

## Leadership Note

## Letter from Editors and Committee News



Greetings from your editors, Ryan Blazure and Shawn Libman! We are excited to share with you the Fall 2019 Retail and Hospitality Committee newsletter, *Customer Connection*!

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We hope many of you had a wonderful experience at the Annual Meeting last month. It was a great time to reconnect with DRI friends from all different practices and locations. New Orleans is always one of the greatest cities in the world in which to network, explore, and party (a little too much)! Highlights included the Fulton Alley Street Party on Thursday and the Mardi Gras Masquerade Ball on Friday, in addition to all the other amazing things The Big Easy had to offer!

We are already starting to plan the spring 2020 DRI Retail and Hospitality Seminar. Be on the lookout for more news in the coming months. If you are interested in participating, speaking, or just want to help plan the seminar, please reach out to either of us. We can help put you in touch with the steering committee.

The steering committee is highlighting the [substantive law groups](#) (SLGs) at the next seminar. SLGs are smaller groups within the Retail and Hospitality Committee, which focus on specific legal topics such as premises liability, negligent security, franchising, technology, amusement,

food safety, employment, insurance coverage and many others. SLGs are a great way to find people who have similar legal experience. If you are interested in being active in an SLG please contact the SLG Chair Shawn Libman. We are working on coordinating special networking events, speaking arrangements and writing opportunities for SLG members.

If you want to keep up with all the committee news check out our online community. You can sign up to receive live email updates or get daily/weekly digest emails from the online forum. This is an excellent resource and I hope you take the opportunity to join the conversation.

The *Customer Connection* newsletter's mission is to cover the latest topics benefiting your daily practice. Is there something brewing that you want to know more about? Any recent experiences that your colleagues could benefit from? Do you have a great win that should be celebrated? Let us know! We would love to cover it in our next issue. Contact us to make it happen.

Thank you to the article authors and the newsletter committee for their hard work. If you enjoyed an article please do not hesitate to reach out and tell the author! I am sure they would enjoy hearing from you.

And don't forget...please share this newsletter with your clients! Now go read those articles!

## Feature Articles

## Food Trucks: A Road to Prosperity with a Detour Through Court

By R. Delacy Peters and Sky Brown



Fast. Fascinating. Affordable. Food. These are the tenets of the food truck industry. Gone are the days of the simple taco truck or lunch wagon. From Burger Buses and Waffle Trucks to Korean Fusion and Lobster Rolls, it's a wild west of entrepreneurs, budding restaurateurs, and established businesses all looking to capitalize on a growing market that promotes creativity, efficiency, and flexibility. In the United States today, there are food trucks

operating in over 300 cities, which in 2017 generated an estimated \$2.7 billion dollars in revenue.<sup>1</sup> However, just as law and order made its way across the prairie to the Pacific and tamed the west, so goes the fate of the humble food truck. As this industry grows, so do the barriers of entry and the regulatory restraints on a once free and fluid market.

<sup>1</sup> U.S Chamber of Commerce, Food Truck Nation.

When advising current and potential clients in this growing minefield of regulations, there are a few areas of particular importance to consider: Entity Formation; Business Aptitude; and Local Permitting and Food Safety.

## Entity Formation

Clients must carefully consider how they wish to structure their new endeavor. This includes considerations of how taxes are to be paid and how liability is to be distributed. While many of these issues are state specific, clients should be discouraged from pursuing a food truck venture as a sole proprietorship which could open the door to direct financial and legal liability. Rather, the recommended route often includes creating a limited liability company (“LLC”) early in the process. This allows for the separation of personal liability while retaining the benefit of a tax passthrough. Another approach can include the creation of a subsidiary under an existing business entity for clients with established brick-and-mortar restaurants.

## Business Aptitude

The landscape and allure of the food truck industry has drawn in many first-time business owners, either looking to break the yoke of their current employers or to find a part-time business that they feel is self-sustaining. This, in itself, forces a unique issue of understanding client expectations versus client abilities and expertise. Therefore, it is important to advise clients not only of possible future conflicts but also to help clients affirmatively address potential pitfalls.

For this reason, operating agreements between partners, financiers, and other invested parties are essential. A well-crafted agreement can help clients distinguish operational guidelines and responsibilities between partners, provide mechanisms for resolving disputes, and set clear financial benchmarks. For example, in the case of two partners, one financial and other operational, the operating agreement should identify which partner is responsible for handling tax issues, which partner is responsible for inventory management, and a mechanism for approving vendor and client contracts. While, these issues may seem mundane, these agreements create a system of checks and balances that will aide clients in navigating the turbulent and stressful start-up period.

## Local Permitting and Food Safety

Permitting and understanding the increasing web of regulations governing food truck operation is—and will

continue to be—a never ending and persistent issue for any individual entering the industry. Depending on the jurisdiction, obtaining the necessary permits and licenses to begin operations can vary from as few as 10 to more than 30 separate procedures.<sup>2</sup> Related costs may range anywhere from \$800 to \$17,000, and this cost variation can be instrumental to the client’s successfully implement his or her vision. As such, start-up costs and related matters should be considered long before the process of purchasing the physical means needed to launch.

For example, in the City of Houston, two sets of plans must be sent to the Health Department for approval prior to constructing or remodeling any mobile food unit.<sup>3</sup> Additionally, all employees must either obtain a food service manager certification or complete a food handler training course within 60 days of employment.<sup>4</sup>

Moreover, different cities may have different approval processes based on certain characteristics of the truck’s operation. For example, in Houston, there is a single process used for all types of vendors while, conversely, San Francisco has two processes depending on whether the food truck will operate on private property or public right-of-way.<sup>5</sup> Luckily, many jurisdictions provide checklists to help navigate the red tape.

An often-overlooked necessity by many first-time entrepreneurs is an understanding of regulations on food safety, preparation, and waste management. Just like a brick-and-mortar restaurant, the food truck industry is subject to regular health inspections, grey water waste management, and strict regulations regarding the offsite preparation and storage of food. Clients are often surprised to learn that food cannot simply be prepped at home or that discarded food waste cannot be disposed of in a conventional manner.

However, as the industry has grown, solutions for these issues have been addressed through the use of city approved commissary kitchens and contracts with established restaurants to share their facilities. The City of Houston currently offers 13 approved commissaries which mobile food vendors may use for waste disposal, potable

<sup>2</sup> U.S Chamber of Commerce, Food Truck Nation.

<sup>3</sup> Houston, Texas – Code of Ordinances, Section 20-25.

<sup>4</sup> Houston, Texas – Code of Ordinances, Section 20-53.

<sup>5</sup> City and County of San Francisco, Department of Public Health Environmental Health Branch, [https://www.sfdph.org/dph/files/EHSdocs/ehsFood/Mobile/MFF\\_Flowchart.pdf](https://www.sfdph.org/dph/files/EHSdocs/ehsFood/Mobile/MFF_Flowchart.pdf)

water, unit maintenance, and food preparation.<sup>6</sup> Chicago's ordinance, by contrast, simply states that a mobile food preparer must be serviced by a commissary approved by the Chicago Department of Health.<sup>7</sup>

In addition to servicing requirements, any, if not all, jurisdictions have implemented strict regulations limiting the areas where food trucks are allowed to offer service. Often, these restrictions include times of operations and minimal distances from brick-and-mortar restaurants, residential areas, and government buildings. Understanding these restrictions and being able to communicate them is essential for protecting client interests and avoiding unnecessary citations and unrealistic expectations. Some examples of restricted-use regulations include Houston's prohibition on street parking<sup>8</sup>, Chicago's limitation on food truck sales within 200 feet of a restaurant's entrance<sup>9</sup>, and New York City's locational restrictions by street.<sup>10</sup>

These restrictions on business operations in the food truck industry have already spawned court battles as food truck operators and other special interest groups work to protect their industries.

## The Road to Court

In many instances, food truck owners have challenged license requirements and restrictive regulations. Some interesting cases are discussed below.

*Lopez, et al. v. City of San Antonio* involved a challenge to Section 13-639(a)(10) of the San Antonio City Code that prohibited food trucks from operating within 300 feet of any restaurant, grocer, or convenience store. The 300-foot ban applied to mobile food vendors whether they were parked on private property with the owner's consent or validly parked on public property. The *Lopez* Plaintiffs argued that their right to economic liberty under Article 1 Section 19 of the Texas Constitution was violated by unreasonable and protectionist governmental interference. In response to the suit the City of San Antonio repealed the law.

<sup>6</sup> City of Houston, Houston Health Department, Approved Commissaries List 2019, [https://www.houstontx.gov/health/Food/documents/Commissary\\_List.pdf](https://www.houstontx.gov/health/Food/documents/Commissary_List.pdf).

<sup>7</sup> Municipal Code of Chicago, 7-38-138.

<sup>8</sup> Houston, Texas – Code of Ordinances, Section 40-8.

<sup>9</sup> Municipal Code of Chicago, 7-38-115(f)

<sup>10</sup> New York City, Dept. of Health and Mental Hygiene, Mobile Food Vending Restricted Streets Guide, [https://www1.nyc.gov/assets/doh/downloads/pdf/permit/mvf\\_restricted\\_streets.pdf](https://www1.nyc.gov/assets/doh/downloads/pdf/permit/mvf_restricted_streets.pdf)

In *King, et al. v. Louisville/Jefferson County Metro Government*, 17-CV-390-DJH-CHL, the Louisville/Jefferson County Metro Government (“Louisville Metro”) likened food trucks to street dealers, peddlers and mobile itinerant vendors. The gist was that food trucks constituted a nuisance and should not exist within a certain distance of food establishments. King sued in the United States District Court for the Western District of Kentucky, and the matter was promptly resolved with the entry of a Consent Decree stipulating that food trucks are considered mobile food vendors and not itinerant. Further, Louisville Metro was ordered to suspend enforcement of any regulation that prohibited food trucks from operating simply because the food truck was within a certain distance of a food establishment.

In *Rock, et al. v Town of Carolina Beach, et al.* the Town of Carolina Beach admitted promulgating Carolina Beach Code of Ordinance Section 14-21(d)(1) to prevent “outsider” food trucks from competing with Carolina Beach restaurant owners. The ordinance provided that, prior to obtaining approval for a food truck license, the food truck operator had to maintain an eating or drinking establishment for a least one year in the town of Carolina Beach. One week after Plaintiffs filed suit, the ordinance was repealed.

The City of Fort Pierce, Florida regulates food trucks under Chapter 9, Article IV of the Fort Pierce Code. The Code provides that food trucks cannot operate within 500 feet of a similar type business (Section 9-111(b)(1)) which is defined as any business that serves or sells any food. Essentially, everywhere in Fort Pierce is within 500 feet of a place that serves or sells any food. In *Diaz, et al. v City of Fort Pierce, Florida* the court agreed with Plaintiffs that the 500-foot ban is not rationally related to any interest other than protectionism and enjoined the City from enforcing the law.

Under Baltimore City Code Article 15, Subtitle 17-1, food trucks cannot operate within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product; A violation of the 300-foot rule is a criminal offense resulting in a conviction and \$500 fine; three violations mandate license revocation. In *Pizza Di'Joey, LLC, et al. v Mayor and the City Council of Baltimore*, the Circuit Court ruled that the ordinance was so vague that fair notice was not provided, and enforcement was likely to be subjective and arbitrary. The City appealed and the Appellate Court reversed. On September 11, 2019, Maryland's highest court granted the Plaintiffs' Petition for Certiorari.

Finally, in 2012, the City of Chicago passed an ordinance that contained (1) a 200-foot proximity rule with a \$1,000 - \$2,000 fine per offense and (2) a requirement to permanently install a GPS device to send real time data allowing the food truck to be tracked. The Chicago ordinance is unique in that the City designated areas in each community where food trucks are permitted without being subject to the 200-foot rule. In *LMP Services, Inc., v. The City of Chicago*, food truck owners challenged the 200-foot rule as violative of due process and equal protection and argued the GPS requirement was an unconstitutional warrantless search. The trial court granted summary judgment in favor of the City which was affirmed by both the intermediate appellate court as well as the Illinois Supreme Court. According to the Illinois courts, the 200-foot ban was rational because the ordinance contained numerous accommodations and exceptions and balanced the interests of brick-and-mortar restaurants with those of food

trucks in managing sidewalk congestion and encouraging food trucks to locate in underserved areas.

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## Introduction to Franchising Law

By Farheen Ibrahim and Laura Canada Lewis



The business and legal structure that creates the franchise business model has taken many forms since its inception in the early 1850s.<sup>11</sup>

What started as a way for Isaac Merritt Singer, the founder of Singer Sewing Machines, to offer convenient repair services for his sewing machines through a license to repair engineers for use of his parts and trademarks,<sup>12</sup> has developed into a defined business structure and legal framework that governs a regulated industry that spans restaurants and grocery stores, personal and commercial services, entertainment, and product production. This introduction to franchising covers the basics of modern franchise law and its intersection with other bodies of law.

### The Franchise Agreement

A “franchise” is a license from the franchisor to a third-party, a “franchisee,” for use of its trademarks, business format, operating system, and other protected and proprietary information for the operation of a franchised business by the franchisee. A franchise agreement is the

<sup>11</sup> Robert Webber, *An Introduction to Franchising* 6-8 (2012).

<sup>12</sup> *Id.* at 7.

contractual agreement between a franchisor and franchisee that provides certain rights and obligations to develop and operate a franchised business at specified location or territory. This franchise agreement contains components of a license to use intellectual property, nondisclosure and restrictive covenants, dispute resolution requirements, and other contractual provisions that govern the relationship between the franchisor and franchisee.

Mr. Singer arguably first recognized the core component of a franchise – the trademark license agreement.<sup>13</sup> A key component in franchising is for a franchisor to have an effective, registrable trademark. There is immense value in a trademark and it can be a franchisor’s most valuable asset. For example, McDonalds’ trademarks are valued at \$43 billion USD<sup>14</sup> and it has brand recognition all around the world. The value of a trademark is “goodwill” in the marketplace,<sup>15</sup> which a franchisee can immediately

<sup>13</sup> *Id.*

<sup>14</sup> Interbrand Rankings, <https://www.interbrand.com/best-brands/best-global-brands/2018/ranking/mcdonalds/> (last visited September 10, 2019).

<sup>15</sup> *Susser v. Carvel Corp.*, 332 F.2d 505, 516-17 (2nd Cir. 1964) (noting that “the cornerstone of a franchise system must be the trademark or trade name of a product”).