Franchise Attorneys Speak Out About AAHOA's 12 Points

Point 9: Venue and Choice of Law Clauses.

By David G. Ross

If franchisees and franchisors are ever at odds, it's usually pretty apparent which party had the upper hand — and it isn't the franchisee. As franchisees know, their franchise relationship is governed largely by the underlying Franchise Agreement. That Agreement is written by and for the franchisor, whose main goal is to protect its own interests. A "well-written" Franchise Agreement, from the franchisor's perspective, clearly and exhaustively will spell out the franchisee's many obligations while committing the franchisor to relatively little. This fact alone overwhelmingly "stacks the deck" in the franchisor's favor in the event of a legal dispute.

As if that weren't enough, Franchise Agreements typically contain "dispute resolution" provisions that favor the franchisor further. Franchisors often draft these provisions to ensure them the upper hand regarding what type of "neutral" third party/parties will determine the victor of a formal legal dispute, what damages will be recoverable, and other "rules of the game." (Some of these are addressed in more detail in Point 8 of AAHOA's 12 Points of Fair Franchising.) One of the ways in which franchisors maintain an unfair advantage is through the use of "venue" and "choice of law" provisions. Point 9 addresses these issues.

Venue

Do not underestimate the importance of a Franchise Agreement's "venue" or "forum selection" clause — a clause that determines where franchisees will have to argue their cases. In Franchise Agreements, these clauses almost invariably require that all legal proceedings be held in the state in which the franchisor is headquartered, thereby giving the franchisor "home field advantage" and increasing franchisees' costs and inconvenience. Although the *franchisor* is the one that is financially much better positioned to attend legal proceedings on someone else's turf, the *franchisee* is the one who is required to do so. Such an unfair, onerous requirement makes it much more likely that franchisees will "cave in" when the time comes to discuss settlement.

Choice of Law

"Choice of law" provisions, on the other hand, require that disputes be governed by the laws of a particular state (usually the franchisor's home state), to the exclusion of all others. The laws of the franchisor's particular state might well be more pro-franchisor than those of the franchisee's. Further, the franchisor's state might have shorter "statutes of limitation"

— or time periods within which to sue — with regard to legal claims franchisees might want to assert. For example, a franchisee's state might permit it to file a claim for fraud within three (3) years of discovering its franchisor's deceitful behavior, whereas the franchisor's state might hold that the franchisee will lose its right to sue unless it takes action within two (2) years. (Please note, however, that some states might have a pro-franchisee statute that protects franchisees *regardless* of where the dispute is heard or what a Franchise Agreement's "choice of law" provision says. In that case, the Franchise Agreement might require the application of, say, Florida law to all claims *except for* those relating to violation of the particular state statute.)

The main problem with a "choice of law" clause that favors the franchisor's home state is that the franchisor will always have a better feel for the "rules of the game" than the franchisee will. Consider this hypothetical: In order to seduce potential franchisees, a franchisor's sales representative may have made fraudulent or misleading statements or promises about the franchise services that it would provide. This conduct worked, thereby enticing the franchisee into an oppressive and non-profitable franchise relationship. As a result, the franchisee lost money and was unable to pay its monthly franchise fees. The franchisor, knowing that its particular state had a two (2)-year statute of limitations for the filing of a fraud claim, waited until after that time period expired to sue the franchisee for breach of contract, knowing that it would be unable to file a counterclaim for fraud. (Although a franchisor might well use the pertinent "statute of limitations" to its advantage regardless of the state law that applies, the uniform use of one set of laws makes it that much easier for the franchisor to play this game on a regular basis.)

The "Point 9" Solution

Point 9 highlights one of AAHOA's efforts to even the playing field in franchisor-franchisee litigation. That point reads as follows:

"In the event a dispute between a Franchisor and Franchisee has not been resolved by participating in an informal, in-person meeting with authorized representatives from the parties, or by participating in mediation proceedings, *the party pursuing its claims in a court of law should do so in the county and state in which the subject facility is located. Further, any lawsuit or claims should be governed by the laws of the county or state in which the lawsuit or claims are filed*." (emphasis added)

This point, if adopted, would require the franchisor to come to the franchisee, thereby giving the *franchisee* the "home field advantage" and requiring the more financially able franchisor to assume the expense and burden of travel. Moreover, it would lessen the franchisor's inherent advantage further by subjecting it to the laws in which state the facility is located.

The requirements proposed by Point 9 would create a more equitable dispute resolution and thereby benefit everyone, not just franchisees. By contributing to a fairer litigation process, adoption of Point 9 would likely make franchisors a little less hasty in choosing conflict over dialogue. **ALB**

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