

PUBLICATION

IFA Legal Symposium Report

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For our readers who did not attend the early May International Franchise Association Legal Symposium held in Washington, we pass along these observations:

- State legislative interest in new franchise relationship laws spans the continent, from Maine to California. Although no new relationship legislation is likely to be enacted, bills introduced in California, Maine, Massachusetts and Rhode Island were deferred for additional study, with the potential to revive next year. The impact of these bills ranges from mildly disruptive to reshaping franchise relationships. If enacted in their present forms, many franchisors will likely avoid franchising in the states where enactment occurs, at least until the price of added legal risk can be factored into the fee structure. A grass roots coalition of franchisee associations is gathering strength, and state legislators who abhor business interests curiously seem to gravitate to these anti-consumer bills.
- Efforts to enact independent contractor laws in Delaware, Massachusetts and Washington to mirror similar legislation recently enacted in Georgia may not be successful this year. Independent contractor laws prohibit state unemployment and workers' compensation insurance funds from treating franchisees as if they were employees of the franchisor, as long as the franchisee has signed a franchise agreement.
- A Minnesota bill to prohibit franchise non-competition covenants and a Nevada bill to enact a "Fat Tax" on quick service restaurant menu items having high calorie counts are not likely to move forward.
- The IFA's Task Force to work with the U.S. Small Business Administration on issues of eligibility for the SBA Franchise Registry reports progress. The Task Force focused on certain key issues where the Franchise Registry eligibility criteria and common franchise agreement terms and conditions clash, particularly on the issue of "one size fits all" criteria used by SBA and Frandata, the contractor for the Registry.
- Franchise disclosure legislation and regulation is likely to arrive for British Columbia in 2014.
- The IFA continues to monitor the *Patterson v. Domino's Pizza* case in California as the appellate decision is reviewed by the California Supreme Court. The case involves a claim that the franchisor should be vicariously liable for the franchisee's alleged violation of workplace discrimination rules.
- While there was no seminal case decision that created buzz among practitioners, many cases discussed by presenters focused on the issue of how much control a franchisor asserted over its franchisees. These cases arose in the contexts of several categories of employment law claims by employees and states against employers, as well as the traditional vicarious liability claims for personal injuries and property damage. Franchisors were unable to extract themselves from cases alleging franchisee violations of fair housing, civil rights, credit reporting and telephone solicitation laws. Courts continued to struggle with agency law principles, and inconsistently analyzed whether liability could be predicated on the mere right to control invested in the franchisor, or whether something more in the nature of the franchisor's asserting the right to control should prevail.
- The opening plenary, moderated by this author, offered the attendees a point-counterpoint perspective on franchise relationship issues. Panelists Ken Walker, former IFA chairman and CEO of franchisor Driven Brands, and Aziz Hashim, CEO of a large multi-unit, multi-brand franchisee, traded views on a number of key issues facing franchising, such as whether an appearance on the

Undercover Boss television show, where 43 percent of the shows were about franchised businesses, is a good idea for the franchise system. They also shared consensus on a set of guiding principles that they have been debating as part of a broader industry task force. These principles are:

- Market forces create the climate for substantive changes in franchising
- Clarity and transparency will strengthen franchising.
- The franchise agreement – nothing else - governs the legal relationship between franchisor and franchisee.
- Successful systems require profitable and sustainable franchisees and franchisors.
- Franchisees should have the opportunity to monetize their equity (if any) at the end of the relationship.
- Franchisors should have the right to determine the terms of their franchise offering.
- Franchising is a unique business model.
- Franchisees should clearly understand the franchise business model before investing in a franchise.
- Franchisors should clearly understand the franchise business model before choosing this method to develop their business concept.