



Focus **on** Franchising

Published by the Franchise and Distribution Practice Group of Farrell Fritz, P.C., Attorneys at Law

Welcome!

We hope that all of our readers enjoyed the summer. Franchising usually takes a break during the summer months, but that wasn't the case this year. There was encouraging activity on all fronts, from selling franchises to starting new franchise systems.

We have some very interesting articles in this issue, and we hope that they will be of interest to all of our readers. We encourage feedback; please contact us with your comments and suggestions at franchise@farrellfritz.com. Enjoy the issue!

James M. Wicks, Esq.
Harold L. Kestenbaum, Esq.

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Survey Says: Two Keys To Improving Franchisee Performance

By Marc W. Horowitz

All franchisors want great performance from each of their franchisees. It's a matter of dollars and cents (because that's how franchises grow and stay profitable) . . . as well as a matter of sense! It's not hard to figure out that the more franchisees can produce at your point of distribution - their store or location - the more you make as the franchisor. So, the question is: **what can you do to help improve franchisee performance?**

Over the last few years, our firm has talked with a number of franchisors and more than 100 franchisees in a variety of industries (service, food and non-food). We learned quite a bit about some of the things that work, and others that don't, with regard to improving performance at the franchisee level. Here are two of the most significant things we learned:

1. It pays to listen.

One thing was blatantly consistent throughout our conversations with franchisees: their desire to be heard by corporate. Invariably, franchisees want to know that their voices are being listened to and respected; they need to feel that they have credibility with their parent companies. Most significantly, we found that the franchisees who believed their voices were heard and respected by the franchisor were usually the same ones who demonstrated an ability to operate successful units.

That is not to say that just because you listen to them, they will do well. It **is** to say, however, that if you **don't** listen to them, there is a greater likelihood that they will **not** do well. Consider the old adage that "you can't give what you don't have." Then think about how you want your end users to be treated by your brand representatives, your franchisees. The obvious conclusion: when franchisees are heard, so are their customers!

2. It's better to assist than enforce.

Another interesting dynamic seems to exist when franchisors dispatch their field representatives to visit the units. Some systems send out their reps with the best



By **Harold L. Kestenbaum, Esq.**

New FTC Rule Nowhere In Sight

The fall is upon us, the leaves are turning, and still no new FTC Rule. My best guess is that we will not see the final new Rule until the Spring of 2006. The government has bigger issues to deal with, and I am sure that this is not at the top of its list.

Some local news of interest: I have created a sub-committee of the New York State Bar Association's Franchise Practice Group, of which I am the Chairman, to look into revising the current New York State Franchise Sales Act. Many franchisors will be happy to hear that this project is under way. But if you think the FTC is taking its time, this project will also take a while. I will keep you current with the status over the next few issues.

From what I understand, the California IFE is sold out as far as booths are concerned, and a bigger turnout than last year is expected. This is good news for the current state of franchising!

Farrell Fritz Briefs

Our firm is pleased to welcome **Louis A. Scarcella** as a partner in our **Bankruptcy & Creditors' Rights Practice Group**. **Four new associates** have also joined the following departments: **David M. Curry**, Real Estate; **Franklin C. McRoberts**, Corporate & Banking; **Gabrielle R. Schaich**, Commercial Litigation; and **Kristina M. Wesch**, Bankruptcy & Creditors' Rights.

LITIGATION NOTES



Food For Thought: Is Nutritional Labeling On The Way?



By **James M. Wicks, Esq.**

The Federal Nutrition Labeling and Education Act ("Nutrition Act"), in effect since 1994, mandates disclosure of the now-familiar nutritional information on packaged food. That act, however, expressly exempts restaurants. That is, restaurants are not required to disclose the nutrition analysis or contents of their menu offerings. This exemption has been the source of discussion on the federal level, and

New York recently weighed in with a proposal from the Senate. Is nutritional labeling likely to be required in New York restaurants anytime soon? Maybe.

The bill recently introduced in the New York State Senate is similar to the Nutrition Act, except that it would expressly apply to "chain" restaurants (S.4551). An amendment to the bill later proposed by the Assembly would add language to ensure that the labeling obligation did not fall squarely on franchisees (A.5664A).

In sum, the current proposals would apply to "chain restaurants" - that is, restaurants with five or more locations in New York, or 10 or more in the United States. The bills would require menu and menu board changes. A printed report of calories, grams of saturated and trans fat, grams of carbohydrates and milligrams of sodium would be required to be posted.

To date, a major supporter of the proposal is the Center for Science and the Public Interest. Opposition appears to come from the New York State Restaurant Association. Stay tuned to see if either of these proposals indeed pass into law. For now, both bills seems to have been laid aside, but the issue seems far from dead.



Protecting Franchisor Rights Via Lease Addenda

By Robert E. Sandler, Esq.



As a successful businessperson, a franchisor is well aware of how critical the location of each franchise is to the overall success of the system. Yet, in most situations, it is the franchisees who will directly lease the real estate for their units. How, then, can franchisors protect their own interests and that of their franchisees with regard to real estate?

The answer is to use indirect controls by developing franchisor leasing requirements and tenant-oriented leasing standards. One effective strategy is a standardized franchisor lease addendum or rider to be added to the landlord's form of lease. This can be critical to negotiating beneficial leases for a franchisee in a cost-efficient manner, and in helping to ensure consistency for operating and administering multiple franchise locations.

These addenda should include the following basic provisions for the benefit of the franchisor:

1. The franchisor should have the right to receive notices from the landlord of any default by a franchisee, as well as the right to remedy the default before the landlord pursues any action against the franchisee.
2. The franchisor should have the right to assume the franchisee's interest in the lease if the franchisee defaults on the lease or its franchise agreement.
3. The franchisor should have the right to reassign its interest in the lease to a subsequent franchisee without the landlord's consent.
4. The franchisor should preserve the right to exercise an option for the lease, if the franchisee fails to notify the

landlord that it is exercising its option in a timely manner.

5. The franchisor should be protected from liability under the lease, unless the franchisor expressly assumes such liability in writing.

In addition to the above, franchisors should also make sure that the following basic tenant-oriented provisions are included in the franchisee lease:

1. Appropriate use and exclusivity provisions.
2. The right to put up building signage (both freestanding and window signage) without landlord's consent.
3. The right to make alterations to the building (both interior and exterior) without landlord's consent.
4. The right to remove signage, decor and other distinctive items representing franchisor trademarks upon the termination of the lease.
5. The landlord should not be able to claim interest in the tenant's personal property as part of the tenant's financing.

There may be other addenda that are appropriate, in cases where there are unique leasing issues, such as space leases or pad locations in shopping centers, downtowns or storefronts. By taking the time to develop comprehensive addenda, franchisors will protect their interest in successful locations, and help ensure that appropriate terms protecting the tenant are set forth in leases for the benefit of both franchisor and franchisee.

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Two Keys To Improving Franchisee Performance

(Continued from page 1)

of intentions - to support, to guide, to nurture, and to share “best practices” while assisting the franchisee in problem-solving on every level. In other organizations, field personnel are regarded as the “gestapo,” whose only role is to be compliance officers for the franchisor, to surprise the franchisee and “play gotcha” throughout their periodic visits.

Again, the significant thing we found in our interviews is that, when field reps were perceived as being there to help, franchisees not only welcomed them with open arms, but also reported that their sales were steadily improving and expressed interest in buying additional units.

Conversely, to no surprise, franchisees who perceived field reps as a threat and spy for corporate reported that they did not feel successful, had trouble making ends meet, and were not likely to buy another unit. A cynic could argue that they feel threatened and unsuccessful because they are weak franchisees. Yet, if they were helped to envision a successful future for their franchise and supported in reaching that goal, results might differ.

Consistently, franchisees asked for regular communication from corporate about the support available to them, including new product information. They also wanted their input about these matters to be considered. It’s no coincidence that in 100 percent of the franchises studied, franchisors reported that when they listened seriously to franchisee input, customer morale improved and franchisees became more optimistic about success. In every case, improved relationships between corporate and franchisees led to greater productivity on both sides.

Want to know more about how you can improve franchisee performance? Ask them or ask us! We’d be happy to help you to facilitate that.

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Events Calendar

November 4 - 6

West Coast Franchise Expo. For further information, go to www.wcfexpo.com.

November 10

New York State Bar Association program: Franchise, Distribution and Licensing Law. For further information, contact Harold Kestenbaum: phone, 516-227-0642; email, hkestnbaum@farrellfritz.com

December 2

Farrell Fritz Quarterly Franchise Forum. To reserve a place, contact Helen Rajcooar: phone, 516-227-0641; email, hrajcooar@farrellfritz.com.