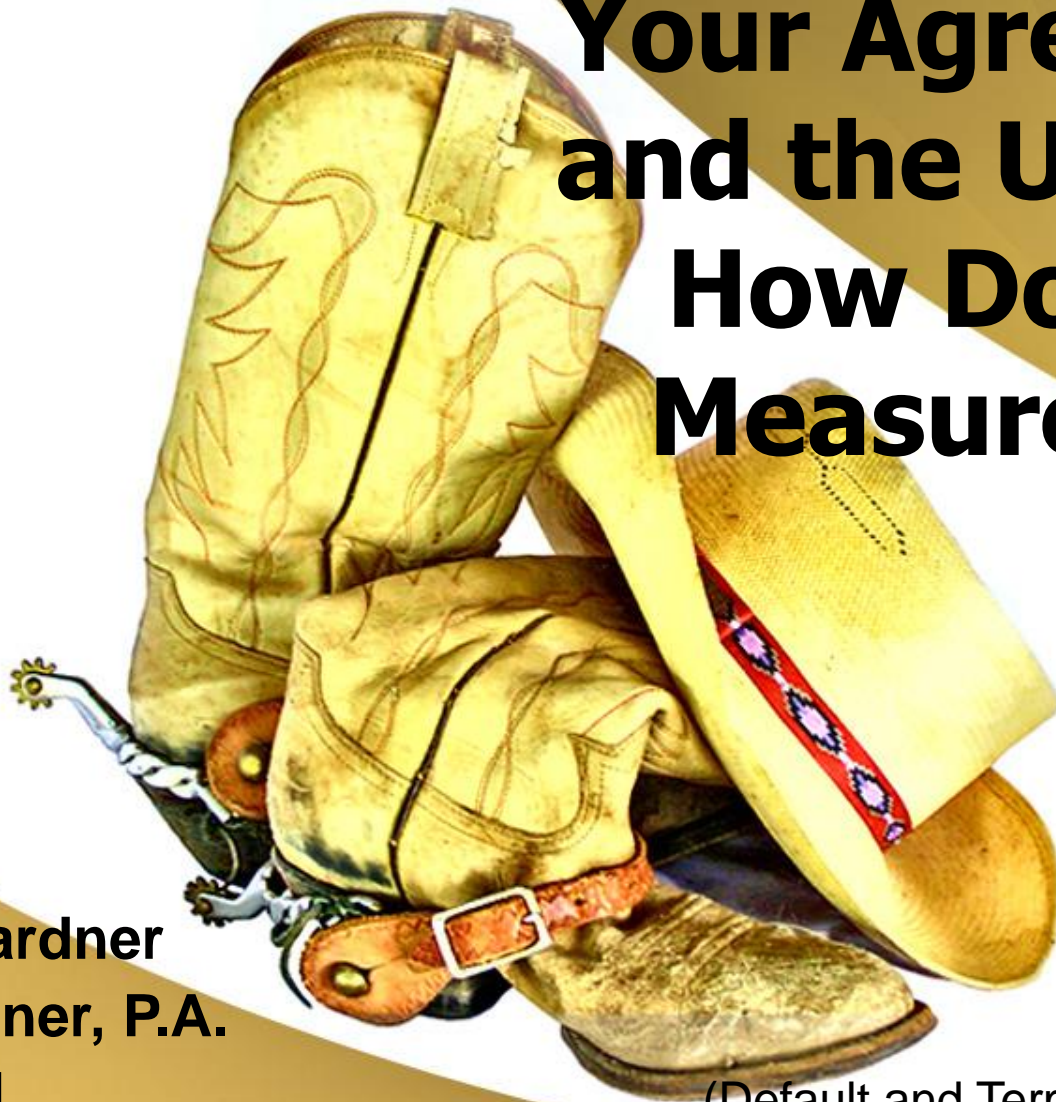


Your Agreement and the UFBOR— How Do You Measure Up?



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(Default and Termination; Good
Faith and Fair Dealing; and
Freedom of Association)

Default and Franchise Termination Rights

- *Prior to franchise agreement termination, the franchisees shall be given detailed reasons for alleged default and reasonable time to cure. Termination shall not occur without good cause, and termination shall not compel payments of liquidated damages or early termination fees. All franchise rights shall remain in full effect for any franchisee not in default or that cured a default. A default under one franchise agreement shall not constitute a default under a different franchise agreement.*



What Does this All Mean?

Prior to franchise agreement termination, the franchisees shall be given detailed reasons for alleged default and reasonable time to cure.

- NO termination “without cause.”
- No pretextual terminations. Clear and honest reasons given.
- When cause exist, a REASONABLE opportunity to fix the problem.



What Does this All Mean?

Termination shall not occur without good cause, and termination shall not compel payments of liquidated damages or early termination fees.

- Cause has to be material.
- Cannot require franchisees to pay to leave the system (through liquidated damages when there is a default, or early termination fees when there is not a default).
- The spirit of the UFBOR bars collection of future lost royalties as well.



What Does this All Mean?

All franchise rights shall remain in full effect for any franchisee not in default or that cured a default.

- No “subjective” penalty box.
- No on-going penalty for franchisee who made a mistake and fixed the problem.



What Does this All Mean?

A default under one franchise agreement shall not constitute a default under a different franchise agreement.

- NO cross-default provisions.
- Watch for “expanded” cross-defaults—coupled with no cure terminations of non-defaulting locations.



How Do CFA Member Agreements Stack Up?

Notice and Time to Cure

- All CFA K's have some defaults where notice must be given and opportunity to cure exists BUT time is different, what is a default is different AND other peculiarities.
- ALL have “non-curable” defaults which can result in immediate termination. Some make sense. Others do not.



How Do CFA Member Agreements Stack Up?

Liquidated Damages and Early Termination Fees

- Few (2) reviewed agreements have outright liquidated damages provisions.
- Some expressly reserve the right to seek “future lost royalties.”
- BUT– one DOES allow early buy-out IF you pay all “past and future lease obligations.”
- All but THREE have a forced buy-out provision!! (And one of them pays out over a FIVE YEAR time horizon!!)(But one MUST buy unused inventory.)

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How Do CFA Member Agreements Stack Up?

Cross-Default Provisions

- Five reviewed agreements have OBVIOUS cross-default provisions!
- One of those says all agreements terminate immediately if one franchise is terminated!
- Watch for expanded cross-defaults. Three of these have those types of defaults.



Good Faith and Fair Dealing

- *A franchisee may rely on a franchisor's good faith, fairness, exercise of due care, and performance in the administration of advertising, rewards programs, marketing funds, and franchise or development agreements.*



What Does this All Mean?

A franchisee may rely on a franchisor's good faith...

- A gap filler.
- A limit on discretion.
- An assurance that your expectations will not be thwarted by the franchisor's conduct.



What Does this All Mean?

*A franchisee may rely on a franchisor's...
fairness [and] exercise of due care...*

- Non-discrimination.
- Duty of competence??



What Does this All Mean?

A franchisee may rely on a franchisor's ...performance in the administration of advertising, rewards programs, marketing funds, and franchise or development agreements.

- They will promise to adequately perform their duties.
- They will make reasonable decisions.
- They promise to not misuse your money.



How Do CFA Member Agreements Stack Up?

Good Faith and Fair Dealing

- Two of the reviewed agreements DISCLAIM an obligation to act in good faith! (Watch for “business judgment”.)
- One agreement limits it to being a “gap filler.”
- One agreement expressly says the Zor must act in good faith!



How Do CFA Member Agreements Stack Up?

Duty to NOT discriminate

- Four agreements expressly allow some sort of “discrimination” in the name of system flexibility.
- How do we balance this requirement with desire for franchisor to be a problem solver for us when circumstances require?



How Do CFA Member Agreements Stack Up?

Duty of Competence in Performance

- Measured by franchisee's ability to terminate if Zor is in material breach.
- SEVEN of the reviewed agreements DO NOT allow the Zee out– even if franchisor is in breach!



How Do CFA Member Agreements Stack Up?

No Misuse of Franchisee \$\$

- Measured by limits on ad funds.
- Six agreements expressly prohibit Zor from using money on G&A, BUT...
- Four of the agreements suggest limits, but leave a lot of flexibility.
- One has a duty to use money in a specific manner– but corporate stores don't pay.
- One has no ad fund!



Freedom of Association

- *A franchisee may freely associate with other franchisees or associations.*



What Does this All Mean?

A franchisee may freely associate with other franchisees or associations.

- Meaning is obvious and illusive at the same time.
- Clearly— you can be a member of an association.
- “Associate with other franchisees” is less clear. Can you join in an action?? Maybe.



How Do CFA Member Agreements Stack Up?

Ability to Join an Association

- Not surprisingly, given that all members of CFA are a member of a franchisee association, NONE of the Agreements EXPRESSLY prohibit membership in an association.
- At least TWO actually establish associations in their FA, and define the rights and roles of the FA.



How Do CFA Member Agreements Stack Up?

Ability to Associate for “Other Purposes”

- Measured by ability to band together to litigate.
- On the plus side, FIVE of the reviewed agreements do not restrict franchisee association in legal actions.
- TWO allows limited class actions for misuse of the ad fund.
- TWO expressly prohibit CLASS ACTIONS, but NOT MASS ACTIONS.
- Two expressly prohibit ANY association in litigation.



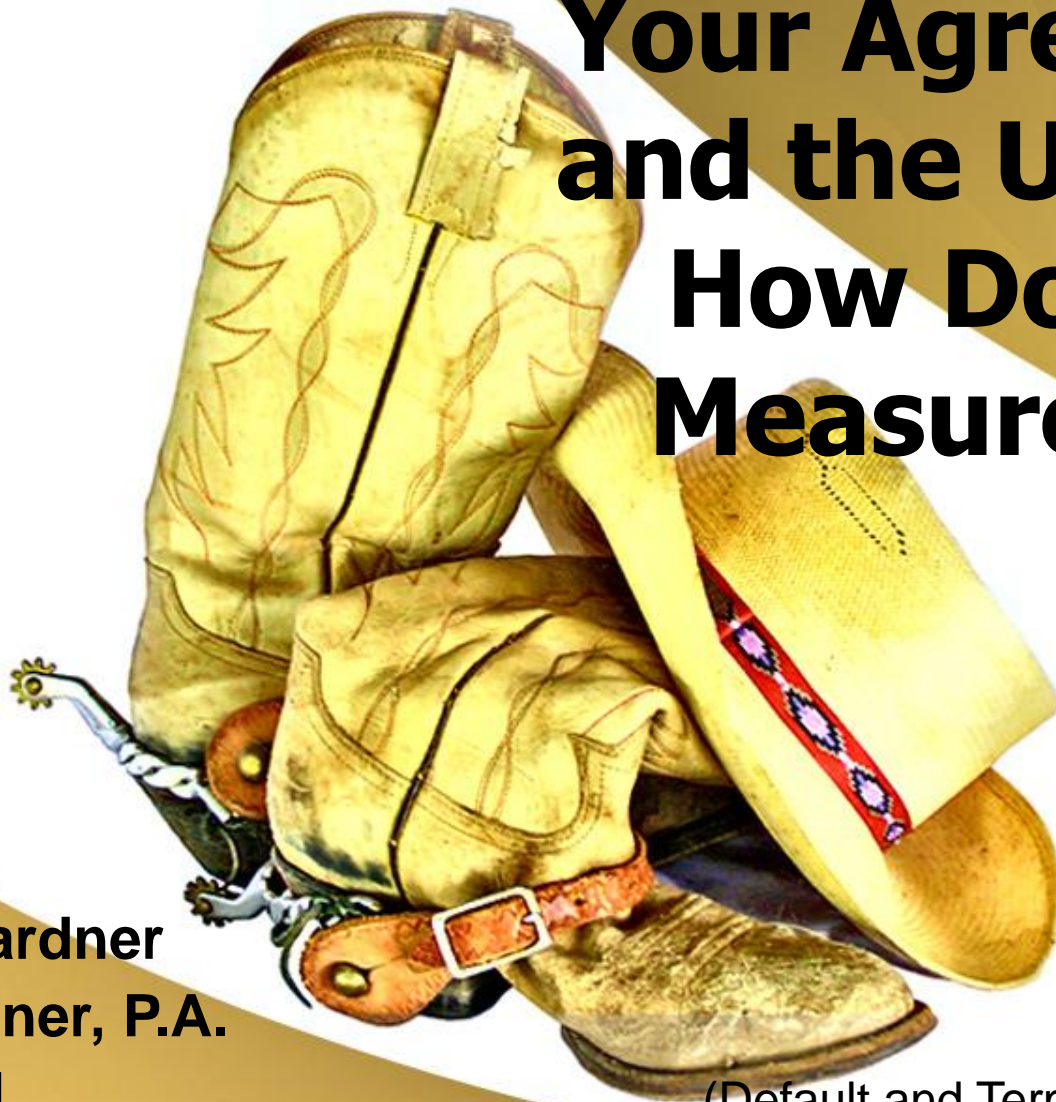


QUESTIONS???

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