

A pineapple stands upright in a field of green grass under a blue sky with white clouds. The pineapple is positioned on the right side of the frame, with its crown of green leaves reaching towards the top. The background is a soft-focus landscape of grass and sky.

THE HOSPITALITY LAW CONFERENCE: SERIES 2.0

January 11, 2018 • San Diego, CA

REPRESENTING THE BRAND IN LITIGATION INVOLVING FRANCHISED LITIGATION

2018 HOSPITALITY
LAW CONFERENCE:
SAN DIEGO

JANUARY 11



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**THE H^{HL}OSPITALITY LAW
C^{HL}ONFERENCE SERIES 2.0**

Introduction

- Ubiquitous Business Model
- Benefit Comes with Burdens



Franchise Basics

- Standards Designed To Protect Brand or Trademark
- Termination of Franchise



Appearance of Relationship

- Mere License to Use Brand, Name or Trademark is Insufficient to Create Agency



Franchisor's Vicarious Liability to Third Parties

- Standards Alone Typically Not Sufficient
- Standards Imposing Precise Methods May Be Sufficient



Actual Control Results in Agency

- Actual Control by Franchisor Creates Vicarious Liability
- Any "Control" May Not Be Sufficient



Apparent or Ostensible Agency

- If it looks like, dresses like, acts like and APPEARS to be like you (Franchisor) it may just become YOU.



Discovery Concerns in Franchisor Litigation

- Plaintiff's attorneys sharing data and the issues with discovery



Who is “YOU” in Discovery Requests, the scope of Discovery

- For example, in California, the Judicial Council has approved the term or word "YOU" to mean "You or anyone acting on your behalf includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf."



Depositions

- Who should be deposed and under what capacity?
- Who should represent the Franchisor deponent?
- What documents should be produced and under what conditions?



Document Production

- What documents to be produced
 - Local / regional or national?
- Under what conditions should the documents be produced?



Protecting the “Brand” by Limiting Discovery

- Timely, proper, and detailed objections
- Protective orders



SPECIAL CONSIDERATIONS REGARDING ACTIONS INVOLVING THE FRANCHISOR-FRANCHISEE RELATIONSHIP OR WHERE EXPRESS INDEMNITY OBLIGATIONS EXISTS

- Who will represent each entity?
 - Separate Counsel
 - Shared Counsel
 - Appropriate Waivers
- Coverages
- Unique Concerns regarding Discovery in Actions Involving Franchisor and Franchisee Relationships



Recommendations

- Prepare and distribute from both law department and claims risk management outside counsel detailed outside litigation guidelines that address who the client is, discovery and brand protection.
- Designate a "point person" to receive, review and assist in preparation of discovery responses.



Recommendations

- Outside counsel should be required to prepare and provide tentative, draft responses to discovery with sufficient "lead time" to permit the designated "point person" to gather responsive, review and analyze information and documents in advance of response date.
- Maintain bank of all corporate employees deposition transcripts.



Recommendations

- Develop and maintain bank of all briefs so that arguments and authorities in support thereof can be shared, refined and perfected.
- Documents that are produced subject to court order or stipulation of confidentiality should be retrieved upon resolution of case; a procedure should be established to monitor and enforce return of those documents or information, including but not limited to a motion to enforce protective orders, if any.



Recommendations

- If outside counsel is retained by an insurance company, either for the company itself or its franchisee, that counsel should be advised of policies and procedures in place with regard to protecting the "brand", including the foregoing.
- If the incorrect entity is named, require that outside counsel work to obtain the dismissal of the entity.



Recommendations

- Be careful of the "You" definitions when responding to discovery.
- Be mindful of whomever executes or verifies discovery of signs a declaration that they may be called upon to give a deposition.
- If a franchisee is sued and the franchisor is served with subpoenas, that counsel for the franchisor, not counsel for the franchisee should prepare responses or at least monitor what the franchisee's counsel prepares on behalf of franchisor.



Questions and Hopefully Answers

- Thank you for your time!

