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W-7: States’ Rights – Multi-State Franchise Relationships
and the Application of Multiple States’ Franchise Relationship Laws

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STATES’ RIGHTS - MULTI-STATE FRANCHISE RELATIONSHIPS AND THE APPLICATION OF MULTIPLE STATES’ FRANCHISE RELATIONSHIP LAWS

I. INTRODUCTION

The interstate nature of most franchise systems often triggers the application of multiple franchise relationship laws. As a result, group or class actions by franchisees may involve multiple states and multiple franchise relations statutes. And, individual franchisees may have franchise agreements in multiple states or a single agreement covering a territory across several states.

Unraveling multi-state state franchise relationship claims is often complicated by contractual provisions including choice of law provisions, mandatory arbitration provisions, mandatory venue provisions, and cross-default terms. Contractual terms may be altered by the parties, usually by franchisors in new or renewal franchise agreements. Civil procedure rules may also have significant impacts on these claims. But, civil procedural rules usually may not be avoided as state imposed mandates. Likewise, franchise relationship laws also generally may not be avoided by franchisors as they reflect public policy of the forum states.

II. FRANCHISE RELATIONSHIP STATUTES; WHEN DO THEY APPLY?

Twenty-two states, the District of Columbia, Puerto Rico and the Virgin Islands currently have statutes governing aspects of the franchise relationship, most commonly applying to the transfer, termination, and renewal of franchise agreements. Franchisor and franchisee counsel initially need to examine the jurisdictional application of each statute, especially when crossing state borders. Most of the statutes contain provisions establishing their jurisdictional reach or limits, although four states’ relationship laws do not include express jurisdictional provisions.1 Each relevant state statute’s jurisdictional application should be examined closely at the inception of a dispute because this analysis varies state-by-state.

A. Franchise Relationship Laws Usually Always Apply To Franchises Located In The State

The jurisdictional reach of a franchise relationship law usually has a geographic component. The statutes apply to franchises operating in the jurisdiction. For example, the New Jersey Franchise Act applies to franchises which maintain a franchise location in New Jersey.2 The California Franchise Relations Act (“CFRA”) applies “to any franchise where… the franchised business is or has been operated in this state.”3 The sections of the Washington Franchise Investment Protection Act which contain the limiting term “in this state” apply only to franchises located in Washington. The non-limited provisions, including the relationship section, may apply to out-of-state franchisees pursuant to contractual choice of law.4

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1 Hawaii, Mississippi, Washington, and the Virgin Islands do not have any specific provisions addressing the jurisdictional application of the franchise relationship statute.


3 CAL. BUS & PROF. CODE § 20015.

4 Red Lion Hotel Franchising, Inc. v. MAK, LLC, 663 F.3d 1080 (9th Cir. 2011); see also 1-800-GOT JUNK? v. Superior Court, 116 Cal. Rptr. 3d 923 (Ct. App. 2010), as modified (Nov. 19, 2010).
Some states limit the application of their franchise relationship statutes to franchises operated in the state. Arkansas, Connecticut, Delaware, Iowa, Maryland, Missouri, Nebraska, New Jersey, Rhode Island, Virginia, Wisconsin, and Puerto Rico have such limiting statutory language that governs jurisdictional application. In these jurisdictions, a franchisor must comply with the relevant statutes only if the franchised location is actually located within the state.

In *Cromeeons, Holloman, Siebert, Inc. v. AB Volvo,* heavy equipment dealers located in Maine, Montana, New York and Texas, and in Alberta and Saskatchewan, Canada, brought termination claims under the Illinois Franchise Disclosure Act (“IFDA”). They asserted the statute applied due to an Illinois choice of law provision in all the dealership agreements. But by its terms the IFDA applies only to franchises located in Illinois, so the out-of-state franchisees could not invoke the statute.

In *Safe Step Walk In Tub Co. v. CKH Industries, Inc.,* a licensor sued its licensee for nonpayment of fees in breach of multiple licensing agreements. The licensee brought 22 counterclaims including under multiple state franchise statutes and unfair business practices laws for the jurisdictions in which the licensees operated. The Safe Step license agreements all had a Tennessee choice of law provision. However, the court concluded that Tennessee “would honor the protections available under franchise acts of states” where the licensees operated. The court then found the counterclaims plausibly alleged claims under state franchise laws of Connecticut, New Jersey, New York and Rhode Island.

B. Franchise Relationship Laws May Also Apply Based On Other Criteria Beyond The Location Of The Franchise Business In The State

The CFRA’s jurisdiction may be based on either the franchisee’s California domicile or the franchisee’s location in California. Indiana and several other states have similar statutory language regarding residency. In *Gilchrist Machinery Co., Inc. v. Komatsu America Corp.,* a Mississippi equipment dealer with an agreement specifying it would be construed under California law, could not invoke the CFRA as the dealer was not domiciled and not operating the franchised business in California.

Indiana has statutory language similar to California’s, but uses residency rather than

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6 Further, for Illinois’s statute, the anti-fraud provision applies if the offer was made in the state, accepted in the state, the franchisee is domiciled in the state or the franchised unit is in the state. 815 ILL. COMP. STAT. ANN. 705/6.

7 349 F.3d 376 (7th Cir. 2003).

8 Earlier decisions under statutes with residency requirements reached the same result. See, e.g., *Graham v. U.S.* Grant Post No. 2665, V.F.W., 43 Ill.2d 1, 6-8, 248 N.E.2d 657, 660-61 (1969).


10 Id., at *8.

11 CAL. BUS. & PROF. CODE § 20015 (“to any franchise where either the franchisee is domiciled in this state or the franchised business is or has been operated in this state”).

domicile. In *7E Fit Spa Licensing Grp. LLC v. 7EFS of Highlands Ranch, LLC*, the franchisor, 7E Fit Spa, moved to dismiss the franchisee's counterclaims under the Indiana state franchise statute. 7E Fit Spa argued that the Indiana statute applies only when the franchisee is a resident of Indiana or operates the franchised business in Indiana. The franchisee was an Indiana limited liability company but principally conducted business, including the franchised business, in Colorado. Further, each member of the franchisee was a citizen of Colorado as was the franchisee entity itself. Accordingly, the court held the franchisee did not have standing to assert claims under the Indiana statutes, and it dismissed the franchisee's claims.

Both Michigan's and Minnesota's statutes have broad jurisdictional application. In Michigan, the state relationship law applies if (1) an offer to sell is made in the state; or (2) an offer to buy is accepted in the state; or (3) "the franchisee is domiciled in the state, the franchise business is or will be operated in the state." 14 Minnesota has a similarly broad statute but with the third provision providing: "or when the franchise is to be located in this state" 15 which has been held to require that even a Minnesota corporation have a business premise in Minnesota. 16

Because there is such variation in the jurisdictional applications of state relationship laws, familiarity with the applicable provisions is essential.

Sometimes courts do not address coverage of franchise statutes. In *D & K Foods, Inc. v. Bruegger's Corp.*, 17 three franchisees and their principals sued a bagel shop franchisor for fraud and violation of multiple franchise statutes. The franchisees were located in Maryland, Washington and an unspecified third state. In discussing the statute of limitations of the Maryland Franchise Act, 18 the court noted that D & K Foods executed 26 Maryland franchise agreements and did not address statutory coverage. The franchisor moved to dismiss claims under the Oregon Franchise Act, 19 arguing that a "franchise sale or offer for sale" was not made in Oregon. The district court rejected this contention since the Oregon statute applied "to any person who sells a franchise" and presumably some of the franchises were located in Oregon. A claim of wrongful discrimination under the Washington franchise Act 20 was adequately pleaded and not dismissed. The application of the statute was not discussed, as presumably some of the franchises were located in Washington.

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14 MICH. COMP. LAWS § 445.1504.
15 MINN. STAT. CH 80C.19.
18 MD. CODE ANN., BUS. REG. § 14-227(e).
19 OR. REV. STAT. § 650.005, et. seq.
20 WASH. REV. CODE § 19.100.180(2)(c).
C.  The Power Of States To Regulate, Including Under Franchise Relationship Laws, Is Governed By The Commerce Clause Of The United State Constitution

The Commerce Clause of the United States Constitution provides: "Congress shall have Power ... To regulate Commerce ... among the several States."21 The Commerce Clause constitutes "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres."22

In Instructional Systems, Inc. v. Computer Curriculum Corp.,23 plaintiff Instructional Systems was the exclusive reseller of defendant Computer Curriculum's products in multiple states including Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and Washington D.C. Instructional Systems was a New Jersey corporation with a facility in New Jersey, while Computer Curriculum was a Delaware corporation with its principal place of business in California. The exclusive distribution agreement specified that it "shall be construed and interpreted, and the legal relations created by it shall be determined, in accordance with the laws of the State of California."24 The distribution agreement provided for a five-year term expiring on July 31, 1989. When the term was nearing an end, Computer Curriculum was concerned that Instructional Systems was not aggressively marketing the products in some states. Computer Curriculum accordingly offered a new distribution agreement for two years covering only three states: New Jersey, New York, and Massachusetts.

In January of 1989, Instructional Systems executed the new distribution agreement under protest and filed a state court action in New Jersey with seven claims for relief, including wrongful termination in violation of the New Jersey Franchise Practices Act.25 The complaint sought an injunction prohibiting termination of the relationship and damages. Computer Curriculum removed the action to federal court and sought a preliminary injunction and partial summary judgment, arguing that (1) California law should apply and trump the New Jersey Franchise Practices Act; (2) application of the New Jersey Act would violate the dormant Commerce Clause; and (3) the distribution contract did not constitute a franchise under the New Jersey Act.

Instructional Systems responded by requesting the district court to abstain pursuant to Railroad Commission v. Pullman,26 so that the New Jersey Franchise Practices Act claim could be first considered by New Jersey courts. The district court agreed with Instructional Systems, reasoning that the New Jersey courts might not need to reach the constitutional issues if they determined the distribution agreement relationship was not a franchise under the New Jersey Franchise Practices Act or did not apply to states other than New Jersey.

21 Art. 1, section 8, cl. 3.
23 35 F.3d 813 (3d Cir. 1994).
24 Id. at 816.
25 N.J. STAT. ANN. §§ 56-10-3, 4 and 5.
26 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 (1941).
The Instructional Systems odyssey continued all the way to the New Jersey Supreme Court. In October of 1992, the New Jersey Supreme Court ruled in favor of Instructional Systems.\textsuperscript{27} First, in a “close question,” it held that the application of New Jersey law, despite the California choice of law provision, was proper. Next, the court found the relationship involved a franchise under the New Jersey Franchise Practices Act. Finally, the court held that extraterritorial reach of the New Jersey Franchise Practices Act in this action did not violate the Commerce Clause or the Due Process Clause. The statute was designed “to deal with the unconscionable business practices affecting New Jersey franchisees” which do not stop at the New Jersey border.\textsuperscript{28} Because New Jersey was regulating in-state conduct with some out-of-state effects, rather than regulating commerce entirely beyond its borders, the application of the statute was constitutional.

After the action returned to the federal district court in New Jersey, it issued a “far-reaching opinion,” limiting the application of the New Jersey Franchise Practices Act to the activities of a New Jersey franchisee within New Jersey because providing extraterritorial effect would conflict with the dormant Commerce Clause.\textsuperscript{29}

On appeal, the Third Circuit held that application of the New Jersey Franchise Practices Act did not violate the dormant Commerce Clause. First, the statute did not discriminate against \textit{interstate} commerce as both in-state and out-of-state franchisors were treated equally.\textsuperscript{30} Nor did application of the statute to a multistate distribution agreement necessarily run afool of the Commerce Clause. Here the New Jersey Franchise Practices Act was not unconstitutionally applied because the parties by their agreement, recognized Instructional Systems’ New Jersey place of business. The Third Circuit distinguished cases in which the statutes, rather than the parties’ agreements, sought to invoke extraterritorial effects. Finally, the court concluded that, under the \textit{Pike v. Bruce Church, Inc.}\textsuperscript{31} balancing test, the New Jersey Franchise Practices Act was not unconstitutional because it balanced New Jersey’s strong interest in protecting its franchisees from terminations without good cause with a lack of discrimination against interstate commerce, as the statute applied equally to New Jersey and out-of-state franchisors.

One issue remained open in the dormant Commerce Clause analysis: Inconsistent state statutes may as a “practical effect” constitute a Commerce Clause violation.\textsuperscript{32} Here, there was no showing that other states imposed different demands on the parties which would constitute a violation of the New Jersey Franchise Practices Act, or vice versa. The Third Circuit also noted that state laws may create additional obligations which, if not irreconcilable, could render their extra-territorial application unconstitutional.

\textsuperscript{27} 130 N.J. 324, 614 A.2d 124 (1992).

\textsuperscript{28} Id. at 147.

\textsuperscript{29} Instructional Systems, Inc., 35 F.3d at 815.

\textsuperscript{30} See also Lake Regions Partners, LLC v. Crest Marine, LLC, No. 2:15-CV-04022-SRB, 2015 WL 4886566 (W.D. Mo. Aug. 17, 2015) (Missouri Marine Franchise Dealers Act claim not dismissed under dormant Commerce Clause because the statute was not discriminatory to in-state and out-of-state vessels and was not an excessive burden on defendant Crest Marine).


\textsuperscript{32} Instructional Systems, Inc., 35 F.3d at 826.
In *Goldwell of New Jersey, Inc. v. KPSS, Inc.*\(^{33}\) the parties entered three exclusive regional agreements covering distribution of KPSS Goldwell hair care products in different states. Goldwell of New Jersey had the exclusive distribution agreement for New Jersey for many years, and then entered two additional agreements, one covering North Carolina, and the last one covering Delaware, Maryland, Virginia, Bermuda, Washington, D.C., and portions of West Virginia.

All three Goldwell agreements had expiration dates of December 31, 2007, and permitted KPSS unfettered discretion whether or not to renew. The agreements required Goldwell to meet minimum sales and technical staff requirements. In 2007, new management at KPSS sought to weed out underperforming distributors. Eventually KPSS sent Goldwell of New Jersey notices of non-renewal. After the non-renewal notices, KPSS sent notices of default alleging inferior service, and Goldwell filed a complaint including claims for wrongful termination of all three distributor agreements under the New Jersey Franchise Practices Act.

The parties filed cross-summary judgment motions, KPSS’s asserting that the New Jersey Franchise Practices Act could not apply to the two distributorship agreements covering states other than New Jersey. The district court initially noted that the New Jersey statute might not apply to multiple agreements which do not envision activities in New Jersey.

But Goldwell asserted that while there were multiple agreements on paper, the business essentially operated as one unified multi-state distribution agreement. Goldwell also established that orders from the three distribution territories were aggregated and the product was shipped to New Jersey. The district court denied summary judgment for KPSS, holding that: “The New Jersey Legislature likely would have intended the NJFPA to apply to franchises which disclaimed connection to New Jersey franchises in the contract, but where the parties nevertheless acted as if the multiple franchises constituted one umbrella agreement.”\(^ {34}\)

III. FRANCHISE RELATIONSHIP STATUTES: WHEN CROSSING STATE BORDERS MAY LEAD TO DIFFERING ENFORCEMENT

As noted, 22 states plus the District of Columbia, Puerto Rico, and the Virgin Islands have franchise relationship statutes that cover various aspects of the franchise relationship, including transfer, default and termination, and renewal.\(^ {35}\) In addition, some of the franchise relationship statutes cover additional conduct ranging from particular issues like encroachment and product sourcing to more general issues such as duties of good faith.\(^ {36}\) An overview of some of the substantive coverage follows, but both counsel for franchisor and franchisee are advised to study each potentially applicable statute when a dispute arises. Also, special attention should be paid to effective dates of statutes since they are not static. For example, the CFRA was recently amended and certain sections are applicable to franchise agreements and renewals entered into after January 1, 2016.

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\(^{34}\) Id. at 187.

\(^{35}\) Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Puerto Rico, Rhode Island, Virgin Islands, Virginia, Washington, and Wisconsin.

\(^{36}\) Some states do not have specific franchise relationship statutes, but have enacted laws that may be applicable to specific situations that arise in the franchise relationship, such as misrepresentations in selling a franchise. See, e.g., FLA. STAT. § 817.417.
A. Defaults And Termination

The circumstances by which a franchisor may terminate a franchise agreement varies from state-to-state. Some states impose a "good cause" requirement for termination, and its meaning is subject to varying interpretations among the states. Some states mandate cure periods of varying length, and others include anti-discrimination provisions which may prevent treating similarly situated franchisees differently.

1. Good Cause Requirement

Many states require "good cause" for termination, with the goal of preserving the equity that a franchisee has developed in its business and to prevent unfair forfeiture of its investment. At least 19 of these state relationship statutes set forth that "good cause" or "just cause" must exist for a franchisor to terminate a franchisee prior to the expiration of the term of the agreement.37 However, the definitions vary from statute to statute, so counsel is advised to study each applicable statute closely.

For example, Puerto Rico defines "just cause" as:

[n]onperformance of any of the essential obligations of the dealer’s contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service.38

In contrast, the Iowa statute provides that:

'[g]ood cause' is cause based upon a legitimate business reason. 'Good cause' includes the failure of the franchisee to comply with any material lawful requirement of the franchise agreement, provided that the termination by the franchisor is not arbitrary or capricious.39

Depending on the state or territory involved, bankruptcy or insolvency could be considered good cause. Voluntary abandonment, conviction of a crime relating to the business, or actions that impair the franchisee's good will also constitute good cause in many states.40

Interpreting the Indiana’s Act definition of "good cause," the court in *Hacienda Mexican Rest. of Kalamazoo Corp.*, held that because the franchisee had been in default of the franchise agreement three times, the statute did not prohibit a unilateral termination of the franchise agreement.41 The Indiana Act provides that "material violations of the franchise agreement

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38 10 P.R. LAWS ANN. § 278.

39 IOWA CODE ANN. § 537A.10.


constitute good cause, but does not limit good cause to material violations. In a case interpreting the New Jersey Act, 7-Eleven, Inc. v. Sodhi, the court found it was a material breach under the franchise agreements to fail to pay and/or withhold payroll and income taxes. Accordingly, the court held that franchisor’s motive was irrelevant and there was good cause to terminate the agreement.

In Century 21 Real Estate LLC v. All Prof'l Realty, Inc., the former franchisees brought a claim under the CFRA asserting that the statute prohibits termination of a franchise agreement without good cause, and alleged that the CFRA provides a reasonable opportunity to cure. The court focused on what law to apply, given a New Jersey choice of law provision in the parties’ agreements. The former franchisees had franchised locations in California and one in Hawaii. In deciding whether to apply the CFRA, the court explained that the statute serves to protect California franchisees, typically small business owners and entrepreneurs, from abuses by franchisors in connection with the nonrenewal and termination of franchises...and that [c]ourts are required to construe ‘the CFRA broadly to carry out legislative intent, that intent...is to protect franchise investors, i.e. those who ‘pay for the right to enter into a business."

The court also noted that the CFRA applies to any franchise domiciled in the state or a franchised business that operates in the state. The court then recognized a similar New Jersey statute, but found that the protections were not as great as the CFRA since the act did not cover franchisees that do not maintain a franchised location in New Jersey. Notwithstanding, the “[a]pplication of New Jersey law, however, would not effectuate a waiver of [former franchisees’] protections under the CFRA because the CFRA provision's good cause and opportunity to cure requirements are incorporated into [former franchisees’] franchise agreements with Century 21.” Nonetheless, the court held that the choice of law provision was enforceable and that New Jersey law applied since the former franchisees would be offered the same protections under the CFRA through the express language of the franchise agreement.

This case illustrates the importance of analyzing the jurisdictional requirements contained within each state’s specific franchise relationship statute. This includes making the determination of whether the specific provision applies to only locations within the state or businesses domiciled within the state.

2. Cure Periods

Many franchise relationship statutes provide a franchisee with an opportunity to cure a default. However, these often include exceptions for incurable defaults, which could include

42 Id.
44 Id.
45 889 F. Supp. 2d 1198, 1216-17 (E.D. Cal. 2012), aff'd, 600 F. App’x 502 (9th Cir. 2015).
46 Id.
47 Id. at 1217 (emphasis added).
48 Id.
voluntary abandonment, bankruptcy, and criminal conviction, among others.\textsuperscript{49}

For example, Illinois's statute provides a list of incurable defaults that do not require notice:

(c) "Good cause" shall include, but without the requirement of notice and an opportunity to cure, situations in which the franchisee:

(1) makes an assignment for the benefit of creditors or a similar disposition of the assets of the franchise business;
(2) voluntarily abandons the franchise business;
(3) is convicted of a felony or other crime which substantially impairs the good will associated with the franchisor's trademark, service mark, trade name or commercial symbol; or
(4) repeatedly fails to comply with the lawful provisions of the franchise or other agreement.\textsuperscript{50}

Also, the length of the cure period varies from statute to statute. Some states only provide a "reasonable" opportunity to cure without defining how much time is reasonable. These states include California, Hawaii, Illinois, Michigan, and Washington.\textsuperscript{51} With the exception of Hawaii, the cure period need not be more than thirty (30) days, which implies that it could be a much shorter time period as long as it is deemed "reasonable."\textsuperscript{52} On the other hand, some state statues specify the length of the cure period. Arkansas, Maryland and Rhode Island require a 30-day cure period while Iowa requires no less than 30 days but no more than 90 days.\textsuperscript{53} Minnesota and Wisconsin have a 60-day cure period.\textsuperscript{54} Connecticut, Delaware, Indiana, Mississippi, Missouri, Nebraska, New Jersey, and the Virgin Islands do not mandate a cure period, although notice is required in these states.\textsuperscript{55}

Other states' cure periods may vary in time or may even be eliminated depending on the nature of the breach. The cure periods in Rhode Island and Wisconsin decrease to 10 days in the case of monetary defaults. The cure period in Arkansas is reduced to 10 days if there are multiple defaults within a 12-month period. Iowa ordinarily requires an opportunity to cure, but requires no cure period when the franchisee has committed a serious breach of the agreement.\textsuperscript{56}

In \textit{Tilted Kilt Franchise Operating, LLC v. 1220, LLC}, the franchisor alleged that the

\textsuperscript{49} Marchiano, \textit{et. al.}, supra note 5, at 16.

\textsuperscript{50} 815 ILL. COMP. STAT. ANN. 705/19.

\textsuperscript{51} Marchiano, \textit{et. al.}, supra note 5, at 16.


\textsuperscript{53} See ARK. CODE ANN. § 4-72-204 (30 days); MD. CODE ANN., COM. LAW § 11-1305 (30 days); R.I. GEN. LAWS ANN. § 6-50-4 (30 days); IOWA CODE ANN. § 537A.10 (no less than 30 days, but no more than 90 days).

\textsuperscript{54} See MINN. STAT. ANN. § 80C.14 (60 days); WIS. STAT. § 135.04 (60 days).

\textsuperscript{55} Marchiano, \textit{et. al.}, supra note 5, at 16.

\textsuperscript{56} \textit{Id.} at 16-17.
defendants, area developers pursuant to area development agreement, made a series of misleading financial performance representations to prospective franchisees.\(^{57}\) The franchisor sought a declaratory judgment that the defendants breached their agreement, that there was good cause for the termination, and that the termination was justified without a cure period. Defendants argued that the franchisor’s requested relief was contrary to the express terms of the Illinois Franchise Disclosure Act which provides a cure period for up to 30 days, and the area development agreement. The agreement set forth grounds for termination without providing an opportunity to cure, and the defendants argued none of those instances were applicable to them. The franchisor argued that the breach was incurable and fell under the provision of the Act providing that repeated violations of lawful provisions of the franchise agreement constitutes good cause without an opportunity to cure.\(^{58}\) The court held that “the pleadings were adequate to establish that the breaches were incurable and that defendant’s conduct was a repeated violation of the law.”\(^{59}\) Accordingly, no cure period was required.

3. **Anti-Discrimination Provisions**

Six states ban certain types of discrimination among franchisees. The states that have the broadest anti-discrimination statutes are Hawaii, Illinois, Washington, and Indiana. Arkansas and Wisconsin limit their anti-discrimination provisions to termination or non-renewal. Additionally, Minnesota has an administrative rule that addresses discrimination.\(^{60}\)

a. **Broader Anti-Discrimination Statutes**

i. **Hawaii:**

The Hawaii anti-discrimination statute provides that it is “an unfair or deceptive act or practice or an unfair method of competition for a franchisor ... to ... discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing...”\(^{61}\) It is important to note that this same section provides defenses to a franchisor. This includes that such discriminatory practices or actions are prohibited unless:

i) Based on franchises granted at materially different times, and such discrimination is reasonably related to such differences in time;

(ii) Is related to one or more programs for making franchises available to persons with insufficient capital, training, business experience, education or lacking other qualifications;

(iii) Is related to local or regional experimentation with or variations in product or service lines or business formats or designs;

(iv) Is related to efforts by one or more franchisees to cure deficiencies in the operation of franchise businesses or defaults in franchise agreements; or

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\(^{58}\) Id. at *7.

\(^{59}\) Id.

\(^{60}\) Marchiano, et. al., supra note 5, at 25.

\(^{61}\) HAW. REV. STAT. ANN. § 482E-6.
(v) Is based on other reasonable distinctions considering the purposes of this chapter and is not arbitrary.\textsuperscript{62}

Due to the minimal case law on this section and lack of legislative intent regarding Hawaii’s anti-discrimination statute, it is undetermined whether discrimination claims under this statute need to be based on discrimination between franchises within the state of Hawaii.\textsuperscript{63}

\textbf{ii. Illinois:}

The Illinois Franchise Disclosure Act provides that it is “a violation of this Act for any franchisor to unreasonably and materially discriminate between franchisees operating a franchised business located in this State in the charges offered or made for franchise fees, royalties, goods, services, equipment, rentals or advertising services. . .”.\textsuperscript{64} However, the language that immediately follows limits its application by stating, “if such discrimination will cause competitive harm to a franchisee who competes with a franchisee that received the benefit of the discrimination.”\textsuperscript{65}

Additionally, like Hawaii, subsections (a)-(e) below provide similar defenses to a franchisor.

[u]nless and to the extent that any classification of or discrimination between franchisees is:

(a) based on franchises granted at different times, and such discrimination is reasonably related to such differences in time;
(b) related to one or more programs for making franchises available to persons with insufficient capital, training, business experience or education, or lacking other qualifications;
(c) related to local or regional experimentation with or variations in product or service lines or business formats or designs;
(d) related to efforts by one or more franchisees to cure deficiencies in the operation of franchise businesses or defaults in franchise agreements; or
(e) based on other reasonable distinctions considering the purposes of this Act and is not arbitrary.\textsuperscript{66}

In \textit{P & W Supply Co., Inc. v. E.I. DuPont de Nemours & Co., Inc.}, the Northern District of Illinois interpreted this section as only applying to price discrimination on the part of the franchisor, against competing franchisees. Accordingly, a claim of discrimination based upon a

\textsuperscript{62} \textit{Id.} at (c)(i-v).

\textsuperscript{63} \textit{West v. Int'l House of Pancakes, LLC}, CIV. 09-00542 ACK, 2011 WL 2607173, at *8 (D. Haw. June 30, 2011) ("Although the legislative history of Hawaii's Franchise Investment Law sheds little light on the issue, and there are few cases even considering this statute, there is a strong argument that discrimination claims under H.R.S. § 482E–6 need to be based on discrimination between franchises within Hawaii."") (citing Robert W. Emerson, \textit{Franchise Selection and Retention: Discrimination Claims and Affirmative Action Programs}, 40 Ariz. L.Rev. 511, 524 & n. 52 (1998)).

\textsuperscript{64} 815 ILL. COMP. STAT. ANN. 705/18.

\textsuperscript{65} \textit{Id.} (emphasis added).

\textsuperscript{66} \textit{Id.}
franchisee's refusal to sell a specific product may not fall under this section.\textsuperscript{67}

iii. **Indiana:**

Indiana's anti-discrimination provision appears to have a broader application than Hawaii's and Illinois' since it does not provide a franchisor with a list of defenses and does not set forth a list of exceptions. This section provides:

\[\text{[it is unlawful for any franchisor who has entered into any franchise agreement with a franchisee who is either a resident of Indiana or a nonresident operating a franchise in Indiana to engage in any of the following acts and practices in relation to the agreement: ...Discriminating unfairly among its franchisees or unreasonably failing or refusing to comply with any terms of a franchise agreement.}^6\text{8}\]

This statute expressly provides that it applies to franchisees who are residents of Indiana and non-residents who are operating a franchise in Indiana. Despite the broader language, courts have limited its application, and discrimination has been to be difficult to prove. For example, in *Carrel v. George Weston Bakeries Distribution, Inc.* the court denied an independent contractor's motion for summary judgment when the facts indicated that the distributor had provided different commission rates to various independent contractors.\textsuperscript{69} The court held that the claim should proceed because there was some evidence to the effect that all independent contractors [IOs] (including those IOs who are not parties to this action) were initially presented with similar routes and agreements and that all IOs were subject to GWBD's marketing plans. This commonality of routes, agreements, and marketing plans creates a genuine issue of material fact regarding whether any alleged discrimination by GWBD among franchisees occurred and, if so, whether it was arbitrary and unfair.\textsuperscript{70}

iv. **Washington:**

Washington's anti-discrimination statute similarly provides that it is an "unfair or deceptive act or practice or an unfair method of competition and therefore unlawful ... to ... discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing."\textsuperscript{71} The application is limited by the following language which provides:

\[\text{[u]nless and to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is: (i) [r]asonable, (ii) based on franchises granted at materially different times and such discrimination is reasonably related to such difference in time, or is based on other proper and}\]

\textsuperscript{67} 747 F. Supp. 1262 (N.D. Ill. 1990).
\textsuperscript{68} IND. CODE ANN. § 23-2-2.7-2 (5) (emphasis added).
\textsuperscript{69} No. 1:05-CV-1769SEBJPG, 2007 WL 2827405 (S.D. Ind. Sept. 25, 2007).
\textsuperscript{70} Id. at *2.
\textsuperscript{71} WASH. REV. CODE ANN. § 19.100.180 (c).
justifiable distinctions considering the purposes of this chapter, and (iii) is not arbitrary. However, nothing in (c) of this subsection precludes negotiation of the terms and conditions of a franchise at the initiative of the franchisees.\textsuperscript{72}

For example, a franchisor's offer of a lower royalty rate to former franchisees, but not to existing franchisees, does not constitute discrimination under this statute.\textsuperscript{73} A Washington court found that the franchisor had a legitimate business interest for offering the lower rate to former franchisees – to induce franchisees at the time to join the new system. The key point was that the franchises were granted at "materially different times and under different circumstances."\textsuperscript{74} This case illustrates that a key to proving a discrimination claim pursuant to these statutes is show that a franchisee's business is being treated different from other franchisees established close in time and under similar circumstances.

b. Anti-Discrimination Statutes Limited To Termination Or Non-Renewal

Arkansas and Wisconsin limit their anti-discrimination provisions to termination or non-renewal. Under Arkansas's anti-discrimination provision, it is a violation for a franchisor to terminate or cancel a franchise without good cause.\textsuperscript{75} Good cause is then defined as

[f]ailure by a franchisee to comply substantially with the requirements imposed upon him or her by the franchisor, or sought to be imposed by the franchisor, which requirements are not discriminatory as compared with the requirements imposed on other similarly situated franchisees, either by their terms or in the manner of their enforcement.\textsuperscript{76}

Similarly, under Wisconsin law, the anti-discrimination provision disallows a franchisor from terminating, canceling or failing to renew an agreement (franchise included) unless there is good cause.\textsuperscript{77} Good cause is then defined as

[f]ailure by a dealer to comply substantially with essential and reasonable requirements imposed upon the dealer by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement.\textsuperscript{78}

The definition of dealer contemplates a franchise agreement or related agreement.

\textsuperscript{72} Id.

\textsuperscript{73} Garner, Michael, § 10:52. Limitations on contractual terms or franchisor's conduct—Prohibitions on discrimination, 2 FRANCH & DISTR LAW & PRAC § 10:52 (September 2016).

\textsuperscript{74} Id.

\textsuperscript{75} ARK. CODE ANN. § 4-72-204.

\textsuperscript{76} Id. at § 4-72-202.

\textsuperscript{77} WIS. STAT. ANN. § 135.03.

\textsuperscript{78} Id. at § 135.02.
Again, it is important to determine each specific statute’s application to out-of-state franchised locations or to non-residents. In Morley-Murphy Co. v. Zenith Electronics Corp., a distributor sued a manufacturer for damages after the manufacturer terminated its dealership agreement. The court granted partial summary judgment in favor of the distributor and found that the termination violated the Wisconsin Fair Dealership Law ("WFDL"). The manufacturer was a Delaware corporation with its principal place of business in Illinois, and the distributor was a Wisconsin corporation with its principal place of business in Wisconsin. The distributor’s territory covered Wisconsin, Iowa, Minnesota, North Dakota, and South Dakota. In evaluating the award of damages, the Seventh Circuit held that the WFDL did not extend to a manufacturer’s termination of a dealer’s right to serve other states. The court went on to hold: "We think, in light of both the presumption against extraterritoriality and the troublesome nature of the constitutional questions that would be raised if the WFDL reached beyond Wisconsin’s borders, that the Wisconsin Supreme Court would construe the WFDL as not applying to [distributor’s] sales of [manufacturer’s] products in Minnesota and Iowa." Accordingly, the court found that the distributor could not make a claim based on the WFDL for lost profits arising out of the termination of its out-of-state dealerships.

B. Renewals

Some states’ franchise relationship statutes have minimum notice requirements for non-renewal. These states include:

- Arkansas (90 days),
- California (180 days),
- Connecticut (60 days),
- Delaware (90 days),
- Illinois (6 months),
- Indiana (90 days),
- Iowa (6 months),
- Minnesota (180 days),
- Mississippi (90 days),
- Missouri (90 days),
- Nebraska (90 days),
- New Jersey (60 days),
- Rhode Island (60 days),
- Washington (1 year), and
- Wisconsin (90 days).

Further, some states impose additional restrictions on a franchisor’s ability to deny a franchisee a renewal of its agreement. These include good cause restrictions, requirements for the franchisor to purchase the equity of the business and certain caveats regarding non-compete provisions, among others. The following states have laws that address additional renewal requirements: Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana,

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80 Id. at 380.
81 Id.
82 Marchiano, et. al., supra note 5, at 34.
Iowa, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, Rhode Island, Virginia, Washington, and Wisconsin have such laws. New Jersey prohibits the franchisor from failing to renew a franchisee unless the franchisee has failed to "substantially comply with those requirements imposed upon [the franchisee] by the franchise agreement." The New Jersey statute also provides exceptions to termination and renewal, and notice of same. Under this section a franchisor is not required to give notice when the alleged grounds are voluntary abandonment (in the event, only provide 15 days) or conviction of franchisee of indictable offense (cancellation or failure to renew written notice effective immediately).

C. Transfers

Approximately ten states specifically address the issue of franchisee transfers in their respective relationship statutes. These states include Arkansas, California, Hawaii, Indiana, Iowa, Michigan, Minnesota, Nebraska, and New Jersey. Many of these statutes require a franchisor to have good cause for refusing to consent to a transfer.

1. Arkansas

Under the Arkansas statute, a franchisee is required to provide written notice to the franchisor of its intent to transfer the franchise. Upon receipt, the franchisor has 60 days to either approve the franchisee or by written notice "advise the franchisee of the unacceptability of the proposed transferee, setting forth a material reason relating to the character, financial ability, or business experience of the proposed transferee." If the franchisor does not reply within 60 days, approval of the transfer is deemed granted. Last, the transferee must agree in writing to comply with all of the requirements of the franchise then in effect or the transfer will not be valid.

2. California

Under California’s transfer provision, a franchisor cannot deny a surviving spouse, heir, or estate of a deceased franchisee “the opportunity to participate in the ownership of the franchise under a valid franchise agreement for a reasonable time after the death of the franchisee or majority shareholder of the franchisee.” However, this does not prohibit a franchisor from exercising a right of first refusal to purchase the franchise upon receipt of a bona fide offer. Additionally, it is unlawful for a franchisor to prevent a franchisee from selling or transferring its business to another person who is qualified under the franchisor’s then-existing

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83 Id.
84 N.J. STAT. ANN. § 56:10-5.
85 Id.
86 Id.
87 Id. at (2).
88 Id. at (c).
89 CAL. BUS. & PROF. CODE § 20027(a).
90 Id. at § 20027(b).
standards.\textsuperscript{91} The notice of the sale or transfer shall be provided to the franchisor in writing. The franchisor shall have 60 days after receipt of all necessary information to approve or disapprove of the sale. Further, the reasonableness of the franchisor's decision is a question of fact regarding requiring consideration of all existing circumstances.\textsuperscript{92}

3. \textbf{Hawaii}

The Hawaii statute provides that it is an unfair or deceptive act or practice or unfair method of competition for a franchisor to refuse to permit a transfer of a franchise except for good cause. Good cause is defined as:

(i) The failure of a proposed transferee to meet any of the franchisor's or subfranchisor's reasonable qualifications or standards then in effect for a franchisee or subfranchisor;
(ii) The fact that the proposed transferee or any affiliated person of the proposed transferee is a competitor of the franchisor or subfranchisor;
(iii) The inability or unwillingness of the proposed transferee to agree in writing to comply with and be bound by all lawful obligations imposed by the franchise, including without limitation all instruction and training obligations, and to sign the current form of franchise agreement used by the franchisor or subfranchisor; and
(iv) The failure of the franchisee or proposed transferee to pay any sums owing to the franchisor and to cure any default in the franchise agreement or other agreements with the franchisor existing at the time of the proposed transfer.\textsuperscript{93}

This statute provides that a franchisor shall have 30 days after being notified in writing of a proposed transfer to state its reasons for disapproval, if any. If the franchisor fails to respond within that time frame, the approval shall be deemed waived.\textsuperscript{94} In addition, Hawaii's franchise relationship statute contains a good faith provision.\textsuperscript{95}

4. \textbf{Indiana}

Under Indiana's statute, it is unlawful for a franchisor to deny a surviving spouse, heir, or estate of the deceased the opportunity to participate in the ownership of the franchise under a franchise agreement for a reasonable time after the death of the franchisee, provided that the survivor maintains all standards and obligations of the franchise.\textsuperscript{96}

It is also important to note that this provision applies to franchisees who are residents of Indiana or nonresidents who are operating a franchise in Indiana.\textsuperscript{97}

\textsuperscript{91} CAL. BUS. \& PROF. CODE § 20028(a).
\textsuperscript{92} Id. at § 20029 (a) and (b)(1)-(2).
\textsuperscript{93} HAW. REV. STAT. ANN. § 482E-6(2).
\textsuperscript{94} Id.
\textsuperscript{95} Id. at (1).
\textsuperscript{96} IND. CODE § 23-2-2.7-2(3).
\textsuperscript{97} Id. at § 23-2-2.7-2.
5. **Iowa**

In Iowa, a franchisee may transfer the franchised business "provided that the transferee satisfies the reasonable then existing qualifications of the franchisor for new franchisees."98 "Reasonable current qualification" is defined as a qualification based upon a legitimate business reason. If the proposed transferee does not meet the reasonable current qualifications, provided it is not arbitrary or capricious, the franchisor may refuse to permit the transfer.99

The franchisor also has the discretion to condition the transfer on any of the following: (a) the proposed transferee's successful completion of a training program; (b) the payment of a transfer fee based on franchisor's reasonable and actual expenses attributable to the transfer; (c) that the franchisee pay or make provisions reasonably acceptable to the franchisor to pay any amount due the franchisor; or (d) the financial terms of the transfer complying at the time of the transfer with the franchisor's current financial requirements for franchisees.100

Iowa also imposes the duty of good faith in the performance and enforcement of the franchise agreement, which applies to transfers. Further, "good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."101

6. **Michigan**

In Michigan, a provision in a franchise agreement (or related document) is void and unenforceable if it refuses to permit a transfer of ownership of a franchise, except for good cause. "Good cause" is defined as:

(i) The failure of the proposed transferee to meet the franchisor's then current reasonable qualifications or standards.
(ii) The fact that the proposed transferee is a competitor of the franchisor or subfranchisor.
(iii) The unwillingness of the proposed transferee to agree in writing to comply with all lawful obligations.
(iv) The failure of the franchisee or proposed transferee to pay any sums owing to the franchisor or to cure any default in the franchise agreement existing at the time of the proposed transfer.102

This section does not prevent a franchisor from exercising a right of first refusal to purchase the franchise.103

In *Franchise Mgmt. Unlimited, Inc. v. Am.'s Favorite Chicken*, a Michigan court analyzed the good cause provision in determining whether the franchisee's refusal to release all claims under the Michigan Franchise Investment Law (MFIL) against the franchisor was considered

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99 Id.
100 Id. at §523H.5(2).
101 Id. at § 537A.10.
103 Id.
good cause to not approve the transfer.\textsuperscript{104} The court held that the contractually agreed upon release fit within the definition of "good cause" contained in section 445.1527, which provides that good cause exists if franchisee has failed to cure any default in the franchise agreement.\textsuperscript{105} Because the franchise agreement required the franchisee to provide a release of any and all claims before franchisor was obligated to approve a transfer, the court held that the franchisee was in default for failure to release its claims and the franchisor had statutory good cause for not approving the transfer. The court further concluded that the good cause requirement centers on commercial reasonability, and that the requirement for franchisor to resolve all non-MFIL disputes prior to transfer was commercially reasonable.\textsuperscript{106}

7. **Minnesota**

Minnesota's statute simply states that it is unfair and inequitable to unreasonably withhold consent to transfer if the transferee meets the franchisor's current qualifications and standards.\textsuperscript{107}

8. **Nebraska**

Under the Nebraska franchise relationship statute, the franchisee is required first to notify the franchisor in writing of its intent to transfer. This notice should include the prospective transferee's name, address, statement of financial qualification and business experience during the previous five years. Then, the franchisor has 60 days from receipt of that notice to either approve or advise the franchisee of the unacceptability of the proposed transferee and set forth material reasons relating to the character, financial ability or business experience of the proposed transferee. If, however, the franchisor does not reply within 60 days, approval is deemed granted.\textsuperscript{108}

9. **New Jersey**

The New Jersey statute is the same as the Nebraska statute above.\textsuperscript{109}

10. **Washington**

The Washington statute provides that a franchisor’s right to approve or disapprove of a sale must be exercised in a reasonable manner.\textsuperscript{110} Additionally, this statute provides that the parties shall deal with each other in good faith and prohibits transfer conditions that are not "reasonable and necessary."\textsuperscript{111}

\textsuperscript{105} Id. at 245.
\textsuperscript{106} Id. at 247-248.
\textsuperscript{107} MINN. STAT. § 80C.14(5).
\textsuperscript{108} NEB. REV. STAT. § 87-405 (2017).
\textsuperscript{109} N.J. STAT. ANN. § 56:10-6 (2017).
\textsuperscript{110} WASH. REV. CODE ANN. § 19.100.030(1)(2017).
\textsuperscript{111} Id. at § 19.100.180(1) and 2(h) (2017).
IV. COVENANTS NOT TO COMPETE: WHEN CROSSING STATE BORDERS MAY LEAD TO DIFFERING ENFORCEMENT

Franchise disputes crossing state boundaries often raise substantive issues reflecting state statutory policies. A leading issue is covenants not to compete, because statutes governing the enforcement of such contractual provisions differ from state-to-state.

Several states’ franchise relationship statutes specifically address the enforcement of covenants not to compete. These states include Illinois, Indiana, Iowa, Louisiana, Michigan, and Minnesota. Additionally, a number of states address covenants not to compete in statutes of general applicability.

A. Illinois

The Illinois Franchise Disclosure Act addresses non-compete agreements with regard to non-renewal of franchise agreements.\(^{112}\) The Act provides that it is a violation for a franchisor to refuse to renew a franchise located in Illinois without compensating the franchisee either by repurchase or by other means for the diminution in the value of the franchised business caused by the expiration of the franchise where (a) the franchisee is barred by the franchise agreement...from continuing to conduct substantially the same business under another trademark, service mark, trade name or commercial symbol in the same area subsequent to the expiration of the franchise; or (b) the franchisee has not been sent notice of the franchisor’s intent not to renew the franchise at least 6 months prior to the expiration date of the franchise.\(^{113}\)

The intent of the statute is to ensure that a former franchisee will be compensated since they will be prohibited from engaging in a competing business and were not provided ample opportunity to sell the business.\(^{114}\)

B. Indiana

The Indiana Deceptive Franchise Practices Act provides that it is unlawful for a franchise agreement to include a covenant against competition for a period that extends over three years or for an area greater than the exclusive area granted by the agreement. If the agreement provides no exclusive territory, the restriction will be to an area of reasonable size.\(^{115}\) It is important to note that this provision only applies post-termination.\(^{116}\)


\(^{113}\) 815 ILL. COMP. STAT. ANN. 705/20 (2017).


\(^{116}\) Id.
C. Iowa

Iowa has two different franchise statutes that apply depending on when the franchise agreement was entered into - before July 1, 2000 or on or after July 1, 2000.\textsuperscript{117} For franchise agreements entered prior to July 1, 2000, the statute prohibits post-termination enforcement of covenants not to compete or refusal to renew unless it is one which relies on a substantially similar marketing program as the terminated or nonrenewal franchise or unless the franchisor offers in writing no later than ten business days before expiration of the franchise to purchase the assets of the franchised business for its fair market value as a going concern.\textsuperscript{118}

This same statute also prohibits enforcement of a covenant not to compete against the transferor "from engaging in a lawful occupation or enterprise."\textsuperscript{119} However, the franchisor may prohibit the transferor from "exploit[ing] the franchisor's trade secrets or intellectual property rights, unless otherwise agreed to by the parties."\textsuperscript{120} Last, this statute "prohibits a franchisor from refusing to renew a franchise agreement unless both proper notice is given of the intent not to renew and one of certain circumstances exists [enumerated in statute], provided that, upon expiration, the franchisor agrees not to enforce any covenant not to compete against the franchisee."\textsuperscript{121}

The current statute, applicable to franchise agreements entered into on or after July 1, 2000, prohibits covenants not to compete when a franchisor refuses to renew a franchise agreement due to the franchisor withdrawing from "distributing its products or services in the geographic market served by the franchisee."\textsuperscript{122} However, the provisions that appeared in the predecessor statute regarding transfer or post-term covenants generally are not present in the current version.\textsuperscript{123}

D. Louisiana:

Under Louisiana law, agreements which restrain anyone from exercising a lawful profession, trade, or business of any kind, with limited exceptions, are null and void.\textsuperscript{124} The parties to a franchise agreement may agree that for a period of two years after severance of the relationship, the franchisee may not compete with the franchisor or other franchisees of the

\textsuperscript{117} IOWA CODE § 523H.2A ("[T]his chapter does not apply to a franchise agreement which is entered into on or after July 1, 2000. A franchise agreement which is entered into on or after July 1, 2000, shall be subject to section 537A.10.")

\textsuperscript{118} IOWA CODE § 523H.11 (2017).

\textsuperscript{119} Id. § 523H.5.

\textsuperscript{120} Id.

\textsuperscript{121} Greene, et al., supra note 114, at 23 (citing Iowa Code § 523H.5).

\textsuperscript{122} IOWA CODE § 537A.10(8)(c).

\textsuperscript{123} Id. at 24.

\textsuperscript{124} LA. REV. STAT. ANN. § 23:921A(1).
franchisor.\textsuperscript{125} The statute does not, however, set forth a geographic limitation on covenants not to compete.\textsuperscript{126}

E. Michigan:

The Michigan statute addresses non-compete agreements in the MFIL with regard to non-renewal of franchise agreements. The MFIL states that a provision in a franchise agreement is "void and unenforceable" if it permits a franchisor to refuse to renew a franchise agreement without fairly compensating the franchisee by repurchasing for the fair market value of "the franchisee's inventory, supplies, equipment, fixtures and furnishings," but only if the term of the franchise agreement is less than five years and the franchisee is prohibited from conducting "substantially the same business in the same area" or the franchisee did not receive proper and timely notice of franchisor's intent not to renew.\textsuperscript{127} However, an in-term covenant is valid, and violation of the provision may be the basis for termination of the franchise agreement.\textsuperscript{128}

F. Minnesota:

Under the Minnesota Franchise Act, a franchisor's public offering statement must set forth the conditions of any covenant not to compete. Additionally, it is unfair under the Act to enforce "any unreasonable covenant not to compete after the franchise ceases to exist."\textsuperscript{129}

G. States With Statutes Of General Applicability:

Other states that do not have franchise specific statutes that address non-competes, have general statutes that do apply to franchise relationships and agreements. Some of these states include Alabama, California, Colorado, Florida, Georgia, Hawaii, Michigan, Montana, New York, South Dakota, and Texas. For a comprehensive analysis of these states' specific statutes addressing covenants not to compete, see the Covenants Against Competition in Franchise Agreements, American Bar Association Forum on Franchising, 3d Edition (3d ed. 2012).

V. PROCEDURAL ISSUES IN MULTI-STATE FRANCHISE DISPUTES: WHEN CROSSING STATE BORDERS MAY LEAD TO DIFFERING ENFORCEMENT

A. Litigating Across State Borders And Pro Hac Vice

When counsel need to appear in litigation or arbitration in a state in which they are not licensed, they should examine and comply with the rules for out-of-state lawyers practicing law in that forum. Different rules often apply depending on the type of court: federal court litigation, state court litigation, and arbitration. In time-sensitive matters, local counsel may be necessary to file initial pleadings and assist with required applications before certain tribunals. In some

\textsuperscript{125} LA. REV. STAT ANN. § 23:921F(2).

\textsuperscript{126} Id.

\textsuperscript{127} MICH. COMP. LAWS § 445.1527(d).


\textsuperscript{129} MINN. R. 2860.4400(l).
jurisdictions, admitted counsel must be of record throughout the action.\textsuperscript{130} Federal courts are sometimes more lenient in allowing out-of-state attorneys to be admitted to the bar, or to be admitted \textit{pro hac vice} for a particular lawsuit.\textsuperscript{131} State courts are more restrictive, often requiring listing of prior representations in the state, lack of current suspension or disbarment, and payment of a fee, pending approval by the state governing body.\textsuperscript{132} Many states have a truncated application for representation in an arbitration proceeding.\textsuperscript{133}

Even when following \textit{pro hac vice} rules, issues may arise. In \textit{YTC Dream Homes, Inc. v. DirectBuy, Inc.},\textsuperscript{134} five out-of-state franchise attorneys were denied \textit{pro hac vice} admission to represent a group of ten out-of-state DirectBuy franchisees in a state court contract dispute. The Indiana Court of Appeals reversed with instruction to grant the \textit{pro hac} applications.

All five attorneys, three from Minnesota and two from Wisconsin, had filed verified applications for \textit{pro hac vice} admission stating the following: (1) that the applicant was not a resident nor regularly employed in Indiana; (2) listing the jurisdictions in which admitted and that the applicant in good standing; and (3) that the applicant had not applied for temporary admission to any Indiana court for the past five years. The court found that the applicant attorneys "have specialized knowledge regarding franchise disputes, which is a large part of the subject matter of this case, and [the Appellants] wish to avail themselves of this specialized knowledge to assist them in prosecuting this case."\textsuperscript{135}

DirectBuy's counsel filed an opposition asserting that there was no showing that local counsel could not be found to handle the matter and listing 17 Indiana licensed lawyers who are members of the ABA Forum on Franchising. In addition, DirectBuy's counsel quoted a website for one of the plaintiff's attorney's website stating that they specialized in "aggravated litigation." DirectBuy asserted this was not how law was practiced in Lake County, Indiana, and would more than double the cost of defending the action with multiple motions especially with five out-of-state attorneys. The trial court denied the \textit{pro hac vice} applications noting that even if good cause was found, the presumption was not overcome under Lake County Local Rule 5(C) that a non-licensed attorney is not to practice before the Court.

The court of appeals reversed after reviewing applicable statewide rules and case law regarding \textit{pro hac vice} admissions and interpretation of local rules. In \textit{in re Fletcher},\textsuperscript{136} the Indiana Supreme Court held that "appearances in one state by an attorney regularly admitted and licensed to practice in another state are generally permitted as a matter of comity" and the relevant rule. The court of appeal found that the petitions for the five attorneys provided the

\textsuperscript{130} See, \textit{e.g.}, Rule 983, \textit{CALIFORNIA RULES OF COURT}.

\textsuperscript{131} See, \textit{e.g.}, S.D. Fla. L.R. 4, Special Rules Governing the Admission and Practice of Attorneys ("Any attorney who is a member in good standing of the bar of any United States Court, or of the highest Court of any State or Territory or Insular Possession of the United States, but is not admitted to practice in the Southern District of Florida may, upon written application filed by counsel admitted to practice in this District, be permitted to appear and participate in a particular case.")

\textsuperscript{132} Rule 983, \textit{CALIFORNIA RULES OF COURT}.

\textsuperscript{133} See, \textit{e.g.}, Rule 983.4, \textit{CALIFORNIA RULES OF COURT}.

\textsuperscript{134} 18 N.E.3d 635 (Ind. Ct. App. 2014).

\textsuperscript{135} Id. at 652.

\textsuperscript{136} 655 N.E.2d 58 (Ind. 1995).
required information for *pro hac vice* admission under Rule 3(2), and that good cause for their admission existed and directed the trial court on remand to grant the petitions.

The court of appeals also noted that another provision of the Indiana Rules provides guidance for good cause for repeated appearances by a *pro hac vice* applicant in Indiana. Rule 3(2)(a)(vii) provides for good cause for at least one of the following: (a) a complex field of law in which the attorney applicant has special expertise; (b) there has been an attorney-client relationship with the client for an extended period of time; (c) there is a lack of local counsel with adequate expertise in the field involved; (d) the case involves the law of a foreign jurisdiction in which the applicant is licensed; (e) such other reason establishing good cause for the temporary admission. Later, in *YTC Dream Homes, Inc. v. DirectBuy, Inc.*,

The Indiana Supreme Court affirmed the reversal of the trial court's denial of *pro hac vice* application. The court held that there is no presumption against *pro hac vice* admissions and directed the trial court to determine whether good cause existed for the admission of the five attorneys.

**B. Dueling Actions And The First To File Rule**

In litigation with multiple franchisees, or a single franchisee with multiple units, one party may file first in its preferred venue. Not to be outdone, the other party may file a competing lawsuit on its home turf. Under the first filed rule, federal courts faced with substantially similar lawsuits in different jurisdictions may choose to stay the later filed action. This rule has played out in multiple franchise law disputes.

*Dunkin' Donuts Franchised Restaurants, LLC v. Wometco Donas, Inc.*

involved dueling actions in federal district courts. Dunkin' Donuts filed first on its home turf in Massachusetts seeking an injunction prohibiting the franchisee from operating its 18 franchises in Puerto Rico. In response, Wometco Donas sued Dunkin' Donuts in federal court in Puerto Rico including for wrongful termination in violation of Puerto Rico's Dealer Act, Law 75. The district court in Massachusetts applied the first to file rule in favor of Dunkin Donuts, holding the two actions, while not identical, were substantially similar. In addition, the court found that Dunkin' Donuts did not race to the courthouse and instead proceeded in an orderly fashion, and there was no compelling evidence that a trial in Puerto Rico would be more convenient.

In *BMS Foods Puerto Rico, Inc. v. Metromedia Steakhouses, L.P.*, the franchisor filed first in federal court in Texas alleging the franchisee had failed to pay franchise fees. The franchisees filed shortly afterwards in Puerto Rico court (which Metromedia removed to the federal court for the District of Puerto Rico), alleging breach by the franchisor of the same franchise agreements and of Puerto Rico's Dealer Act. The court held that the first to file rule required transfer of franchisee's action from Puerto Rico to the Northern District of Texas. The franchisee's argument that it was actually the "first to file," due to being the first to establish jurisdiction, was rejected. The Texas court held that the rule addresses only the timing of filing, and "is not a jurisdictional inquiry."  

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139 10. P.R. LAWS ANN. §§ 278-278d.
141 *id.* at 234.
In many cases the district court with the second filed action will transfer the action to the forum of the first filed action. In *Colortyme Financial Services, Inc. v. Kivaline Corp.*,\(^{142}\) a franchisor sued in Hawaii for sums allegedly due and owing against a franchisee. The franchisee, had, however, filed first in Texas alleging that the franchisor had fraudulently induced the franchise purchase, had violated the Texas Business Opportunity Act and had committed other wrongs. The district court found the franchisor’s Hawaii claims were compulsory counterclaims to the earlier filed Texas action, and transferred the claims to the federal district court for the Northern District of Texas.

In *Best Western Intl., Inc. v. Mahroom*,\(^{143}\) a franchisor unsuccessfully sought relief under the first to file rule. The franchisee filed their action in state court in California on April 4, 2007, alleging, *inter alia*, breach of the CFRA. On April 26, 2007, the California action was served, and on April 30, 2007, Best Western removed the California action to federal court. Meanwhile Best Western filed its action for breach of contract and Lanham Act violations in Arizona on April 19, 2007, and sought a temporary restraining order on April 26, 2007. The district court in Arizona found the actions involved substantially similar issues, and held that the California court where the first-filed action was pending should weigh the balance of convenience factors regarding venue.

In the somewhat odd case of *Best Western International, Inc. v. Patel*,\(^{144}\) Best Western was the first to file yet still was denied a stay. Best Western sued Patel in Arizona following a termination, including for Lanham Act violations, on April 17, 2007. When Patel did not respond to a preliminary injunction application, the Arizona court entered a preliminary injunction against her. When Patel failed to comply with the preliminary injunction and discovery, contempt orders were issued leading to her compliance. Meanwhile, two weeks after Best Western filed its claim, on April 30, 2004, Patel filed her own claim against Best Western including for violation of the CFRA. After finding the same parties in both actions, and substantially the same claims, the Arizona court found for Best Western – and that the first to file rule applied. The Arizona court also found that the convenience of witnesses supported the Arizona action. Nonetheless, the district court in Arizona declined to stay or dismiss the California district court action under principles of comity.

**C. Group And Class Actions – Statutory Authorization Versus Statutory Provisions For Severance And Bifurcations**

The uniformity inherent in franchising lends itself to claims being filed on behalf of multiple franchisees. The Federal Rules of Civil procedure allow for permissive joinder of plaintiffs against the same defendant(s) when they assert rights arising from the same transaction or series of transactions and where "any question of law or fact common to all plaintiffs will arise in the action."\(^{145}\) Most states allow mass actions by multiple plaintiffs seeking the same claims and relief against the same defendant(s). California, for example, allows for permissive joinder of multiple plaintiffs on nearly the same terms, i.e. when they assert a right to


relief from "the same transaction occurrence or series of transactions or occurrences." Given the numerosity requirement for class action relief, often the only way groups of franchisees under forty may seek relief is through group action. On the other hand, many state civil procedure statutes provide relief for defendants who perceive they are improperly or unfairly named defendants in a group action by allowing for severance as defendants or bifurcation of issues at trial in the interests of justice.

The procedural law governing group and class actions will often affect the outcome of multi-party and multi-unit disputes involving franchise relationship claims. One of the key forum issues in class actions involving franchisee claims is the Class Action Fairness Act of 2005 ("CAFA"). CAFA provides for removal to federal court of state court class or mass actions involving 100 or more class members and a minimum aggregate jurisdictional amount of $5,000,000. But class actions invoking multiple state statutes may be vulnerable to denial of class certification for lack of commonality.

A new personal jurisdiction decision in a pharmaceutical drug case has imposed limits on the reach of state court jurisdiction in a mass action case. In Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, the U.S. Supreme Court found that California courts lacked specific jurisdiction over claims by certain out-of-state plaintiffs. The action involved claims by over 600 plaintiffs who consumed the drug Plavix alleged it damaged their health. The majority of the plaintiffs were from outside California, and these out-of-state plaintiffs did not allege they obtained the drug from California, took the drug in California, or were treated for their injuries in California. Because the defendant was found not subject to general jurisdiction, the Supreme Court addressed and rejected specific jurisdiction as to the claims of the many out-of-state plaintiffs: "... all the conduct giving rise to the nonresidents’ claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction." The Court noted that the plaintiffs could file a single action in states where the defendants were present for general jurisdiction, and that the decision did not cover whether federal courts could exercise specific jurisdiction of such an action.

D. **Venue Provisions – Statutory Limitations**

General venue statutes, and venue provisions in franchise relationship statutes, can play a prominent role in the resolution of venue issues in multi-party and multi-unit disputes involving franchise relationship claims. Several franchise relationship statutes void out-of-state venue

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146 See, e.g., CAL. CIV. PROC. CODE § 378.


148 See, e.g., CAL. CIV. PROC. CODE § 379.5 and 1048.


150 Id. at § 1332(d)(2).


153 Id. at 1782.
clauses.\textsuperscript{154} Despite these statutes, franchisors include such venue provisions in their standard franchise disclosure documents. The result is often franchisees with franchise agreements containing out-of-state venue clauses in states with franchise statutes voiding such clauses. Are these clauses enforceable? In \textit{Atlantic Marine Construction Co., Inc. v. U.S. Dist. Court for W. Dist. Of Texas}\textsuperscript{155} the U.S. Supreme Court held that valid forum selection clauses negate private interest factors in deciding a motion to transfer venue or dismiss under 28 U.S.C. § 1404. All that is to be considered in such cases are public interest factors.

In \textit{Frango Grille USA, Inc. v. Pepe’s Franchising Ltd.},\textsuperscript{156} a franchisor filed a motion to dismiss for forum non conveniens or to transfer venue under 28 U.S.C. § 1404(a). The master franchise agreement contained a forum selection clause stating that “any proceeding arising out of or in connection with this Agreement shall be brought in any court of competent jurisdiction in London.”\textsuperscript{157} After concluding the relationship involved a franchise agreement under the CFRA, the court next ruled that \textit{Atlantic Marine} applies only to “valid forum selection clauses.” But the Ninth Circuit had already held, in \textit{Jones v. GNC Franchising, Inc.},\textsuperscript{158} that forum selection clauses in franchise agreements in California are void. Hence the motion to dismiss or transfer was denied.\textsuperscript{159}

In \textit{Family Wireless #1 LLC v. Automotive Technologies, Inc.},\textsuperscript{160} a group of 41 wireless zone franchises from 13 states sued their Connecticut franchisor in Michigan. The franchise agreements all contained a choice of forum clause requiring litigation in the “[s]tate or federal court in Connecticut.” But under the franchise statutes of Michigan and Indiana, the forum selection clauses were invalid, and the parties also disputed whether the forum selection clauses were void under Minnesota law. The forum selection clauses were valid for the 24 plaintiffs in states without franchise statutes. The amended complaint contained claims for breach of contract, as well as breach of nine state franchise laws: Indiana, Maryland, Michigan, Minnesota, New York, Ohio, Pennsylvania, Virginia, and West Virginia. Despite the franchise statutes of the home states of several plaintiffs, the district court granted a transfer of the claims of all plaintiffs to the district of Connecticut at the franchisor’s request. For the 24 plaintiffs with valid forum clauses, the inquiry was simple as private interest factors were not to be examined under \textit{Atlantic Marine}. The claims of the plaintiffs with void forum clauses (under applicable home state franchise laws) also were transferred because their claims were centered on franchise agreements and disclosure documents drafted in Connecticut. The defendant franchisor and its documents were also located in Connecticut, and other than Michigan plaintiffs, the remaining plaintiffs had no real connection to Michigan. Under the public interest factors, transferring the entire case was appropriate as the alternative would be having two

\begin{footnotesize}

\textsuperscript{155} 134 S. Ct. 568, 187 L.Ed.2d 487 (2013).

\textsuperscript{156} No. CV 14-2086 DSF, 2014 WL 7892164 (PLAx) (C.D. Cal. 2014).

\textsuperscript{157} Id., at *1.

\textsuperscript{158} 211 F.3d 495, 498 (9th Cir. 2000).

\textsuperscript{159} In \textit{Rogovsky Enterprise, Inc. v. Masterbrand Cabinets, Inc.}, 88 F. Supp. 3d 1034 (D. Minn. 2015), a manufacturer’s motion to transfer from the District of Minnesota to the Southern District of Indiana was granted on finding the relationship did not constitute a franchise under the Minnesota Franchise Act. Thus, the out-of-state venue clause was not void, and \textit{Atlantic Marine} factors supported a transfer.

\end{footnotesize}
cases in different district courts adjudicating the same claims.

In Rob & Bud's Pizza, LLC v. Papa Murphy's Intl., Inc.,\textsuperscript{161} Papa Murphy's franchisees from Arkansas, Missouri, and Kansas filed multiple fraud-in-the-inducement claims against Papa Murphy’s in Arkansas. Papa Murphy’s moved to transfer the action to the State of Washington pursuant to a Washington venue provision in the franchise agreements. The franchisees responded by invoking the Arkansas Procedural Fairness for Restaurant Franchisees Act ("APFRFA").\textsuperscript{162} Arkansas public policy, set out in the APFRFA, banned waiver of its statute by a franchise agreement designating the law of another jurisdiction or venue in another jurisdiction. The court applied the APFRFA despite Papa Murphy’s contention that under federal regulations the take and bake pizza facilities were not restaurants. Given the void venue clause, the district court denied the motion to transfer and rejected contentions of duplicative or redundant litigation claims.\textsuperscript{163}

In Service Master of Fairfax, Inc. v. ServiceMaster Residential/Commercial Services, L.P.,\textsuperscript{164} a franchisee with territories in the District of Columbia, Virginia, and Maryland sued ServiceMaster in Maryland including for violations of the Maryland Franchise Registration and Disclosure Law.\textsuperscript{165} Armed with a Tennessee venue provision, ServiceMaster removed the case to federal court and moved to transfer the action under 28 U.S.C. §1404(a). The district court found the forum selection clause was valid and mandatory. Under Atlantic Marine, the district court only considered public interest factors, which did not warrant a Maryland forum as it found no factual basis was established of misconduct in Maryland.


For disputes involving franchisees located in multiple states, contractual choice of law provisions may, or may not, be dispositive of particular claims.

In Instructional Systems, Inc. v. Computer Curriculum Corp.,\textsuperscript{166} the plaintiff, a distributor located in New Jersey, entered into a multistate distribution agreement with a California integrated learning company. The distribution agreement specified California law. Finding the issue to be a “close question,” the New Jersey Supreme Court applied the New Jersey Franchise Practices Act despite the agreement’s California choice of law provision. The factors supporting applying New Jersey law included New Jersey’s strong policy of protecting its franchisees, a franchisee location in New Jersey, the fact that most of the franchisee’s employees for the multistate business were in New Jersey, and that most of the investments were in New Jersey.

\textsuperscript{161} No. 5:15-cv-5090, 2015 WL 3901611 (W.D. Ark. June 24, 2015).

\textsuperscript{162} ARK. CODE ANN. § 4-72-602.

\textsuperscript{163} In a later decision in the same case, Rob & Bud's Pizza, LLC v. Papa Murphy's Intl., Inc., No. 5:15-cv-5090, 2016 WL 153095 (W.D. Ark. January 12, 2016), the district court also rejected a motion to stay the Arkansas action under the doctrines of abstention.


\textsuperscript{165} MD. CODE ANN., BUS. REG. 14-201 et seq.

\textsuperscript{166} 130 N.J. 324, 614 A.2d 124 (1992).
In *G.P.P., Inc. v. Guardian Protection Products, Inc.*,\(^{167}\) the plaintiff sued in the Eastern District of California regarding nine distribution agreements for territories in the north-eastern and southern United States. The plaintiff alleged that the agreements were franchises under the FTC rule and were sold without registration in violation of the North Carolina Unfair and Deceptive Trade Practices Act ("NCUDTP"). Although the earlier distribution agreements specified California law, the latest agreement specified North Carolina law. Under North Carolina choice of law rules, however, designation of a forum's law governs only contract claims and thus did not reach the NCUDTPA. The court then applied California's choice of law rules, first deciding whether the substantive laws of California and North Carolina conflicted. The court found no conflict as both states had unfair trade practices statutes. The statutes, however, had different remedies. California provides only for injunctive relief and disgorgement, but not damages, while North Carolina allows treble damages. But the court found that the difference between remedies did not impair North Carolina policy as the California statute provided some remedies. The court thus dismissed the plaintiff's claims under the NCUDTPA.

In *Black Hills Truck & Trailer, Inc. v. MacTrailer Mfg., Inc.*,\(^{168}\) a manufacturer of truck trailers forwarded a modified distributor agreement to the plaintiff distributor, a resident of South Dakota. After the distributor declined to sign the modified agreement, the manufacturer refused further orders. The distributor then sued for termination without cause in violation of the South Dakota Motor Vehicle Code. The manufacturer contended that the Ohio choice of law provision in the agreement barred the South Dakota Motor Vehicles Act claim. The district court disagreed. First, applying the choice of law rules of South Dakota, the forum state, the district court found a strong South Dakota public policy in favor of protecting its franchisees. Ohio law conflicted with South Dakota law, as Ohio had no such statute. Next, the district court found that South Dakota had a materially greater interest in the matter because its motor vehicle dealer law provides protections which Ohio law does not. Accordingly, the claim under South Dakota Motor Vehicle Statute could proceed.

In *Family Wireless #1, LLC v. Automotive Technologies, Inc.*,\(^{169}\) multiple franchises from different states, brought franchise disclosure, fraud and other claims against a licensee of Verizon in Connecticut. The district court first applied Connecticut choice of law rules which apply the doctrine of *lex loci* - where the wrong occurred. Since the plaintiff franchisees alleged misrepresentations occurred to each in their respective states, the district court found that the laws of the state of each plaintiff would apply to that plaintiff's claims.

In *Century 21 Real Estate, LLC v. All Professional Realty, Inc.*,\(^{170}\) multiple real estate franchises located in California and Hawaii brought claims following termination of their franchises. The franchise agreements contained the following choice of law provision: "This Agreement will be governed by the laws of the state of New Jersey, except that the New Jersey Franchises Practice Act shall not apply to agreements with the Offices located outside of New Jersey." Under California choice of law rules, which follow the Restatement of Conflicts of Law, if the chosen law has a substantial relationship to the parties or their transaction or if there is a reasonable basis for the choice of law, then a second step is a determination of whether the chosen state's law is contrary to the fundamental policy of California. Here, claims under the


\(^{170}\) 889 F. Supp. 2d 1198.
CFRA embodied a fundamental policy of the California Legislature, as indicated by the statutory
anti-waiver provision. Moreover, the New Jersey Franchise Act was not applicable despite the
choice of law provision, as it does not cover franchises located outside New Jersey. But the
court nonetheless enforced the New Jersey choice of law provision because the franchise
agreements included good cause and opportunity to cure provisions providing the same
protections from termination as the statute, thus did not diminish the franchisee’s rights under
the CFRA. 171

In Red Lion Hotels Franchising, Inc. v. MAK, LLC, 172 a California hotel franchisee
brought claims against a Washington franchisor under the Washington Franchise Investment
Protection Act. The choice of law provision in the franchise agreement specified that it was
governed by Washington law except that “[n]othing in this section is intended to invoke the
application of any franchise . . . law of the State of Washington . . . which would not otherwise
apply absent this paragraph.” The district court held, after studying the Washington statute and
its purpose, that the statute limited its application to franchises located in Washington, and
granted partial summary judgment dismissing the Washington statutory claim. The Ninth Circuit
reversed, ruling that application of the “franchisee bill of rights” portion of the Act 173 is limited to
transactions occurring in Washington. It remanded to the district court to consider whether the
remedies available under Section 180 (which are provided by the Washington Consumer
Protection Act) are also available to out-of-state franchisees.

In Stillwell v. RadioShack Corp., 174 RadioShack franchisees from California,
Massachusetts, Ohio, and Virginia filed suit in California for breach of contract and asserted
common law and statutory unfair competition claims. RadioShack moved to dismiss several
claims including allegations under the California, 175 Massachusetts, 176 and Ohio 177 unfair
competition laws. Applying a Texas choice of law clause, the district court dismissed these
claims because there was no fundamental public policy conflict between Texas and California
law, including the CFRA’s non-waiver provision. The district court also concluded that there was
no showing why Massachusetts and Ohio law should apply rather than Texas or California law.
The court further found that under California law a valid choice of law clause warrants dismissal
of a claim under the California unfair competition law. Finally, although the plaintiffs conceded
that they could not state a claim under Texas’s unfair competition law, the court dismissed the
cause of action alleging violation of the California, Massachusetts and Ohio unfair competition
laws with leave to amend.

F. Mandatory Arbitration Trump Card – Limits On Mandatory Arbitration

The ultimate trump card for franchisors in controlling multi-party or multi-state franchise
relationship claims is the Federal Arbitration Act (the “FAA”). Under settled Supreme Court

171 Id. at 1217.

172 663 F.3d 1080 (9th Cir. 2011).


175 CAL. BUS. & PROF. CODE § 17200.

176 MASS. GEN. LAW CHAPTER 93.

177 OHIO REVISED CODE § 4165.02.
precedent, an agreement to arbitrate clearly specifying a particular venue will be enforced.\footnote{178} Likewise, the Supreme Court has ruled that a provision in an arbitration agreement barring group or class actions will be enforced.\footnote{179}

The FAA rule mandating full enforcement of arbitration provisions overcomes state franchise relationship provisions voiding out-of-state venue provisions.\footnote{180} As a result, franchisors may usually trump the out-of-state venue voiding provisions of state franchise relationship laws when embedding forum selection provision within mandatory arbitration provisions.

Franchisees, however, may nonetheless sometimes negate mandatory arbitration clauses. The FAA provides for courts to void arbitration provisions on “grounds for revocation.”\footnote{181} One recognized ground is unconscionability although the unconscionability analysis examines the arbitration clause itself, not the overall underlying franchise agreement. Numerous cases have found arbitration provisions in franchise agreements to be unconscionable and unenforceable.\footnote{182} In at least one case, the out-of-state venue clause in an arbitration clause was specifically held unconscionable.\footnote{183}

VI. CONCLUSION

Disputes involving franchisees located in differing states from the franchisor usually raise multiple substantive and procedural issues. While franchisors may shape some of the issues through contract drafting, ultimately issues raised by franchise relationship statutes will require careful study of the application of each involved state’s franchise statutes. Counsel should also bear in mind that while contract terms are dispositive under normal circumstances, franchise relationship statutes reflect public policies enacted by state legislatures. These statutes are designed to protect a protected group, namely franchisees, and in most instances such statutory rights cannot be abrogated by contract provisions.


\footnote{179} AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed. 2d 742 (2011); Meadows v. Dickey’s Barbecue Restaurants, Inc., 144 F. Supp. 3d 1069, n. 8 (N.D. Cal. 2015).


\footnote{181} 9 U.S.C. § 2: (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

\footnote{182} Nagrampa v. Mailcoups, Inc., 469 F.3d 1257 (9th Cir. 2006); Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996 (9th Cir. 2010); McGuire v. Coolbrands Smoothies Franchise, Inc., No. H030202, 2007 WL 2381545 (Cal. Ct. App. Aug. 22, 2007); Indep. Ass’n of Mailbox Ctr. Owners, Inc. v. Superior Court, 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659 (2005). Mr. Lagarias in, or assisted in the briefing, of the above matters, was counsel.

\footnote{183} Bolter v. Superior Court, 87 Cal. App. 4th 900, 104 Cal. Rptr. 2d 888 (2001), as modified on denial of reh’g (Mar. 30, 2001); but see, Gold v. Melt, Inc., No. B210452, 2010 WL 1509795 (Cal. Ct. App. Apr. 16, 2010), in which fifteen plaintiff franchisees from California, Florida, Massachusetts, and Nevada brought a class action in California against Melt, Inc., a gelato franchisor. The franchise agreements required individual arbitration and barred class actions. The defendants filed a demurrer based on the group and class action ban in the arbitration agreements. The court analyzed cases under California, Florida, and Massachusetts law which held class arbitration waivers to be unconscionable. The court distinguished all those cases from the franchisees’ claims, and noted that the plaintiffs failed to establish unconscionability under their states’ laws, and therefore the demurrer was sustained.
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