Hospitalitas
Fall/Winter 2012
News and Views for Your Hospitality and Franchise Business

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC
EXPAND YOUR EXPECTATIONS℠

NLRB Hooks Alaska Hotel Anti-Union Efforts

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A recent decision from the Federal District Court in Alaska dealing with the Sheraton Anchorage highlights the necessity of periodically reviewing handbooks and making frontline supervisors and other managers aware of employee rights under the National Labor Relations Act (Act). In *Ahearn v. Remington Lodging and Hospitality, d/b/a The Sheraton Anchorage*, the NLRB objected to a number of anti-organizing approaches taken by the hotel management company. The court sustained most of the objections.

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Would You Bet Your Business on Untrained Employees?

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Why do franchisees need to train their employees on harassment, discrimination and retaliation? Because we live in a social media/YouTube world where outrageous conduct and the lack of direct personal communication skills dominate the culture of the generation at the entry level of most workplaces. We also live in a climate where many hourly workers and supervisors were born, educated and obtained their cultural values outside the United States and our educational system. As a result, these younger workers may have little common sensitivity to conduct that older generations recognize instinctively as inappropriate in the workplace.

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KFC Franchise Guarantors Not Subject to Mint Julep Jurisdiction

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Franchise agreements are often signed by single purpose entities that are not income-tax-paying entities and that own only the franchised business for a particular location. The franchisee's equity owners are often asked to guaranty the franchisee's obligations under the franchise agreement, as these flow-through entities employed to eliminate double taxation of income rarely accumulate capital and net worth to make creditors more secure.

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Greetings from *Hospitalitas*

Hospitalitas is the Baker Donelson newsletter for our clients and friends in the hospitality industry – hotels, restaurants and their suppliers. It is published several times a year when we believe we can deliver first-class, useful information for your business. Please send us your feedback and ideas for topics you would like to know more about. True to our Southern heritage of hospitality, we'll work hard to make each visit with us something special and worth repeating.

In this issue:

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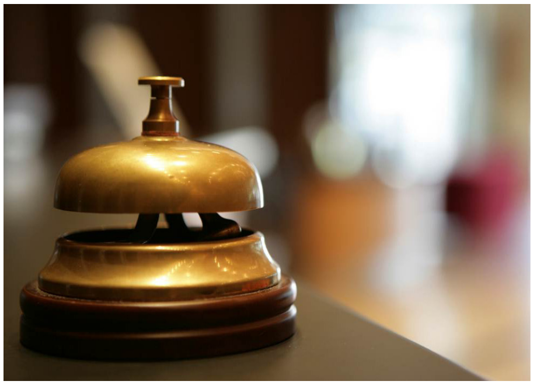
NLRB Hooks Alaska Hotel Anti-Union Efforts, *continued from page 1*



The starting point under the Act is Section 7, which gives the NLRB the authority to enforce employees' rights to seek union representation or otherwise engage in concerted activity or to refrain from seeking union recognition or other concerted activity. In this case, the Regional Director for the NLRB's Seattle office, Richard Ahearn, was seeking to enjoin the Sheraton from engaging in certain conduct dealing with work rules and other union activity. Although the court decision also dealt with issues surrounding bargaining and the hotel's involvement with a decertification petition (the Sheraton was organized by UNITE HERE Local 878), for the sake of brevity this article will deal with those issues which impact both union and non-union employers.

Work Rules

An NLRB administrative law judge (ALJ) found the following rules in the Sheraton handbook to be unlawful:

1. Employees agree not to return to the hotel before or after their working hours without authorization from their manager.

2. Distribution of any literature, pamphlets or other material in a guest or work area is prohibited. Solicitation of guests by associates at any time for any purpose is also inappropriate.

3. Insubordination or failure to carry out a job assignment or job request of management is prohibited.

4. Employees must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots or outside facilities without the permission of the immediate department head.

5. Conflict of interest with the hotel or [management] company is not permitted.

6. Behavior which violates common decency or morality or publicly embarrasses the hotel or company is prohibited.

7. Employees are prohibited from disclosing confidential information, including

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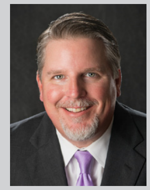
Legal Hospitality Veteran Ted Raynor Joins Baker Donelson



Ted C. Raynor has joined Baker Donelson's Chattanooga office. Mr. Raynor, who is of counsel and a member of Baker Donelson's Business Litigation group, represents clients in commercial litigation, dispute resolution, employment-related matters and franchise concerns. He also assists clients in the hospitality industry and is a certified Rule 31 mediator.

"Ted brings years of valuable legal experience coupled with practical business knowledge gained during his tenure with Hilton Hotels Corporation," said Russell W. Gray, managing shareholder of Baker Donelson's Chattanooga office. "Ted's experiences will be of great benefit to our clients, particularly those in the hospitality industry."

A 1991 graduate of the University of Memphis Cecil C. Humphreys School of Law, Mr. Raynor is the former vice president and senior counsel of Hilton Hotels Corporation. He is a Fellow of the Memphis and Tennessee Bar Foundations and is a member of the Tennessee Association of Professional Mediators and the Tennessee Hospitality Association as well as the Greater Chattanooga Hospitality Association. He graduated from the University of the South (Sewanee) in 1988.

NLRB Hooks Alaska Hotel Anti-Union Efforts, *continued from page 2*

"personnel file information" and "labor relations" information; when disclosure is required by judicial or administrative process or order or by other requirements of law, employees must give 10 days' written notice to the hotel's legal department prior to disclosure.

8. Employees may not give any information to the news media regarding the hotel, its guests or associates without authorization from the general manager and must direct such inquiries to his attention.

Additionally, one of the hotel's managers demanded that an employee remove a pro-union button and confiscated the button as well as several others the employee had in her possession.

The administrative law judge found all of the above rules and actions taken by the hotel management to be a violation of the employees' Section 7 rights. NLRB Regional Director Ahearn then sought the injunction to restrain the enforcement of the above work rules and to restrain the confiscation of pro-union buttons being worn and carried by employees, pending review of the ALJ's decision by the NLRB itself. In a lengthy decision by the judge, the federal court granted the injunction.

Lessons for Employers

It is imperative that employers take preventive action before union problems begin. Much of current labor law is in a state of transition because of the current pro-employee leaning of the NLRB, which currently has four members, three Democrats and one Republican.

1. Handbooks should be reviewed periodically. In addition to the rules cited above, the NLRB has a whole series of decisions dealing with issues arising out of employees using social media to discuss workplace issues and using company computers to do so. Language like the Alaska hotel handbook language at issue here clearly has another, more benign intent and focus, but the context of Section 7 makes for a totally negative connotation for NLRB review purposes.

2. Train your department managers and supervisors on the boundaries the NLRB has drawn between permissible employee conduct protected by Section 7 and the employer's right to run its business efficiently and without interruption.

Save the Date for 2013 FBN Kick-Off

Baker Donelson will host a unique Franchise Business Network event to kick off the 2013 program year. Please mark your calendars and save the date for a late afternoon program on Tuesday, January 8, 2013, featuring nationally-recognized financial professional and speaker Mark Zinder. He is a seasoned presenter with a unique gift for making the complicated clear, and he will examine the trends and ideas actively reshaping business today in light of the 'fiscal cliff' that may or may not have become a reality by our January meeting. This session will be co-presented by First State Bank and Horne LLP; look for additional details later in November.

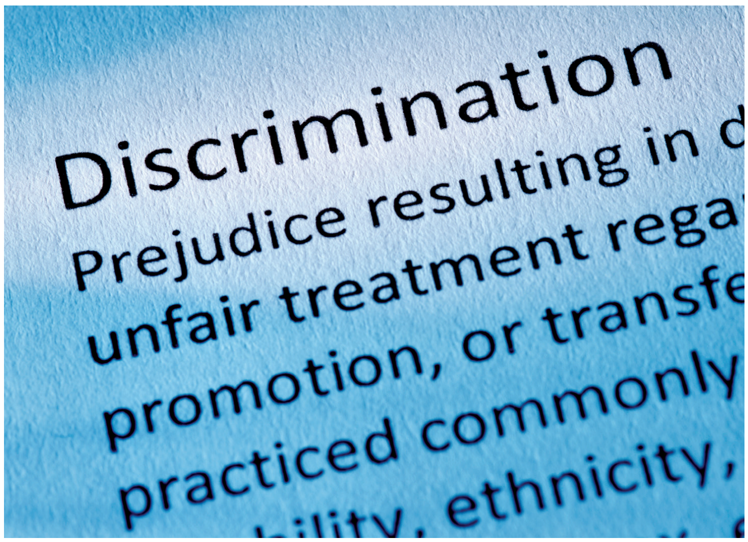
New CFE Requirement

The ICFE Board has adopted new requirements for the CFE program that will become effective on February 1, 2013. For all new candidates who enroll in the CFE program after February 1, 2013, completion of the IFA FRAN-GUARD™ Franchise Sales Management and Compliance course will be required. Effective February 1, 2014, completion of this program will become a mandatory requirement for all current CFEs who will recertify after February 1, 2014.

Baker Donelson's franchise attorneys are considering offering a FRAN-GUARD session sometime in early 2013. If you would be interested in attending such an in-person program in one of our office locations in the Southeast, please email lellis@bakerdonelson.com.

Would You Bet Your Business on Untrained Employees?, *continued from page 1*

For starters, some states, including California, Maine, Connecticut and New Jersey, have their own requirements for mandatory sexual harassment training. Failing to train in those states can lead to fines and penalties, and to strict liability in the event of employee lawsuits. Court decisions in a number of other states have issued guidance making training virtually mandatory under judicial interpretation of those states' laws. These courts have created a presumption against the employers on alleged violation of state labor law that correlates to federal Title VII if the employer fails to train its employees.



Most states do not require training and impose no automatic penalty for failure to conduct such employee anti-harassment training, but considering the defensive benefits and the downside of failure to perform training, many employment lawyers now consider it to be virtually mandatory.

Initially, proper training can greatly assist in defending harassment claims. Most employment lawyers agree that the best insurance against harassment conduct and claims is an effective anti-harassment policy. In order for policy to meaningfully benefit liability risk reduction, the policy must be effective and employees must be made aware of it. According to the EEOC, "The employer should provide training to all employees to ensure they understand their rights and responsibilities concerning workplace harassment." (*Employment Guidance: Vicarious Liability for Unlawful Harassment by Supervisors 6/18/99*).

One of the biggest fears for any franchisee is a punitive damages award. When a lawsuit verdict makes the newspaper headlines, it is usually because of punitive damages, which are intended to punish the employer and can be large. Fortunately, the Supreme Court has crafted a very strong defense for employers to use against punitive damage claims. Proper training can give employers an important defense in harassment cases, known as the *Kolstad* defense, after the Supreme Court case that created it (*see Kolstad vs. American Dental Ass'n*, 527 U.S. 526 [1999].)

Kolstad allows an employer to avoid an award of punitive damages (the multimillion dollar type of award) even if sexual harassment is proven, and even if a compensatory damage award is made to the employee. In order to take advantage of this defense, an employer needs to show that it engaged in "good faith efforts to implement an anti-discrimination policy." Generally, employers qualify for the *Kolstad* defense by adopting a comprehensive anti-harassment policy, and providing adequate harassment training for at least every management-level employee. Providing harassment training for all employees helps strengthen the defense.

Some courts, like the Seventh Circuit Court of Appeals in *EEOC v. IHOP of Racine*, have found that canned, generic training such as common videotaped training does not qualify for the *Kolstad* good-faith effort defense. In that case, the franchisee-employer was subjected to only $5,000 in compensatory damages, but $100,000 in punitive damages for its failure to adequately train its employees. Accordingly, policies and canned video training alone are not enough. Attorneys familiar with the relevant state's laws where the franchisee does business should be consulted to ensure that materials comport with the state's laws, and provide interactive training.

Case law from around the country has shown that employers pay the price for not having adequate training. For example, in *Bains v. ARCO Prods. Co.*, employees were originally awarded $1 million in compensatory damages and $5 million in punitive damages for failing to train on harassment. *405 F.3d 764 (9th Cir., 2005)*. Similarly, in *Swinton v. Potomac Corporation*, an appellate court upheld a trial court's ruling that a lack of manager training justified a punitive damage award of $1 million in a single plaintiff case. Having a policy alone is not sufficient. *270 F.3d 794 (9th Cir., 2001)*.

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Would You Bet Your Business on Untrained Employees?, continued from page 4

This area of training cannot be supported by franchisors. Under recent rulings, franchisors undertake the risk of direct liability to franchisee employees if the franchisor conducts, supervises or prescribes the training. Under the indemnity clauses in most franchise agreements, this risk boomerangs back on franchisees. While on appeal to the California Supreme Court, the appellate court decision in *Patterson v. Domino's Pizza* caused the franchise community to pause and reflect on franchisor involvement in franchisee HR issues. *143 Cal.Rptr.3d 396 (Cal. App. 2 Dist. 2012).*

In sum, franchisees and employers in general need to provide appropriate, state-specific and interactive training to at least all of their management-level personnel. Additionally, a comprehensive anti-discrimination policy must be adopted, publicized and enforced for all employees at every level. Performing these two relatively simple, inexpensive steps is an extremely wise investment to avoid costly punitive damages awards in the future.

KFC Franchise Guarantors Not Subject to Mint Julep Jurisdiction, continued from page 1

The written guaranty usually repeats or incorporates the personal jurisdiction and venue selection provisions of the franchise agreement so any action against the franchisee for money owed can include claims against the guarantors as well. But what happens if some of the guarantors are not subject to the personal jurisdiction of the court selected in the franchise agreement?

The franchisee and the guarantors had signed franchise agreements and related agreements for two KFC restaurants in the Dallas, Texas area. KFC became aware of certain breaches, gave notice to cure, and then terminated when the breaches continued without cure. The franchisee continued to operate both stores, allegedly violating the Lanham Act and the express terms of the franchise agreements. KFC brought an action to enforce post-termination remedies and for damages against the franchisee and its guarantors in its local federal district court, although the opinion reports that the franchise agreement and the related guaranty agreement contained no forum selection clause.

The U.S. District Court for the Western District of Kentucky[1] decided that a case by KFC Corporation against a terminated, holdover Texas franchisee and its guarantors must be transferred to a Dallas court, instead of continuing in the Louisville federal court designated in the KFC franchise agreement. Although the franchisee corporate entity and the principal shareholder-operator were subject to the Kentucky Long Arm Statute, in the court's view, the other shareholder-guarantor, who worked in the business on an active basis, and the wives of the investors who were also guarantors but did not work in the business, were not subject to the court's personal jurisdiction. The court recognized the inefficiency of splitting the case and elected to grant KFC's alternative motion to transfer, rather than dismissing the case.

Procedural issues aside, the decision presents a curious analysis by the court of what is a common commercial context in franchising. The franchise agreement and the guaranty recited that payment and performance of the franchise agreement's obligations to be guaranteed by the guarantors was due in part in Kentucky, where the franchisor's headquarters were located. The franchise agreement was signed and made binding in Kentucky, which satisfied the primary test of the Long Arm Statute, namely, the last act necessary to form the contract occurred in Kentucky. The guaranty recites that the franchisor was relying on the undertaking of the guarantors to assure performance of the franchisee's obligations in Kentucky to enter into the franchise agreement with the franchisee.

The court has no trouble with finding jurisdiction over the franchisee under the standards of the U.S. 6th Circuit Court of Appeals,[2] and the Supreme Court in *Burger King v. Rudzewicz.*[3] However, the court relied on the analysis of a similar question in a Long John Silvers case[4] to find that the connection between Kentucky and the guarantors was too infrequent and attenuated

1 *KFC Corporation, v. Texas Petroplex, Inc., Et Al.*, Civil Action NO. 3:11-CV-00479, United States District Court For The Western District Of Kentucky, 2012 U.S. Dist. LEXIS 144342, October 4, 2012, Decided, October 5, 2012, Filed.
2 *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)
3 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).
4 *Long John Silver's, Inc. v. DIWA III, Inc.*, 650 F. Supp. 2d 612 (E.D.Ky. 2009).

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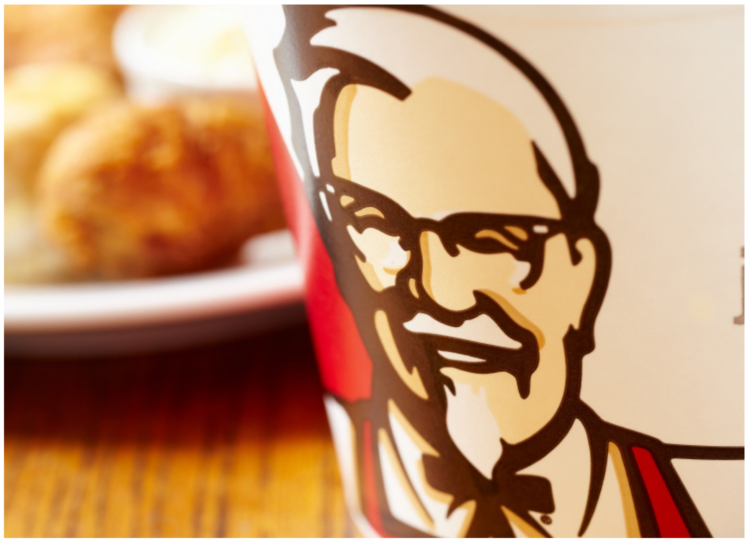
KFC Franchise Guarantors Not Subject to Mint Julep Jurisdiction, *continued from page 5*

to support jurisdiction. Because the contracts contemplated that the guarantors' contacts with Kentucky would arise only if the franchisee defaulted, the contacts were not sufficiently frequent or regular to satisfy the court's notion of due process. The court found that the signing of the guaranty, the submission of information as part of the franchise application by the guarantors and the reliance of the franchisor on the guaranty were insufficient to meet the requirements for personal jurisdiction.



As Kentucky is home to some substantial franchise organizations, this case now confirms the earlier decision as a non-anomaly with some punch. Franchisors relying on Kentucky law will need more specifics and continuous interaction with guarantors to be assured of local jurisdiction. Indeed, the paradox of this decision is to deprive Kentucky franchisors of the opportunity to protect their interests in Kentucky courts if the franchisee to which they have granted a franchise defaults so that enforcement of a contract entered into in Kentucky becomes necessary against the out-of-state owners of the franchisee. The case also reminds us that alleged violations of the Lanham Act perpetuated by a holdover franchisee create a federal question that federal courts should decide, but don't subject the franchisee and any contributory parties to jurisdiction where the franchisor is located. The franchisor must still satisfy the elements of its home state long arm personal jurisdiction statute to haul the franchisee and related parties into its local courts.

In this case, one speculates on the outcome if the guarantors signed initially as a general partnership and then assigned the franchise agreement to their controlled corporation. The franchisor could condition consent to the assignment on the continuation of primary liability for the assignors. What would happen if the history of the relationship included several instances where the franchisee had failed to pay, the guarantors were then called upon to pay and then did so by making direct payments to the franchisor, instead of contributing the funds necessary to the franchisee and directing that such entity make the payments? At a minimum, franchisors should pay attention to and document interaction with the guarantors of a franchisee with a view toward evidence needed for their home state long arm statute.

Hilton Not Liable to Guests for Terrorist Attack in Egypt

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In October 2004, a suicide bomber drove an explosives-laden truck into the lobby of the Taba Hilton near the border between Egypt and Israel in the Sinai Peninsula. The blast caused ten floors of the hotel to collapse. The bombing of the Hilton hotel was part of a coordinated attack that included simultaneous explosions in two other neighboring resort locations.[1]

At the time of the attack, the Hilton hotel was full of international guests who were celebrating the Jewish holiday of Sukkot. Thirty-one people were killed in the attack on the Hilton property and approximately 160 people were seriously injured. Two other people died in the related bombings that day. It was obvious that all three attacks were focused on Israeli tourists.

1 The other explosions were in Ras al-Shitan, a camping area popular with young Israeli backpackers. The site is near the town of Nuweiba, which itself boasts a few hotels and restaurants.

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Hilton Not Liable to Guests for Terrorist Attack in Egypt, *continued from page 6*

Taba is a main crossing point between Israel and Egypt, and a major gateway for thousands of Israelis going on holiday to resorts and hotels on the Red Sea. Security at the hotel was controlled in part by the Egyptian Tourist Police Department, which maintained an office in the hotel. There were also numerous Egyptian National Police guards routinely stationed at the nearby border crossing. Given its location and the level of security present, it was generally considered to be a safe resort location.

Litigation followed, with two suits filed against Hilton in the United States alleging inadequate security and gross negligence. One action was filed in federal court in New York, New York and the other action was filed in state court in Miami, Florida (where Hilton International's central offices were located).

Both actions were challenged by Hilton on the basis of "forum non conveniens." The trial court in the Florida action denied Hilton's motion to dismiss because the lead plaintiffs were American citizens living abroad and working for the Army Corps of Engineers and had other indicia of Florida citizenship. Under the Florida law analysis, the lead plaintiffs were given an "edge" or increased deference to their chosen forum and then the other plaintiffs (who were Israeli and German citizens) were permitted to join the action based on Florida's liberal joinder rules because their claims "raised the same factual matters and questions of law."

However, on appeal the Florida appellate court reversed that decision and dismissed the action. The appellate court pointed out that the United States citizens were not really residents of Florida in that they had only acquired an interest in property and obtained drivers' licenses after the bombing and just before the suit was filed.

The U.S. District Court in New York subsequently dismissed the action filed there on the basis of forum non conveniens.

In both actions, the plaintiffs contended that their remedies abroad were inadequate or ineffective because they would not be able to recover as much as they would presumably recover in the U.S. On the other hand, Hilton pointed out the difficulty in trying cases in the United States for an event that occurred on the border of the Red Sea. For instance, jurors would not be able to actually visit the hotel site; international witnesses could not be compelled to appear; and documentary evidence was largely written in Arabic and would require translation.

After a thorough analysis of all of the factors, both the Florida Court of Appeals and the United States District Court for the Southern District of New York found that Egypt (where the bombing had occurred) was an adequate forum. Of course, those decisions came before the political revolt in Egypt.

Nevertheless, both groups of plaintiffs re-filed their actions in Israel. An evidentiary hearing on the issue of liability was held. In late August this year, the Tel Aviv District Court held that Hilton was not legally responsible for the deaths and injuries that resulted from the terrorist attack. After deciding to apply Israeli law to the suits, the court addressed the issue of how one can take proper measures to prevent crime and especially terrorist attacks.

The Taba Hilton was located in a resort area that was frequented by Israeli citizens and Westerners and presumably would be considered an attractive terrorist target. Yet, prior to the incident, there had not been a car bomb explosion in Egypt in general and in the Sinai in particular for seven years.

Hilton's efforts to secure the hotel included perimeter road blocks manned by Egyptian police forces; posted security personnel at the access roads and entrances to the hotel; a unit of plainclothes "Muhabarat" forces who patrolled Taba and the hotel area; and a metal detector at the front entrance. Neighboring hotels had similar arrangements but the Taba Hilton was unique in that the

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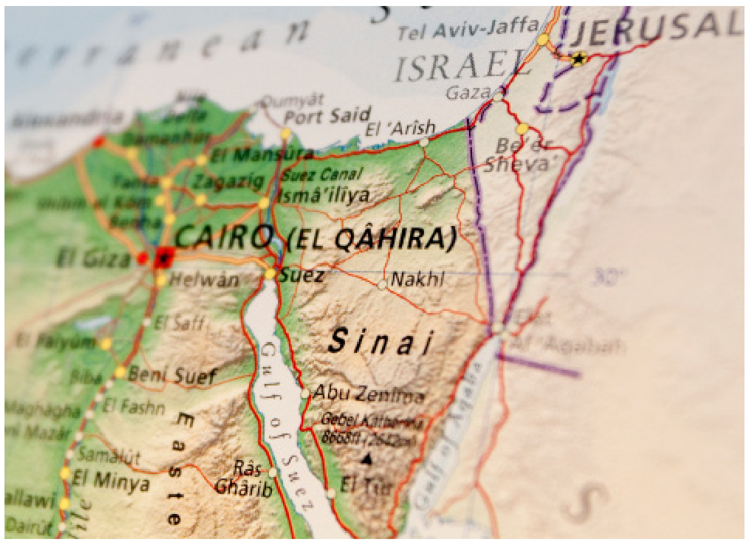
Hilton Not Liable to Guests for Terrorist Attack in Egypt, *continued from page 8*

Egyptian police forces actually maintained an office within the hotel.

The plaintiffs argued that international hotel attacks were occurring with more and more frequency and that this, as well as other factors, should have placed Hilton on heightened notice to take additional security steps. The question became whether Hilton was required to second-guess or supplement the security put in place by the national police forces to deal with this foreseeable risk?



The Israeli court noted that:

> "The State of Israel is very sensitive to the security of its citizens. Since **we do not exist among friendly people** and over the years there are acts of hostility against Jews and Israelis both in Israel and abroad, our intelligence services are always on the lookout and justly so. From the evidence it arises that the Egyptian security conception was different. The Egyptians are aware of the importance of tourism for their country and certainly wish for tourists to keep coming without being afraid of staying in hotels in Egypt." (emphasis added)

But, considering all of the various factors, it could not be proven to the satisfaction of the court that the hotel could have concretely foreseen a terror attack against its guests. Thus the cases were dismissed.

In Israel there is a state-supported system of no-fault compensation for terrorist victims, the "Benefits for Victims of Hostilities Law," which would provide some recovery to the Israeli citizens impacted by the terrorist blast. But what about compensation for the other deceased and injured guests?

After concluding that Hilton was not technically liable under the applicable legal analysis, the court went on to urge Hilton to compensate the victims anyway:

> "The parties emphasized the hotel's respectability; it seems to me that part of this respectability should be a moral-humane approach, and therefore it would be only appropriate to determine a criterion for compensating the victims, even if the Defendant prevailed in Court."

Hotels in security-sensitive locations maintain a delicate balance among the factors of security, guest convenience and access, and costs in a rate-competitive environment. Any meaningful disclosure to guests of the inherent risks of visiting in a security-sensitive location would have a chilling, if not fatal, impact on occupancy and rate. Hotels typically blend passive and active security measures in conjunction with local law enforcement such as was done by the Taba Hilton to promote safety and comfort. Much like the incidents themselves, the question of whether these measures will be a sufficient defense against claims arising from future incidents cannot be predicted. Governments of sensitive locations may wish to underwrite tourism promotion with a victims' compensation program similar to Israel's program, so that hoteliers will not risk their investments over a lapse in security and guests will not be left without remedy in their hour of need.

'Til Death Do Us Part: Not So Fast!

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On September 7, 2012, the U.S. Circuit Court of Appeals for the Eight Circuit issued its opinion in *H&R Block Tax Services, LLC v. Franklin*, 691 F.3d 941 (8th Cir. 2012), reversing the lower court's ruling that a franchise agreement carried a perpetual term. The plaintiff, H&R Block, is a Missouri limited liability company which operates retail tax preparation offices and franchises others to operate such offices under its service marks. The franchisee, who was the defendant in the case, operated two such offices in California pursuant to a Franchise Agreement dated 1975. The Franchise Agreement contained the following provision governing its duration:

> The initial term of this Agreement shall begin on the date hereof and, unless sooner terminated by Block [for cause] as provided in paragraph 6, shall end five years after such date, and shall automatically renew itself for successive five-year terms thereafter (the "renewal terms"); provided, that Franchisee may terminate this Agreement effective at the end of the initial term or any renewal term upon at least 120 days written notice to Block prior to the end of the initial term or renewal term, as the case may be.

On June 30, 2010, H&R Block gave the franchisee notice of its intent not to renew the Franchise Agreement when the then-current renewal period was said to expire on December 1, 2010. H&R Block also filed a suit in Federal District Court in Kansas City, Missouri seeking a declaratory judgment that it could terminate the agreement. The franchisee counter sued for a declaration that H&R Block was not entitled to decline to renew the Franchise Agreement.

The parties filed cross-motions for summary judgment on the issue of H&R Block's right to terminate the Franchise Agreement. The District Court ruled in favor of the franchisee holding that the language of the Franchise Agreement contained an unequivocal expression of the parties' intention to enter into a perpetually enforceable contact.

On appeal, the Eighth Circuit noted that, absent ambiguities, the intention of the parties to a contract is derived exclusively from the plain language of the writing. The court also noted that the Franchise Agreement provided that it was to be governed by Missouri law, and this choice-of-law provision was reasonable and enforceable. Thus, the court looked to Missouri substantive law.

The Appeals Court found that, in the past, Missouri courts were prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation. *Paisley v. Lucas*, 364 Mo. 827, 143 S.W.2d 262, 270 (Mo. 1940). For a contract to be enforceable in perpetuity, it must be "adamantly clear" that such was the parties' intent. *Preferred Physicians Mut. Mgt. Group, Inc. v. Preferred Physicians Mut. Risk Retention Group, Inc.*, 961 S.W.2d 100, 103 (Mo. Ct. App. 1998). The parties' intention that the contract's duration is perpetual must be clearly expressed in unequivocal terms. *Paisley*, 143 S.W.2d at 271. This approach is generally in accord with most other states. See, e.g. 17B *Corpus Juris Secundum*, Contracts, § 602 (2011), and the cases cited therein.

The franchisee correctly pointed out to the court that the franchise agreement expressly gives the franchisee the sole right to terminate the contract without cause. Thus, the franchisee argued, the parties intended a perpetually enforceable contract subject only to its exclusive right to terminate without cause.

In a split two-to-one decision, the Eighth Circuit disagreed and reversed the district court's opinion. The court noted that in only

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'Til Death Do Us Part: Not So Fast!, *continued from page 9*

one other Missouri case did the court construe a contract as perpetually enforceable, and in that case the word "perpetually" was contained in that contract. Additionally, the court concluded that the clause providing for automatic renewal contradicts the notion that the contract would last forever.

Ultimately, H&R Block was allowed to terminate its Franchise Agreement, but only after two and a half years of costly litigation, and even then by virtue of a split decision of the Court of Appeals. At the time this suit was filed, the Franchise Agreement was 35 years old. An updated agreement was badly needed. Franchisors have an obvious interest in securing long term franchisees. However, for franchisors, your franchisees are the face of your brand. Changes in circumstances over time sometimes necessitate fresh faces. Franchisors must draft term and renewal clauses that, in the absence of franchise relationship statutes which control franchise terminations in some states by limiting termination unless good cause exists, provide franchisors and franchisees with a certain end date of the term, and give both parties the flexibility they may need to deal with changed circumstances many years in the future.

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