

BY GLENN PLATTNER AND
SHELLY GOPAUL

Can a Franchisor Be Sued For “Malpractice”?

A LAWYER OR DOCTOR WHO ACTS negligently can be sued for malpractice. Many franchisees rely on the franchisor’s purported expertise in running their business. If such assistance is not helpful, can the franchisee sue for “franchisor malpractice?”

Proposed franchise legislation

There are no laws codifying a franchisor duty of competence. In 1998, U.S. Rep. Howard Coble (R-N.C.) introduced the Small Business Franchise Act, which provided that “[U]nless a franchisor represents that it has greater skill or knowledge in its undertaking with its franchisees, or conspicuously disclaims that it has skill or knowledge, the franchisor is required to exercise the skill and knowledge normally possessed by franchisors in good standing in the same or similar types of business.” The Act passed the House but did not pass the Senate. There have been several unsuccessful attempts since to reintroduce similar legislation.

Cases on franchisor malpractice

There is no claim for “franchisor malpractice.” Instead, such claims are usually brought as implied covenant or negligence claims, which have resulted in mixed rulings.

1. Cases imposing liability. Courts will enforce an explicitly stated standard of care. In *Proteus Books Ltd. v. Cherry Lane Music Co.*, the defendant had agreed to perform distribution services with “due professional skill and competence.” In allowing the claim to proceed, the court held that “[I]t is not fatal that the contract does not define the standards of due professional skill and competence. Reference to the managerial and marketing standards of the book publishing

and distribution industries is sufficient to make the phrase readily understandable.”

Liability has been imposed even where there is no particular standard of care required. In *Fox v. Dynamark Security Centers Inc.*, the franchisor argued “it could not breach the franchise contract because its only obligation was to provide ‘training,’ presumably even incompetent training, and, if it did so, it would thereby satisfy the terms of the contract.” The court found the jury should “resolve the question of whether the training provided... was so inadequate as to constitute a breach.” (See also *Ponderosa System, Inc. v. Brandt* (supply of defective meat breached implied covenant); and *In re DeRosa* (failure to provide entire line of pastries, supplying inferior products, and late deliveries breached implied covenant).

2. Cases finding franchisor not liable. In *TCBY Systems, Inc. v. RSP Co., Inc.*, plaintiffs alleged TCBY was obligated “to operate its system and to deal with the [franchisees] in a skilled manner, [and] to exercise the care and skill a reasonably prudent franchisor would exercise under similar circumstances....” The court disagreed, holding there is “a duty of ordinary care only where the professions were sanctioned by state law.”

In *RHC, LLC v. Quizno’s Franchising*, where the contract addressed site selection responsibility, plaintiffs could not “create a duty of competence with respect to [the franchisor’s] approval of the locations.” (See also *In re Sizzler Restaurants Int’l, Inc.* (the claim that the franchisor must “insure any franchisee against failure who follows the Sizzler method” was “unacceptable”); *California Bagel Company v. American Bagel Company* (the claim that “defendants breached their contract duty to exercise due care in assisting in the selection of good locations”

could not “support a cause of action in tort”); *A.J. Temple Marble & Tile, Inc. v. Union Carbide Marble Care, Inc.* (rejecting the claim that defendant breached “a duty to perform as a franchisor in a manner consistent with the standards of franchisors generally” because “[n]o such duty has been imposed on franchisors by New York courts”).

In *Century Pacific v. Hilton Hotels Corp.*, the court rejected the claim that franchisees were entitled to *national* advertising and a *global* reservation system. The franchisor had “the sole right to determine how money paid to [it]... would be used.” Thus, the argument that plaintiffs “reasonably expected that the reservations and advertising services would be a certain scope and caliber” was “unpersuasive, because the best evidence of what parties to a written agreement intend is what they say in their writing.”

Recommendations

There is no conclusive answer as to whether a franchisor can be liable for “incompetence,” but a franchisor is unlikely to be held responsible for a franchisee’s failure unless it commits specific bad acts. Courts are also reluctant to impose obligations that contradict the explicit language of the parties’ agreement. Thus, having a well-written franchise agreement that clearly outlines the franchisor’s responsibilities can reduce the potential for liability. ■

Glenn Plattner is a partner and **Shelly Gopaul** an associate with Bryan Cave, LLP in Los Angeles. Both focus their practice on business and franchise litigation, representing leading franchisors and businesses throughout the country. Plattner is a former chair of the Franchise Law Committee of the State Bar of California and a California Certified Franchise and Distribution Law Specialist. Gopaul was recently selected as a Southern California Super Lawyer Rising Star. Contact Plattner at 310-576-2158 or glenn.plattner@bryancave.com, or Gopaul at 310-576-2378 or shelly.gopaul@bryancave.com.