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LEGAL

New class action legislation poses little threat to franchisees seeking justice

Here's what the Class Action Reform Act can and can't do, according to experts from both the franchisor and franchisee camps.

By Mike Mitchelson

The Class Action Reform Act, signed into law in February, is designed to limit frivolous class action lawsuits, not take away a group's right to file a class action suit.

"This isn't saying you can't file your class action," IFA Vice President of Governmental Affairs John Gay said. "It's saying where and under what circumstances."

The legislation will largely affect those suits filed by attorneys representing consumers, Gay said. The new law limits "venue shopping"—targeting certain states or jurisdictions more friendly to those types of suits, instead moving those suits to federal courts. The legislation also bans certain settlements that reward lawyers with large fees but leave the plaintiffs with little reward, such as a coupon for service.

The IFA's support of the Class Action Reform Act is only part of the "larger litigation reform issue," said Gay. "We've been supportive of class action reform, bills that would combat obesity lawsuits, legislation that would make it harder to file drive-by

ADA (American Disabilities Act) lawsuits—any frivolous lawsuit that takes away from a large or small franchise business and how they operate in class action falls well within that category."

Attorney Gerald Marks of Marks & Associates, who is seeking a class action suit for a group of Snap-on franchisees against the franchisor, said the new class action legislation shouldn't make "much of any difference for franchisees."

"First of all, a great majority of franchise agreements are now subject to arbitration," he said. "And you are permitted to have class actions in arbitration."

The legislation in large part was designed to eliminate forum shopping, he added, which will affect many cases, but that shouldn't make a difference in the case of a franchisee class action suit. "So you can have a class action in Federal court," he said. "I don't see that as being that much of a problem."

Eric Karp of Witmer, Karp & Warner said the legislation shouldn't make any difference to franchisees. One reason is franchisors are already writing into their franchise agreements that arbitration "must proceed on an individual basis and not a class or combined basis, which effectively closes the door on class action litigation as an alternative for franchisees," he said. "Or in the dispute resolution

provisions of the franchise agreement do not provide for arbitration, they nevertheless will provide for a prohibition on participation in a class action."

That doesn't mean, however, that the "enforceability" of those clauses are "beyond question," Karp added. But in one of his past cases where a class action would have been an "ideal remedy," all the franchisees' agreements prohibited them from participating in a class action suit. "The franchisor could have argued that they were in default of their franchise agreement (if they participated in a class action suit)."

Still, if there are "legitimate wrongs committed by franchisors," Marks said, "then franchisees will have their absolute right to bring the class (action suit)."

Gay agreed. "Legitimate suits should be able to proceed just fine through the federal courts," he said.

The new law gives federal courts

jurisdiction over class action suits in which there are at least 100 members, the aggregate value of the claims exceeds \$5 million and if any of the plaintiffs is a citizen of a state different from any defendant. "In my mind it's just the beginning of many more state-specific class actions," attorney Robert Zarco of Zarco Einhorn & Salkowski said, adding that many lawyers' tactics won't change, including his. "I would be filing multiple party plaintiff actions in one state, or I file individual actions in individual states."

Even if franchise agreements include no class or association action against the company, there are ways around it, Zarco said.

"A guy like me will file 30 lawsuits for each individual person, I'll work out a package deal for everybody, and I'll handle them all," he said. "Innovative lawyers will always find alternative ways to skin the cat." **ET**