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BET THE SYSTEM LITIGATION

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BET THE SYSTEM LITIGATION

I. WHAT IS BET THE SYSTEM LITIGATION (BTSL)?

Bet the System Litigation. As lawyers, we probably all have an idea of what we think that means. However, if you give any serious consideration to the phrase, you quickly will come to recognize that this could mean radically different things to different people. Do you Bet the System only when there will be a potential monetary award that will destroy the business? Or does Bet the System Litigation mean that your business model would be changed if the court found that a method of operation would need to be altered in order to be legal? Because the phrase could mean different things to different people, the authors find it necessary to begin with what is, perhaps, obvious – a definition of Bet the System Litigation.

A. For Franchisees, MOST Cases Involve The Analysis Laid Out In This Paper—Every Case Has The Potential To Involve The Franchisee Betting His Or Her Existence As A Franchisee.

Let's begin with full disclosure. The authors of this paper come from completely divergent viewpoints on many of the issues that we address below. However, all of us recognize that for franchisees, almost any case – and most certainly a termination case – contains components of a Bet the System analysis. Franchisees are typically risking their entire relationship when they consider any sort of litigation against the franchisor. Accordingly, much of the analysis set forth below concerning the franchisee view (in Section II, and to a lesser extent Sections V-VI) would be in play whenever a franchisee walks into a lawyer's office for potential representation.

B. This Paper Will Focus On Cases Of A Systemic Nature, Which Assume That If The Franchisee(s) Prevails, It Will Bring: 1) Extreme Changes In The Franchisor's Business Methods And/Or Model; 2) Extreme Economic Pressure Or Hardship On The Franchisor; Or 3) Both.

While a franchisee might be faced with the equivalent of Bet the System choices much more frequently than a franchisor, this paper primarily considers Bet the System cases for a franchisor. We believe that BTSL, properly defined, includes: cases where if the franchisee(s)

prevailed, the franchisor (1) would be forced to make radical changes to its business methods or model; (2) would face the prospect of going out of business or filing for bankruptcy protection because the damage award would exceed the assets of the franchisor; or (3) where both outcomes are possible. Examples of potential BTSL would include cases alleging systemic fraud by the franchisor (through purportedly faulty FDD disclosure or otherwise); cases claiming that the franchisor's business model simply does not work on a large scale; and cases charging that the franchisor's contractual requirements violate either statute or the public policy of a state (*e.g.*, a franchisor requires franchisees to hire "contract employees" to make its economic model work, but states will not allow the franchisees to treat their employees in this fashion, thereby completely upsetting the franchisor's essential business model).

Because the authors each bring a different perspective, we believe it would be most helpful for us each to describe our experience, approach, and considerations when BTSL arises. Section II of the paper reviews the proper analysis for the franchisee lawyer when a prospective client presents facts that might give rise to Bet the System claims. Section III then shifts to the view of the franchisor's in-house general counsel, when the franchisor is first served with the complaint in a Bet the System case. Section IV addresses the overall role of outside litigation counsel for the franchisor in BTSL, and Sections V-VI discuss, from all three points of view, important considerations for pre-trial, trial and appeal of BTSL.

II. STEPS IN A FRANCHISEE/PLAINTIFF'S DECISION TO BRING BTSL

It is 2:00 on a Wednesday afternoon, and a prospective client has left a voicemail while the franchisee lawyer was out to lunch, indicating that the franchisee was having some problems with his franchisor, and that he would like to take a few minutes of the franchisee lawyer's time to discuss the situation. While the prospective client does not say it specifically, he intimates that many franchisees are unhappy in the system, and that there might be lots of clients waiting in the wings if the franchisee lawyer is interested in jumping into the case.

Returning the call, the franchisee lawyer speaks to this prospective client. In the following interview, which typically lasts anywhere from a half hour to an hour and a half, the franchisee describes the history of his relationship with the franchisor, including how he learned of the franchise opportunity, his conversations with the franchisee sales folks, his experience at Discovery Day, and his later experience, exemplified by what he perceives to be a lack support from his franchisor, and an economic model that is causing him to lose a substantial amount of money every month. A franchisee will typically ask what his chances of success are, and whether the lawyer is willing to work for a contingent fee, based on just this conversation. Of course, no prudent lawyer would answer either one of these questions without knowing a lot more about the facts. In response to the lawyer's instructions, the franchisee sends counsel his contract, his profit and loss statements for the last several applicable periods, and any "dispute-related correspondence" with the franchisor, whether it is related to the franchisee's complaints, or more typically, to notices from the franchisor that the franchisee is in default. At this point, a serious analysis of the franchisee's situation can be undertaken.

A. The First Step: WHO Is The Plaintiff, And Is BTSL In The Plaintiff's Best Interest?

During the course of the initial conversation with the franchisee, the franchisee said expressly what he intimated in his voicemail – that there are literally dozens of similarly-situated franchisees who he has been conversing with, all of whom have been having the same sorts of problems. Not surprisingly, prospective franchisee clients often make these types of representations to franchisee lawyers – all based on the belief that the more potential clients that the franchisee can bring to the attention of the lawyer, the more likely that the lawyer will be interested in the case. Ironically, the exact opposite may be true.

If, after review, the substantive case really does involve numerous potential plaintiffs/franchisees, the franchisor has the financial capability to absorb claims of several franchisees, and the franchisees are all of the same mind about how the case can proceed,

then it might make sense to investigate a potential claim by multiple franchisees. However, a franchisee lawyer cannot automatically jump to that conclusion. Instead, a multitude of factors must be considered when answering the question "who is the plaintiff?"

1. <u>The Single Plaintiff Analysis</u>

Assuming for the moment that the substance of the prospective client's claims would indeed support a potential Bet the System case against the franchisor, the pros and cons of proceeding with that individual as your only plaintiff must be considered.

Obviously, there are some advantages if it is possible to prosecute a claim on behalf of multiple franchisees simultaneously. First, the economic advantages of combining plaintiffs are clear. It is unlikely that the additional incremental expenses of adding plaintiffs will compare to the extraordinary cost savings that a single plaintiff would enjoy if, for instance, 15 franchisees were paying the lawyer fees and costs that a single franchisee would otherwise have to bear.

Likewise, with respect to the "muscle" the franchisees may wish to flex, there is not only strength (and anonymity) in numbers: there is gravitas as well. Frequently, franchisors are much more willing to talk to a franchisee lawyer who represents multiple franchisees in a matter. Conversely, a single franchisee who complains will often be marginalized, or hear the franchisor insisting that this franchisee's case is somehow "unique," and that the matter does not, in fact, raise any systemic issues.

Surprisingly, however, there are just as many negatives to taking on a group. While it may be so that a single franchisee will have difficulty financing a full-scale war against the franchisor, the franchisor is also much less likely to settle with a group than with an individual franchisee. This is true for several easily apparent reasons. For instance, the cost of settling with one franchisee will be much smaller than it would be with a group. Additionally, a franchisor is not forced to make any significant changes if it can simply pay off an individual franchisee to drop his claim, sign a release, and move on. When an entire group is involved, that is a much more difficult prospect.

Likewise, the "group" gravitas might get lost in front of a court. It is quite difficult to keep the stories of different franchisees separate, and, to the extent that the franchisees are located in different states, the laws affecting the claims of the franchisees may be different. Accordingly, there is simplicity in the single plaintiff approach that could never be found in any sort of "group" action.

Nonetheless a franchisee and his lawyer may decide that it would be better for the franchisee to proceed in concert with other franchisees. Accordingly, we now turn to the different types of "group action" that a lawyer may consider.

2. A "Group" Action?

The franchisee lawyer typically should consider at least these three forms of group action: (1) the "one action, multiple plaintiffs" approach; (2) a putative class action; and (3) an action by an association. There are pros and cons to each alternative.

a. One Action, Multiple Plaintiffs

While there are several iterations of a "group," a frequently utilized tactic is to bring all of the franchisees together in one action, naming each franchisee as an individual plaintiff. This approach is attractive for many reasons, although it does have its drawbacks.

On the plus side, the franchisee lawyer does not have to worry about the downsides of either class action (making sure that you can actually get a class defined and certified) or an association action (where standing issues can create big headaches). Additionally, if the dispute resolution clause is not drafted properly, franchisors who try to avoid "consolidated" actions cannot get out of this type of an action – this is ***not*** a consolidation.[1]

However, there are significant drawbacks to this approach as well. For one thing, and not surprisingly, it is very difficult for a lawyer to "herd this many cats." Franchisees often have

[1] *See American Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107 (6th Cir. 1991) (noting that a consolidation, by its very definition, involves the unification of at least two separate proceedings); *Baesler v. Cont'l Grain Co.*, 900 F.2d 1193 (8th Cir. 1990) (same); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984) (same).

disparate views of how they would like the case to proceed, disparate views of where they would like to see it end, and disparate views on how they would like to get from the starting point to the finish line. This type of action also subjects the plaintiff's lawyers to a massive amount of discovery management – as the defendants will be entitled to take written discovery and depositions related to each individual plaintiff. In short, if you are not particularly well-organized, this approach can be a management nightmare.

From the client's perspective, this approach is probably the most desirable. It gives every franchisee a say in how their case is handled (as opposed to a class action or suit by an association), and keeps their costs down to the maximum extent possible.

One final note on the difficulty of settling this type of case: not surprisingly, franchisors generally want to settle Bet the System cases in one-fell-swoop. There is little incentive to settle with a portion of the plaintiffs, if a dramatic threat to the system remains after those cases have been resolved. Accordingly, franchisors regularly take the approach of "settle all or settle none." Besides the obvious disadvantage for a particular plaintiff who wants to settle, it also has the potential of creating conflicts for the franchisee lawyer among his client group. Representing each individual plaintiff separately requires the franchisee lawyer to be steadfast in following the directions of each individual client, and not sacrificing the interests of one client in favor of another. If, therefore, a franchisee lawyer cannot gain consensus about a particular settlement, settling cases that are structured this way can be extraordinarily difficult.

b. <u>The Putative Class Action</u>

Class actions, on the other hand, offer the franchisee lawyer a significant advantage in case management. There are only a few clients to deal with directly, and yet they are still negotiating on behalf of a large number of putative plaintiffs.

As for the downside, many is the case where a franchisee lawyer has invested significant time, money and effort, only to have a court reject class certification.[2] Additionally, these cases can be extraordinarily expensive to fund (as there is no franchisee who is paying on behalf of everyone), and, therefore, if the case does not settle, the franchisee lawyer might be betting his own existence on the outcome of the case. Perhaps that is why so few franchise class actions have been brought – even though at first blush, BTSL would seem to lend itself to class action-treatment.

c. Action By An Association

Finally, assuming that the system has a franchise association, a franchisee lawyer may, under certain circumstances, bring claims on behalf of all the franchisee members, by representing the association as a plaintiff.

As a general rule, a franchise association will have standing if: (1) the association's members would otherwise have standing to sue in their own right; (2) the interests the association seeks to protect are germane to the organizational purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[3] Depending on the nature of the case, associational standing may or may not be possible.

Assuming that the association can gain standing, the "association as plaintiff" approach offers many of the advantages of the class action, without the procedural drawbacks. The franchisee lawyer will take its marching orders from a small group of franchisees; the association, likely through dues or some other collection mechanism, will collect money from a

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[2] *See, e.g., Vincent De Giovanni, Mariette Barros, and All Other Similarly Situated v. Jani-King Int'l, Inc.*, BUS. FRAN. GUIDE ¶ 14232 (D. Mass. 2009); *MMO Enters. Ltd., et al. v. Baskin Robbins USA Co., et al.*, BUS. FRAN. GUIDE ¶ 11732 (N.D. Ohio 1999); *Carol Hall, et al. v. Burger King Corp.*, BUS. FRAN. GUIDE ¶ 10127 (S.D. Fla. 1992); *McNerney, et al. v. Carvel, et al.*, BUS. FRAN. GUIDE ¶ 12056 (Conn. Super. Ct. 2001).

[3] *National Franchisee Ass'n v. Burger King Corp.*, BUS. FRAN. GUIDE ¶ 14387 (S.D. Fla. 2010) (citing *Hunt v. Washington State Apple Advisory Comm'n*, 432 U.S. 333, 343 (1977).

large number of franchisees to fund the case; and, frequently, this approach will also make the case easier to settle, again because there are only one or two decision makers instructing the lawyer.

However, to end where we began, the standing issue is a difficult one. Franchisees with Bet the System claims frequently allege fraudulent misrepresentation, and those cases often can not survive the standing challenge.[4] Additionally, if a claim is for breach of contract, the franchise agreements at issue must be identical for the association to have standing to sue.[5] The relief sought must also be fairly uniform—effectively making it impossible for an Association to seek damages on behalf of its members, and instead limiting the relief on Association claims to injunctions and declaratory judgments. Finally, to the extent that any or all of the claim relies on franchisee protection statutes, and the franchisees are not all in the same state – it is unlikely that the association will be able to pursue the claim.[6] In short, franchisee lawyers must be careful when choosing their initial plaintiff, as there are pitfalls associated with virtually every option.

B. Procedural Issues To Be Addressed

Having determined who the plaintiff is (although admittedly, the procedural and substantive issues may influence that choice – in other words, these decisions probably are not made in a linear fashion), we now turn to the inquiries that the franchisee lawyer must make about procedural issues when he or she is deciding to proceed against a franchisor in BTSL. Not surprisingly, most of the information the franchisee lawyer will need will be in the franchise

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[4] *See e.g. DDFA of S. Fla., Inc. v. Dunkin' Donuts, Inc.*, No. 00-7455-CIV, 2002 WL 1187207, at *7 (S.D. Fla. May 22, 2002) (holding that the franchise association lacked standing because plaintiffs' allegations of tortious conduct would require individual determinations and could not be considered without the individual participation of the association's members).

[5] *Dunkin' Donuts Franchised Rest. LLC v. Shrijee Inv., Inc.*, No. 08-12836, 2008 WL 5384077, at **11-12 (E.D. Mich. Dec. 23, 2008).

[6] *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 212 (D.N.J. 2003) (holding that the association lacked standing because a claim for damages under various state statutes would require the individual participation of members).

agreement. Because different franchisees may have different franchise agreements, at least an initial decision about a particular plaintiff will be helpful in beginning the inquiries necessary regarding procedural issues that must be considered.

1. Are There "Pre-dispute" Requirements That Must Be Met?

The starting point should always be the dispute resolution mechanism contained in the franchise agreement. Because so many of the decisions that the franchisee lawyer makes are controlled by what the parties have agreed to beforehand, it is critical that the franchisee lawyer understand the steps that must be taken in order to avoid getting sidetracked on procedural fights that will detract from the ultimate resolution that the clients seek.

As most franchise practitioners are aware, many franchise agreements contain "pre-dispute" requirements. Frequently, these provisions require that the franchisee(s) place the franchisor on notice of any complaints, providing the franchisor with an opportunity either to remedy, or at least speak to, the issues raised by the franchisee. Additionally, many of these clauses require pre-filing direct negotiation and/or mediation. It is this particular franchisee lawyer's recommendation that, to the extent that you do not forfeit advantages your client might otherwise have (including your client's ability to choose the forum and/or be the plaintiff), that these contractual mechanisms be followed to the letter. This will help avoid being slowed down in your initial efforts to resolve and/or file your claims.

To make certain that franchisees do not, by failing to follow these notice requirements, lose procedural rights that they might otherwise have, the franchisee lawyer should propose to the franchisee entering into a standstill and tolling agreement as part of this pre-dispute discussion. Any franchisor who refuses to entertain the idea of a standstill and tolling agreement as part of pre-dispute discussions sends a loud and clear signal that the pre-dispute mechanisms are meant to prejudice the franchisee somehow (whether it be to take away the franchisee's procedural rights, or alternatively, allow enough time to pass that the statute of limitations runs). If a franchisor refuses to entertain these ideas, it is frequently our

recommendation to our clients that they ignore the contractual requirements and take their chances with the court. If the franchisor wants to play hardball right out of the blocks, we see no reason to tie the franchisee's hands behind their back early in the proceeding.

2. Is There an Arbitration Clause, And If So, What Issues Does It Present?

For several reasons, an arbitration clause is one of the most vexing franchise agreement provisions for any franchisee lawyer contemplating a claim.

First, arbitration clauses are amazingly diverse. Each one is unique, and it seems that all transactional lawyers who have ever written an arbitration clause think that they have some special insight into how the arbitration might be fashioned in a way that will somehow either lead to a better result for the franchisor or be a "better mousetrap" than the standard form arbitration. Differences include not only the standard variations related to the number of arbitrators, and the attempted limitations on the type of claims the arbitrators may hear, but also attempts to define discovery rights, appellate rights, and virtually every other type of right that one can imagine between the beginning and end of the proceeding. Because courts are likely to enforce most arbitration agreements, it is critical that franchisee lawyers note and understand each element of the arbitration clause.

However, because courts perceive some franchise agreement arbitration clauses as overreaching in their attempts to strip franchisees of rights (including rights related to shortening of statute of limitations, deprivation of substantive rights under contract or statute, or deprivation of procedural rights related to discovery and/or forum of the arbitration, *e.g.*, consolidation, class action, etc.), a franchisee lawyer must consider whether to attempt to avoid arbitration altogether. Under the right circumstances, an arbitration clause can be voided – particularly if it strips franchisees of significant substantive rights.[7] But it is far more likely that the challenge to

[7] *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1292-93 (9th Cir. 2006).

arbitration will fail.[8] Thus, franchisee lawyers should be wary of tilting at windmills, and should save their challenges to arbitration for circumstances where, after careful consideration of the law and the facts, they have real reason to think that they will prevail.

In BTSL, the attempt may be warranted if the franchisee lawyer can convince the court that an appropriate remedy simply cannot be had in arbitration. However, and not surprisingly, especially when the franchisor has chosen arbitration as a safeguard against a runaway jury (thereby diminishing the possibility that the franchisor will ever have to face BTSL), you can bet that the fight over whether or not the case is arbitrable will be fierce.

3. Is There A Choice Of Law Clause, And If So, What Are The Implications?

Another critical feature of the franchise agreement that the franchisee lawyer must examine is the choice of law provision.

If a franchisor's transactional lawyers are doing their job, the franchisor will have chosen the law of a state that diminishes the likelihood of BTSL. Such states will generally not have enacted franchise protection statutes or little FTC acts, and their courts will often be hostile to a liberal view of the covenant of good faith and fair dealing. A franchise agreement with a choice of law provision requiring all disputes to be resolved under the laws of a state that fits this description will make BTSL much less palatable for a plaintiff-franchisee. Of course, if the franchisor is truly engaged in systematic fraud, for instance, very few states will protect the franchisor from such egregious conduct.

It is crucial to remember that the choice of law analysis is not as simple as looking at the contract. Franchisees are frequently entitled to the protection of the laws in their own state – particularly if their state has a franchise act, with a "non-waiver" provision, barring the enforcement of a choice of law clause that would otherwise strip the franchisee of rights under

[8] *Voicestream Wireless Corp. v. U.S. Commc'n, Inc.*, 912 So.2d 34, 37 (Fla. Dist. Ct. App. 2005).

the statute.[9] Moreover, a narrowly drafted choice of law provision that restricts itself to the "construction and interpretation" of a contract will generally not be found to govern fraud and other tort or statutory claims that do not involve the construction of the franchise agreement, but instead arise directly from the parties' conduct.[10]

Franchisee lawyers should also be certain that they understand the public policy of the states where their clients reside, particularly as that public policy relates to franchisees and consumer protection. Because the sale of franchises can frequently fall under the consumer protection law of a state, a hostile choice of law provision might be defeated through this mechanism.[11]

4. Is There A Venue Clause, And Will It Be A Significant Impediment To Resolution?

Finally, and somewhat less important, a franchisee lawyer must understand what the venue clause says.

In this franchisee lawyer's experience, venue rarely makes a difference, except to the convenience of the parties and/ the expense associated with bringing the claim. Justice is about the same from place to place (although, there are obviously extremes on both ends of the ideological spectrum in various parts of the United States).

When considering a claim of the magnitude generally associated with BTSL, while cost is not an unimportant factor, it is certainly less important than it would be in a single unit claim with a franchisee who only makes $40,000 a year. In other words, to the extent that franchisors insert venue clauses as a way to discourage franchisees from bringing claims, decisions related to BTSL will usually not be driven by venue.

C. How Do You Analyze The Substantive Claims?

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[9] *See, e.g.*, Maryland Franchise Act, MD. CODE ANN. § 14-226.

[10] *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 171 (9th Cir. 1989).

[11] *Kinnard v. Shoney's, Inc.* 100 F. Supp. 2d 781 (M.D. Tenn. 2000).

Of course none of the foregoing will matter unless the franchisee lawyer feels fairly confident about the substantive claims that he or she is contemplating. While different lawyers may approach this differently, at the end of the day, there are at least three component pieces that all lawyers must closely examine before they proceed.

1. What Does The Contract Say?

Because franchises are a creation of contract, the place to begin is the written agreement. Besides looking at the procedural provisions discussed above, it is probably most critical, for substantive analysis, that the franchisee lawyer pay particular attention to the integration clause. Franchisors often assume that a franchise agreement integration clause bars consideration in litigation or arbitration of other communications or practices which might otherwise affect the relationship. This is a dangerous, and often erroneous, assumption. Courts often take into account, under a variety of legal theories, what the parties' "real agreement" is. Franchisee lawyers are regularly successful at convincing courts to consider the parties' oral communications, course of dealing, custom and practice, and other conduct and statements outside the written agreement – even when the written agreement contains an integration clause.[12] Additionally, integration clauses, properly applied, will rarely bar a fraud claim.[13]

Accordingly, when faced with potential BTSL, franchisee lawyers must investigate at the very outset their ability to circumnavigate the integration clause – which will almost certainly be the franchisor's first, and most substantive, line of defense.

2. Is There Potential Statutory Protection?

A franchisee lawyer's best friend, whether in BTSL or otherwise, is statutory protection. A franchisee plaintiff from a state that has enacted a statute to protect its citizens against

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[12] *Allapattah Serv., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1308 (S.D. Fla. 1999).

[13] *Ramada Franchise Sys., Inc. v. Tresprop, LTD.*, 188 F.R.D. 610, 616 (D. Kan. 1999).

wrongful acts by a franchisor will have substantially increased leverage – indeed, franchisors committing systematic violations of franchise protection statutes will, by and large, face serious trouble.

Key among the potential benefits of statutory protection is a lowering of the reliance requirement for fraud claims,[14] and the existence of clauses that require a franchisor to refrain from engaging in unreasonable conduct.[15] While it is difficult to discuss the types of claim that might be brought here in a vacuum, suffice it to say that these types of provisions are broad enough that franchisors could have a very difficult time defeating either one of them.

Moreover, franchise protection statutes can offer still more leverage because the franchisee-plaintiffs who prove statutory violations can recover their attorneys' fees.[16] This will increase the "Bet the System" stakes for a franchisor that chooses to fight the claim, rather than attempt to settle it somewhere along the way.

As a franchisee lawyer, this author can state with certainty that he is always looking for "leverage" in every case he handles. Because most leverage has been stripped from the franchisees before the franchisee lawyer ever gets involved (through one-sided provisions of the franchise agreement), these franchise statutes, with the potential recovery of the franchisee attorneys' fees, achieve their goals of helping to level the playing field between franchisor and aggrieved franchisee.[17]

3. <u>What Common Law Claims Might Exist?</u>

Besides studying the contract and the potentially applicable statutes, franchisee lawyers must also examine the full range of potential common law claims. These include claims

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[14] *See, e.g.*, *Morris v. Int'l Yogurt Co.*, 729 P.2d 33, 40-42 (Wash. 1986).

[15] *See, e.g.*, IND. CODE § 23-2-2.7.2 (it is unlawful for a franchisor unreasonably to fail to comply with its duties under the franchise agreement or discriminate unfairly among its franchisees).

[16] *See, e.g.*, *Tuf Racing Prod., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585 (7th Cir. 2000).

[17] *Bitronics Sales Co., Inc. v. Microsemiconductor Corp.*, 610 F. Supp. 550, 556 (D. Minn. 1985).

sounding in equity, including promissory estoppel, unjust enrichment, and equitable estoppel, as well as claims sounding in tort, including tortious interference with contract and/or prospective economic advantage. Any or all of these may be appropriate in the proper case. And, as discussed above, fraud is always a key potential claim.

These claims are important for a number of reasons. The equitable claims, if successful, will entitle the franchisee to remedies, including injunctions, that may not be limited by the franchise agreement. The tort causes of action might entitle the franchisee to bring a claim for punitive damages – a more likely occurrence in BTSL, where the conduct complained of is some sort of systematic wrongdoing.[18]

D. The Business Question—How the Plaintiff's Lawyer Approaches The $$ Question?

From the franchisee perspective, the economics of BTSL can be very, very complex. On the one hand, the potential upside for a franchisee lawyer's firm, particularly one that is willing to consider a contingent fee arrangement under the right circumstances, is very tempting. When a franchisee, or group of franchisees, walk in with a substantively viable claim, which includes statutory violations, the potential right to recover attorneys' fees, and a franchisor who has the financial wherewithal to pay a significant judgment, the prospect of a premium can be quite appealing. However, in addition to the substantive and procedural hurdles reviewed above, some significant economic factors must be taken into account before a contingency, or any other alternative to straight hourly billing, can realistically be considered.

First, the franchisee lawyer must feel extremely confident in the outcome, not only on liability, but on damages and collectability, before something other than straight hourly billing can seriously be considered. Because the vast majority of lawyers are not formally trained in the correct assessment of damages, this will require either a consultation with an expert early

[18] *Hawkinson v. Bennett*, 962 P.2d 445 (Kan. 1998).

on or some significant research into the value of the case. That in itself may be a significant deterrent to considering a contingency.

Additionally, even if it appears that the claim is viable (good facts on liability and damages and confident that a large judgment would be collectible), either the franchisee lawyer or the clients, or some combination thereof, must be willing to front the costs of litigation like this – and that can be formidable.

We discuss below the importance of qualified experts, and experts are the single largest cost in a case like this. It is not unusual for an expert who has to deal with multiple plaintiffs to charge anywhere from $150,000 to $300,000 for their work – and that is money that someone has to pay irrespective of the outcome.

Additionally, in the event of an arbitration clause, the costs associated with arbitrations, particularly if there is a panel, can also run into the hundreds of thousands of dollars. Most recently, this author was involved in an arbitration that involved a significant number of expensive experts, and an arbitration panel that cost the parties in excess of $750,000. Very few franchise associations, and far fewer franchisees, will be able to stomach the idea of funding a case where the costs alone (not counting anything for attorneys' fees) can exceed a half-million dollars. Therefore, if a franchisee lawyer's firm is unwilling or unable to front these costs, there may be no alternative but pay-as-you-go billing for both fees and expenses.

Of course, pay-as-you-go billing also creates its own problems – as adding attorneys' fees to the mix only increases the costs to the franchisees.

It is a difficult situation, and one that is difficult to discuss in a vacuum. Each case is different, and therefore, there are a panoply of fee arrangements between franchisees and their lawyers. Suffice it to say that the client will almost always desire a contingency, and that arrangement might be in the best interests of the lawyer as well – although that is never clear until the outcome of the case.

E. The End Game—What Is The Objective And How Can You Get There As Effectively And Efficiently As Possible?

Something that far too few lawyers consider early in the case, but should likely be discussed in the very first conversation between the lawyer and the prospective client, is the question of the end-game. Knowing what the clients want, having an opportunity to reflect on that goal, advising the clients whether the goal is realistically obtainable, and if not, what the lawsuit or arbitration can in fact accomplish – all of this is obviously crucial to forging an effective (and harmonious) attorney-client relationship. Additionally, knowing what the franchisee's goals are will help answer a couple of other questions that are necessary at the outset of BTSL.

1. The Pros And Cons Of A Pre-Filing Settlement Strategy

How to approach the franchisor initially is a delicate question for many franchisee lawyers. There is a prevailing view (one to which this author does not subscribe), that inviting settlement discussions early may be seen as a sign of weakness. Therefore, franchisee lawyers are frequently slow to engage franchisors and their counsel in pre-filing settlement negotiations for fear of being underestimated or marginalized (of course, this also can potentially expose the franchisees to losing procedural advantages related to venue and status as the plaintiff).

However, failure at least seriously to consider pre-filing settlement strategies is a disservice to your client. At this point in the life of the litigation, franchisees have leverage that they will not have once they file the suit – particularly if the franchisor is sensitive to the material that it must disclose in its FDD. Approaching the franchisor, either through a phone call or more appropriately through a detailed demand letter (which may or may not append a sample complaint) will frequently lead to serious discussions between the parties that may avert a lawsuit altogether. If you believe that the job of a lawyer is to resolve the client's problems effectively and efficiently, this is a good result. However, as mentioned above, there are risks

associated with this approach. The franchisor may take the demand letter and immediately file a declaratory judgment action, with the franchisor as plaintiff, in a court where the franchisee would prefer not to litigate. Therefore, whether to engage the franchisor in pre-filing settlement discussions will always be a case-by-case decision, requiring significant research by the franchisee lawyer on who the opposition lawyers are likely to be, what the personality of the franchisor principals are, and other factors that would contribute to predicting how the franchisor will likely respond to the demand letter.

2. The Shoot First, Ask Questions Later Tactic

If your research about the franchisor reveals that you are likely to lose significant substantive rights by sending a demand letter, or your client feels that it needs to send a stronger signal than a demand letter might convey, the franchisee lawyer may not have any real viable alternative but to file and serve the lawsuit. This "shoot first and ask questions later" approach may or may not be conducive to opening productive settlement negotiations, depending on the personality of the franchisor. What this approach will do is start the parties (more precisely, their counsel) at least talking to each other, even if those "conversations" involve nothing more than Rule 26 initial disclosure requirements or the selection of an arbitrator. One important side note here – franchisors who insert contractual statute of limitations clauses in their franchise agreements frequently will strip franchisee lawyers of the opportunity to take a measured and reasonable approach. Moreover, once an arbitration demand is filed (assuming that an arbitration clause exists), it is very difficult for the case to be shut down without the franchisee or his lawyer losing significant money because of the large filing fees generally required for big dollar arbitration claims. Accordingly, if you are a franchisor with both a contractual statute of limitations clause and an arbitration clause, you are probably committing any franchisees who have a complaint against you to filing their claims and sticking to their guns. Once that commitment has been made, it is very difficult to back up and recover any funds from most arbitration organizations.

In short, franchisors that are subject to receiving a complaint, without any warning, understandably may feel shell-shocked, and get defensive right out of the blocks. However, franchisors and their lawyers need to stop and consider the position they place franchisee lawyers in when they insert contractual SOL clauses. The lesson: be careful what you ask for.

3. A Modified Approach

A potential modified approach, assuming that the jurisdictional requirements can be met, is for the franchisee plaintiffs to file a lawsuit (thereby securing all the first-to-file rights), and then sending the demand letter, a courtesy copy of the complaint, and a standstill and tolling agreement. If the franchisor agrees to the standstill and tolling agreement, the franchisees can quickly dismiss the complaint without prejudice under Federal Rule of Civil Procedure 41 or a state court analog. This will allow the franchisor to make some choices about how it wants to approach the case: does it want to forward it to counsel, and refuse to enter into this standstill and tolling agreement, and thereby force the franchisee group to serve the complaint and commence the litigation in earnest; or would it prefer to have the litigation dismissed, and enter into serious negotiations with the franchisees? By offering the franchisor these sorts of choices, franchisee lawyers and their clients can show that they are indeed serious about proceeding with this significant threat to the franchisor, but allow the franchisor to minimize that threat in a way that is conducive to a potentially amicable negotiated (and early) resolution.

III. JUST ABOUT EVERYTHING OUTSIDE COUNSEL NEEDS TO KNOW ABOUT WHAT GOES ON INSIDE THE WALLS OF FRANCHISOR CLIENTS WHEN THE BIG LAWSUIT IS SERVED!

You are General Counsel of a franchisor. It is Friday morning, and an email arrives from your registered agent; you open it to find a complaint filed in California state court. There are eleven plaintiffs and your company is the defendant. You note that the document is a weighty one, nearly 100 pages in length with 25 plus counts; and it alleges a putative class. You immediately ask your paralegal to search the company's databases to determine if all of the

plaintiffs are your franchisees (or franchisees of your masters), and whether they are active or terminated.

You recognize a few names – rabble rousers who have been stirring up your franchisee base for some time now using the franchisee association as a platform. Your assistant confirms that the plaintiffs are a combination of current and former franchisees from all over the country; so you are looking at a possible nationwide class.

The claims run the gamut from breach of contract, common law fraud, disclosure violations (little FTC claims), statutory unfair and deceptive business practices to a "private attorney general" claim under § 17200 of the California Business & Professions Code, an onerous statute that would permit recovery of all the money that your company collected from its California franchisees as a result of the alleged unfair business practices, and the greatest concentration of your franchisees is in California.

What do you do now?

You alert the executive team, e-mailing a copy of the complaint and directing your assistant to schedule a meeting of the Executive Committee for Monday morning. You also forward the complaint to the staff attorneys who will work on the case with you; and direct them to research and provide you as much information as they can possibly gather about the named plaintiffs so that you can have a meaningful discussion with the Executive Committee on Monday, and with your outside lawyers. Your most pressing query: Who are the key custodians of relevant documents? You want your team to identify for you all employees who may have interacted with the plaintiffs.

A. Removal: Is It An Option?

Next, you read the allegations pertaining to the plaintiffs to determine if the case can be removed to federal district court. Your company is a Delaware corporation, and considering the size of the investment that each of the named plaintiffs made to acquire their franchises, you conclude that the requisites of the federal diversity statute are met. There is a short window of

opportunity for removal, and you need to discuss the pros and cons of removal as soon as possible with your outside counsel.

B. Document And E-Mail Retention Holds

You have known for a while about the small group of malcontents trying to rally the franchisees; but neither you nor the Executive Committee thought the rumblings were very serious. The business people were addressing the issues, and endeavoring to placate those franchisees who were making noise. Thinking that this was a mere blip on the radar, it did not even occur to you put a hold on document destruction. Your company has well established document retention policies in place for both hard and electronic files; and purging is routinely performed according to long ago established schedules.

Now, you're concerned. How long ago did that group of franchisees start complaining? What document destruction has taken place since the issues first came to your attention? Should you reasonably have anticipated that these disgruntled franchisees would sue? You make a note to discuss with outside counsel.

You retrieve the document retention policy from the company's intranet. You conclude that a scheduled hard document purge has likely occurred since the date that you first learned that there was trouble brewing; but, to your great joy (or not), the IT Department's scheduled electronic file maintenance has not taken place. You immediately call the CIO and direct him to suspend maintenance until further notice.

You confirm your directive with an e-mail to the CIO and the IT Director, and invite them to a meeting on Monday morning. You are concerned because you are aware that there are employees within the company whose e-mail bypasses the main server and is housed on their hard drives; and you want to know what IT can do to capture e-mail of those employees who interacted with these plaintiffs; and you also need to know if IT can resurrect the e-mail of departed employees who may have touched the plaintiffs. Another critical issue that you want to discuss with IT is the manpower it will take to search backup tapes should it be necessary;

whether outside forensic experts might be needed, and what that might cost. Will you need to purchase another server? Your conversation with IT may be premature; but you need certain basic information in order to have a meaningful discussion with outside counsel; and to be in a position adequately to brief counsel in preparation for the FRCP 26(f) conference with opposing counsel.

But you also need to know right now what hard documents need to be preserved. The head of each department that touched each of the named plaintiffs in any way must be notified. Finance comes first to mind. You shoot off an e-mail to the CFO and Finance Director identifying the plaintiffs and directing the suspension of all scheduled document destruction until further notice – regardless of whether the documents are hard or electronic. You note in your e-mail that this directive may be further refined by the Legal Department; but for the moment nothing may be destroyed.

Have any of the plaintiffs been touched by the Legal Department? You send out a query to all staff attorneys and paralegals asking if they recognize any of the named plaintiffs; and if they do, directing them to gather all files (hard and electronic). The Compliance Department must be directed to gather (from storage if necessary) and preserve all files that pertain to the plaintiffs' purchases of their franchises; and, if not already done, to image those files and post to an ftp site created to house all documents gathered from throughout the company.

You meet that afternoon with your legal team to discuss their preliminary findings. The employees who would have had meaningful interaction with each of the plaintiffs are identified. One of your staff attorneys has drafted a formal litigation hold memorandum addressed to heads of each department where the identified employees work. A discussion ensues about whether the memorandum should likewise be directed to the actual employees. Someone expresses concern that rank and file employees may view the direction to preserve documents as a mandate to destroy documents. (It seems that some members of your staff remember Enron.) You note her concern; but agree that the employees must likewise be notified, and edit

the memorandum so that there can be no mistake about the meaning and intent of the litigation hold.

C. The Executive Committee Meeting

It's Monday morning, and the five members of the Executive Committee are gathered around the conference table in the CEO's office. There are lots of questions; most prominently – how could these ungrateful cretins say these things about our company? Tempers are hot; the weekend having been spoiled by the Friday arrival of the Complaint.

The CFO wants to know how much this is going to cost. She knows a small local firm (they handled her divorce and she knows them to be mad dogs) with low hourly rates (in the $150/hour range), and wants to introduce you to them. You roll your eyes.

The CEO and COO are concerned about the distraction that this litigation will cause among the people charged with operating the company; and they want to know how you are going to minimize interruptions to the business. Revenue generation must continue. You have already upset the business people with that Memorandum you issued on Friday about documents. What were you thinking? Shouldn't you have consulted with us before sending that out?

The Senior Vice President of Marketing wants you to meet with the public relations team to develop a plan to counter the adverse publicity that is sure to come as a result of the Complaint being filed; the allegations make us sound like the worst, most out of touch company in the world.

They all want to know if we can simply terminate these franchisees and be done with them; throw a little money at them in exchange for releases and make them go away. And for that matter rid the system of anyone that we believe is sympathetic to their cause.

You sigh. Your company is rarely sued; and these executives, although rightfully upset, have absolutely no idea what to expect. And, right now, you don't know the facts; documentary information is being gathered but no one from the Legal Department has yet spoken with the

employees who know the facts. All you can do is explain the basics of litigation. When you tell them that they may be constrained (because of the class action allegations) from undertaking a program of purging ungrateful franchisees from the system, there is a lot of rumbling about this being America and isn't that unconstitutional. You sigh again.

D. Choosing Litigation Counsel

You tell your assistant that under no circumstances are you to be disturbed. You close your office door and sit down with the offensive, over the top complaint and carefully reread it. An hour later, you raise your head, check your notes and pick up the phone.

You call the CEO and explain to him why you aren't interested in talking to the CFO's divorce attorney (despite the fact that he is a real bargain). You explain what type of legal representation the company needs:

1. A firm with nationwide coverage: the company has franchisees in all but six states and the eleven named plaintiffs alone hail from eight states. You want lawyers with manpower who can assemble a powerful litigation team, and who can call upon lawyers in their own firm conversant in the laws of multiple states.
2. A firm that understands the franchise business model with lawyers who have expertise in franchise disclosure and franchisor/franchisee relationships.
3. A firm that has expertise in defending class actions – as class action litigation is unique and if a class is certified under any of the legal theories advanced by the plaintiffs an adverse ruling could bankrupt the company.

The CEO is quiet. He sighs. That sounds horribly expensive he says. You agree that it will be expensive; but the Executive Committee must weigh necessary legal costs against the impact on the company of an adverse ruling. You can't send a small, unknown firm into battle to defend the company in a case like this. We can't be penny wise and pound foolish.

You are pressed for time. You are convinced that the case should be removed to federal district court; so you must quickly choose counsel. You interview several firms that fit

your basic criteria, including your usual go-to outside counsel. You present your recommendation to the Executive Committee advising them of hourly rates, the fact that it isn't just the lawyers that we will have to pay; but paralegals, expert witnesses, possible private investigators. It is a long meeting; but at the end the Executive Committee agrees with your choice.

E. Briefing Outside Counsel

You make the call. You identify the parties and request the conflicts check; and then you wait to hear back from your chosen counsel about whether the firm can accept your case. The call comes a few hours later, and you get the all clear.

You e-mail a copy of the complaint to counsel. While counsel awaits the arrival of the e-mail, you advise them that you have issued litigation holds, and that you will forward copies of the memoranda. Removal is discussed; and possible dispositive motions that might be filed in response to the complaint. Counsel agrees with you that the case should be removed.

You invite counsel to a meeting with you and your team to begin the immersion in the company's culture and the hard facts. Learning the culture is as important as learning the facts, so shortly after the meeting with the in-house legal team, you arrange to introduce outside counsel to the executive team.

IV. THE INITIAL INVOLVEMENT OF THE FRANCHISOR'S OUTSIDE COUNSEL

A. The Crucial Importance Of The Relationship With Inside Counsel

Defending a franchisor in BTSL is the most professionally satisfying experience that any trial lawyer who represents franchisors can ever have. When a client confronting system-threatening claims has sufficient confidence in counsel to place the fate of its enterprise largely in that lawyer's hands, that is flattering, exhilarating, humbling – and occasionally frightening. In Bet the System cases, lead outside counsel must play an unusually multi-faceted role, far more diverse and demanding than most litigation typically requires.

The lead litigator has no chance of performing effectively, however, absent a harmonious working relationship with the in-house counsel responsible for managing the engagement. No sensible in-house lawyers want to work with outside counsel who they fear will not listen to them, will be looking for chances to show them up in front of their shared client, or whose bullish views of the case may transform into palpable anxiety and a push to settle as the trial date nears. And no outside counsel worth his salt wants to work with in-house lawyers who are afraid of company executives or fond of dodging responsibility and second-guessing. Like all strong human relationships, the essential ingredients in effective working relationships between in-house franchisor counsel and outside counsel with shared responsibility for defending BTSL are mutual respect and trust. Those traits are sometimes firmly developed when the system-threatening case arrives, after long years of counsel comfortably working together. In other situations, the relationship must be forged on the fly under conditions of great stress and anxiety, because the franchisor's general counsel or chief executive has decided that the stakes demand retention of a lawyer who has not previously represented the company. Regardless of the history, the franchisor's future may depend upon its inside and outside counsel's ability to work collaboratively as a team, dedicated to the goal of safely navigating the franchisor to an outcome that preserves its business model materially unscathed.

If the relationship is working properly, the in-house GC will be outside counsel's key ally in managing senior management. The GC lives with management every day, knows each person's quirks, and knows what is likely to send particular people off on a rant. The GC knows which executives have a long-term future and who is about to get the axe, and understands who might not be a reliable source of information for outside counsel. Accordingly, outside counsel should understand that they will not have free rein to contact whoever they want, about whatever they want. Outside counsel's communications with businesspeople should always be coordinated with in-house counsel, who may have good reason to limit contact with certain members of senior management. If the GC and the trial lawyer she retained to represent the

franchisor respect and trust each other, they will be able to communicate frankly with one another about all subjects, including the strengths and weaknesses of important executives, and in that event the proper channels of communication between outside counsel and senior management will emerge smoothly, as a natural part of the give and take between close colleagues.

B. Outside Counsel's Multi-Faceted Roles In Defending BTSL

Brief-writing and courtroom skills are mandatory attributes for any lawyers hired to defeat system-threatening claims. Given the now vanishingly small percentage of civil cases tried to a conclusion, the courtroom part might seem less important than it once was, but unless the plaintiffs and their lawyers are convinced that the franchisor is fully prepared to try the case if necessary, the chances of settlement on palatable terms will never be optimal, and franchisors also cannot count on their counsel's persuasive briefs and oral advocacy disposing of the case on motion. In sum, a franchisor can never know in advance whether its bet the system dispute will turn out to be the statistical outlier that goes to verdict, and the franchisor's lead outside counsel should therefore be not just a litigator, but an accomplished trial lawyer.

What makes the bet the system case so intellectually and emotionally rewarding for the outside counsel, however, is not simply the potential opportunity to try a case of unusually large commercial consequence, but the chance to draw upon a range of emotional and intellectual resources more commonly associated with other professions and trades, including:

- **Psychiatrist**

Business executives often like to present themselves as unshakeable pillars of rationality, able to control their emotions and objectively assess the facts, no matter how threatening those facts may be to the viability of the enterprise or to the executive's personal stature and livelihood. A few such people may actually exist, somewhere, but this author has never had occasion to represent one. The senior management of franchisors, and the founders in particular, are usually passionate entrepreneurs, whose passionate commitment to their

concept was an essential building block for their franchise system's success. Litigation of this magnitude is almost guaranteed to generate a similarly passionate, but not always constructive, response, as the franchisor's senior management processes its emotional reactions to the case – a potent admixture of intense anger and equally intense fear that can often produce either paralysis or an instinct to pursue aggressive, uncontrolled and potentially disastrous countermeasures. At these times, outside counsel must sometimes function essentially as a lay psychiatrist, letting the clients vent, listening with genuine sensitivity and concern, while trying to help management avoid uncorrectable mistakes that will make the case substantially more difficult to settle on favorable terms or to win if it must be tried. Perhaps most important of all, while communicating a passionate commitment to the client's cause, the lead litigation lawyer should always be a model of emotional control. Just as no patient wants to undergo a major operation performed by an anxious, rattled, or angry surgeon, no franchisor wants BTSL counsel who is prone to losing his cool or wilting under pressure.

- **Diplomat**

It is, of course, never a lawyer's job to tell a client what it wants to hear. Our obligation is to tell the client what, in our best professional judgment concerning the client's best business interests, the client ***needs*** to hear. Giving the client what the lawyer regards as necessary advice is a meaningless, self-serving exercise, however, unless the advice is delivered in such a way that the client can actually hear it, think about it, and have a meaningful opportunity to act on the advice and thereby further its own best interests. "Advice" along the lines of "What are you, crazy??!! You can't do that!" may allow the lawyer to express his own anxiety and satisfy his desire to cover his own behind in the event of a bad outcome, and it may even be technically "correct," but it is often unlikely to dissuade headstrong – and riled up – executives from walking a path where disaster looms. There is a third alternative to the roles of Dr. No and cheerleader as the client marches over a cliff – the role of diplomat, which requires the lawyer to avoid pontificating lectures and instead employ more subtle and nuanced approaches to convince an

agitated client who feels besieged not to engage in ill-considered behavior bound to cause serious, self-inflicted wounds. In his memoirs *Present at the Creation*, Dean Acheson wrote that when he served as Assistant Secretary of State for Congressional Relations, he had only two weapons at his disposal: "reason and eloquence."[19] These come in handy for the trial lawyer-diplomat, too.

If the franchisor's senior executives believe that outside counsel understands their business, understands on a visceral level their views of the litigation and their concerns about its potential affect on the franchise system, is dedicated to their best interests, and is ready, willing and able to fight tenaciously on their behalf, they will join inside counsel in a relationship of trust and mutual respect with outside counsel. If ***that*** lawyer seeks to temper the client's potentially damaging, reflex reactions by recommending a safer course of conduct that is still in sync with the franchisor's sensible business goals, the client is far more likely to follow the advice. That sort of relationship can also give outside counsel the standing, when necessary, to be bracingly direct with senior management, if that is what it takes to get their attention.

- **Field General/Football Coach**

Waiting to react to what the plaintiffs do is not a recipe for success in bet the system litigation. As early as possible after being retained, the franchisor's outside counsel should, in consultation with management and inside counsel, start developing an overall defense strategy, along with the tactics for implementing that strategy. Among other things, this process enables counsel to gauge management's commitment to the defense and to assess whether early settlement is a realistic possibility.

The strategy should address not just the concrete realities of day-to-litigation, like motion practice and a discovery plan, but also the overall themes of the case, ultimately designed to dictate to the extent possible how the jury, judge or arbitrators will view the fundamental fairness

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[19] Dean Acheson, *Present at the Creation*, NORTON, 98 (1969).

of the franchisor's conduct and thus the overall equities of the dispute. Motion practice and discovery should be designed to advance the franchisor's themes and theories of the case and blunt the plaintiffs'. Otherwise, discovery becomes a mindless waste of the client's money and a huge missed opportunity.

As in war and any highly competitive sport, successful execution of a litigation strategy requires a pair of characteristics that may at first blush seem contradictory: resolve and flexibility. On the one hand, if client and counsel put sufficient time and thought into developing the strategy, they should have the courage of their convictions and stay the course. Ditching a game plan before you know whether it is working betrays a fundamental lack of confidence that is impossible to hide – indecisive zigzagging wastes money, time and energy and sends all the wrong messages to your adversaries. On the other hand, the only thing that counts is whether the strategy is working, and stubborn adherence to a flawed strategy, driven by pride of authorship or deficits in imagination, is not resolute but foolish – a formula for failure. Just as so many battles and athletic events are full of surprises, no litigation ever proceeds precisely as the clients and lawyers at the outset envisioned. Litigation is a highly dynamic process, in which counsel should always expressly reserve the right to get smarter, and with it the opportunity for mid-course strategic corrections in response to events as they unfold.

- **Movie Director**

At bottom, litigation is a narrative art form – an effort to construct and tell a powerful story that will capture and hold an audience's interest and ultimately persuade that audience, both intellectually and emotionally, to adopt a particular point of view. Think of the trial as a movie (although it may actually be more akin to slightly structured improvisational theater) the litigators as dueling movie directors, and discovery as all the rough footage that gets filmed and then edited down to the final print. As with real movies, most of the film from discovery winds up on the cutting room floor. But unless the trial lawyer/director has a clear vision of the trial/movie

in his head while conducting discovery – a vision shaped by the evolving themes of the case – there will be potentially fatal gaps in the movie when it is finally ready to be screened.

C. Dealing Effectively With The Threshold Legal Issues

This paper is not the occasion for detailed exploration of the complex procedural issues that frequently arise in bet the system litigation, but as inside and outside counsel craft the franchisor's initial response to the claims, they should always be conscious of the points addressed below. Depending upon the decisions of the plaintiff franchisees' counsel and the quality of the pleading, a host of important choices may need to be made, early in the case. For example:

- **Arbitration vs. Litigation**

If the system's franchise agreement contains an arbitration clause, the plaintiffs sued in court, and the franchisor wants to enforce the arbitration clause, there are various ways to try to do that, some far more likely to work than others. In recent years, state and federal courts in certain jurisdictions (e.g., California) have been unwilling to enforce franchise agreement arbitration clauses as written, especially if the contract on its face would require the franchisee to travel from that jurisdiction to arbitrate in the franchisor's home state. As an alternative to seeking a stay of the litigation from the court where suit was filed, the franchisor should always consider instead filing a petition to compel arbitration, in a court with jurisdiction over the contractually designated arbitral venue.[20] If the franchisor can satisfy the requirements of diversity jurisdiction, it should sue under the Federal Arbitration Act ("FAA")[21] in the federal judicial district where the arbitration would occur, and take advantage of the vast body of federal precedent enforcing arbitration agreements. If there is incomplete diversity of citizenship, the franchisor may be able to sue in its home state court to compel the franchisee to arbitrate, on

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[20] Edward Wood Dunham and Mark Kravitz, *Compelling Arbitration*, 23 LITIGATION 1 (Fall 1996).

[21] 9 U.S.C. § 1 *et seq.*

the theory that by agreeing to arbitrate in that state, the franchisee consented to personal jurisdiction and venue in the courts of that state, at least in litigation related to the arbitration agreement.

- **Class Arbitration**

The franchisees might instead comply with the arbitration clause, but seek to conduct a consolidated or class arbitration, hoping to increase their leverage over the franchisor. With the U.S. Supreme Court's decision earlier this year in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[22] it is now clear that the FAA prohibits consolidated or class arbitrations unless the arbitration agreement expressly contemplates proceeding in that fashion. None of the authors has ever seen a franchise agreement arbitration clause that expressly provides for class or consolidated arbitrations, and if any exist, they are surely few and far between.

- **A Franchisee Association As Plaintiff**

Franchisees sometimes have their Association file a lawsuit or arbitration against the franchisor, to limit the financial burden and avoid the heightened profile and attendant adverse consequences that they fear will befall individual franchisees with the temerity to take on the franchisor. Whether the Association has standing will depend on the specific facts of the dispute, including the nature of the pleaded claims and requested relief.[23]

- **The Impact of Twombly and Iqbal**

The Supreme Court's decisions in *Twombly*[24] and *Iqbal*[25] have ushered in a new era in federal pleading, imposing new requirements that may – at least in theory – be far more rigorous than the notice pleading standard long embodied in the Federal Rules of Civil

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[22] 130 S. Ct. 1758 (2010).

[23] Edward Wood Dunham and Erika L. Amarante, *Downey v. DAI: Associational Standing and Arbitration*, 27 FRANCHISE L.J. 1 (Summer 2007). Ms. Amarante is Mr. Dunham's partner.

[24] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

[25] *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Procedure. The ultimate real world impact of *Twombly* and *Iqbal* likely will not be clear for many years, as the district and circuit courts grapple with the application of this precedent, which has spawned a substantial increase of motions to dismiss for failure to state a claim in numerous categories of federal litigation, including franchise disputes.[26] Because many practitioners have yet to adapt their pleading techniques in light of this new authority, franchisor counsel should always have *Twombly* and *Iqbal* in mind as they consider potential responses to the complaint, even if the case in pending in state court (at least in jurisdictions whose procedural rules are modeled on the Federal Rules).

- **Some Class Action Considerations**

A putative class action requires early, close analysis of many potentially complex legal and factual issues. For example:

- If the franchisees sued in state court, is the case removable under the Class Action Fairness Act ("CAFA")?[27]
- If the case is filed in or can be removed to federal court, in recent years many federal circuits have adopted more rigorous tests for class certification, which have resulted in an expansion of discovery before class certification, to enable trial judges to decide on more fully developed records whether plaintiffs have carried their burden of demonstrating that they satisfy all of Rule 23's certification requirements.[28]
- Even if the argument for certification appears weak (or fatally flawed), in federal litigation the process for determining whether a class will be certified can be

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[26] For a discussion of the impact of *Twombly* and *Iqbal* on franchise litigation, *see* Erika L. Amarante, *New Pleading Standards in Federal Court: Will They Impact Franchise Cases?*, 29 FRANCHISE L.J. 2 (Fall 2009).

[27] 28 U.S.C. § 1715.

[28] *See*, e.g., *in re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *in re Initial Pub. Offering Secs. Litig.*, 471 F.3d 24 (2d. Cir. 2006); *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

protracted and extremely expensive. The longer that process takes, the greater the expense, distraction and risk of significant strain on the franchisor's relationships with its franchisees that can cause long-term damage to the system. Franchisor counsel should therefore familiarize themselves with the precedent – limited, but under the right circumstances potentially highly persuasive – for district courts deciding as a matter of law, on a motion to dismiss, that the plaintiffs' claims cannot be certified.[29]

D. The Possibility Of Early Settlement

Any BTSL will be expensive to defend, will divert substantial management energy and attention from productive operation of the business, and – if it is genuinely worthy of the label – a loss will involve potentially catastrophic consequences for the franchisor's business model, and perhaps even threaten the viability of the franchisor and its system. Sometimes, the litigation may truly involve a matter of such fundamental principle that it is literally non-negotiable, or the plaintiffs or their lawyers may be so demonstrably unreasonable that there is no point in the franchisor or its counsel wasting their breath by broaching the possibility of settlement. But any decision ***not*** to explore settlement early in the case, either by sending out feelers or by having an open mind if the plaintiffs raise the subject, should be the result of careful consideration by the franchisor and its counsel. Concern about appearing excessively eager to settle being read as a sign of weakness, which will in turn make an acceptable deal difficult or perhaps impossible to negotiate, is clearly legitimate. It is imprudent, however, for

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[29] *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 655 (D. Nev. 2009) (quoting *in re Walls*, 262 B.R. 519, 523 (Bankr. E.D. Cal. 2001)) (a court may dismiss class allegations and a request for class certification based on the pleadings alone "'if, as a matter of law, a class cannot be certified," because "it would be a waste of judicial resources to conduct discovery on class certification.'"); *Muehlbauer v. Gen. Motors Corp.*, 431 F. Supp. 2d 847, 870 (N.D. Ill. 2006) (the court should examine whether class allegations are "facially deficient," and dismiss them if "no amount of discovery can save them."); *see also DeBose v. Fedex Corp.*, No. 08 Civ. 07042 (AKH), 2009 WL 1542572, at *2 (S.D.N.Y. June 2, 2009) (granting motion to class claims and strike class allegations where plaintiff could not succeed on them as a matter of law); *Shabaz v. Polo Ralph Lauren Corp.*, 586 F. Supp. 2d 1205, 1211(C.D. Cal. 2008) (reviewing motion to strike class claims using Rule 12(b)(6) standard).

any franchisor facing claims of this magnitude to act upon that concern as a reflex, without stepping back and assessing as objectively as possible, with the advice of senior in-house counsel and lead outside counsel, the factors discussed below. That assessment should be done initially as soon as the client and its lawyers know enough about the facts, the law, and the nature of their adversaries to make sensible, reasonably informed judgments. And the franchisor and its counsel should revisit the subject of settlement periodically as the case progresses, to be alert to shifting circumstances that may have opened new windows of opportunity for acceptable resolution. No matter how confident the franchisor may be in its position, and how resistant management may therefore be to any consideration of compromise, the lawyers owe their client an obligation to try to ensure meaningful consideration of the risks of litigation and possible avenues for avoiding them. This is especially true of outside counsel, whose firm is likely to be a large financial beneficiary of extensive litigation. In the authors' judgment, that fact imposes a particular obligation on outside counsel to advise the client candidly and, when necessary, forcefully, about settlement opportunities. If the case goes to term and disaster strikes, client and counsel alike should at least be able to tell themselves that the result was unavoidable – that they took every reasonable step available to identify and pursue any potentially sensible settlement opportunities.

At every stage in the Bet the System case, prudent consideration of settlement possibilities requires assessments as objective as possible of these ten factors:

- The factual and legal strengths and weaknesses of the client's case
- The likely cost in time, money and distraction of carrying on the fight, and whether the client is capable of absorbing those costs
- The emotional constitutions of key executives and potential witnesses—will the key company personnel be able to withstand the scrutiny and stress of their involvement in the case?

- What is the worst potential outcome of the case within the realm of realistic possibility, how likely is that outcome, and could the client survive that outcome with its franchise system and essential business model in tact?
- What is the best potential outcome of the case within the realm of realistic possibility, and is it worth the price, in time, stress and treasure, to try to achieve that result?
- Are the plaintiff franchisees sensible businesspeople with legitimate grievances, or unguided missiles – unsophisticated, blinded by anger, or simply habitual malcontents not suited to be franchisees? Is their emotional state likely to change/has it changed as a result of developments in the case?
- What sort of counsel represent the plaintiffs? Are they responsible problem-solvers interested in practical solutions that will serve their clients' best interests? Self-promoting grandstanders? Lawyers unfamiliar with franchising or otherwise in over their heads?
- What are the likely financial arrangements on the other side of the case – are the plaintiffs probably paying by the hour or has counsel taken the case on a full or partial contingent fee?
- What are the respective emotional constitutions of the plaintiffs and their lawyers? Are they built for the strain of big – ticket litigation, and do the attorneys have any track record of successfully handling such matters?
- Finally, is it possible to craft a settlement that will terminate the dispute? Are the claims such that only a fundamental change to the business model will foreclose future litigation? And, if that is the case, what is the impact on the franchisor and its franchisee base?

V. LITIGATING – AND TRYING – THE BET THE SYSTEM CASE

As noted above, the vast majority of American civil actions end before trial, by settlement or dispositive motion. Particularly when a case involves a huge, potentially crippling damage

claim or a challenge to system policies and practices that, if successful, would fundamentally transform the franchise system's way of doing business, the pressure on the franchisor to settle can be overwhelming. If the plaintiff franchisees and their counsel perceive that the franchisor is feeling that pressure – especially if they also perceive that the franchisor is encountering difficulty funding its defense – the franchisor will have little if any bargaining leverage. Its best hope may be that the franchisees will want to find a solution short of trying to destroy the system, because it is in their own financial self-interest to avoid that result.

Conversely, if a franchisor with deep pockets gets the sense that the plaintiff franchisees or their counsel do not have the funding or the heart to take the litigation all the way, the franchisor's best settlement strategy may be to capitalize on its resource advantages and send the message that any concessions will have to be earned the hard way.

One overriding point bears repeating: for plaintiff franchisees and defendant franchisors alike, the way to maximize the chances of a reasonable settlement is to make clear to your adversaries that you and your counsel are prepared to go to trial and that you know what to do when you get there.

The balance of this paper addresses some key considerations in the effective preparation and trial of a bet the system case.

A. The Facts—And The Decision-maker's Sense Of The Equities—Are More Important Than The Law.

As lawyers, we would never suggest that the law is unimportant in any case, or advocate anything less than thorough exploration and development of the best possible legal arguments. Every franchise relationship is, after all, a contractual relationship, grounded in some state's ***law*** of contract, and many of the causes of action that franchisee counsel often deploy in hopes of avoiding, or at least blunting the impact of, that essential fact are complicated, difficult to plead and prove, and vulnerable to attack by motions to dismiss and for summary judgment. Through innovative use of legal theories, however, creative plaintiffs' counsel can also make a case

where the franchisor and its lawyers may have been confident that none existed. In short, neither side in BTSL can prudently afford to give the law short shrift.

That said, anyone who believes that elegant legal argument always carries the day has no experience with the real world of American litigation. Many businesspeople (including franchisors and franchisees) and corporate lawyers labor under the misimpression that our judicial system dependably yields entirely rational outcomes determined by what the law requires. In fact, such outcomes are likely only when they accord with the decision-makers' sense of basic equity. Whether the case is decided by a jury, a judge, one arbitrator or a panel of three, this simple truth remains: Most Americans place a high value on their own sense of fairness. Almost nobody likes the idea of being complicit in anything that strikes them as fundamentally ***un***fair, especially if they feel that they are helping a powerful party do something unfair to someone less powerful. Thus, even when the law ostensibly "requires' a given result, most decision-makers are unlikely to go there if the result does not comport with their own sense of the essential equities, and will instead take full advantage of the ambiguity and flexibility in the law – or ignore the law entirely – to cut a different path to a different outcome.

This can be a difficult concept for successful business executives to grasp, particularly if they have no significant litigation experience and have lost touch with what ordinary people believe is the right way to act. It is all too easy for any corporate headquarters to become an echo chamber, with people throughout the organization repeating the same point of view until they start to take for granted that it is the only legitimate perspective. This insularity is a breeding ground for smugness and arrogance, characteristics that are difficult to hide, and all too easy for a competent cross-examiner to exploit, on the witness stand.

B. The Potentially Outcome-Determinative Significance Of Effective Witness Preparation

Preparing witnesses to testify at deposition and trial is always among the trial lawyer's most important tasks in any lawsuit. In BTSL, the preparation of the lead witnesses – the

principal spokespersons for each side's respective narrative of the case – can often make the difference between triumph and disaster. Witness preparation is not an off the rack product: it must be custom-tailored to the intelligence, personality, character and learning style of the given witness, an exercise that can sometimes require the full measure of the lawyer's skills as diplomat and lay psychiatrist, especially when the witnesses are strong-willed, intelligent, successful entrepreneurs or corporate executives accustomed to receiving frequent, positive reinforcement of virtually everything they do.

The goal should never be to perform a personality transplant – juries, judges and arbitrators have keen noses for fakes, and any party presenting testimony from witnesses perceived as trying to be something that they are not is likely to pay a serious price with the decision-maker. However, while some people are naturally good witnesses, for many others effective testimony is a learned skill, which takes time, practice and the help of intellectually and emotionally acute counsel to develop. Ego, anxiety, anger and the aforementioned echo chamber effect can all interfere with the ability of smart business people to understand that there are relatively more and less effective ways to tell the same truth: humility is more appealing than arrogance; admission of error and acceptance of responsibility are more becoming than finger pointing attempts to evade accountability; confessions of ignorance, when that is the actual state of knowledge, are more likeable than strained attempts to feign knowledge that does not exist; straight forward answers to direct questions are more credible than incessant jousting with opposing counsel; and consciousness of the importance of basic decency in human relationships is an endearing character trait. The content of testimony is obviously crucial, but so is how the testimony is delivered – body language, tone of voice and other indicators of whether the witness is comfortable in his own skin all matter, because they all affect the audience's assessments of witness credibility and likeability, which in turn so frequently drive case outcomes.

This is where in-house counsel can be especially helpful, in identifying the personality quirks of the potential witnesses and alerting you to what needs to be done to prepare them, including how much time you will likely need to spend with each witness... Witness preparation is as much about assuaging the witness' fears and assessing his level of aggression as it is about his knowledge of the facts.

C. Experts: Never Settle For Anything Less Than Top-Shelf Talent, And Be Creative In Identifying The Subjects Of Expert Testimony

Every BTSL is likely to present opportunities for expert testimony, perhaps from multiple experts from a variety of fields. In identifying and retaining expert witnesses and working with them to develop their testimony, counsel should keep two governing principles foremost in mind. First, unless an expert is genuinely excellent – with impeccable credentials, the capacity to produce comprehensive reports in clear, persuasive prose, and the ability to be a star on the stand – do not hire that expert. Many things that can go wrong in litigation are entirely beyond counsel's control, but settling for mediocre expert witnesses is not among them. Just because someone is a well-known expert in a particular discipline does not mean that he is any good, let alone that he is the best fit for your case. Do thorough research (including into the candidate's writings and prior testimony, to make as sure as possible that nothing contradicts the positions you expect the expert that you hire will take). Seek recommendations from experienced trial lawyers whose judgment you respect. If the case demands an expert in a particularly esoteric field related to your client's business, ask your client to identify the top experts in the field. Conduct interviews. Check references. Make sure that the client personnel who will be working with the expert are comfortable with the choice you recommend. This may be one of the most important hires that you will ever be involved in making, and you need to do everything reasonably within your power to get it right. Few things are more dispiriting in the course of major litigation than to discover that a key expert is simply not up to the assigned tasks, especially when that is revealed from the witness box at trial. And there are few things more

comforting to a trial lawyer than being secure in the knowledge that opposing counsel cannot hurt your experts, because they are too knowledgeable, well prepared and effective on their feet.

We recognize that the second principle governing expert witnesses may in some instances be in tension with our first principle, by causing counsel to consider using an expert who is not a proven commodity, but we offer it nonetheless: do not shrink from being creative (and aggressive) in identifying potential subjects of expert testimony. Rule 702 of the Federal Rules of Evidence permits testimony about any "specialized knowledge" that: "will assist the tier of fact to understand the evidence or determine a fact in issue, " from someone who is an expert in that field by virtue of: knowledge, skill, experience, training or education, " provided that the testimony has sufficient factual basis, is the product of reliable principles and methods, and "the witness has applied the principles and methods reliably to the facts of case." On its face, therefore, the Rule contemplates the possibility of expert testimony on virtually any subject, and many state court evidence rules are comparably broad. We do not mean to encourage wasting the client's money and the judge and jury's time with tangential testimony on issues at the margin of the case. The point is not to overlook meaningful opportunities to present effective expert testimony on important issues, just because that is not normally done or because the other side has not designated an expert on the subject. There may be experienced franchise executives (or even lawyers) who, while not professional expert witnesses, are authentic, world-class experts on one or more of the issues in dispute, and you may be able to describe their testimony so that it fits within the expansive confines of Rule 702 or a state court analog. If you can satisfy yourself that one or more of these experts will likely acquit themselves well on the stand, in the authors' experience, that is sometimes a chance well worth taking.

D. The Impact Of Presentation Technology

Every trial is a battle to supply the lens through which the decision-maker views the facts – a fight to determine the language and images that the decision-maker employs in considering

the facts. The weapons available to wage those battles have expanded exponentially with the advent of modern presentation technology. Many believe that jurors in this multi-tasking age have limited patience, short attention spans, an endless fascination with gadgets and high expectations that the lawyers' and witnesses' job is to entertain them, and there is probably at least a kernel of truth in all of that. When it comes to courtroom technology, however, "everything in moderation" might be the appropriate motto. So long as the technology is one tool that the lawyers use to advance the case narrative in a crisp and arresting way, it can unquestionably be used to excellent effect. But there is a great risk of the lawyers becoming tools of the technology, doing things for no reason except that the technology allows them to. A demonstration of technical wizardry as an end in itself is boring, confusing, and distracting.

E. It Is Never Too Late To Settle

It is important for both sides in BTSL to remember that there is no designated season for settlement talks, no game clock that limits negotiating time, and no rule that negotiations must proceed in a particular sequence with breaks of limited duration. If a case settles, the timing and terms are often unpredictable and sometimes a complete surprise. This does not mean, of course, that litigants or their counsel should constantly be raising the possibility of settlement if prior attempts have proved unavailing. Rather, we simply suggest that, given the potentially catastrophic consequences of losing, it pays to keep channels of communication open and remain alert to signs of settlement interest from the other side, to make sure that a genuine opportunity is not missed by failing to pay attention. It also pays to remember that every now and then, a trial actually can be a cathartic experience for one or both sides of the dispute, which can enable sharper focus and more temperate, productive discussions than were possible in the run-up to battle.

F. Remember – The Trial Is Not The Last Step In The Process

In the heat of battle at trial, it is often easy to forget that whatever the outcome, an appellate court is likely to have the last word. Especially in BTSL, therefore, the trial lawyer

must always be mindful of the appellate record – making sure to take all required steps to preserve arguments for appeal, and avoiding overly aggressive positions that could lead the trial judge into error. To cite just one example: lawyers sometimes propose jury instructions that obviously do not accurately state the law, even on arcane points that are highly unlikely to influence the verdict. This conduct may reflect a tactical judgment, an inability to control pugnacity, or simple ignorance about the law. Whatever the explanation, if the judge accepts counsel's misguided position, this can also be a way to snatch defeat from the jaws of victory. It does not pay to overreach.

In cases of this magnitude, however, it does pay to enlist appellate expertise before the time comes to file an appeal. Appellate lawyers think differently than trial lawyers, and having the advice of skilled appellate counsel before and during trial is well worth the cost, to maximize the chances of holding onto a victory or overturning a loss.

G. Post Mortem

After the dust settles, trial counsel has the opportunity to do his client an even greater service. Cases of this magnitude are rarely a surprise, and are often the result of the client's failure to connect the dots – to hear its franchisees and consider that the rumblings are serious and that system wide change may be necessary. The paternalistic attitude of some franchisors resulting in a classic bunker mentality rejecting any suggestion that does not arise from within the inner sanctum can lead to disaster. As trial counsel, you have gained a rare insight into your client's operations, the insight of an outsider; and you are uniquely positioned to suggest changes to your client's system. Win or lose, you have an informed sense of what needs to be done to avoid further litigation; so take the opportunity to meet with in-house counsel and the relevant executives to discuss the future.

VI. CONCLUSION

All reputable franchisors and franchisees enter the franchise relationship with the same goal: making money from the conduct of their shared enterprise. Neither franchisors nor

franchisees want to litigate even small cases, let alone disputes that threaten the continued existence of the franchise system. For reasons as diverse as human behavior itself, however, franchise relationships can irretrievably break down, emotions can become raw, and negative momentum can build, with BTSL the ultimate result. It is never entirely possible to prepare for an existential threat – nobody can truly know how they will act until they are staring at the real world possibility of disaster. But we hope that the foregoing thoughts, based on the authors' personal experiences with litigation of this magnitude, will give the reader at least a modest head start in getting your bearings in the unfortunate event that you become embroiled in BTSL, as plaintiff, defendant, in-house counsel or trial lawyer.

Edward Wood Dunham

Jack Dunham, Chair of Wiggin and Dana's Litigation Department, has tried to a conclusion many cases of various types, before juries, judges and arbitrators, in jurisdictions across the country.

For over thirty years Mr. Dunham has represented businesses in a wide variety of complex litigation, including antitrust, patent and trademark infringement, trade secrets, product recall and employment discrimination disputes. He has also defended hospitals and physicians in numerous medical malpractice cases involving complex medical issues and large damage claims.

Mr. Dunham has extensive experience representing, at trial and on appeal, franchisors, manufacturers and importers in disputes with franchisees, area developers, dealers, distributors, vendors and brokers. He is the Immediate Past Chair of the American Bar Association Forum on Franchising, served as Chair of the Forum from August 2007-July 2009, and previously served as the Editor-in-Chief of the ABA Franchise Law Journal.

Chambers USA 2010 ranks him as one of the ten leading franchise lawyers in the United States and also as one of Connecticut's leading commercial litigators, noting his "highly esteemed complex litigation practice." According to Chambers, Mr. Dunham is "at the top of his craft as a trial attorney," clients praise his ability to "remain calm in the heat of the battle" and report that he has "the right mix of intelligence and practical approach to complex matters. He is excellent at trial, but is as good at resolving matters before they get that far."

Mr. Dunham is a Fellow of the American College of Trial Lawyers and is included in *The Best Lawyers in America* as both a commercial litigator and franchise lawyer (for more about the standards for inclusion in *The Best Lawyers in America*. From 2002-2006, Mr. Dunham served as Chair of the Wiggin and Dana Executive Committee.

Before starting at Wiggin and Dana in 1979, Mr. Dunham was a law clerk to Judge Robert A. Ainsworth, Jr., of the United States Court of Appeals for the Fifth Circuit in New Orleans.

He graduated from Trinity College, Phi Beta Kappa, and with honors in history and received his J.D. from New York University School of Law, where he was a Note & Comment Editor of the *Law Review*.

Ronald K. Gardner, Jr.

Ronald K. Gardner is the Managing Partner of the firm of Dady & Gardner, P.A., and limits his practice to the representation of franchisees, dealers and distributors when they are in disputes with their franchisors, manufacturers and suppliers. Ron, along with the rest of his colleagues at Dady & Gardner, P.A., prides himself on the fact that the firm has a national reputation for effectively and efficiently helping their franchisee, dealer and distributor clients to resolve their disputes through litigation, negotiation, mediation and arbitration. More specifically, Ron has helped clients in dozens of industries, including fast food, automobile, trucking, construction equipment and agricultural implements. He was co-counsel and the principal brief writer in the widely discussed trilogy of "Fiat" cases (See e.g. Coehlo & Bacchetti v. Ford New Holland, Bus. Fran Guide (CCH) 10,924 (AAA 1996)), and the frequently cited case of Dunafon v. Taco Bell, Bus Fran. Guide (CCH) 10,919 (W.D. Mo. 1996) and Bus. Fran. Guide (CCH) 11,239 (W.D. Mo. 1997). Ron was lead counsel in the widely publicized decision Pool Concepts, Inc. v. Watkins, Bus. Fran. Guide (CCH) 12,249 (D. Minn. 2002)(finding that payment of funds into a co-op ad fund was an "indirect franchise fee" under the Minnesota Franchise Act, entitling the franchisee to the protections of the Act, including a preliminary injunction against termination).

Ron is a member of the American, Minnesota, Hennepin County and Rice County Bar Associations. He is an active member of the ABA Forum on Franchising, is the current Chair of the Forum, and is the past Membership and Program Officer, as well as a past Division Director of the Forum on Franchising's Litigation and Alternative Dispute Resolution Division. Ron was the co-chair of the 2005 Forum on Franchising convention.

Ron is a frequent speaker at various gatherings on franchise and distribution-related topics, such as the ABA's Annual Forum on Franchising, the National Convention of the American Association of Franchisees and Dealers and the International Franchise Association. He also speaks regularly to various franchise and industry groups about their rights. Ron is formerly one of the primary authors of the widely cited treatise "Franchising: Realities and Remedies," published by Law Journal Seminars Press and distributed nationally, as well as being a co-author of the "Annual Franchise and Distribution Law Developments 2002" volume published by the American Bar Association. He also frequently lectured on franchise issues at the University of St. Thomas' School of Entrepreneurial Leadership.

Ron has represented businesses of all sizes, including multi-unit franchisees, as well as single owner operations. He represents numerous franchisee associations, including the associations of several of the largest franchise systems in the world. He has handled disputes ranging from unlawful terminations to encroachment to cases regarding franchisor's failure to comply with registration and disclosure requirements of the FTC and state governments. He has represented or counseled clients in virtually all 50 states. Ron has also been named one of the Best Lawyers in America the last six years, as one of Minnesota's "Rising Young Stars of the Legal Profession" by Law & Politics magazine, as one of Minnesota's "Super Lawyers." also by Law & Politics, as a "Hot Shot under Forty" by the Franchise Times, and as one of Franchise Times "100 Legal Eagles" every year since the list started. The past four years (2007-2010), Ron has been selected by Chambers USA independent research firm as one of the top 15 franchise lawyers in America---and was the only one of the top 15 under the age of 50. In 2010, Ron was listed, along with his partner, Michael Dady, as the only "Tier 1" Franchisee lawyers in the United States. In August, Ron was recognized for the third time by Law & Politics magazine as one of Minnesota's Top 100 lawyers. Additionally, Ron was selected this year as the Hamline University School of Law Distinguished Alumnus for 2010.

Ron graduated magna cum laude in 1991 from Mankato State University, and is a 1994 cum laude with honors graduate of the Hamline University School of Law. Among his other activities, Ron is an adjunct professor at Hamline University School of Law, as well as being the former Chairman of the Board of Trustees of Prairie Creek Community School. He and his wife Becky are also the proud parents of Devyn and Zach.

Jacqueline Vlaming

Jacqueline Vlaming, Senior Vice President, General Counsel and Secretary, joined Coverall Health-Based Cleaning System® in 2000. Ms. Vlaming is a member of the company's Executive Committee.

Ms. Vlaming is active in the International Franchise Association and the American Bar Association Forum on Franchising.

Prior to joining Coverall, Ms. Vlaming was a partner in the Chicago law firms of Keck, Mahin & Cate and then McBride, Baker & Coles with a practice focus of franchise law. She is a graduate of Loyola University of Chicago School of Law and a member of the Illinois and Florida bars.