Antitrust and Franchising Law

New Environments and New Controversies

By Howard Yale Lederman

From its American beginnings approximately 150 years ago during the Civil War era to today, franchising has exploded into a worldwide phenomenon. From the Alaskan Arctic to the African Sahara, from the American Midwest to the Russian heartland, from Latin America to Southeast Asia, franchising has planted its roots. It has expanded into more and more lines of business, ranging from the well-known (restaurants, hotels, automobiles) to the less familiar (child care, pet care, senior care, funeral homes). Even during the recent severe recession, franchising continued to grow. Franchising now comprises more than 10 percent of the American economy, and experts forecast this percentage will keep growing. Therefore, franchising and franchise law affect every American's financial well-being.

From the 1890 Sherman Antitrust Act to today, antitrust law is crucial to protect and regulate competition. Without antitrust law, monopolies and oligopolies would dominate. Without it, abusive anticompetitive practices would proliferate. Accordingly, like franchise law, antitrust law affects every American's financial well-being.

In this theme issue's first article, authors Howard Iwrey, Cale Johnson, and Cody Rockey analyze *Innovation Ventures*, a recent Michigan Supreme Court decision. They conclude that it will enable many businesses to draft stronger noncompetition clauses in agreements made with other businesses, which are to be judged under the rule of reason. The authors caution that there are still limits on what is permissible, and attorneys drafting these agreements should be careful to consider the specific circumstances of the involved businesses and markets.

The second and third articles focus on a major franchising issue: the joint employer doctrine. In the second article, authors David Steinberg, Derek McLeod, and Emily Mayer argue that the National Labor Relations Board's reawakening of the joint employer standard threatens the predominant franchising model's existence. For decades, the NLRB defined the standard as actual, direct, and immediate control over employees' terms and conditions, such as hiring, firing, discipline, hours, and supervision. But in 2015, the board redefined the control necessary to include reserved and implied authority over such matters.

In the third article, I take the counterpoint, arguing that the NLRB's redefined joint employer standard does not threaten franchising. Rather than adopt a new standard, the board returned to its original standard under which contractual and implied control over employees' terms and conditions was sufficient to make the franchisor a joint employer. This test prevailed for decades before the NLRB changed the standard in the 1980s. The redefined standard is justified and necessary to prevent franchisor control over employment matters without responsibility and franchisee responsibility for employment matters without control. This standard promotes a fairer balance of power among the franchising parties. Further, franchisors have alternatives available to make joint employment liability less likely. If the redefined joint employer standard is incompatible with the present franchising model, that model must change.

Matthew Powell's article, which will appear in a later issue of the *Bar Journal*, focuses on the antitrust law governing resale price maintenance agreements. For almost 100 years, the courts held such agreements as per se illegal. But in 2007, the United States Supreme Court ruled that courts must evaluate such agreements under the rule of reason. Powell cautions that the new regime does not remove all antitrust risks and that manufacturers' and suppliers' pricing discretion still has limits.

These articles are important not only for antitrust and franchise practitioners, but also for business and employment law practitioners. ■

Howard Yale Lederman has been an officer in the SBM Antitrust, Franchising & Trade Regulation Section since 2006. He founded and has led the section's Franchise Practitioners Group since 2011. He has been a Western Michigan University Cooley Law School adjunct professor of franchising since 2012. He practices mainly appellate, commercial, and employment litigation.