

# Franchisee Law Letter™

www.franchiseelawletter.com • Volume 1, Issue 1 • January 2005

## Einbinder & Dunn, LLP

is a full-service business law firm representing franchisee clients in all matters relating to their franchised businesses. The firm represents franchisee clients in the retail, manufacturing, restaurant, optical, health care, education, recreation, and service sectors.

Michael Einbinder is a member of Einbinder & Dunn and represents franchisee clients in dispute resolution and litigation matters relating to:

- Renewal agreements;
- Non-compete agreements;
- Encroachment issues;
- Advertising and marketing fund disputes; and
- Site selection and support.

Michael Einbinder also represents franchisees in the formation of independent franchisee associations and represents associations in system-wide negotiations and dispute resolution with franchisors.

Terrence Dunn is also a member of Einbinder & Dunn and represents franchisee clients in:

- Business transactions involving the development, acquisition and sale of franchises from franchisors as well as from existing franchisees; and
- Real estate transactions such as lease negotiation and property acquisition.

## Renewal Agreements — The Ticking Time Bomb

By Michael Einbinder

Is your franchise agreement coming up for renewal? If it is, in order to continue in business, you will have to sign a new franchise agreement when your old agreement expires. The renewal provision of your agreement may be a ticking time bomb. Most agreements state that to renew, the franchisee has to sign what is referred to as the *then current form of franchise agreement*. That is, you will be required to sign the agreement that your franchisor is making its new franchisees sign. This new agreement will be substantially different than the one that is about to expire. The franchise that you have had for ten years will suddenly be changed and you will be operating under a new and greatly modified document and the rights that you had under the old agreement may be taken away.

For example, franchise agreements that originally appeared to provide for unlimited renewals may now be limited to one or two renewals and the term may be shortened from ten years to five years. Although your old agreement granted you an exclusive territory, the new agreement may allow the franchisor to establish new franchises

or company-owned units nearby. Or the new agreement may provide that the franchisor can distribute products in your territory through alternative channels, such as the Internet or non-branded retail outlets. Franchisors can also change royalty rates, advertising contributions and the level of service they are required to provide to their franchisees.

What can you do? First you need to know your rights. Have a professional review your original franchise agreement and the renewal document. Find out what the differences between the two are. The original franchise agreement may provide more rights to you than you know or than the franchisor wants to acknowledge. In some cases, the old agreement binds the franchisor for longer than the initial ten-year term. It may not allow the franchisor to take away territory or encroach on your territory. The key is to know your rights and to enforce those rights. (One choice for franchisees whose agreements are expiring is to not renew. This option will be discussed in an upcoming issue.)

Contact Michael Einbinder at [me@ed-lawfirm.com](mailto:me@ed-lawfirm.com)

## The Hidden Costs Of Owning A Franchise

By Terrence Dunn

A knowledgeable franchisee will understand how much it should cost to run his or her business. But it is the hidden or unforeseen costs that arise in the course of running a business that will make the difference between success or failure. Many of these hidden costs can be identified in advance by a careful review of your lease, which may contain additional charges to the tenant/franchisee, sometimes conveyed in a confusing manner. For instance:

- contributions towards property tax payments or tax escalations over a base year;**
- contributions towards building or common area operating expenses, including capital improvements;**
- charges related to repairs, alterations or maintenance of the structure or infrastructure of the building or common area, including those required by law; and**
- percentage rent and other additional rent items, typically tied to your gross sales of services or products.**

These items can create an unexpected and dramatically negative affect to the bottom line. A prior careful reading of the lease by experienced real estate counsel can help you identify these expenses in advance, minimize them in lease negotiations and include them in pro forma projections. Even after the lease is signed, an understanding of these lease items can help the franchisee respond to these charges once imposed, as they typically are presented with little or no explanation, calculated in a manner designed to profit the landlord most. For example, you should: (i) examine the property's tax bills and determine the real tax increases; (ii) analyze the percentage share that you are being charged for operating expenses and confirm it is fairly assessed in relation to other tenants; and (iii) require the landlord to itemize operating and common area expenses and repairs and maintenance items to determine that you are not being charged for items that are actually the landlord's cost.

Your cost of doing business can be significantly reduced by identifying and managing these hidden costs. Contact Terrence Dunn at [tmd@ed-lawfirm.com](mailto:tmd@ed-lawfirm.com)