



2023 LEGAL SYMPOSIUM

MAY 7-9, 2023 | WASHINGTON, DC



Basics Track: Franchise Litigation

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Business Costs of Litigation

Litigation is frequently a last resort (for good reason):

- Significant management disruption
- Diminished focus on business activities
- Franchisor/Franchisee revenue decline
- Threat of injunction or adverse monetary judgment
- Attorneys' fees
- Negative morale impact on franchise system
- Disclosure requirements



Considerations for Avoiding Litigation

Franchisors/franchisees may have several alternatives:

- Management-level B2B pre-litigation negotiations
- Probation, training, and rehabilitation (for deficient sales performance)
- Approved transfer (rather than termination)
- Franchisor “buyout” (rather than termination)
- Pre-litigation neutral-led mediation



Primer on Litigation and Arbitration

Litigation:

- Opportunity for jury trial
- Formal discovery processes
- Benefits of binding precedent
- Appeal rights
- Longer time to judgment
- More expensive on average
- Public record

Arbitration:

- Confidential
- Informal (but cheaper) discovery
- Shorter time to judgment
- No appeal rights (usually)
- Cost of arbitrator
- No jury trial



Pre-Litigation Strategic Considerations

Where litigation is unavoidable, parties have several important pre-suit strategic considerations:

- Where should we sue?
- What law applies?
- Does applicable law override the contract?
- What are our available remedies/defenses?
- Litigation holds and document preservation



TROs and Preliminary Injunctions

Early injunctive relief can provide significant leverage. Seeking it escalates the dispute (and fees), but there may be good reason:

- Some state laws create presumption of irreparable harm
- Franchisor protecting IP, trade secrets, proprietary info, customer goodwill, public health, etc.
- Franchisee preserving sole income source

Arbitration can provide emergency relief. (AAA Rule 38)



Time-consuming Procedural Issues

Manage expectations re: time to resolution. Litigation is often bogged down with early (and pricey) procedural battles:

- Removal and/or remand
- Choice-of-law
- Forum-selection clauses/transfer motions
- Jurisdictional issues
- Motions to dismiss
- Amended pleadings



Discovery Headaches and Expenses

Discovery is an expensive and disruptive process for all litigants. Ensure the business understands this before filing suit:

- Document retention and preservation
- Document collection process, disruption, and expense (attorneys' fees, vendor fees, storage fees, etc.)
- Written discovery
- Deposition preparation and attendance (incl. management-level employees)
- Expert witness fees
- Discovery motion practice
- Process can take 9+ months



Franchisee's Potential Claims

Pre-sale claims:

- Improper/inadequate franchise disclosures
- Common-law fraud and financial misrepresentations
- Unfair and deceptive trade practices

Post-sale claims:

- Breach of contract/good faith and fair dealing
- Refusal to consent to transfer/sale
- Unlawful termination



Franchisor's Potential Defenses

Procedural defenses:

- Choice-of-law and inapplicability of franchise statutes
- Transfer/removal/compel arbitration
- Statute of limitations

Substantive defenses:

- Merger and integration clauses
- Economic loss doctrine
- Statutory "good cause" for termination
- Franchisee failure to comply with contract (beware of anti-waiver provisions)



Franchisor's Potential Claims

Post-sale claims:

- Non-compliance with system standards
- Failure to pay royalties, advertising fees, products/services invoices
- Abandonment
- Insolvency
- Unauthorized transfer or sale
- Non-compete/non-solicitation violations
- Trademark/trade name infringement (Lanham Act)
- Disclosure of confidential information and trade secrets



Franchisee's Potential Defenses

Post-sale defenses (sometimes counterclaims):

- Failure to comply with contract
- Unlawful termination (i.e., no "good cause," notice/cure period, etc.)
- Injunction prohibiting termination
- Materiality of system standards/performance deficiencies
- Waiver
- Express or implied modification of contract



Available Remedies

Franchisor remedies:

- Contract damages
- Liquidated damages
- Injunction
- Declaratory relief (i.e., termination was lawful)

Franchisee remedies:

- Contract damages (incl. lost profits or fair market value?)
- Rescission and restitution
- Injunction
- Specific performance



Questions?

