

Planes, Trains and Automobiles: How Franchise Companies Build Brand Awareness with the Travelling Public

By Susan A. Grueneberg

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Building brand awareness has become the new hot button for companies both large and small. Branding strategies increase positive recognition among consumers and drive demand and sales. Sometimes these strategies include association with a person, animal or symbol. Think about what springs to mind if you see an ad with a quick-witted lady dressed in a white apron with a price gun.

While local and regional brands can be very successful in their limited geographic areas, they can be unknown in other parts of the country. Creating national awareness and even international recognition can be difficult and expensive. As a result, many companies have decided to focus their efforts on establishing locations where new customers can come to them.

As counsel to California companies striving to expand into new markets, it is important for lawyers and their clients to be aware of the legal and regulatory issues they may meet along the way. Keeping up with brand development translates into being familiar with laws governing product and service distribution, including franchise and business opportunity laws.

Airports are an obvious choice to expose a concept to eager customers from a wide range of geographic locations. Increasingly, restaurants and other food concepts have realized the value that contact with visitors from other areas of the country and the world can bring.

In many locations, airport authorities are looking for local concepts to provide a reflection of the city's unique flavor. That may mean cheesesteak sandwiches in Philadelphia, half smokes in Washington DC or beignets in New Orleans. For these restaurants, the goal is for consumers to take awareness of the food concept back to their homes and create a demand for the product when it arrives. In some cases, the

travelers may seek to take the concept back themselves and will contact the concept owner for a license to do so.

The appeal of other types of venues may not be as obvious. For example, a restaurant can reach a targeted audience by having a presence at a convention center, sports arena, a museum or even an amusement park. Imagine the appeal of being the branded food service operation at a convention center for one of the large franchise expositions. Or opening a frozen dessert cart at an iconic amusement park and creating a lifetime of loyalty among a younger generation of customers who flock there from around the world.

What are the legal implications if your client decides to take this route? Concessionaires frequently dominate the market in non-traditional locations. There are also operators who specialize in convention centers and similar types of locations.

Airport concessionaires will often have a group of different brands they shuffle in and out of their proposals to airport authorities. These bids are typically submitted in response to formal requests for proposals. If successful in the bid process, the concessionaire will operate the restaurant at the airport location. The agreement between the owner of the restaurant concept and the concessionaire will technically be a franchise agreement no matter what its title, if it has all of the elements of the definition of a franchise. Under California law, these include substantial association with the trademark or commercial symbol of the restaurant owner, the payment of a fee and a marketing plan prescribed in substantial part. This last element of the definition is actually broader than merely providing marketing assistance. Determining whether or not it is present in a commercial relationship is highly fact driven. The following types of provisions are influential in determining whether or not a "marketing plan" is present: a prescribed menu, standards and specifications for products

and equipment to be purchased, proprietary recipes that must be followed, training, an operations manual and other types of controls on the operation of the business. It is a rare restaurateur who does not want to control most of the aspects of the business conducted by a third party using the restaurateur's valued brand name.

The consequences of being a franchise in California include the requirement to provide presale disclosure in accordance with both federal and state law, and to register the franchise offering with the California Department of Corporations prior to the offer or sale (see www.corp.ca.gov for more information on compliance with the California Franchise Investment Law).

Unless the owner of the restaurant concept is already franchising, this can be a significant impediment to participating in a bid for a location at the airport. Complying with these laws merely on the off chance that the bid will be successful is not an attractive proposition.

Fortunately, there are several alternative strategies to pursue when faced with this situation. The first is to research and document exemptions to both federal and state law. Federally, the "fractional franchise exemption" is one to consider. A fractional franchise has two components: the franchisee (or an affiliate) has at least two years experience in a similar type of business and the parties must reasonably anticipate that revenues from the franchised business will not exceed 20 percent of the franchisee's total volume of revenues during the first year of operation.

Because of the latter requirement, this exemption will not be available if the franchisee forms a new entity to operate the business since, by definition, this entity must be engaged in other endeavors. One additional caveat is that in many airport contracts the concessionaire is required to allocate a certain number of operations to a minority business enterprise, also known as an MBE. If the agreement is between the owner of the franchise concept and an MBE, there may be an issue with respect to the applicability of the fractional franchise exemption.

Even if an exemption is available under federal law, there is also an issue of compliance with California franchise law.

Occasionally, a restaurant concept owner may consider entering into a "license" with the airport concessionaire. If it is later discovered that this so-called license has all of the elements of a franchise, the California Franchise Investment Law does provide for a mechanism to report the violation to the Department of Corporations through a registered notice of violation. Delivery of this registered notice to the franchisee will shorten the statute of limitations for claims under the California Franchise Investment Law by the franchisee to 90 days.

The allure of non-traditional locations to build brand awareness for companies in a variety of sectors, especially food and retail industries, is strong. Companies considering this route and their counsel should be aware that navigating the legal minefield of franchise laws in these endeavors is crucial to success.



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