windfall to the franchisor.

The enforceability of a liquidated damage clause depends on the legal distinction between a "penalty" and actual "liquidated damages." A penalty is security for the performance of a contract. Liquidated damages constitute the measure of recovery in the event of a breach. Therefore, the determination of whether a contract clause is enforceable as a liquidated damages provision or void as a penalty is a question of law.

If a court determines a liquidated damage clause unenforceable as a penalty to secure performance, then the franchisor asserting a breach must show actual damages to recover. Moreover, a liquidated damage clause in a franchise agreement may become a penalty if it

provides for unreasonable damages for trivial breaches, as well as reasonable damages for major breaches.

A liquidated damage clause will be enforceable by the franchisor ***if*** the harm to the franchisor is incapable or difficult to estimate. The difficulty of estimating the amount of damages is based on the circumstances existing at the time the franchise agreement was negotiated, not when the actual harm occurs. The clause in question will be a liquidated damage clause, and not a penalty clause, if the actual damages, because of the circumstances of the case, are uncertain, intangible, or not ascertainable by a satisfactory, known rule.

Solution: A franchisor could include a liquidated damages clause which contains a fixed, realistic number based on the amount of time that it takes to replace the property, rather than being based on the number of rooms in the property. The liquidated damages should be based on a graduated scale with the amount of damages directly tied to the time it takes to replace the franchisee. In the event that the franchisor already has a franchisee lined up to replace the existing franchisee, then the franchisor should agree to waive all liquidated damages as they will result in a windfall to the franchisor.

A franchisee should always carefully review and calculate and analyze the amount of liquidated damages contained in the franchise agreement prior to execution of the franchise agreement. If the number seems disproportional to the actual amount of damages that a franchisor is likely to suffer in the event of a premature termination, then the franchisee should challenge the clause and attempt to negotiate the number in advance. The franchisee should also insist that the franchisor waive all liquidated damages in the event that there is a replacement franchisee lined up by the franchisor.

Ever mindful of the distinction between a "liquidated damages" clause and a "penalty" clause, the franchisor, in its negotiation with the franchisee, should insist that the predicate for the "liquidated damage" clause be spelled out in the franchise agreement. Specifically, the language relating to the "liquidated damage" clause should reference the inability of the parties to determine damages to the franchisor, should the franchisee seek to terminate the franchise agreement prior to its full term. Conversely, if the franchisor terminates the franchise agreement for cause, the method of determining damages should also be spelled out clearly in the franchise agreement, for the failure to do could very well result in the outright forfeiture of the franchisor's contractual right to the payment of such damages and a "windfall" to the franchisee.

To address this problem, the franchisor should consider "quantifying" a method to determine damages which would survive an attack by the franchisee accusing the franchisor of specifying a certain amount for future damages, and thereby making the "liquidated damage" clause a penalty. A method to avoid the classification of a "liquidated damage" clause as a "penalty clause" is for a franchisor to charge a certain dollar amount on a "per-key" basis for a breach or early termination.

Moderator's Comments:

In some large hotel franchise systems, the calculation of liquidated damages is based on future projections for the number of rooms, percentage of occupancy, and gross rooms revenue.

These projections are agreed in advance and set forth in the franchise agreement, although the franchisor generally disclaims that it is validating the projections as guaranteed results for the franchisee.

III. CONCLUSION

Franchise law is in a constant state of evolution. Franchisors and franchisees both acknowledge the importance of self-preservation in an area of law that has typically favored franchisors from its formative stages. For franchisors, loss of hand in their relationships with franchisees will no doubt be a tough pill to swallow, and for franchisees, a gain in respective power conferred on them by franchisee protectionist case law and statutory law is likely to make them greedy. To achieve an optimal win-win outcome within a franchise relationship, both franchisors and franchisees must make good faith efforts to compromise.

Despite progressive case law and statutory law which seeks to provide protection to franchisees, franchisees must stay tuned into the inherent inequities in largely one-sided franchise agreements, a relic of old times. It is critical that franchisees have both an in-depth knowledge of the legal points, as well as an understanding of the franchise-business issues within their own industries. As outlined herein, there are a multitude of reasons why franchisees should read the franchise agreement carefully, ***and*** prior to signing ***anything***, why franchisees should consult with an experienced franchise attorney about the meaning of each the above clauses and how to avoid and/or minimize disputes with the franchisor.

Conversely, since franchisee's voluntarily enter into franchise agreements, the franchisee, as well as the franchisor, should be bound by the terms and conditions contained in the franchise agreement. Too often, franchisors bear the brunt of frivolous lawsuits designed to "cover-up" the franchisee's purported mismanagement of the asset, and seek to put the blame on the franchisor. Notwithstanding, the franchisor community does appreciate the need for a "win-win" relationship between franchisor and franchisee. Unfortunately, that path can be turbulent!