

## Avoiding Tortious Interference Lawsuits

**C**ompetition in the hotel industry is fierce, and it comes both from obvious and more subtle sources. Obvious sources of competition are new hotels, renovated hotels, independent hotels and other franchisors. Less overt is the stealth competition hoteliers don't acknowledge: a franchisor's attempt to convert a franchised hotel to its flag.

The stealth competition involves the efforts of a prospective franchisor to enter into a new franchise agreement with an owner *while* that owner has a contractual relationship with another franchisor. Commonly, the prospective franchisor will disparage the existing franchisor by claiming it does not generate enough reservations for the hotel or its brand appeal has declined. More importantly, the prospective franchisor will probably ask for and receive from the owner's agent details about the franchise agreement.

Franchisors have an incentive to win over new licensees before their existing franchise agreement expires. What if the prospective franchisor offers a cash incentive for the owner to sign on at the termination of the franchise agreement? What if the prospective franchisor offers a ridiculously low franchise fee (to offset a termination fee or potential damages the owner may incur for unlawful termination of the franchise agreement) for a couple of years to induce the owner to sign a new franchise agreement before the original fran-

chise agreement expires? What if the reduced franchise fee does not take place until after termination of the initial franchise agreement? Do any of these actions sound unlawful?

chise agreement expires? What if the reduced franchise fee does not take place until after termination of the initial franchise agreement? Do any of these actions sound unlawful?

They may be considered unlawful if a third party, such as the prospective franchisor, "willfully and intentionally" interferes with a party to a contract, such as the owner, to breach its contract with the original franchisor. Depending on the remaining term of the original franchise agreement, the right(s) to terminate the agreement (for cause or for a fee) and/or the location of the hotel and its relative impor-

tance to the franchisor within its system, the original franchisor may retaliate by filing a lawsuit against the prospective franchisor for tortious interference with the franchise agreement between the owner and franchisor. Generally, the original franchisor probably would not sue the owner for tortious interference because a party (the owner) that interferes with the contract cannot be a party to the contract. If that were true, every breach of contract claim would be converted into a tortious interference claim.

The original franchisor may also sue the consultants, depending on their culpability in the matter. If the owner's asset manager, financial advisor or hotel operator assisted the prospective franchisor in wrongfully inducing the owner to terminate the existing franchisor, then they may be sued as well. That "assistance" could take a form as innocent as maligning the existing brand or as blatant as receiving cash or a promise of new business by the new franchisor. Under these circumstances, the hospitality consultants may be drawn into the lawsuit under a "conspiracy" theory of tortiously interfering with the existing franchise agreement. All this requires is that two or more parties take an affirmative act to interfere with an existing contract between two parties. Here, the contract is the original franchise agreement. The conspirators could include the prospective franchisor, asset manager, financial advisor and/or hotel operator. The allegation would be that the conspirators interfered with the franchisor's contract with the owner.

With the hotel industry in the doldrums, it's difficult to



Both franchisors and consultants need to act cautiously to avoid being sued for tortious interference with existing contracts.

resist promises of better performance by prospective franchisors. Like it or not, in today's litigious society, franchisors and hospitality consultants should act cautiously in soliciting new business to avoid being sued for tortiously interfering with an existing contract.

**Richard Barrett-Cuetara, Esq.**, is senior counsel to the Dallas-based law firm of Cowles & Thompson. Barrett-Cuetara has extensive experience in the hospitality arena, representing owners, franchisors, franchisees and hotel management companies in disputes throughout the U.S. He can be reached at [rbarrett@cowlesthompson.com](mailto:rbarrett@cowlesthompson.com) or 214-672-2165.