

Franchisee Law Letter™

www.ed-lawfirm.com • Volume 1, Issue 3 • June 2006

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. The firm's franchisee clients include individual franchisees, multi-unit operators, area developers, franchisee associations and franchisee groups.

Michael Einbinder, a member of Einbinder & Dunn, 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, also a member of Einbinder & Dunn, 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.

Please visit our website at www.ed-lawfirm.com for more information about the firm's services. If you would like a consultation, please contact Terry or Michael via telephone at (212) 391-9500, or via email, at tmd@ed-lawfirm.com or me@ed-lawfirm.com, respectively.

Encroachment

By Michael Einbinder

Is your franchisor competing with you? Is your franchisor allowing other franchisees to compete with you? Generally, if your franchisor is competing with you or allowing other franchisees to compete with you, your rights are governed by the franchise agreement. Until recently, many franchise agreements provided franchisees with exclusive territories within which the franchisor could neither open a company store nor license other franchisees to open a store. Recently, however, franchisors have refused to grant exclusive territories in franchise agreements and, in some cases, the franchisee is given no protected territory whatsoever.

Even where the franchise agreement purports to offer protection, franchisors may unfairly compete by encroaching on a franchisee's territory. Sometimes, franchisors encroach by establishing a brick and mortar location for a competing business. Other times, the franchisor encroaches by establishing an internet website which siphons business from the existing franchisee.

If your franchisor is competing with you or allowing others to compete with you, the first thing you should do is review your franchise agreement to determine whether it clearly protects you. In that event, you may have a breach of contract claim against your franchisor. However, even if you are not protected by the explicit language of your franchise agreement, you may still have a legal remedy because every party to an agreement has an obligation to act in good faith and with fair dealing to accomplish the purposes of that agreement. If you can demonstrate that your franchisor has violated its obligation of good faith and fair dealing by establishing the competing business, you may be able to stop the unfair competition. These cases can be hard to prove, but when successful, they afford a remedy to franchisees who are suffering from competition imposed by the franchisor.

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Transfers of Interest

By Terrence Dunn

Let us assume that you are an operating franchisee, subject to a franchise agreement. Then let us further assume that events occur which cause you or your family to consider a transfer of your interest in the franchise, such as a possible sale of the business, a franchisee's desire to retire, or the death of a franchisee. It is crucial that you understand how your franchise agreement controls what will happen in those instances.

An examination of a number of franchise agreements for major national franchises reveals the following requirements:

- (i) Every assignment of an interest requires the franchisor's consent;
- (ii) Failure to obtain consent is an event of default;
- (iii) Consent will not be unreasonably withheld, provided a laundry list of requirements are complied with, including (1) a general release of all claims by assignor; (2) assumption by all assignees (including shareholders and member of an entity) of all obligations; (3) assignees must meet certain qualifications to operate the franchise; (4) a transfer fee based upon franchisor's expenses is paid; and
- (iv) Every assignment requires a right of first refusal to be exercised or waived by franchisor under the franchise agreement.

These same franchise agreements provide that in the event of the death of a franchisee, the representative of the franchisee's estate must apply within 9 months to transfer the franchise to a qualified franchisee, or terminate the franchise. Even a transfer of less than control (less than 50% ownership of the franchise) is subject to consent and a list of requirements.

If you want to sell your franchise, you will have to understand the limitations and requirements imposed by your franchise agreement. If you desire to engage in estate planning and perhaps arrange for the transfer of your business to your family, either during your lifetime or through your will, you must understand what restrictions your franchise agreement imposes upon you in that regard. In the case of the franchise agreements described above, even the simple incremental transfer of a percentage of the business to the next generation, entered into for estate planning purposes, will require the franchisor's approval and a possible release of all claims against the franchisor up to that date.

It is essential as a business owner that you understand the transferability of this particular asset. An attorney experienced in franchise matters, with a background in estate planning and business transactions, can review your franchise agreement and advise you as to exactly how you may assign or transfer a whole or partial interest in your franchised business.

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Franchisee Law Letter™

**If you have any questions,
please email them to us at**

info@ed-lawfirm.com

We will respond within 48 hours.

Message from Einbinder & Dunn:

We are pleased to provide you with the third in a series of Franchisee Law Letters devoted to issues affecting franchisees. Our third edition includes an article about issues that arise when a franchisor encroaches on a franchisee's territory. Also featured is an article describing requirements to be met when a franchisee wants to sell or transfer an interest in their franchise.

There are many opportunities in the world of franchising and equally there are risks; therefore it is important that franchisees understand their legal rights. The intention of this newsletter is to help you understand your rights.

If there are any issues you would like future editions of the Franchisee Law Letter to address, please email us at info@ed-lawfirm.com. For additional information about our franchise practice, including a detailed description of our services for franchise clients, as well as to access our past newsletters, and articles written by the firm's members, please visit our website at www.ed-lawfirm.com. Our website also features attorney biographies, information about the firm's additional practice areas, notably our business/corporate law, business/commercial litigation, real estate and trusts and estates practices, and much more.

The information you obtain in this newsletter is not, nor is it intended to be, legal advice. You should consult an attorney for advice concerning legal issues affecting your business.
