The Soul of Franchising

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RESCISSION:
THE ANNULMENT OF FRANCHISE MARRIAGE

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ANNULMENT OF A FRANCHISE RELATIONSHIP
Technically, **rescission** is an equitable remedy that unwinds the contract and annuls the relationship.

Technically, **restitution** is the process of restoring parties to the position they would have occupied had there been no contract.

As a practical matter, rescission and restitution are two distinct parts of a single remedy. In practice, statutes and decisions use the two terms together or interchangeably to mean the same things.

Just like divorce is different than annulment, rescission of a contract is different than termination of a contract.
CONFLICTING POLICIES RE: CALCULATING RESTITUTION

- Starting point – franchise fee and other fees paid to franchisor
- Minus value of franchise benefits (e.g., training, branding)?
- Franchisor’s unjust enrichment?
- Franchisee’s investment costs; third party expenses?
- Franchisee’s profits from operations?
CHALLENGES

• Widespread *non-technical* use of operative terms has resulted in significant inconsistency and confusion in cases and state franchise statutes that address rescission and restitution remedy.

• 2011 Restatement of Restitution – finally, clarity!

• Practical implications to not being able to perfectly restore both parties to pre-contract position
A TROIKA OF REMEDIES FOR ACCOMPLISHING A FRANCHISE ANNULMENT

1. Rescission/restitution in a private civil action as a common law claim

2. Rescission/restitution in a private civil action as a statutory claim brought under a state franchise sales law, business opportunity law, or unfair trade practice law

3. Rescission/restitution in the regulatory context (where a state agency potentially is the plaintiff)

• #1 and #2 may be combined in the same complaint. A state may be disinclined to initiate #3 on behalf of a franchisee in active litigation against the franchisor involving the same issues.
COMMON LAW RESCISSION

• A remedy?
• A cause of action?
• State statute?
• Cannot rescind if affirm the contract
• Cannot rescind if contract is terminated
COMMON LAW RESCISSION
Elements

• Contract
• Grounds
• Timely notice of intent to rescind
• Tender benefits received
• No adequate remedy at law
COMMON LAW GROUNDS FOR RESCISSION
Fraud

• Conflicting approaches
• Require a showing of fraudulent inducement?
• Something less?
COMMON LAW GROUNDS FOR RESCISSION

Breach of Contract

Breach is of such a nature and of such importance that the contract would not have been made without it.

Goes to the root of the contract.

So substantial and fundamental as to defeat object of contract.
“The essential object of the franchise agreement is that the franchisee succeed economically while abiding in good faith by the terms and restrictions contained in the agreement.”
- Manpower v. Mason (E.D. Wisc. 2005)
TIMELY NOTICE

- After knowledge of grounds, cannot retain the fruits of the bargain awaiting future developments to see if it will be more profitable to affirm or disaffirm

- Can be shorter than SOL

- Not determined by the amount of time which has elapsed but whether the period has been long enough to result in prejudice to the other party
TENDER OF BENEFITS RECEIVED

- Strict Approach – No rescission if cannot tender exact property
- Flexible Approach – Partial restoration with adjustment of the equities
- Generally, neither party may retain an unfair advantage
- Need not tender where no benefits received
RELIEF

- Fees paid to other side minus benefits received?
- Compensatory damages?
- Lost income?
- Attorneys’ fees?
- Balancing of the equities
Play the Violins!
PRIVATE ACTIONS FOR STATUTORY RESCISSION

• 14 states have franchise sales laws that grant franchisees a private right of action for rescission

• Business Opportunity Laws and Little FTC Acts may grant rescission rights

• Generally available for failure to register or improper registration, failure to disclose or improper disclosure, fraud, or misrepresentation/omission of a material fact
CIRCUMSTANCES THAT CURTAIL A FRANCHISEE’S ABILITY TO BRING A STATUTORY CLAIM

• Written rescission offer:
  – MI, NY, ND: Precludes franchisee from filing or maintaining any private action under the franchise sales law
  – IL: Precludes franchisee from suing for rescission under the franchise law, but not damages
  – RI, SD: Shortens SOL to 90 days
CIRCUMSTANCES THAT CURTAIL A FRANCHISEE’S ABILITY TO BRING A STATUTORY CLAIM

• Written notice of violation
  – CA: written notice of false or misleading statement cuts SOL to 30 days
  – IL, WI: written notice of any violation cuts SOL to 90 days

• Discovery of the facts constituting the violation can cut shorten SOL
  – Do not need to have actual knowledge of the claim
  – *Pyramid Controls Inc. v. Siemens Indus. Automation, Inc.* (7th Cir. 1999)
CIRCUMSTANCES EXTENDING FRANCHISEE’S ABILITY TO BRING A STATUTORY CLAIM

• Equitable tolling
  – Claim must be premised on allegations of fraud or wrongful concealment
  – The franchisee must have acted with due diligence

• Oregon Franchise Act is not subject to tolling or the discovery rule

• Hawaii Franchise Investment Law codifies equitable tolling
IS A "TECHNICAL" VIOLATION ENOUGH?

- NY & WI franchise sales laws expressly require that the violation be material to the franchisee’s decision to purchase

- Other courts have added a requirement of actual injury despite no such language in the franchise sales statute
  - The focus is on equity
APPLICATION OF EQUITABLE DEFENSES DESPITE NO SUCH LANGUAGE IN THE STATUTES

• Common law requirements of rescission

• Waiver/Equitable Estoppel – franchisee cannot “pocket” its claims
  – Codified in the South Dakota Franchise Law
APPLICATION OF EQUITABLE DEFENSES DESPITE NO SUCH LANGUAGE IN THE STATUTES

• Unclean Hands


  – “We will not impose the requirement of clean hands on a franchisee where the MFIL gives a franchisee an unqualified right to rescission upon a franchisor’s violation of the MFIL.” *Martino v. Cottman Transmission Sys.* (Mich. App. 1996)
RESCISSION REMEDY

• Franchise sales laws offer little to no guidance on calculation
  – Maryland: court may order the franchisor to rescind the franchise and “make restitution”
  – Oregon: “The franchisee may recover any amounts to which the franchisee would be entitled upon an action for a rescission.”

• Courts apply common law and equitable principles, as well as their own discretion, to calculate the remedy
Join the Band!
No uniformity on why, how and when franchise regulators (FTC, state agencies) enforce their franchise sales laws.

Impossible to know about enforcement requests state administrators receive and do not pursue.

Not all states publish enforcement decisions or consent orders.

Because regulatory resources are overburdened, regulators turn away requests if complaining party is a party to pending action.
Regulators share enforcement intelligence with one another. Yet little evidence of coordinated enforcement activity across jurisdictions.

Statutes vest regulators with broad discretion to enforce franchise laws, but not all statutes authorize rescission as a regulatory remedy.

- HI (law unclear); MN; ND; RI (law unclear); WA (law unclear)

Vast majority of enforcement cases are disposed of through a consent order (voluntary settlement with defendant). No court review.

Discretion leads to uneven regulation (even with the same jurisdiction).
REGULATORY ENFORCEMENT - WHEN NO CONSENT ORDER IS POSSIBLE

- Only 3 states – California, Indiana and Virginia - vest franchise agency with authority to order rescission following an agency hearing without having to file a lawsuit first

- All other states: franchise agency must initiate civil lawsuit

- Enforcement of FTC Rule: FTC must initiate civil lawsuit

- Natural disincentives to public enforcement via litigation

- Franchisee: drawbacks of enlisting franchise agency to take case
Where rescission is available, regulators differ on what regulatory rescission should accomplish and how to measure regulatory rescission/restitution:

- Strip franchisor of unjust enrichment?
- Send public message that violators will be punished?
- Restore franchisee?
- Weigh franchisee enrichment (training, branding)?
- Consider franchisee losses/profits?
• State laws define “rescission remedy” differently
  - FTC: “consumer redress”
  - California: “rescission, restitution or disgorgement or damages”
  - Wisconsin: “pecuniary loss”

• Yet statutory differences do not explain regulatory outcomes
OFFENSIVE RESCISSION

- Does state franchise sales law recognize a “voluntary” or “offensive” rescission process (franchisor self-reports)

- Advantages of “offensive rescission”

- Disadvantages of “offensive rescission”

- Competing considerations on whether to self-report

- Content and procedure for a rescission offer (must franchisor admit to wrongdoing?)
Play On!
DO FRANCHISORS SEEK RESCISSION UNDER COMMON LAW?
PRACTICAL DISCUSSION
RESCISSION AND THE FRANCHISEE

• Is there a statute?
• Is there a technical violation or fraud?
• When did the franchisee have knowledge? SOL issues?
• Is the franchise business profitable?
• What benefits did the franchisee receive (e.g., training, purchasing advantages; branding); can the franchisee return those benefits?
• 3P commitments (lease; equipment lease; bank loans, other contracts)
• Was franchisee in same line of business before franchise investment, and does franchisee want to stay in business as an independent?
• Is franchisee in compliance with the franchise agreement?
• Was franchisee represented by an attorney in franchise sale?
• Are money damages adequate?
• Is there a merger clause?
• Does the franchisor have defenses; set-off claims?
  − Franchisee’s knowledge of the violation
  − Franchisee’s business sophistication
  − Did franchisee read FDD and contracts before signing?
• Are there personal guarantors??
RESCISSION AND THE FRANCHISOR

- Notify franchisee?
- Self-report to public agency?
- Many franchisee considerations also apply, e.g.,
  - Is there a statute?
  - Is there a technical violation or fraud?
  - When did the franchisee have knowledge? SOL issues?
  - Is the franchise business profitable?
  - Defenses/set-offs
- # of franchisees with similar claims
- Extent of franchisee 3P obligations
- Will rescission with one lead to an avalanche of similar requests?
- Will self-reporting to one public agency result in other public enforcement?
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I. INTRODUCTION ............................................................................................................ 1

II. COMMON LAW RESCISSION AND RESTITUTION ...................................................... 2
A. Elements of the Common Law Claim for Rescission .................................................... 3
   1. Contract Relationship ............................................................................................. 3
   2. The Existence of Grounds ....................................................................................... 3
      a. Fraudulent Inducement ....................................................................................... 3
      b. Material Breach .................................................................................................... 4
      c. Mistake ............................................................................................................... 4
      d. Impossibility of Performance ............................................................................ 5
   3. Notice of Intent to Rescind ...................................................................................... 6
   4. Tender of Benefits Received ................................................................................... 6
   5. No Adequate Remedy at Law ............................................................................... 7
B. Defenses to Rescission ............................................................................................... 7
C. The Effect of Contract Clauses on Claims for Rescission ........................................... 8
   1. Arbitration ............................................................................................................. 8
   6. Attorneys’ Fees ..................................................................................................... 9
   7. Merger and Integration Clause ............................................................................ 9
D. Restitution .................................................................................................................. 9

III. CIVIL ACTIONS FOR RESCISSION PURSUANT TO STATE STATUTES ............. 11
A. Franchise Disclosure/Registration Statutes ............................................................... 11
   1. California Franchise Investment Law ................................................................. 12
   2. Hawaii Franchise Investment Law ....................................................................... 13
   4. Maryland Franchise Law ....................................................................................... 14
   5. Michigan Franchise Investment Law .................................................................... 15
6. Minnesota Franchise Law ................................................................. 16
7. New York Franchise Sales Act ......................................................... 17
8. North Dakota Franchise Investment Law ......................................... 18
9. Oregon Franchise Transactions Law ............................................... 19
10. Rhode Island Franchise Investment Act ......................................... 20
11. South Dakota Franchise Law ....................................................... 21
12. Virginia Retail Franchising Act .................................................... 22
13. Washington Franchise Investment Protection Act ......................... 23
14. Wisconsin Franchise Investment Law .......................................... 23

B. Business Opportunity Laws .......................................................... 24

C. Unfair and Deceptive Trade Practices Acts ....................................... 25

D. Application of Equitable Principles to Statutory Claims .................. 26

IV. RESCISSION IN A REGULATORY ACTION ........................................... 29

A. Observations About Achieving Rescission Through Regulatory Actions 30

B. Comparing Regulatory Attitudes About Rescission .......................... 32

C. Comparing Regulatory Approaches to Rescission ............................ 37

1. FTC Rule .......................................................................................... 37
2. California .......................................................................................... 38
3. Hawaii ............................................................................................... 39
4. Illinois ............................................................................................... 40
5. Indiana .............................................................................................. 40
6. Maryland .......................................................................................... 40
7. Michigan .......................................................................................... 40
8. Minnesota ......................................................................................... 40
9. North Dakota ................................................................................... 41
10. New York ......................................................................................... 41
11. Oregon ...................................................................................................41
12. Rhode Island ..........................................................................................41
13. South Dakota .........................................................................................42
14. Virginia ...................................................................................................42
15. Washington ............................................................................................ 42
16. Wisconsin ...............................................................................................42

V. OFFENSIVE RESCISSION ...................................................................................43
1. California ................................................................................................45
2. Illinois .....................................................................................................45
3. Michigan ................................................................................................. 46
4. New York ................................................................................................46
5. North Dakota ..........................................................................................46
6. Virginia ...................................................................................................46

VI. CONCLUSION ..............................................................................................................47
I. INTRODUCTION

Rescission and restitution are often referred to interchangeably, but they are two distinct parts of a single remedy. Rescission is also mistakenly referred to as a cause of action, but it is a form of legal relief. The remedy of rescission and restitution combines the avoidance of a contract and the mutual restoration of the parties to the positions they would have occupied had there been no contract. The fundamental purpose of rescission and restitution is to restore both parties to their former position as far as is possible and to bring about justice by adjusting the equities between the parties. A party seeking rescission must establish a right to void the contract. He or she must also demonstrate that “the unwinding of performance...is both feasible and equitable on the facts of the case.” Rescission and termination are different. Terminating a contract ends the contract going forward and relieves the parties from future performance. In contrast, rescission “unmakes” the contract from the contract’s very inception. Generally, once a contract is properly terminated or fully performed, it can no longer be rescinded.

Restitution operates to restore the parties to their pre-contract positions. As the cases and administrative remedies reviewed in this paper illustrate, restitution is not formulaic. Broadly, the objective of restitution is to restore to the rescinding party the value of what it parted with in performing the contract, but restitution is rooted in equity principles so it does not demand that the rescinding party be placed in exactly the same position that it was in before the contract, only that it be placed substantially in its original position. However, the rescinding party cannot derive unconscionable advantage from the rescission, and the other party is typically entitled to receive a return of the benefits received by the rescinding party.

Typically, it is the franchisee seeking rescission of the franchise agreement. Perhaps this is because a rescinded contract generally nullifies its terms. If a franchisor chooses to seek rescission of a franchise agreement, it will likely lose the ability to enforce the franchisee’s post-termination obligations such as those relating to non-competition. If rescission is the means by which an unhappy franchisee may nullify a franchise marriage, restitution is the franchise marital

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2 Restatement (Third) of Restitution and Unjust Enrichment §54, cmt. a (2011) (hereinafter “Restatement of Restitution”).
3 Wall v. Zynda, 278 N.W. 66 (Mich. 1938) citing 1 Black on Rescission and Cancellation, ¶ 1; 13 Arthur Linton Corbin, Corbin on Contracts (Corbin) § 67.8(8), at 74; see also Michael Joblove and Peter C. Lagarias, Remedies: What Do I Want and How Do I Get It?, in ABA 36th Annual Forum on Franchising, W14 (2013).
4 Restatement of Restitution §54, cmt. a (2011).
6 For a comprehensive and detailed analysis of restitution damages and courts’ awards in the franchise context, see Natalma M. McKnew and Eric Karp, Restoring the Status Quo Ante: Rescission and Restitution in Franchising, in ABA 30th Annual Forum on Franchising, W23 (2007).
settlement. An order of restitution typically requires the franchisor to refund to the franchisee an amount equal to all of the franchise fees paid to date. A franchisor will often argue to offset this amount by the value of the benefits conferred by the franchisor. Restitution may also require a franchisor to reimburse the franchisee if the franchisee sustained business losses as a result of the nullified franchise investment, but, when the franchisee has been profitable, a franchisor will typically seek to have restitution damages reduced by the amount of any profits derived by the franchisee from the franchise business. In a perfect case, rescission and restitution would restore both parties to the status quo ante through the exchange of specific property previously transferred with no unjust enrichment and no loss to either party. But in the real world, rescission and restitution are more complicated, particularly for courts deciding whether a franchisee with unclean hands should be entitled to rescind the franchise agreement and how to return the parties to a pre-contract status quo ante when a franchise party is unable to restore specific benefits received.

This paper addresses these issues in three parts by examining the key components and practical implications of rescission and restitution (i) under common law; (ii) under various state statutes that provide for civil litigation between franchise parties; and, (iii) in the context of regulatory proceedings where the moving party is a franchise agency, not a private plaintiff. All three sections illustrate that the unwinding of a franchise marriage under any of these settings is rarely simple.

II. COMMON LAW RESCISSION AND RESTITUTION

In order to establish a right to rescission under the common law, a plaintiff must demonstrate:

(1) the character or relationship of the parties; (2) the making of a contract; (3) the existence of fraud, mutual mistake, false representation, impossibility of performance or other grounds for rescission or cancellation; (4) the party seeking rescission rescinded the contract and notified the other party to the contract of such rescission; (5) if the moving party has received benefits from the contract, he should further allege an offer to restore these benefits, if restoration is possible; and (6) the moving party has no adequate remedy at law.11

Rescission generally requires each party to return to the other whatever the party has received by way of the other party's performance of the contract. However, the practical impossibility of perfectly restoring both parties to their pre-contract position means that judicial discretion plays an important role in determining the appropriate award. Indeed, as rescission is an equitable remedy, it necessarily involves judicial discretion and can result in particularly

10 RESTATEMENT OF RESTITUTION §54, cmt. b (2011).
12 RESTATEMENT OF RESTITUTION § 37 cmt. a(3) (2011)
unpredictable outcomes.\[^{13}\]

A. **Elements of the Common Law Claim for Rescission**

1. **Contract Relationship**

Proving that a contractual relationship exists between the parties is typically not difficult in the franchise context, provided the claimant can demonstrate the existence of a franchise agreement.\[^{14}\]

2. **The Existence of Grounds**

In common law, rescission is generally sought by a party claiming fraudulent inducement of a contract or a material breach where the breach is so substantial that it goes to the heart of the contract. When rescission is granted under these circumstances, it is typically based on principles of fairness and economy.\[^{15}\] Rescission is also potentially available for failure of consideration, mistake or duress in order to prevent one party from being unjustly enriched.\[^{16}\]

   a. **Fraudulent Inducement**

A plaintiff who has been fraudulently induced to enter into a contract has two potential remedies: either (i) seek to rescind the contract and be restored to its pre-contract position; or (ii) affirm the contract and recover damages caused by the defendant's fraud.\[^{17}\] If the plaintiff rescinds the contract and seeks restitution, then both the plaintiff and the defendant must restore to each other what each received under the agreement.\[^{18}\]

   In order to rescind a contract based on fraudulent inducement, a plaintiff must show that the misrepresentation or omission: (1) involves material facts; (2) is made for the purpose of inducing the other party to act; (3) is known to the maker to be false or not believed by him to be true, and the other party reasonably believes it is true; and, (4) is relied upon by the other party to his detriment.\[^{19}\] Notably, the maker’s intent need not be an intent to deceive but rather an intent to induce the other party to act or refrain from acting.\[^{20}\]

\[^{13}\] **RESTATEMENT OF RESTITUTION** § 54 cmt. b (2011); McKnew and Karp, *supra* Note 6.

\[^{14}\] *Beaver*, 2012 WL 3822264.

\[^{15}\] **RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT** § 54 cmt. e (2011).


b. Material Breach

A material breach of contract that goes to the essence of the contract constitutes grounds for rescission.21 “[T]o justify rescission, there must be a ‘material nonperformance or breach’ by the opposing party.”22 What constitutes a material breach of a franchise agreement? A federal district court in Wisconsin has held that “the essential object of a franchise agreement is that the franchisee succeed economically while abiding in good faith by the terms and restrictions contained in the agreement.”23 The court explained that franchise agreements are “licenses coupled with restrictions designed to enforce either uniformity of operation or a minimum standard of service… A franchisor can threaten a franchisee’s investment, and a franchisee can significantly affect a franchisor’s reputation.”24 The District Court for the Eastern District of New York has held that a franchisee’s violations of its implied covenant not to “engage in schemes or gimmicks that deprive [the franchisor] of its contractual share of the gross profit went to the “root of the matter or essence of the contract.”25 These are the types of material breaches which should provide a franchise party the right to rescind a franchise agreement.

c. Mistake

A plaintiff can rescind a contract based upon a mistake that is so fundamental in character that the parties did not have a meeting of the minds.26 For rescission of an agreement based on a mistake, the plaintiff must establish (1) a material mistake; (2) of such consequence that enforcement is unconscionable; (3) that it occurred notwithstanding the plaintiff’s exercise of due care; and (4) that rescission can place the other party in its pre-contract position.27

21 Yi v. Li, 721 S.E.2d 144, 147-48 (Ga. Ct. App. 2011) (breach must be so “substantial and fundamental as to defeat the object of the contract”), quoting Lanier Home Ctr. v. Underwood, 557 S.E.2d 76 (Ga. Ct. App. 2001); Southland Corp. v. Froelich, 41 F.Supp.2d 227 (E.D.N.Y. 1999), citing Southland Corp. v. Mir, 748 F. Supp. 969 (E.D.N.Y.1990); (court found substantial evidence of repeated violations of the franchise agreement by the franchisee that went to the “root of the matter or essence of the contract.”); see also Beckman v. Carson, 372 N.W. 2d 203 (Iowa 1985) (where franchise car dealer entered into agreements to sell assets to prospective buyer and have prospective buyer act as dealer’s agent until buyer could obtain his own franchise agreements, the dealer’s surrender and revocation of his dealer’s license for criminal behavior constituted a substantial breach of the agreements defeating their purpose).


23 Manpower Inc. v. Mason, 405 F.Supp.2d 959, 970 (E.D.Wis. 2005). (The franchisor sought to terminate the franchise agreements based on the franchisee’s material breach of the agreements and to compel the franchisee to comply with its post-termination obligations. The franchisee sought a preliminary injunction to stop the termination. The court granted the franchisee’s request, finding that the franchisor failed to establish that it complied with its contractual conditions for termination. The court noted that the law distinguished between exercising a reserved power of termination under a contract and rescinding a contract. Thereafter, the franchisor sought rescission of the franchise agreements. The second time around, the franchisor was more successful. The court found that the franchisor was likely to succeed on its claim for rescission of some of the franchisee’s agreements based on breaches of those agreements and denied the franchisee’s motion to enjoin rescission of those agreements. See Manpower v. Mason, 377 F.Supp.2d 672 (E.D.Wis.2005).


25 Froelich, 41 F. Supp.2d at 247-8 citing Mir, 748 F. Supp. 969, 983-84. (In Froelich, the franchisor sought termination of the agreement, not rescission, but presumably the same arguments could be made in a case for rescission.)


27 Northern Trust Co. v. MS Sec. Servs., Inc., No. 05C3370, 05C3373, 2006 WL 695668 (N.D. Ill. Mar. 15, 2006),
For a mistake to be material, it must go to the “very nature of the property,” rather than merely to its monetary value.28 “The mistake of fact must be such that it animated and controlled the conduct of the party” and “the court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved.”29

d. **Impossibility of Performance**

Impossibility of performance and frustration of purpose are separate and distinct grounds for rescission of contract, though they are often confused by the courts in applying them.30 Impossibility of performance occurs when the purpose for which the contract was made has, on one side, become impossible to perform.31 For example, where a franchisee of a child care franchise system sought rescission, the court denied the franchisor’s motion for summary judgment, finding there were material issues of fact as to whether certain factors, including the franchisor’s unilateral seizure of managerial control of the franchise centers, was sufficient for a finding that the parties’ performance under the agreements became impossible to perform.32 Frustration of purpose, on the other hand, occurs when one party to a contract cannot obtain the benefit of his bargain because of the failure of consideration or impossibility of performance of the other party.33 An example of frustration of purpose was found in a case where the plaintiffs purchased a motor home that became inoperable. The court recognized that their benefit of the bargain to use the vehicle for traveling, cooking, sleeping, and eating was frustrated and granted rescission.34

Of course impossibility of performance and frustration of purpose may result from the same set of facts. In *Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, a court granted rescission finding impossibility of performance by the seller of commercial ice-making equipment and a consequent frustration of the buyer’s purposes in making the contract.35

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28 *Roers v. Countrywide Home Loans, Inc.*, 728 F.3d 832, 836 (8th Cir. 2013).

29 *Knudsen*, 521 N.W.2d at 418. (although the Supreme Court of South Dakota affirmed a trial court’s denial of rescission due to the plaintiffs’ failure to timely commence the action, the court noted that a house constructed on inadequate support was a latent defect demonstrating a material mistake which would have entitled plaintiffs to rescission).

30 *Crown Ice Mach. Leasing Co.*, 174 So.2d at 617–618 (because plaintiff alleged that it entered into a contract for the purpose of having a readily available supply of ice and that defendant did not install equipment that would fulfill this need, plaintiff sufficiently alleged that it would be impossible for defendant to fulfill its contractual obligations, and that plaintiff’s purpose in making the contract had been frustrated, entitling a discharge of obligations).

31 *Id. at 617; Creative Am. Educ., LLC v. Learning Experience Sys.*, LLC, No. 9:14-CV-80900, 2015 WL 2218847, at *11 (S.D. Fla. May 11, 2015) (holding that franchisee’s request for rescission could not be dismissed on the element of impossibility of performance where questions of material fact existed regarding franchisor’s unilateral seizure of managerial control of franchise center, franchisee’s subsequent withdrawal from franchise, and passage of one year’s time) (the firm of one of the authors of this paper represented the franchisee in *Creative Am. Educ., LLC v. Learning Experience Sys. LLC*).


33 *Crown Ice Mach. Leasing Co.*, 174 So.2d at 617-618; *Bland*, 206 F. Supp. 2d at 1207-08; *Hyler*, 548 N.W. 2d 864 (where plaintiffs purchased a motor home that became inoperable, plaintiffs sufficiently alleged a ground for rescission where their benefit of the bargain of using the vehicle for traveling, cooking, sleeping, and eating became frustrated).

34 *Hyler*, 548 N.W.2d 864.

35 174 So.2d 614.
3. Notice of Intent to Rescind

A party seeking rescission must promptly notify the other party of the claim for rescission.\textsuperscript{36} If a claimant were able to delay seeking rescission he or she would essentially have an option between enforcement of a contract and avoidance, with the ability to decide based on fluctuating values. Thus, even where grounds might exist to set aside a contract, a party waives his right to rescind for fraud or mistake if he unreasonably delays asserting that right after learning of the fraud or mistake giving rise to the right of rescission.\textsuperscript{37} There is no bright line test as to when a party must seek rescission. Generally, a party must give notice of the intent to rescind the agreement shortly after a party discovers grounds for rescission and when that occurs depends on the facts of the case. Whether to give notice of an intent to rescind prior to bringing an action will depend in part on the jurisdiction in which the dispute will be heard; some courts have found that the filing of a complaint can constitute timely notice.\textsuperscript{38}

In Albarqawi v. 7-Eleven, the court held that a franchisee was not entitled to rescission because it failed to act promptly after learning the facts supporting the claim. Rescission was sought based on 7-Eleven’s alleged misrepresentation that the store had no history of problems with crime. The plaintiff entered into the franchise agreement in August 2008. On the first day of the franchisee’s operation, former employees stole $50,000 worth of money orders. Two days later, the store was robbed at gunpoint. A few days thereafter, a police officer informed the franchisee that the store had been robbed repeatedly before the franchisee assumed ownership. Thus, the plaintiff knew from the first week of operations that the defendant had misrepresented the safety of the store. Nonetheless, the plaintiff waited over two years before asserting a claim for rescission and the court denied the claim because it was not filed promptly.\textsuperscript{39}

4. Tender of Benefits Received

A party seeking rescission must be able to restore the other party to its pre-contract position, and a tender of benefits received may be a precondition for rescission.\textsuperscript{40} The requirement of prior tender provides safeguards to the defendant against one-sided restitution, whereby the defendant may be compelled to restore what had been received in the transaction.


\textsuperscript{38} Bank of America, N.A. v. GREC Homes IX, LLC, No. 13-21718-CIV, 2014 WL 351962, at *9 (S.D. Fla. Jan. 23, 2014) (amended complaint filed four months after original was timely notice of rescission), citing United Air Lines, Inc. v. ALG, Inc., 912 F. Supp. 353, 360 (N.D. Ill. 1995) (denying summary judgment where rescission claim was brought within 6 months of discovery of facts giving rise to it).


without obtaining restitution of what had been given.\textsuperscript{41} The inability to return both parties to their former position is often considered by a court in determining if rescission would be inequitable\textsuperscript{42} and can bar recovery.\textsuperscript{43} In \textit{PCJ Franchising Co., v. Newsome}, the court granted the franchisor’s motion to dismiss the franchisee’s counterclaim for rescission. The coffee shop franchisee was unable to restore the franchisor to its pre-contract position because it had donated certain equipment and furniture to charity and could not return the training received.\textsuperscript{44}

However, in \textit{Final Cut, LLC v. Scott Sharkey}, the franchisees sought to rescind their franchise agreements for three existing hair salons purchased from the franchisor. The franchisees returned or offered to return two of the salons but had closed the third location and were unable to return it to the franchisor. The court granted rescission, noting that although the third location was no longer in existence, rescission was still possible where the “value of the property consumed or disposed can be definitely ascertained.”\textsuperscript{45}

5. \textbf{No Adequate Remedy at Law}

Typically, a plaintiff seeking an equitable remedy such as rescission must demonstrate that it has no adequate remedy at law. However, some courts have held that a plaintiff can obtain rescission even if there is a related cause of action at law.\textsuperscript{46} For a legal remedy to bar an equitable one, it must “afford relief that is as prompt, complete, and certain in all respects as that available in equity.”\textsuperscript{47}

B. \textbf{Defenses to Rescission}

As noted above, a party must timely inform the other party of its intent to rescind and tender or offer to tender benefits received from the contract that it is rescinding. The failure to do so may be defenses to rescission. In addition, a party must not waive its right to rescission by ratifying the contract through actions or words. A party who continues to perform under a contract after learning that the contract was induced by fraud, may be deemed to have ratified that contract.\textsuperscript{48}

A party seeking rescission must also overcome other equitable defenses such as unclean hands.\textsuperscript{49} The doctrine of unclean hands “bars relief to a plaintiff who has violated

\begin{footnotes}
\footnotetext{41}{RESTATEMENT OF RESTITUTION §54 cmt. j (2011).}
\footnotetext{43}{Holiday Hospitality, 2006 WL 2466819.}
\footnotetext{44}{No. 7:08-CV-41-BO, 2008 WL 4772191 (E.D.N.C. Oct. 28, 2008).}
\footnotetext{45}{2012 WL 310752, at *28.}
\footnotetext{46}{Anchor Bank, S.S.B. v. Conrardy, 763 So. 2d 360 (Fla. Dist. Ct. App. 1998).}
\footnotetext{47}{See St. Lucie Estates v. Nobles, 141 So. 314 (Fla. 1932); Ganaway v. Henderson, 103 So. 2d 693 (Fla. Dist. Ct. App. 1958) (“the mere existence of a remedy at law for damages does not exclude the wider jurisdiction of equity to unravel the transaction, undo the contract, and restore the parties to their former position”).}
\footnotetext{48}{See Dodds, 750 S.E.2d at 414 (former member of limited liability company demonstrated an intent to affirm a settlement agreement by failing to tender amounts received under the agreement and filing tax returns acknowledging the amounts as income).}
\footnotetext{49}{Assured Guar. Mun. Corp. v. UBS Real Estate Sec., Inc., No. 12-CV-1579(HB)(JCF), 2012 WL 5927379, at *3-4 (S.D.N.Y. Nov. 21, 2012) (rescission is equitable relief subject to equitable defenses); Clapp v. Peterson, 327 N.W.
conscience, good faith or other equitable principles in his prior conduct, as well as to a plaintiff who has dirtied his hands in acquiring the right presently asserted." 50 In *Two Men and a Truck/Int'l, Inc. v. Two Men and a Truck/Kalamazoo, Inc.*, the franchisees’ failure to report earnings and pay royalties to the franchisor constituted unclean hands sufficient for the court to deny them rescission. 51

C. The Effect of Contract Clauses on Claims for Rescission

If rescission unwinds a contract as though it never existed, what is the effect of the contract clauses themselves? Does rescission cancel an agreement to arbitrate disputes? Does rescission prevent the rescinding party from recovering its attorneys’ fees pursuant to a contractual provision providing for an award of attorneys’ fees to the prevailing party? Does a merger and integration clause in a contract preclude a party from rescinding on the basis of pre-contract misrepresentations? Are these clauses enforceable when a party seeks rescission?

1. Arbitration

Courts will enforce arbitration clauses contained in contracts that a party is seeking to rescind because, according to the U.S. Supreme Court, under the Federal Arbitration Act ("FAA"), an arbitration clause is separable from the remainder of the contract. 52 Therefore, to avoid arbitration even upon rescission of a contract based on fraudulent inducement, a party must allege that it was fraudulently induced into entering the arbitration clause itself. 53 Further, in *Cusamano v. Norrell Health Care*, Inc., an Illinois appellate court held that a franchisee seeking to rescind a franchise agreement on a statutory claim for misrepresentation was required to arbitrate the claim. The court reasoned that rescission presumes the existence of a valid agreement. The court further opined that when the parties choose arbitration in their contract, the party later seeking to avoid arbitration should not be allowed to do so by merely alleging that no contract (and, implicitly, no arbitration agreement) exists. 54 The result may be different when a contract is rescinded prior to the demand for arbitration. In *Henderson v. Coral Springs Nissan, Inc.*, a Florida appellate court refused to enforce a car dealership's demand for

3d 585 (1982) (equitable defenses are permitted in a claim for rescission based on technical violations of the Minnesota Franchise Act).


53 *Id.* It is unclear whether the party which sought rescission argued that it was fraudulently induced into entering the arbitration clause specifically. Compare *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin and Jenrette Sec. Corp.*, 912 F.2d 1563 (6th Cir. 1990) (holding that because the complaint alleged that defendants fraudulently procured plaintiff's assent as to the contract and the arbitration clause contained therein, the district court must adjudicate the validity of the arbitration clause, which will determine whether the arbitrator or district court would adjudicate the contract claims).

54 *Cusamano v. Norrell Health Care, Inc.*, 607 N.E.2d 246, 250-51, (Ill. App. Ct. 1992); *Jensen v. Quik Int'l*, 820 N.E.2d 462, 468 (Ill. 2004) (Court found that rescission based on violation of Illinois Franchise Disclosure Act was arbitrable pursuant to the arbitration clause in the franchise agreement).
arbitration after it had rescinded the contract and repossessed the car. The court found rescission of the contract rendered the arbitration clause unenforceable.  

6. **Attorneys' Fees**

Many franchise agreements provide the franchisor (and, on occasion, the franchisee provided it is the prevailing party) with the right to recover attorneys' fees in a dispute arising under the franchise agreement. When seeking rescission of the franchise agreement, a franchisee may be precluded from recovering attorneys' fees under common law. This is so because rescission voids the contract, including the contractual provision providing for such fees. A party may still be able to recover fees by demonstrating that an award of attorneys' fees is necessary to restore it to its pre-contract position. Courts have held both ways.

7. **Merger and Integration Clause**

Typically, a merger and integration clause will not operate to bar a claim for rescission based on fraudulent inducement because when a party elects to void a contract, he is not bound by the terms of the rescinded contract. When asserting a claim for fraudulent inducement, counsel should consider the presence of a merger and integration clause in the contract to determine whether to affirm the contract and sue for breach or rescind the contract and sue for fraud. If the defrauded party affirms the contract, the merger and integration clause may prevent recovery whereas if one seeks rescission, the merger and integration clause will often not prevent recovery.

D. **Restitution**

Restitution initially requires not only a return of any consideration received by the defendant but also a set off for any benefits received by the plaintiff. When a party is entitled to receive property that is no longer in the possession of the other party, an award of restitution can be difficult for courts to calculate. A court must first determine whether an award of equivalent value is an acceptable substitute. Then the court must determine the measure of the award.

Typically, courts will give greater latitude in creating a substitute of equivalent value and may not require a set off by the plaintiff when the contract was induced by fraud by the

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56 *See Overton v. Kingsbrooke Dev., Inc.*, 788 N.E.2d 1212 (Ill. App. Ct. 2003) (“[t]he recovery of attorney fees is an inconsistent remedy in an action for the rescission of contract”); *but see Katz v. Van Der Noord*, 546 So.2d 1047 (Fla. 1989) (attorneys' fees awarded on a claim for rescission).


58 *Holiday Hospitality*, 2006 WL 2466819; *Nexus Servs.*, 410 S.E.2d at 811; *Liberty v. Storage Trust Properties, L.P.*, 267 Ga.App. 905, 910 (2004) (If a defrauded party does not rescind, but instead elects to affirm the contract, he is relegated to a recovery in contract, and a merger clause will prevent his recovery. If, on the other hand, he does rescind the contract, the merger clause will not prevent his recovery under a tort theory.)

defendant. For example, in Final Cut, LLC v. Sharkey, the court determined that requiring the franchisor to pay the franchisees the full amount of their investment in three hair salon franchises was necessary to undo the harm caused by the franchisor's fraud and unfair trade practices under the Connecticut Unfair Trade Practices Act. In addition to awarding the franchisees a refund of all fees paid to the franchisor, the court required the franchisor to pay to the franchisees the amounts paid to third parties such as rent and the costs and expenses of litigation, including attorneys' fees.

In Young v. T-Shirts Plus, Inc., a Wisconsin appellate court determined that the trial court erred in not awarding lost wages and business losses to a franchisee whose franchise agreement was rescinded as a result of the franchisor's violation of the Wisconsin Franchise Investment Law. The trial court had awarded Young restitution, which included a return of the initial franchise fee; money paid by Young for a release from the franchise; royalty payments paid during the operation of the franchise; and the amount paid for an option to purchase an additional franchise plus prejudgment interest. The appellate court determined that because rescission required that Young be financially restored to her presale position, she was entitled to recover lost wages and business losses incurred as a result of the rescinded franchise operation, subject to offsets for income or profits received as a result of the franchise.

In E.T. Runyan v. Pacific Air Industries, the California Supreme court affirmed a trial court award of rescission to a franchisee of a surveying and photogrammetric services franchise as a result of the franchisor's failure to provide training and support. The franchisee was awarded restitution that included both the initial franchise fee and the loss of income the franchisee incurred while operating the franchise based on his salary earned prior to operating the franchise. The court noted that the franchisee had resigned his employment in reliance on the franchise agreement. In calculating the award, the court did, however, deduct income the franchisee had earned while operating the franchise prior to rescission.

Even where a jury determines that a franchisee has not suffered financial damages, the franchisee may still be entitled to rescission. In Bonanza Restaurants v. Uncle Pete's, Inc., the franchisee changed the name of its restaurant and stopped operating as a franchise only a few months after taking over an existing franchised restaurant. When the franchisor sued for unpaid royalties, the franchisee counterclaimed for rescission. Although the franchisee had not paid any royalties and the jury found the franchisee had suffered no monetary losses, the court nonetheless granted the franchisee rescission. On appeal, the court upheld the rescission award. It found that the actions taken by the franchisee to comply with obligations under the franchise agreement constituted damages that permitted rescission.

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60 Restatement of Restitution § 54, cmt. g; Restatement of Restitution III 7 1 Intro, Note.
61 2012 WL 310752, at *30.
62 118 Wis.2d 824, 349 N.W.2d 109 (Table) (Wis. Ct. App. 1984) (although this is a statutory case, it provides an interesting analysis of how a court will determine the value of the award in a franchise context).
63 Id.
65 Id.
66 757 S.W.2d 445 (Tex. App. 1988) (despite franchisor's argument that trial court erred in granting rescission of franchise agreement without restoring status quo, Court of Appeal of Texas held that the franchisee did not benefit from the agreement because it lost money, and affirmed rescission).
In *Ramada Franchise Systems, Inc. v. Tresprop Base Ltd.*, the franchisee sought rescission based on a claim of fraudulent inducement by the franchisor. The franchisee argued that equity required that it be reimbursed all franchise fees; all money spent to remodel its existing business premises to adopt the franchisor’s appearance standards; lost profits; extra overhead costs; and diminished property value. The court recognized that but for the franchisor’s fraud, the franchisee would not have incurred the franchise fees, but did not find that the franchisee proved that Ramada’s tortious acts caused it to incur the additional losses. Nonetheless, the court did not render an award of restitution of those franchise fees because there was insufficient evidence at trial to calculate the value of the benefits conferred on the franchisee by virtue of its operation as a Ramada franchisee.67

In *Little Caesars Enterprises, Inc. v. OPPCO, LLC*, the Sixth Circuit Court of Appeals determined that restitution required a restoration of payments made under the franchise agreements to avoid unjust enrichment. There, the court affirmed an award to the franchisee of a return of: the initial franchise fees; royalty fees paid; advertising fees paid; and the profits received by the franchisor for the required purchases of spices and dough as well as the amount of profits the franchisor received from purchases paid to a supplier after the supplier became a subsidiary of the franchisor.68

**III. CIVIL ACTIONS FOR RESCISSION PURSUANT TO STATE STATUTES**

In addition to common law rescission rights, a franchisee may have rights under state statutes applicable to franchising. This section provides an outline of state statutory avenues available to franchisees seeking to initiate civil actions to rescind their franchise agreements.69 Such statutory avenues include franchise disclosure/registration statutes, business opportunity laws, and Little FTC acts. Under these statutes, rescission is generally available in situations involving failure to register or improper registration, failure to disclose or improper disclosure, fraud, or misrepresentation/omission of a material fact.

**A. Franchise Disclosure/Registration Statutes**

The primary statutory source for private rights of action to rescind franchise agreements is state franchise disclosure/registration statutes. Fourteen states have franchise disclosure/registration statutes expressly granting franchisees the right to pursue private causes of action for rescission.70 Each statute is unique, and a practitioner must carefully review the language of the governing statute. A quick-reference chart identifying the sections of each statute pertinent to a private right of action for rescission is included as Appendix A. The following is a general summary of those provisions.

68 219 F.3d 547 (6th Cir. 2000).
69 Statutory provisions empowering franchise regulatory agencies to order rescission and restitution as part of an enforcement action are discussed, infra section IV.
70 The fifteenth "franchise registration state," Indiana, is not discussed in this section because its disclosure/registration law does not grant a franchisee a private right to seek rescission of its franchise agreement for a statutory violation; rather, a franchisee is only entitled to recover consequential damages, 8% interest on the judgment, and reasonable attorney fees. Ind. Code § 23-2-2.5-28 (2008). For discussion regarding the Indiana franchise regulatory agency’s power to order rescission, restitution, or disgorgement, see discussion, infra section IV.D.5 and Appendix C, at C-5.
1. California Franchise Investment Law

If a franchisor engages in any of the following conduct, a franchisee may sue for damages: (a) offers or sells a franchise that is not registered and not exempt from registration, (b) violates the terms or conditions of an exemption from registration, (c) does not timely furnish the disclosure document to the prospect, or (d) includes a false or misleading statement in any filing or disclosure. If, however, the franchisor's conduct is willful, the franchisee may also sue for rescission.71

The Ninth Circuit has affirmed that the term “willful” as used in the statute simply means: “an act that is committed knowingly and intentionally. There is no requirement of a showing of an intent to violate the law, an evil motive, or a purpose to gain undue advantage. Good faith or reasonable care are not defenses to ‘willfulness’ under [section 31300].”72 Accordingly, a franchisor can be found to have willfully violated the California Franchise Investment Law, and therefore liable for rescission, even though it was not specifically aware of the provisions of the statute that it was violating.73

If the basis of the franchisee’s claim is a false or misleading statement in a filing or disclosure, the franchisor may avoid liability if it proves that: (a) the franchisee knew the facts concerning the untruth or omission; or (b) the franchisor exercised reasonable care and did not know, or even if the franchisor had exercised reasonable care it would not have known, of the untruth or omission.74 Additionally, it is a defense to any action based upon joint and several liability that the franchisor had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.75 Unlike other states discussed below, unless the franchisor can show that the franchisee acted in bad faith or with fraudulent intent, unclean hands may not serve as a defense to avoid rescission.76

Any action must be brought before the expiration of the earliest of the following: (a) four years after the act or transaction constituting the violation; (b) the expiration of one year after the discovery by the franchisee of the fact constituting the violation; or (c) ninety (90) days after delivery to the franchisee of a written notice disclosing any violation involving a false or misleading statement in any filing or disclosure, which notice shall be approved as to form by the Commissioner.77 Any condition, stipulation or provision waiving the franchisee’s rights under the statute is void.78

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72 Dollar Sys., 890 F.2d 165, 172-73 (9th Cir. 1989) (emphasis in original).

73 Id.


75 Id. § 31302

76 Dollar Sys., 890 F.2d at 173.

77 CAL. CORP. CODE § 31303.

78 Id. § 31512.
2. Hawaii Franchise Investment Law

Any person who sells or offers to sell a franchise in violation of the Hawaii Franchise Investment law is liable to the franchisee for damages, rescission, or other relief as the court may deem appropriate.79 Rescission is not available if:

(a) the franchisee claims that the franchisor violated the statute by (i) making an untrue statement of a material fact in any offering circular or report filed or willfully omitted to state any material fact in an offering circular or report that is required to be included, (ii) selling or offering to sell a franchise by means of any communication that includes an untrue statement of a material fact or omits to state a material fact necessary in order to make statements not misleading, (iii) employing any device, scheme, or artifice to defraud, or (iv) engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person;80 and

(b) the franchisor proves that: (i) the franchisee knew the facts concerning the untruth or admission; or (ii) the franchisor exercised reasonable care and did not know, or if the franchisor had exercised reasonable care would not have known, of the untruth or admission.81

The franchisee may seek to recover the actual damages sustained together with the cost of the lawsuit, including reasonable attorneys’ fees. Additionally, the court may in its discretion increase the award of damages to an amount not to exceed three times the actual damages sustained.82 The action may not be brought later than five years subsequent to the date of the violation or two years subsequent to the discovery of facts constituting the violation, but in no event later than seven years subsequent to the date of the violation.83


Under the Illinois statute, a franchisee may sue for damages and rescission if the franchisor offers or sells a franchise: (a) that is not registered and not exempt from registration, (b) where the disclosure document was not furnished when required, (c) that includes a false or misleading statement in any filing or disclosure, (d) which employs any device, scheme, or artifice to defraud, (e) which operates as a fraud or deceit upon any person, (f) where there was a failure to amend the disclosure document upon a material change in any facts required to be disclosed, or (g) where the franchisor violated an escrow or impound order.84 A franchisee cannot, however, sue for rescission if it fails to accept an offer to return the consideration paid or to repurchase the franchise within thirty (30) days from receipt of such an offer.85 For the rescission offer to be effective, it must be in writing; be delivered to the franchisee or sent by

80 Id.
81 Id.
82 Id. § 482E-9(c)
83 Id. § 482E-10.5(b)
84 815 ILL. COMP. STAT. 705/26 (2009).
85 Id.
certified mail to the franchisee’s last known address; offer to return any consideration paid or to repurchase the franchise for a price equal to the full amount paid less any net income received by the franchisee, plus the legal rate of interest thereon; and may require the franchisee to return all unsold goods, equipment, fixtures, leases and similar items received from such person. The offer must also continue in force for thirty (30) days from the date on which it was received by the franchisee, and must advise the franchisee of such rights and the period of time limited for acceptance. Any agreement not to accept or refusing or waiving any such offer made during or prior to the expiration of said thirty (30) days shall be void.86

It is a defense to any action based upon joint and several liability that a person who otherwise is liable had no knowledge or reasonable basis to have knowledge of the facts, acts or transactions constituting the alleged violation.87 A franchisee in whose favor judgment is entered is entitled to the costs of the action including, without limitation, reasonable attorneys’ fees.88

Any civil action must be brought before the expiration of the earliest of the following: (a) three years after the violation; (b) one year after the franchisee becomes aware of facts or circumstances reasonably indicating that it may have a claim for relief; or (c) ninety (90) days after delivery to the franchisee of a written notice disclosing the violation.89 With respect to the one year limitations period, the Seventh Circuit opined that: “The ‘facts or circumstances’ language that the Illinois Legislature included must mean that something less than actual knowledge of a claim is required to trigger the statutory period. The Illinois courts have decided that knowledge of facts reasonably indicating a claim plus consultation with an attorney is enough.”90

The statute of limitations contained in the Illinois Franchise Disclosure Act may be equitably tolled if the franchisee can show that it acted with due diligence and that the franchisor engaged in fraudulent concealment.91 Any condition, stipulation or provision waiving the franchisee’s rescission rights under the statute is void.92

4. Maryland Franchise Law

Pursuant to the Maryland Franchise law, a franchisee may sue for damages, and a court may order rescission of the franchise and award restitution damages, if the person who sold or granted the franchise did so: (a) without the offer of the franchise being registered, or (b) by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, if the person who buys or is granted a franchise does not know of the

86 Id.
87 Id.
88 Id.
89 Id. at 705/27.
90 Pyramid Controls Inc. v. Siemens Indus. Automation, Inc., 172 F.3d 516, 519 (7th Cir. 1999) (holding that the one year statute of limitations was triggered by the franchisee possessing knowledge of the facts indicating a claim under the statute and consultation with an attorney, regardless of the fact that the attorney did not actually inform the franchisee of its claim under the statute).
92 815 ILL. COMP. STAT. 705/41.
A franchisor may avoid liability for a claim that it sold the franchise by means of an untrue statement or omission of a material fact, if the franchisor meets its burden to prove that the person who sold or granted the franchise did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. It is a defense to any action based upon joint and several liability that the person did not have knowledge of or reasonable grounds to believe in the existence of the facts by which the liability is alleged to exist.

A civil action must be brought within three years after the grant of the franchise. As a condition of the sale of a franchise, a franchisor may not require a prospective franchisee to waive its rights under the statute.

5. Michigan Franchise Investment Law

A franchisor is liable to a franchisee for damages or rescission under the Michigan Franchise Investment Law if in connection with the filing, offer, sale, or purchase of any franchise, the franchisor: (a) employed any device, scheme, or artifice to defraud, (b) made an untrue statement of a material fact or omitted a material fact necessary to make the statements made not misleading, (c) engaged in any conduct that operates as a fraud or deceit; or (d) failed to first provide to the franchisee, at least ten (10) business days before the franchisee executed any binding franchise or other agreement or at least ten (10) business days before the receipt of any consideration, whichever occurred first, a copy of the disclosure statement and notice described in the statute, and a copy of all proposed agreements relating to the sale of the franchise. But a franchisee may not file or maintain suit if before suit and at a time when the franchisee owned the franchise, the franchisee received a written offer to refund the consideration paid together with 13% interest from the date of purchase, less the amount of income received on the franchise, conditioned only upon tender of all items received by the franchisee for the consideration and not sold, and failed to accept the offer within thirty (30) days of its receipt; or if the franchisee received the offer before suit, but at a time when the franchisee did not own the franchise, the franchisee may not file or maintain a suit unless the franchisee rejected the offer in writing within thirty (30) days of its receipt. If the franchisee

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93 Md. Code Ann., Bus. Reg. § 14-227(a)-(c) (1992). Courts have, however, applied equitable doctrines such as waiver and equitable estoppel, to bar statutory claims of rescission under the Maryland Franchise Law. See also infra section III.D, notes 191 and 194.

94 Id. § 14-227(a)(2).

95 Id. § 14-227(d).

96 Id. § 14-227(e).

97 Id. § 14-226.

98 Mich. Comp. Laws §§ 445.1505, 445.1508, and 445.1531(1) (1984). Similar to common law rescission claims, see supra section II, before seeking rescission under the Michigan Franchise Investment Law, the franchisee must: (1) timely assert its rescission right; (2) tender the consideration and benefits received under the contract; and (3) demand repayment of any consideration paid. Two Men and a Truck/Int'l Inc. v. Two Men and a Truck/Kalamazoo, Inc., 949 F. Supp. 500, 507 (W.D. Mich. 1996) (quoting Dynamic Enterprises, Inc. v. Fitness World of Jackson, 32 B.R. 509, 521 (Bankr. M.D. Tenn. 1983)). Failure to comply with these requirements results in waiver of the right to rescission under Michigan law. Further, if the franchisee is itself in default under the franchise agreement, the doctrine of unclean hands may bar the equitable remedy of rescission. Id. at 506. See also infra section III.D.
involves substantial building or substantial equipment and a significant period of time has elapsed since the sale of the franchise to the franchisee, the rescission offer may recognize depreciation, amortization, and other factors which bear upon the value of the franchise being returned to the franchisor. The statute specifies that damages may be based on reasonable approximations, but not speculation. In addition to damages or rescission, the franchisee is entitled to recover interest at the rate of 12% per year from the date of purchase, reasonable attorneys’ fees, and court costs.

Any action brought to enforce civil liability created under the Franchise Investment Law must be brought before the expiration of four years after the act or transaction constituting the violation. The statute of limitations may be tolled under Michigan’s fraudulent concealment statute if the franchisee properly pleads that: (a) the franchisor wrongfully concealed actions; (b) the franchisee did not discover the operative facts within the statute of limitations; and (c) the franchisee exercised due diligence until discovery of the fact. It is a defense to any action based upon joint and several liability that the person had no knowledge of or reasonable grounds to believe in the existence of the facts on which the liability is alleged to exist. A requirement that a franchisee waive or release its rights under the statute is void and unenforceable.

6. Minnesota Franchise Law

A person who violates any provision of the Minnesota Franchise Law or any rule or order thereunder is liable to the franchisee (or subfranchisor), who may sue for damages, rescission, or other relief as the court may deem appropriate. The statute states that a plaintiff may recover actual damages sustained together with costs and disbursements plus reasonable attorneys’ fees. As construed by the Minnesota Supreme Court, the legislature intended “to afford the franchisee who suffers harm by reason of the franchisor's violation of the franchise statute the right to have his agreements with the franchisor treated as entirely void and to be restored to the position he occupied prior to his involvement with the franchisor. The effect of the remedy of rescission is generally to extinguish a rescinded contract so effectively that in contemplation of law it has never had existence.”

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99 Id. § 445.1531(2).
100 Id. § 445.1531(4).
101 Id. § 445.1531(1). The statute provides for an interest rate of 6% until June 20, 1984, and 12% per year thereafter. In light of the four (4) year statute of limitation and the passage of thirty-one (31) years since this cutoff date, the lesser interest rate is no longer applicable.
102 Id. § 445.1533.
104 MICH. COMP. LAWS § 445.1532.
105 Id. § 445.1527(b).
107 Id. § 80C.17(3).
108 Chase Manhattan Bank, N.A. New York, N.Y. v. Clusiau Sales & Rental, Inc., 308 N.W.2d 490, 494 (Minn. 1981). Equitable defenses are, however, available in an action for rescission under the Minnesota Franchise Law. Clapp, 327 N.W.2d at 586-87. See generally infra section III.D.
It is a defense to any action based upon joint and several liability that the person who would otherwise be liable had no knowledge of or reasonable grounds to know of the existence of the facts by reason of which the liability is alleged to exist.109

The Minnesota Franchise Law provides that no action may be commenced more than three years after the cause of action accrues.110 One federal court has held, however, that if a claim under the Minnesota Franchise Law is premised on allegations of fraud and such allegations are properly pled, Minnesota’s discovery rule tolls the statute of limitations.111 Any condition, stipulation or provision, including any choice of law provision, purporting to waive the franchisee’s statutory rights is void.112

7. **New York Franchise Sales Act**113

A franchisor is liable for damages under the New York Franchise Sales Act if it offers or sells a franchise: (a) that is not registered, (b) that does not comply with the terms and conditions of an exemption, (c) where the disclosure document does not contain the requisite information and/or was not furnished when required, (d) that involved a false or misleading statement in any filing or disclosure, (e) that employed any device, scheme, or artifice to defraud, or (f) that operated as a fraud or deceit upon any person.114 If the franchisor’s conduct was *willful and material*, it is liable for rescission.115 “Willful” as used in the statute has been interpreted to mean “no more than voluntary and intentional,” as opposed to having some form of malicious intent.116 A successful plaintiff may recover interest at 6% per year and reasonable

109 MINN. STAT. § 80C.17(2).
110 Id. § 80C.17(5).
112 MINN. STAT. § 80C.21.
113 In February 2015, Bill No. 4880 was introduced in the New York General Assembly. If passed, it will amend several sections of the New York Franchise Act, discussed herein, including adding additional unlawful acts under § 687, which would serve as additional bases for a rescission claim. It would also amend the language of § 691 to provide that: “A person who offers or sells a franchise in violation of section six hundred eighty-three, six hundred eighty-four or six hundred eighty-seven of this article is liable to the person purchasing the franchise for rescission, with interest from the date of purchase at an annual interest rate set forth in or determined in accordance with rules or regulations promulgated by the department, and if such violation is willful and material, for damages, in each instance along with reasonable attorney fees and court costs.”
115 *Id. See EV Scarsdale Corp. v. Engel & Voelkers North East LLC*, Nos. 651169/2011 and 651608/2011, 2015 WL 3549361, at *6-7, 10 (N.Y.Sup. June 5, 2015) (denying a motion to dismiss the franchisee’s claim for rescission under the New York Franchise Sales Act because whether a franchisor’s conduct was willful and material is a question of fact. The court also rejected the franchisor’s argument that a franchisee cannot suffer compensable harm from the untimely delivery of an FDD if the FDD was ultimately provided prior to execution of the agreement. In rejecting the argument, the court looked to the plain language of the Act, noting that “it appears that the legislature believed that advance written disclosures can prospectively mitigate the persuasive influence of in-person solicitation. Once the sales presentations begin, along with the attendant dose of puffery and overly optimistic projections, subsequent written disclosure may have less of an influence on the decision making process of a prospective franchisee. That the legislature saw fit to expressly require pre-meeting disclosure, raises, at least for the purposes of this motion to dismiss, a reasonable inference that a compensable injury may be sustained if pre-meeting disclosure does not occur.”).
attorneys’ fees.\textsuperscript{117} It is a defense to any action based upon joint and several liability that the defendant did not know or could not have known by the exercise of due diligence the facts upon which the action is predicated.\textsuperscript{118}

A franchisee may not file or maintain suit if before the suit was commenced, and at a time when it owned the franchise, it received a written offer to refund the consideration paid together with interest at 6\% per year from the date of payment, less the amount of income earned by the franchisee from the franchise, conditioned only upon tender by the person of all items received by him for the consideration and not sold, and failed to accept the offer within thirty (30) days of its receipt, provided that the offering documents are submitted to the department for approval at least ten (10) business days prior to submission to the franchisee, and the rescission offer must recite the statutory provisions. If the franchise involves a substantial building or substantial equipment or fixtures and a significant period of time has elapsed since the sale of the franchise to the franchisee, the department in approving a rescission offer may approve an equitable offer recognizing depreciation, amortization, and other factors which bear upon the value of the franchise being returned to the franchisor.\textsuperscript{119}

An action may not be brought to enforce a liability created under the statute unless brought before the expiration of three years after the act or transaction constituting the violation.\textsuperscript{120} It is unlawful to require a franchisee to assent to a release, assignment, novation, waiver or estoppel which would relieve a person from any duty or liability imposed by the statute.\textsuperscript{121}

8. \textbf{North Dakota Franchise Investment Law}

Any person who violates any provision of the statute or any rule or order issued by the commissioner thereunder is liable to the franchisee (or subfranchisor), who may bring an action for damages, rescission, or for such other relief as the court may deem appropriate.\textsuperscript{122} But the franchisee may not file or maintain an action if before the action was commenced and at a time when it owned the franchise, it received an offer from the franchisor to refund the consideration paid together with interest at the rate of 7\% per annum from the date of purchase, less the amount of income received on the franchise, conditioned only upon tender by the franchisee of all items received for the consideration and not sold, and failed to accept the offer within thirty (30) days of its receipt; or if the franchisee received the offer before the action was commenced, but at a time when the franchisee did not own the franchise, the franchisee may not file or maintain the action unless the franchisee rejected the offer in writing within thirty (30) days of its receipt; provided, that in either instance the offering documents and rescission prospectus must be submitted to the commissioner for approval at least fifteen (15) days prior to submission to

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\item[\textsuperscript{117}] N.Y. GEN. BUS. LAW § 691(1).
\item[\textsuperscript{118}] Id. § 691(3).
\item[\textsuperscript{119}] Id. § 691(2). \textit{See Hot & Tasty Corp. v. IOB Realty}, 270 A.D.2d 67 (N.Y. App. Div. 2000) (barring rescission because the franchisee rejected the franchisor’s offer to rescind).
\item[\textsuperscript{120}] Id. § 691(4).
\item[\textsuperscript{121}] Id. § 687(5).
\item[\textsuperscript{122}] N.D. CENT. CODE § 51-19-12(1) (1995). Equitable defenses are available to a franchisor; therefore, at a minimum, “before a franchisee may rescind a franchise agreement under N.D.C.C. § 51-19-12, he must overcome any equitable defenses raised by the franchisor.” \textit{Peck of Chehalis, Inc. v. C.K. of Western America, Inc.}, 304 N.W.2d 91, 100 (ND 1981). \textit{See generally infra} section III.D.
the franchisee, and the rescission offer must recite the statutory provisions. If the franchise involves a substantial building or substantial equipment and a significant period of time has elapsed since the sale of the franchise, the commissioner, in approving a rescission offer, may approve an equitable offer recognizing depreciation, amortization, and other factors which bear upon the value of the franchise being returned to the franchisor.123

No action may be brought after five years from the date that the aggrieved party knew or reasonably should have known about the facts that are the basis for the alleged violation. This limitation does not apply to any action under those sections of the statute relating to (a) denial, suspension, or revocation of registration or exemption, in which case the period is ten (10) years, or (b) fraudulent and prohibited practices in which case the period is six (6) years.124 Any condition, stipulation, or provision purporting to waive statutory rights is void.126 If successful, a franchisee is entitled to recover costs and disbursements plus reasonable attorneys' fees.126 It is a defense to any action based upon joint and several liability that the defendant had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.127

9. Oregon Franchise Transactions Law

A franchisor is liable for damages and rescission if it employs any device, scheme or artifice to defraud, or makes any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.128 The franchisee may recover any amounts to which it would be entitled upon a common law action for a rescission.129 Additionally, the court may award reasonable attorney fees to the prevailing party.130 The court may not award attorneys' fees to a prevailing defendant if the action is maintained as a class action.131

An action may not be commenced more than three years after the sale.132 The statute of limitations is not subject to a discovery rule or equitable tolling.133 It is an affirmative defense to any action for legal or equitable remedies that the franchisee knew of the untruth or omission.134 It is a defense to any action based upon joint and several liability that the party alleged to be

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123 Id. § 51-19-12(4).
124 Id. § 51-19-12(5).
125 Id. § 51-19-16(7).
126 Id. § 51-19-12(3).
127 Id. § 51-19-12(2).
129 Id. § 650.020(3).
130 Id.
131 Id. § 650.020(4).
132 Id. § 650.020(6).
133 Towne v. Robbins, 331 F. Supp. 2d 1269, 1271-72 (D. Or. 2004) (concluding that the Oregon Franchise Act is not subject to tolling or a discovery rule because “the Oregon Supreme Court has cautioned against grafting discovery rules onto statutes of limitations which are silent on the issue,” and the Act itself does not include any language revealing a legislative intent to create a discovery rule or allow equitable tolling).
134 OR. REV. STAT. § 650.020(2).
liable did not know, and, in the exercise of reasonable care, could not have known, of the existence of the facts on which the liability is based.\textsuperscript{135}

\textbf{10. Rhode Island Franchise Investment Act}

A person who violates any provision of the Rhode Island Franchise Investment Act is liable to the franchisee for damages, costs, attorneys’ fees, and expert fees.\textsuperscript{136} If the person engaged in any of the following conduct in connection with the offer or sale of the franchise, the franchisee also has the right to sue for rescission: (a) offered or sold a franchise that is not registered or not exempt from registration, (b) failed to first provide the required disclosure document together with a copy of all proposed agreements relating to the franchise at the earlier of the first personal business meeting held for the purpose of discussing the sale or ten (10) business days prior to execution of an agreement or payment of any consideration relating to the franchise relationship, (c) employed a device, scheme, or artifice to defraud; (d) made an untrue statement of material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; (e) engaged in an act, practice, or course of business that operated as a fraud or deceit on a person; (f) represented to a franchisee that the filing of a franchise registration application or the registration of a franchise constitutes a finding by the director that a document filed under the Act is true, complete, and not misleading or that the director has passed upon the merits of the franchise; or (g) misrepresented that a franchise is registered or exempted from registration.\textsuperscript{137}

No person is liable if the defendant proves that the plaintiff knew the facts concerning the violation.\textsuperscript{138} Similarly, it is a defense to any action based upon joint and several liability that the allegedly liable agent, employee, officer, or director proves he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the fact by reason of which the liability is alleged to exist.\textsuperscript{139} A condition, stipulation or provision requiring a franchisee to waive compliance with or relieving a person of a duty of liability imposed by or a right provided by this statute or a rule or order under the statute is void. An acknowledgement provision, disclaimer or integration clause or a provision having a similar effect in a franchise agreement does not negate or act to remove from judicial review any statement, misrepresentations or action that would violate this statute or a rule or order under this statute.\textsuperscript{140} An action must be commenced no later than the earlier of (a) four (4) years after the act or transaction constituting the violation, or (b) ninety (90) days after the receipt by the franchisee of a rescission offer in a form approved by the director.\textsuperscript{141}

\textsuperscript{135} Id. § 650.020(5).
\textsuperscript{138} Id. § 19-28.1-21(a).
\textsuperscript{139} Id. § 19-28.1-21(b).
\textsuperscript{140} Id. § 19-28.1-15.
\textsuperscript{141} Id. § 19-28.1-22.
11. **South Dakota Franchise Law**

A person who violates any provision of the statute is liable to the franchisee for actual damages, costs, attorneys' fees and expert fees.\(^{142}\) The franchisee may also sue for rescission if the franchisor sold or offered to sell a franchise without first (a) making a notice filing (unless it is exempt from notice filing); (b) updating its disclosure documents in accordance with the statute; (c) providing appropriate financial statements; (d) providing the franchisee with the disclosure document at least fourteen (14) calendar days before execution of a binding agreement or payment to the franchisor; (e) providing the franchisee with a copy of any agreement previously attached to the disclosure document that the franchisee has unilaterally and materially altered at least seven calendar days before execution of the agreement, unless the changes to the revised agreement arose out of negotiations initiated by the franchisee; and (f) providing a disclosure document that includes all of the information required.\(^{143}\) The Court may award other relief as the court deems appropriate and may in its discretion, if the circumstances are sufficiently egregious, increase the award of damages to an amount not to exceed three times the actual damage sustained.\(^{144}\)

No person is liable under the statute if the defendant proves that the franchisee affirmed the transaction with knowledge of the facts concerning the violation.\(^{145}\) Also, a person may avoid joint and several liability if he or she proves that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.\(^{146}\)

An action for rescission under the statute must be instituted within one year after the pertinent violation occurred.\(^{147}\) An action for damages, costs, attorneys' fees, and expert fees must be instituted within the earlier of two years after discovery of the facts constituting the violation or three years after the violation.\(^{148}\) If, however, the franchisee receives a rescission offer in a form approved by the director, the franchisee may not obtain relief under the statute unless the suit is instituted within ninety (90) days after receipt.\(^{149}\) Any condition, stipulation or provision waiving the franchisee's rescission rights under the statute is void.\(^{150}\)

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143 *Id.* §§ 37-5B-49, 37-5B-4, 37-5B-7 through -9, 37-5B-17, and 37-5B-49.
144 *Id.* § 37-5B-49.
145 *Id.* This provision is consistent with case law interpreting the pre-2008 Franchise Investment law, in which it was held that a franchisee was not automatically entitled to rescission upon violation of the statute; rather, the franchisee must comply with the established rules of rescission under South Dakota law (including rescinding promptly and restoring to the other party everything of value that he received under the contract) and the franchisee must overcome any equitable defenses raised by the franchisor (including estoppel and waiver). *Martschinske v. Olympic Styles, Inc.*, 628 F. Supp. 231, 237-38 (D. S.D. 1984), aff'd, 774 F.2d 1172 (8th Cir. 1985); *Nielsen v. McCabe*, 442 N.W.2d 477, 481 (S.D. 1989).
146 S.D. Codified Laws § 37-5B-49.
147 *Id.* § 37-5B-50(1).
148 *Id.* § 37-5B-50(2).
149 *Id.* § 37-5B-50(3).
150 *Id.* § 37-5B-21.
12. **Virginia Retail Franchising Act**

A franchisee may declare a franchise void by sending a written declaration of that fact and the reasons therefor to the franchisor by registered or certified mail if:

(a) The franchisor offered or sold an unregistered franchise, and was not exempted from registration, or in connection with the offer or sale, the franchisor employed a device, scheme, or artifice to defraud, made an untrue statement of material fact or omitted to state a material fact necessary to avoid misleading the franchisee, engaged in conduct that operated as a fraud or deceit upon the franchisee, or failed to provide the franchisee with the franchise agreement and disclosure document as required. Under these circumstances, the franchisee must send such written declaration within seventy-two (72) hours after discovery thereof but not more than ninety (90) days after execution of the franchise agreement;\(^{151}\)

(b) The franchisee was not afforded the opportunity to negotiate with the franchisor on all provisions within the franchise, except that such negotiations shall not result in the impairment of the uniform image and quality standards of the franchise, provided that the franchisee send such written declaration within thirty (30) days after execution of the franchise;\(^{152}\) or

(c) The franchisee was not furnished a copy of the franchise agreement and disclosure documents at least seventy-two (72) hours prior to execution of the franchise agreement, provided that the franchisee send such written declaration within thirty (30) days after execution of the franchise.\(^{153}\)

Any franchisee who has declared the franchise void may bring an action against its franchisor to recover the damages sustained by reason thereof.\(^ {154}\) If successful, the franchisee is also entitled to the costs of the action, including reasonable attorneys' fees.\(^ {155}\)

No suit shall be maintained to enforce any liability created under the statute unless brought within four years after the cause of action upon which it is based arose.\(^ {156}\) Any condition, stipulation or provision binding any person to waive compliance with any provision of the statute shall be void; provided, however, that nothing in the statute bars the franchisor and franchisee from agreeing to binding arbitration of disputes consistent with the provisions of the statute.\(^ {157}\)


\(^{152}\) Id. § 13.1-565(2).

\(^{153}\) Id. § 13.1-565(3).

\(^{154}\) Id. § 13.1-571(a).

\(^{155}\) Id.

\(^{156}\) Id. § 13.1-571(b).

\(^{157}\) Id. § 13.1-571(c).
13. **Washington Franchise Investment Protection Act**

Any person who sells or offers to sell a franchise in violation of the statute is liable to the franchisee (or subfranchisor), who may sue for damages, rescission, or other relief as the court may deem appropriate.\(^{158}\) The suit may be brought to recover the actual damages sustained by the plaintiff and the court may in its discretion increase the award of damages to an amount not to exceed three times the actual damages sustained.\(^{159}\) The prevailing party may in the discretion of the court recover the costs of action including a reasonable attorneys’ fee.\(^{160}\)

If the plaintiff’s claim is premised on the franchisor having engaged in fraudulent conduct or having made false or misleading statements, rescission is not available if the franchisor proves that the plaintiff knew the facts concerning the untruth or omission or that the franchisor exercised reasonable care and did not know or if he had exercised reasonable care would not have known of the untruth or omission.\(^{161}\)

The Washington Franchise Investment Protection Act does not contain a specific statute of limitation applicable to rescission or restitution claims. Accordingly the six-year statute applicable to contract actions and the three-year statute applicable to oral contracts and fraud apply.\(^{162}\) Any agreement, condition, stipulation or provision purporting to bind any person to waive compliance with any provision of the statute or any rule or order thereunder is void. A release or waiver executed pursuant to a negotiated settlement in connection with a bona fide dispute between a franchisee and a franchisor, arising after their franchise agreement has taken effect, in which the person giving the release or waiver is represented by independent legal counsel, is not prohibited.\(^{163}\)

14. **Wisconsin Franchise Investment Law**

Any person who sells a franchise without first delivering a copy of an offering circular at least fourteen (14) days prior to the execution of any binding franchise or other agreement or at least fourteen (14) days prior to the receipt of any consideration, whichever first occurs, if the violation was material in the franchisee’s (or subfranchisor’s) decision to purchase the franchise, shall be liable for rescission.\(^{164}\)

No action may be maintained unless brought before the expiration of three years after the act or transaction constituting the violation upon which the liability is based or ninety (90) days after delivery of a written notice that discloses any violation of the statute and that is filed with the division, whichever first expires.\(^{165}\) It is a defense to any action based upon joint and several liability that the person who would otherwise be liable had no knowledge of or


\(^{159}\) Id. § 19.100.190(3).

\(^{160}\) Id.

\(^{161}\) Id. § 19.100.190(2).


\(^{163}\) Id. § 19.220.

\(^{164}\) [WIS. STAT. § 553.51(1)](https://wisconsinlegis.matfield.com) (2000). A franchisee may sue for damages for certain other violations of the statute pursuant to Wis. Stat. § 553.51(2).

\(^{165}\) Id. § 553.51(4).
reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist. Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive is void. This section does not affect the settlement of disputes, claims or civil lawsuits arising or brought under this statute.

B. Business Opportunity Laws

Twenty-six states have business opportunity laws, which have the potential to apply to franchising. Each of these laws provide buyers with a private remedy for violations. Many of these statutes expressly grant the purchaser, under certain circumstances, the right of rescission. For example, some statutes provide the purchaser with a right to rescind the contract if the seller does not deliver equipment, supplies, or products within a certain period of time from the date specified in the contract. The majority of statutes grant the purchaser an extended period of time to rescind the contract, ranging from ninety (90) days after discovery (New Hampshire) to any time (Alaska), if the seller makes any misrepresentations in the offer or sale process, or fails to comply with the business opportunity statute. Attached as Appendix B is list of the state business opportunity statutes that contain rescission rights.

Although they vary, most of these statutes provide that once the purchaser renders the contract void, the purchaser is entitled to receive all sums paid to the seller if the purchaser is able to return all equipment, supplies, or products purchased from and delivered by the seller. If the purchaser cannot make a complete return, the purchaser is entitled to all sums paid to the seller, minus the fair market value of items that the purchaser is unable to return. Additionally, the purchaser is entitled to sue for actual damages, attorneys’ fees, and costs. In Illinois, if a seller violates the law by making a misrepresentation or engaging in fraudulent conduct, the purchaser may sue for rescission, for recovery of all money paid for the business opportunity, and for treble damages together with 10% interest per annum from the date of sale, reasonable attorneys’ fees and court costs.

Under the New Hampshire business opportunity law, a purchaser may elect to void the contract by providing notice to the seller within ninety (90) days after gaining knowledge of the seller’s failure to register or failure to provide a disclosure statement. Upon receipt of the notice, the seller may make an offer of rescission. The offer must be in writing; be delivered to the distributor or sent by United States mail, return receipt requested, addressed to the

166 Id. § 553.51(3).
167 Id. § 553.76.
169 The states are: Alaska, California, Florida, Georgia, Indiana, Kentucky, Maryland, Nebraska, North Carolina, South Carolina, Texas, and Virginia.
170 See Appendix C. In Ohio, the purchaser is also entitled to recover up to three times the amount of damages or $10,000, whichever is greater. OHIO REV. CODE ANN. § 1334.09 (A)(1)(b) (2012). In Utah, the purchaser may recover actual damages or $2,000, whichever is greater. UTAH CODE ANN. § 13-15-6(2) (2006).
171 815 ILL. COMP. STAT. 602/5-120(b) (1996).
distributor; and offer to return any consideration paid or to repurchase the business opportunity for a price equal to the full amount paid together with 6% interest from the date of payment, less any income received by the purchaser, and may require the purchaser to return to the seller all unsold goods, equipment, fixtures, leases and similar items received. The offer must remain available for fifteen (15) days from the date on which it is received by the purchaser, advise the purchaser of such rights and the period of time limited for acceptance, and any additional information required by the division. If the offer is accepted, the seller must pay all sums due within ten (10) days of its receipt of the acceptance. If the purchaser does not accept the offer, the purchaser waives any right to proceed against the seller for its failure to register or provide a disclosure statement.

Nebraska and California give sellers the opportunity to cure inadvertent failures to make required disclosures or to include required provisions in contracts. In these states, a seller may cure its failures by providing the purchaser with corrected documents, and by notifying the purchaser that it has an additional fifteen (15) day period after receipt to cancel the contract. If the purchaser does not exercise its cancellation right during the fifteen-day period, the purchaser cannot later attempt to use its rescission rights for such violations.

C. Unfair and Deceptive Trade Practices Acts

In addition to state disclosure/registration laws and business opportunity laws, aggrieved franchisees may have a statutory claim under state consumer protection or deceptive and unfair trade practices statutes (generally referred to as “Little FTC Acts”). Little FTC Acts were enacted to address perceived deficiencies in common law fraud remedies, vary greatly from state to state, and cover a multitude of wrongful business practices. Although the remedy under Little FTC Acts is usually damages (sometimes multiple damages), attorneys’ fees and costs, some courts have upheld rescission as a proper remedy under Little FTC Acts.

For example, in Bonanza Restaurants v. Uncle Pete’s, Inc., the franchisor sued its franchisee for royalties due under the franchise agreement, and the franchisee counterclaimed for rescission of the franchise agreement and damages, asserting fraud and violations of the Texas Deceptive and Unfair Trade Practices Act (“Texas DTPA”). The jury found sufficient evidence that the franchisor’s conduct was unconscionable under the Texas DTPA and the trial court rendered judgment, inter alia, rescinding the franchise. The Court of Appeals of Texas affirmed the trial court’s judgment, noting that a party may obtain rescission under the Texas DTPA if it shows actual damages, and holding that the franchisee had undisputedly incurred actual damages as a result of the franchisor’s unconscionable conduct in the form of the obligation to operate the business in a certain fashion and to make payment of royalties.

173 Id. § (III)(b).
174 Id. § (III)(c).
176 757 S.W.2d 445. The Texas DTPA provides that a consumer who prevails may obtain, inter alia, “orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter” and “any other relief which the court deems proper.” TEX. BUS. & COM. § 17.50(b)(3)-(4) (2005).
177 Id. at 446. See also Wings ’N’ Curls of Fla., Inc. v. Dennard Enter., Inc., No. 01-90-00861-CV, 1992 WL 63484, at *1 (Tex. Ct. App. Apr. 2, 1992) (affirming the trial court’s order awarding both rescission and actual damages under the DTPA).
178 Id. at 448.
Other courts, however, have interpreted similar Little FTC Acts, such as the California Unfair Competition Law, to limit recovery in a private action to restitution damages, and to not allow for rescission.\footnote{MRW, Inc. v. Big-O Tires, LLC, No. CIV. S-08-1732 LKK/DAD, 2008 WL 5113782, at *8 (E.D. Cal. Nov. 26, 2008). (noting that “because the remedies available to a private party bringing an unfair competition claim are limited to injunctive relief and restitution, the claim could not result in rescission of the franchise agreement itself . . . .”). CAL. BUS. & PROF. CODE § 17203 (2004) (“Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition....”).}

Although not a Little FTC Act, or a franchise disclosure/registration statute for that matter, the Florida Franchise Misrepresentation Act prohibits the making of certain misrepresentations, including omissions, in connection with the sale of a franchise. Specifically, under the Florida Act a person engaged in selling or establishing a franchise or distributorship is prohibited from: (a) intentionally misrepresenting the prospects or chances for success of a proposed or existing franchise or distributorship; (b) intentionally misrepresenting, by failure to disclose or otherwise, the known required total investment for the franchise or distributorship; or (c) intentionally misrepresenting or failing to disclose efforts to sell or establish more franchises or distributorships than is reasonable to expect the market to sustain.\footnote{FLA. STAT. § 817.416(2) (1971). The definition of a “franchise or distributorship” differs significantly from the definition contained in the FTC Franchise Rule and most other state laws; however, the broad definition captures many franchise relationships. See Id. § 817.416(1).} Although the terms rescission and restitution are not used in the Florida Act, a franchisee that successfully brings a cause of action for a violation of the act may recover all money invested in the franchise or distributorship, which includes the return of all franchise fees as well as other incurred expenses in connection with the acquisition of the franchise or distributorship.\footnote{Id. § 817.416(3). See Travelodge Int’l, Inc. v. Eastern Inns, Inc., 382 So.2d 789, 790-91 (Fla. Dist. Ct. App. 1980) (affirming a jury award for the recovery of the initial franchise fee and other related expenses).} The franchisee is also entitled to recover reasonable attorneys’ fees and costs incurred in bringing the action.\footnote{Id.}

\section*{D. Application of Equitable Principles to Statutory Claims}

Even though a claim arises under one of the above described state statutes, at their core rescission and restitution are equitable claims. As such, practitioners must be mindful that equitable defenses may defeat an otherwise viable statutory rescission claim.\footnote{See, e.g., Clapp, 327 N.W.2d 586-87 (opining that equitable defenses are available in an action for statutory rescission under the Minnesota Franchise Law); Peck of Chehalis, Inc., 304 N.W.2d at 100 (ND 1981) (holding that at a minimum, “before a franchisee may rescind a franchise agreement under N.D.C.C. § 51-19-12, he must overcome any equitable defenses raised by the franchisor”).} Likewise, because most statutes do not provide guidance on the factors to be considered when calculating restitution, courts are left to apply common law and equitable principles, as well as their own discretion, to balance the equities between the parties.\footnote{See also restitution discussion, supra section II.D.}
**U-Bake Rochester, LLC v. Utecht** is a recent example of a court applying equitable estoppel to a statutory rescission claim. In *U-Bake*, after operating for almost 2 years, plaintiffs initiated litigation asserting that their “Trademark License Agreement” was in fact a franchise agreement under the Minnesota Franchise Act and the Wisconsin Franchise Investment Law, and sought rescission for, *inter alia*, the purported franchisor’s failure to register and comply with disclosure requirements. After citing cases supporting that both Minnesota and Wisconsin law provide that equitable estoppel may prevent a franchisee from rescinding a franchise agreement based on technical violations of the disclosure/registration statutes, the court held that “the words, conduct, and silence of Plaintiffs and their attorney equitably estop Plaintiffs from now asserting violations of the [Minnesota and Wisconsin franchise laws].” In reaching this conclusion, the court focused on the fact that: (1) plaintiffs, through their attorney (who had suggested revisions that were ultimately incorporated into the agreement and who understood the requirements for a franchise) were aware of the type of business arrangement that constitutes a franchise at the time of execution of the agreement; (2) during the process of reviewing and revising the agreement, plaintiffs never expressed a belief that the terms created a franchise and they left intact the provision expressly disclaiming that the agreement constituted a franchise; (3) plaintiffs engaged in affirmative conduct consistent with the position that the arrangement was not a franchise, including touting the non-franchise relationship as a benefit when seeking an SBA loan; and (4) the plaintiffs only asserted that the agreement constituted a franchise after their sales declined in their second year of operation. According to the court, the defendants relied on the plaintiffs’ words, silence, and conduct when they entered into the agreement without registering as a franchisor and without providing the plaintiffs with an FDD. Under such circumstances, the court held that the defendants would be materially harmed if the plaintiffs were allowed to assert claims inconsistent with their earlier representations and conduct, essentially using “the franchise laws as an escape hatch to undo a business decision they now regret.”

Courts have also held that regardless of the fact that a claim is asserted within the applicable statute of limitations, a franchisee may be deemed to have waived the right to rescind a franchise agreement if: (a) after ascertaining the facts that justify rescission, the franchisee “does any act which recognizes the continued validity of the contract or indicates that he still feels bound under it,” or (b) fails to express an unconditional willingness to tender to the franchisor any benefits received under the franchise agreement. In *Two Men and a Truck/Int'l, Inc. v. Two Men and a Truck/Kalamazoo, Inc.*, for example, the court held that even though the franchisor had violated the Michigan Franchise Investment Law, the franchisees waived their right to rescind the franchise agreement by continuing to operate the franchise for

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187 Id. at *5-6.
188 Id. at *6.
189 Id.
190 Id. at *6-7.
191 *Bagel Enters., Inc. v. Baskin & Sears*, 467 A.2d 533, 541-42 (Md. App. 1983). *See also Chicago Male Med. Clinic, LLC v. Ultimate Mgmt., Inc.*, No. EDCV 13-00199, 2014 WL 7180549 (C.D. Cal. Dec. 16, 2014) (referring to the equitable doctrine as the “sitting on its hands” defense, and explaining that under Illinois law, a franchisee may not “pocket” a rescission claim under the Illinois Franchise Disclosure Act while waiting to see whether continuing under the contract or enforcing the rescission claim is more profitable).
two years after it had knowledge of the violations. The franchisees also were not entitled to rescind because they had not tendered to the franchisor the consideration and benefits received under the franchise agreement. Similarly, in Nat'l School Reporting Serv. v. Nat'l Schools of Cal., Ltd., the court determined that the franchisee was estopped from rescinding the franchise agreement under circumstances where the franchisee knew that the franchisor’s failure to register the franchise agreement violated the California Franchise Investment Law; but instead of exercising its rescission rights, it continued benefitting from the franchisor’s services, name and network, and executed additional agreements with the franchisor.

Unclean hands is yet another example of an equitable defense that may bar statutory rescission claims. In Two Men and a Truck, the court held that in addition to waiver, the franchisees were not entitled to rescind their franchise agreements because they were in breach for failure to pay royalties when they attempted to rescind the agreements. The court in Layton v. AAMCO Transmission, Inc., discussed application of the unclean hands doctrine in a different context. In Layton, the franchisees asserted a claim for violation of the Maryland Franchise Act for failure to disclose that customer complaints had been filed against the franchisor and that the franchisor was negotiating the resolution of the complaints with the Attorneys General from multiple states. As a result of the negotiated consent judgments, the franchisor modified the procedure that triggered the complaints (i.e., disassembling customers' transmissions for diagnostic purposes before informing the customers of the costs, and then requiring customers to pay the disassembly and reassembly costs in the event that they chose not to have the repair service performed), which the franchisees claimed impacted their profits, causing them damage. In granting the franchisor’s motion to dismiss the franchisees’ claim under the Maryland Franchise Act, the court noted that rescission was not available because this was not a case in which a franchisor’s non-disclosure was morally reprehensible or in violation of public policy. Additionally, the court stated that “to the extent [the franchisees] complain that the profitability of their franchise has been diminished by [the franchisor’s]

192 949 F. Supp. at 507.
193 Id.
194 967 F. Supp. 127, 130-31 (S.D.N.Y. 1997). See also Layton v. AAMCO Transmission, Inc., 717 F. Supp. 368, 372 (D. Md. 1989) (noting in dicta that the plaintiffs inequitably delayed filing suit, and that “[b]y waiting for two years before filing suit, plaintiffs have given themselves an opportunity to determine if the profitability of their franchise is acceptable to them and have been responsible for the evolution of circumstances which make impossible the recreation of the conditions which existed in February 1987. In effect, were they seeking rescission, they would be playing a game of ‘heads, we win, tails, you lose.’”); A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., No. 12-CV-1117-KBJ, 2014 WL 4852095, at *14-15 (D.D.C. Sept. 30, 2014) (quoting Layton and holding that the franchisee, who filed suit approximately 3 years after execution of the franchise agreement, would not be allowed to rescind the franchise agreement based on a minor violation of the Maryland Franchise Law).
195 949 F. Supp. at 507.
196 But see Martino v. Cottman Transmission Sys., 554 N.W.2d 17, 21 (Mich. App. 1996) (construing the plain language of the Michigan Franchise Investment Law and concluding that “[w]e will not impose the requirement of clean hands on a franchisee where the MFIL gives a franchisee an unqualified right to rescission upon a franchisor’s violation of the MFIL.”). See also Dollar Sys., 890 F.2d at 173 (holding that despite the franchisee’s gross negligence in failing to perform under the franchise agreement, the franchisee’s misconduct did not rise to the level necessary to apply the doctrine of unclean hands).
198 Id. at 372.
IV. RESCISSION IN A REGULATORY ACTION

While Sections II and III focus on rescission as a remedy in civil cases between franchisors and franchisees, Section IV explores the extent to which a franchise regulatory agency may accomplish a “franchise divorce” by ordering restitution, rescission, disgorgement or other forms of “rescission remedies” as part of an enforcement action. Regulatory rescission is the third leg in the troika (after common law and statutory rescission) for unwinding a franchise relationship.

Why, how and when do franchise regulators get involved in seeking rescission relief for an aggrieved franchisee? Often, it is the aggrieved franchisee looking for “divorce” that instigates the regulatory investigation by filing a complaint with its state’s franchise regulators about alleged sales violations. Franchise regulatory agencies also learn about statutory violations in other ways: by initiating “sting” activities on their own (e.g., walking through tradeshows and surfing franchisor websites); from other government agencies that are investigating the same franchisor; from disgruntled former employees of the franchisor; from the franchisor’s own disclosure document (in particular, from the Item 20 tables and accompanying list of existing outlets); and very often from the franchisor’s competitors. Once armed with enforcement information, franchise regulatory agencies freely share what they learn with one another to improve the effectiveness of franchise law enforcement in the United States.

As a matter of regulatory policy, when a franchise regulatory agency can dispose of an enforcement matter through a consent order – a voluntary settlement agreement between the agency and the franchisor and its owners and management that imposes sanctions for a statutory violation – it will. The use of a consent order spares both the franchise agency and

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199 Id.

200 Most franchise laws confer broad enforcement authority on the designated franchise agency to secure a spectrum of remedies including (i) denial, revocation, or suspension of the franchise registration; (ii) interim and permanent cease and desist orders; (iii) administrative penalties; (iv) prosecution of criminal actions; (v) appointment of receivers; (vi) recovery of penalties and fines; (vii) rescission and restitution and in some cases “other ancillary relief;” and (viii) reasonable attorneys’ fees, investigative expenses, and related costs. This section focuses on rescission remedies available to franchise law enforcement agencies. Reference to “rescission remedies” encompasses any form of relief that involves canceling the franchise agreement and returning money or more to the aggrieved franchisee.

201 The FTC freely shares information and complaints that it receives about the laws that it administers with other federal, state or local law enforcement agencies that belong to the Consumer Sentinel Network. Consumer Sentinel Network, FTC.GOV, https://www.ftc.gov/enforcement/consumer-sentinel-network (last visited June 25, 2015). Through the use of the FTC’s Consumer Sentinel database, states can also readily determine if a specific complaint about a franchise system is isolated or whether other franchisees have made similar allegations to other law enforcement agencies.

202 The FTC’s Rules of Practice express the Commission’s policy favoring consent orders, specifically 16 C.F.R. § 2.31(a) (“Where time, the nature of the proceeding, and the public interest permit, any individual, partnership, or corporation being investigated shall be afforded the opportunity to submit … a proposal for disposition of the matter in the form of a consent order agreement executed by the party being investigated … for consideration by the Commission in connection with a proposed complaint submitted by the Commission’s staff.”). As for state regulatory policies, see Leonard D. Vines, Gina D. Bishop and Rupert M. Barkoff, Damage Control for Violations of Registration and Disclosure Obligations, 24 FRANCHISE L.J. 191, 193 (Winter 2005). The authors conducted an informal survey of state regulators and, among other questions, asked state regulators to rank the types of actions they would most likely take against a violator in order of preference. At the top of their list they ranked “pursuing a consent decree that
the parties involved the time and expense required by a formal administrative hearing or litigation.\textsuperscript{203} However, when an agreement to enter into a consent order cannot be reached, the franchise regulatory agency must initiate a formal administrative or civil enforcement action, depending on the procedures set forth in the applicable franchise statute and regulations, if the agency wants to discipline a franchisor or accommodate a franchisee’s request for a “franchise divorce.”

Appendix C summarizes the scope of each franchise agency’s enforcement authority to seek rescission remedies on behalf of injured parties when a consent order agreement cannot be worked out with the franchisor.\textsuperscript{204} Appendix C identifies:

- Jurisdictions where a franchise agency may award rescission remedies through an agency or other type of administrative action.
- Jurisdictions where the franchise agency or state Attorney General must file a \textit{parens patriae} lawsuit on behalf of parties injured by a statutory violation to secure rescission.
- Jurisdictions where rescission remedies are not mentioned in the statute as among the remedies within the scope of the agency’s authority.
- When rescission remedies are available to a franchise agency, whether the franchise law sheds light on what rescission relief means.
- Whether the statute allows a franchisor to initiate rescission and thereby shorten the statute of limitations for civil (private) litigation.

A. Observations About Achieving Rescission Through Regulatory Actions

Appendix C reveals that, while rescission is generally available to state regulators, franchise laws differ in terms of whether state regulators have authority to order rescission remedies at the conclusion of an administrative hearing without having to initiate a formal civil action to recover rescission remedies for injured citizens.\textsuperscript{205}

According to our analysis, only 3 states – California, Indiana and Virginia - vest the franchise agency with authority to order rescission following an agency hearing without having

\textsuperscript{203} As a strategy for “damage control,” franchise lawyers should encourage their franchisor clients to consider resolving an enforcement inquiry from a franchise regulatory agency through a consent order when an investigation discloses merit to allegations of wrongdoing. See Dale E. Cantone, Steve Toporoff, and C. Griffith Towle, \textit{Keeping the Enforcers at Bay – Handling an FTC or State Franchise Investigation}, in ABA 24TH ANNUAL FORUM ON FRANCHISING, 11 (2001); Vines, Bishop and Barkoff, \textit{supra} note 201.

\textsuperscript{204} Appendix C is designed as a starting point reference and comparative tool. Practitioners should not rely on it as a substitute for checking each applicable statute’s express language.

\textsuperscript{205} Per Appendix C, the franchise statutes in Hawaii, Minnesota, Rhode Island, North Dakota and Washington do not reference any form of rescission relief in describing the remedies available to the franchise agency in a non-criminal matter.
to file a lawsuit first.\textsuperscript{206} All other jurisdictions require the franchise agency to seek rescission through civil litigation.

When a state agency can only obtain rescission remedies by bringing what in essence is a \textit{parens patriae} lawsuit, the burdens of proof and legal defenses in the state’s case are the same as those in a private party’s lawsuit asserting a statutory claim for rescission, reviewed in Section III of this paper. When the state is the plaintiff, a judge fashions the rescission award, not an administrative hearing officer or the agency itself. As a result, when a state agency must go to court to pursue a “divorce” on behalf of franchisees that are the victims of statutory violations, the regulatory leg and statutory leg of the troika are near equivalents.

It is useful to contrast (i) jurisdictions that provide regulators with authority to order rescission remedies through an administrative hearing process, and (ii) jurisdictions that require regulators to bring a lawsuit in order to achieve the same outcome. Among other things, a franchisee looking for a “divorce” should know its fate sooner if regulatory justice can be accomplished through a consent agreement or an administrative proceeding than if the franchise regulator must go to court.\textsuperscript{207}

Getting a regulatory agency to take an enforcement case is no simple matter. There are natural disincentives, namely the jurisdiction’s limited financial and staff resources and competing demands on its time. The regulatory agency may not regard the merits of the case to be strong enough. The franchisee may have private legal counsel making the need for public agency enforcement less compelling.\textsuperscript{208} As public resources are intended to advance the welfare of the general public, regulatory agencies generally do not take cases on behalf of a single plaintiff when there is no accompanying evidence of a pattern of wrongdoing by the defendant.\textsuperscript{209} Furthermore, given budget constraints, some regulatory agencies may be

\textsuperscript{206} The franchise laws in California, Indiana and Virginia each empower the state franchise agency with authority to order rescission after conducting a hearing where defendants may produce their own evidence. While the FTC Act empowers the FTC to apply to an administrative law judge for consumer redress for Amended FTC Rule violations instead of filing a civil action, as a matter of practice, the FTC rarely pursues the administrative option, which involves a trial-type proceeding conducted under the Commission’s Rules of Practice. Cantone, Toporoff and Towle, \textit{supra} note 202, at 11 note 20. It is beyond the scope of this paper to speculate if a violator’s due process protections and appeal rights in agency hearings are comparable to their rights in civil litigation.

\textsuperscript{207} Accomplishing the “divorce” between franchise parties through regulatory enforcement actions is the easier part; securing the actual “marital property settlement” – that is, getting the franchisor to return franchise fees and make other restitution – can be a struggle regardless of whether a regulatory agency pursues rescission relief administratively or through litigation. The FTC’s case against National Business Consultants (NBC) is a perfect example. The FTC originally filed its franchise enforcement action in 1989 against NBC and its owner for promoting a business opportunity that promised immediate consulting assignments and revenue of $35,000-$100,000 per year in violation of the federal franchise rule which, back then, regulated both business format franchises and business opportunities. By 1991, a federal district court in Louisiana ruled in the FTC’s favor and entered a $3 Million judgment against the defendants. But it took the Department of Justice over 23 years to reach a settlement and repayment terms with NBC’s owner. In 2015, the FTC will finally begin paying refund checks to consumers representing 41% of the money they lost more than two decades earlier in the unlawful business opportunity scheme.

\textsuperscript{208} Cantone, Toporoff and Towle, \textit{supra} note 202, at 24 (observing that “most franchisees who complain to a state do not have counsel”).

\textsuperscript{209} \textit{id.} The article reviews the FTC enforcement history between 1993 and 2000 and state enforcement practices and observes that franchise regulators look for patterns of illegal behavior and generally will not bring an enforcement action on the basis of an isolated complaint due to limited resources.
disinclined to seek rescission or restitution in an enforcement action if they believe the defendant will not be able to perform.\footnote{According to a United States General Accounting Office report published in 2001, the FTC considers the proposed respondent's financial ability to pay consumer redress in deciding whether to file a lawsuit for regulatory relief. \textit{U.S Gen. Accounting Office, GAO-01-776, Federal Trade Commission: Enforcement of the Franchise Rule} (2001), \url{http://www.gao.gov/assets/240/231939.pdf}.}

For aggrieved franchisees, while bringing a civil lawsuit against a franchisor is both costly and time-consuming, there are drawbacks to relying on a government enforcement action.\footnote{A franchisee that can convince a regulatory agency to take its case is spared the enormous personal expense of private litigation.} A franchisee that pursues a statutory claim on its own retains control over the timing, substance and ultimate resolution of the case; a franchisee that relies on public enforcement has none of these advantages. Furthermore, once a franchisee brings its complaint to the attention of public law enforcers, the franchisee may be unable to withdraw its complaint. This may stand in the way of the franchisor offering to settle the case with the complaining franchisee since the franchisee has no control to stop the franchise agency “train” once it has left the station and the agency decides to bring an enforcement action against the franchisor.

B. Comparing Regulatory Attitudes About Rescission

Appendix C reveals that jurisdictions differ in how they describe the rescission remedies available to a regulatory agency. For example:

- Wisconsin’s franchise law vests the state Attorney General with authority to bring a civil action for statutory violations “to restore to any person any pecuniary loss suffered.”\footnote{Wis. Stat. § 553.54(2)(a) (2015).}

- The Amended FTC Rule empowers the FTC to obtain “consumer redress” resulting from unfair or deceptive acts or practices, and defines consumer redress non-exhaustively to include the “rescission or reformation of contracts, the refund of money or return of property.”\footnote{16 C.F.R. § 0.17 (2015).}

- Rhode Island’s franchise law authorizes the state’s franchise agency to bring a civil action to recover “appropriate ancillary relief” for injured parties.\footnote{R.I. Gen. Laws § 19-28.1-18(c)(2) (2015).}

- The rest of the state statutes that empower the state agency to obtain rescission remedies use the classic terms \textit{restitution} or \textit{rescission} (or in a few cases use both).\footnote{California (“rescission, restitution or disgorgement”); Illinois (“rescission”); Indiana (“rescission, restitution, or disgorgement”); Maryland (“restitution”); Michigan (“restitution”); New York (“restitution”); Oregon (“rescission”); South Dakota (“rescission”); Virginia (“rescind” “restitution”); Washington (“rescission”).}
In practice, do these different terms yield different outcomes or reflect different regulatory policies about what regulators want to accomplish when they seek rescission remedies?

The simple answer is no. The different terms used in franchise statutes to describe rescission remedies all describe fundamentally the same remedy.\textsuperscript{216} Differences in statutory terms do not appear deliberate or purposeful and most likely reflect legislative confusion over what the operative words mean.\textsuperscript{217} We find no authority suggesting that differences in how statutes describe rescission remedies produce materially different outcomes when state regulators order a “divorce” between franchise parties or reflect materially different public policies about rescission.\textsuperscript{218}

Supporting this conclusion is the Restatement (Third) of Restitution and Unjust Enrichment (“Restatement”) adopted in 2011, which describes rescission colloquially as a term of art. Rescission, according to the Restatement, is “the common, shorthand name for a composite remedy (more fully, ‘rescission and restitution’) that combines the avoidance of a transaction and the mutual restoration of performance thereunder.”\textsuperscript{219} Based on the

\textsuperscript{216} As explained in the Introduction, \textit{rescission} and \textit{restitution} are two different legal concepts that operate in tandem: \textit{rescission} is the remedy that negates the contractual relationship, while \textit{restitution} is a form of damages that attempts to measure the benefit conferred on the breaching party, rather than the profits the injured party would have recovered but for the statutory violation. Using the marriage analogy, \textit{rescission} orders the divorce between franchise parties while \textit{restitution} accomplishes the marital property settlement. See McKnew and Karp, supra note 6, at 38 (“restitution follows rescission”).


\textsuperscript{218} Because rescission remedies apply in many different contexts unrelated to franchising, practitioners might consider looking outside franchise authority for enlightenment as to what rescission remedies mean for franchise parties. Surprisingly, this approach yields little insight. Statutes generally do not define \textit{rescind, rescission or restitution}; instead they use \textit{rescission} freely without defining it, as if the term were universally well-understood. See e.g., CAL. CIV. CODE § 1691 (West 2015) (“to effect a rescission a party to the contract must …”). The terms \textit{rescind, rescission and restitution} are used throughout the Uniform Commercial Code, but never defined. UCC commentators remark that the UCC’s references to \textit{rescission} are unhelpful and ambiguous. 1 JAMES J. WHITE, ROBERT S. SUMMERS & ROBERT A. HILLMAN, \textit{UNIFORM COMMERCIAL CODE} § 9:1 (6th ed. 2012) (“A word should be devoted to that ambiguous action called “rescission.” At least in early cases, courts used the term in several different ways. Some used the word “rescission” to encompass what the Code defines as a rejection or revocation of acceptance; others used it to mean simply the buyer’s act in returning the goods; still others used it to cover the buyer’s cancellation of the executory terms of the contract; and finally, some called it the buyer’s cause of action for fraud …”)

\textsuperscript{219} \textit{RESTATEMENT OF RESTITUTION} § 54 (2011). A primary goal of the 2011 Restatement is to “clear up prevailing confusion” about the rescission remedy. Id. at Part II, Ch. 4, Topic 2, Introductory Note. The authors of the Restatement of Restitution attribute the confusion to the original and Second Restatements of Contracts adopted in 1932 and 1981 respectively. The older Restatements used the term \textit{restitution} to describe both the rescission and restitution legal concepts. In doing so, the older Restatements muddled the two legal concepts. The older Restatements have undoubtedly influenced jurisprudence and legislatures writing franchise laws before 2011. Consequently, pre-2011 judicial decisions and franchise laws that refer to \textit{rescission}, but not \textit{restitution}, or vice versa, or both or something else to describe the process of unwinding a franchise relationship reflect muddled misunderstandings about rescission and restitution that the Restatement of Restitution has set out to fix. Authors of prior ABA Forum materials addressing rescission note this confusion and the difficulty of trying to rationalize across jurisdictions what rescission or restitution should look like in any given franchise case. See, for example, McKnew and Karp, supra note 6, at 29 (“usage of the terms has often become confused”). The Restatement of Restitution finally explains that the pre-2011 franchise cases and laws addressing rescission remedies cannot be completely rationalized. Consequently, there is no need to speculate about whether different terms used in franchise statutes mean different things or assume that when the term \textit{rescission or restitution, but not both}, appear in franchise
Restatement’s non-technical explanation of the rescission remedy, we suggest that practitioners not read too much into the differences in how franchise laws describe a state’s authority to obtain rescission remedies for aggrieved franchisees.

Whether pursued by a regulator or by a private litigant, rescission and restitution find their roots in equity principles and therefore allow wide discretion to whomever fashions the remedy, be it the regulatory agency or a court. Only a handful of state statutes supply any guidance to inform the restitution calculation. Other than the limited guidance in a few state statutes, franchise agencies offer no transparency into their own policies for what they expect a rescission remedy to accomplish.

As noted, when an investigation discloses that allegations of wrongdoing have merit, the FTC and state regulatory agencies as a matter of policy first try to secure compliance through a consent order. For the sake of judicial economy, a regulatory agency’s consent proposal routinely will require the franchisor to offer to rescind existing franchise agreements and provide some form of restitution to franchisees whose rights were violated. Even when a regulatory agency pursues a formal enforcement action, rescission and restitution are frequently components of the complaint.

Generally, the benefits to all interested parties – the regulatory agency, the franchisor and aggrieved franchisees – in quickly resolving a matter by agreeing to a consent order that incorporates rescission and restitution far outweigh the disadvantages. Nevertheless, all parties involved – the regulating agency, accused franchisor and aggrieved franchisees -- often have widely differing notions of what rescission should entail, especially when the franchisee has received training and assistance or has opened the franchised business, and particularly when the franchise business has been profitable.

Having insight into regulatory attitudes about the rescission remedy should help franchisors defend themselves in public enforcement actions and negotiate consent agreements more effectively. It should also help aggrieved franchisees who are not represented by legal counsel better evaluate regulator-prompted rescission offers and present counter proposals for rescission that may yield them a richer outcome than the rescission offer a franchisor is able to broker with a franchise agency to settle an enforcement dispute through a consent order.

In developing policies regarding what a fair rescission remedy should look like, regulators contend with the same imperfect legal concepts that plague private litigants who bring and defend common law and statutory claims for rescission and restitution. As noted in

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220 See Appendix C, Voluntary Rescission. The limited guidance that exists about regulatory rescission can be found in a couple of different state laws that address the process by which a franchisor may voluntarily offer rescission to franchisees that are the victims of statutory violations and thereby shorten the limitations period that franchisees have to bring a civil suit for rescission based on the same alleged wrongdoing. There is no guaranty that the guidance for calculating restitution in the handful of state laws that recognize a voluntary rescission process will be respected by the state’s franchise regulator in designing a restitution award as part of a consent order agreement or in seeking rescission remedies through an administrative or civil enforcement action.

221 See Cantone, Toporoff and Towle, supra note 202.

222 Anecdotally, franchisees who receive a regulator-prompted rescission offer may not consult an attorney in deciding whether to accept it or not or to negotiate for better terms.

223 Restatement of Restitution § 1 cmts. b and c. The Restatement of Restitution calls restitution “predominantly the
Sections II and III discussing rescission relief under the common law and for violation of franchise statutes, respectively, courts have different ideas about the remedial goals that rescission should serve. When it comes to regulatory rescission, the fundamental question is the same: is the goal of regulatory rescission (i) to return the aggrieved franchisee to its pre-contract position; or (ii) to strip a franchisor found to have violated the law of its unjust gain; or (iii) both; or (iv) something in between?  

If legal scholars are confused about the goals of a rescission remedy, it is no surprise that franchise regulators may hold different views about what rescission remedies should accomplish when they pursue the remedy in enforcement actions or negotiate consent agreements on behalf of injured franchisees. The mission of franchise regulators is to enforce the law. When franchise regulators seek rescission remedies, they may be more concerned with punishing the violator by stripping the franchisor of any money or other benefits secured from an unlawful arrangement or deceptive practice than with analyzing each injured franchisee’s own situation and restoring that party fully to its unique pre-contract position. Regulators may strictly focus on the violator’s unjust enrichment as a means of sending out a public message that violators will be punished without regard to whether claimants received anything of value from the unlawful arrangement. Regulators may not concern themselves with the fact that aggrieved franchisees may have benefited from training, advertising support, use of the franchisor’s name, operating assistance, or group purchasing power, benefits that might enable the claimant to compete with the franchisor after the parties’ contractual relationship is unwound.

It has been suggested that, when it comes to ordering rescission, “states generally try to take a middle ground in calculating rescission -- taking the position that the franchisee should be placed in the position it would have been in before buying the franchise but not receive a ‘windfall’ and retain any benefits from the franchise without compensating the franchisor.” It is impossible, however, to pin franchise regulators down as a unified group and confirm that they all take similar reviews about the rescission remedy especially given the backdrop of disuniform franchise laws, as evident in Appendix C.

Because rescission remedies potentially can involve complex calculations, unless a franchise law directs the regulatory agency to consider specific types of costs or obligations, franchise regulators are most likely to focus on ensuring that the franchisor returns to the franchisee all franchise fees, royalties and other money paid for the franchise rights, and may not focus on placing a fair value on the benefits that a franchisee received during its tenure as a franchisee. While franchise regulators may require a violator to cover a franchisee’s economic losses, regulators may not always require the franchisee to disgorge its profits from the franchise business or deny a remedy to profitable franchisees.

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224 Id. In describing restitution awards in non-franchise cases, the Restatement of Restitution observes: “There are cases in which the essence of a plaintiff’s right and remedy is the reversal of a transfer, and thus a literal ‘restitution,’ without regard to whether the defendant has been enriched by the transfer in question. Conversely, there are cases in which the remedy for unjust enrichment gives the plaintiff something—typically, the defendant's wrongful gain—that the plaintiff did not previously possess.”

225 Cantone, Toporoff and Towle, supra note 202, at 25. The suggestion may be based on the authors’ own anecdotal evidence since the authority the authors cite as support for their position involve private litigation where the state was not the plaintiff.
Most enforcement cases are resolved by a consent order agreement, but not all jurisdictions publish these orders where they are readily accessible for public review, which makes it difficult to draw conclusions about regulatory attitudes regarding rescission remedies. Consequently, it is important that franchise parties appreciate that there are multiple approaches to measuring rescission remedies. From a franchisor’s perspective, a franchise agency’s particular view may be too generous or not give sufficient weight to affirmative equitable defenses that the franchisor may have against particular franchisees, including a franchisee’s unclean hands and breach of contract. Once a franchisee has commenced operations under a franchise, it may be very difficult for a franchise agency to frame a fair and effective offer of rescission that recognizes in the rescission equation the value of benefits conferred. A franchise regulator may request rescission for even technical violations (e.g., miscounting the pre-sale FDD delivery period) and, in that context, the franchisor may feel that the rescission remedy is extreme and unfair. Of course, if a franchisor is unable to convince the regulator to modify its rescission proposal, the franchisor will need to consider the cost of potentially defending administrative or judicial enforcement proceedings and their associated consequences.\footnote{A defendant’s recourse, if it believes the state’s remedy is overreaching, is to initiate litigation challenging the agency’s decision, an investment requiring the dedication of significant resources towards a highly uncertain outcome, given that franchise laws have historically been treated as consumer protection laws and broadly construed. However, it is worth noting a recent decision under the Maryland franchise law, \textit{A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.}, No. 12-CV-1117-KBJ, 2014 WL 4852095 at *14-15 (D.D.C. Sept. 30, 2014), in which the court, despite finding that the defendant had sold an unregistered franchise in violation of Maryland’s franchise law, declined to award the plaintiff franchisee money damages or rescission describing the statutory violations as “an oversight” and “generally harmless” and attributing the franchisee’s losses to the franchisee’s “own conduct.”}

From a franchisee’s perspective, a franchise agency’s rescission offer may not adequately restore the franchisee to its pre-contract position or cover the franchisee’s third party liabilities that the franchisee incurred as a result of buying the franchise.\footnote{These liabilities may include loans taken out to buy the franchise business, trade debt, lease obligations to a third party landlord; special “sunk” costs in adopting a particular business system that may not be easily translatable to the franchisee’s next business; costs to train employees in the franchisor’s operating methods; and similar types of indirect investment costs dedicated to the franchise brand that have little utility once the franchise relationship ends. If the franchisee finds a rescission offer ordered by the franchise agency to be too low, the franchisee’s recourse is to pursue its own private right of action against the franchisor, something that a franchise agency is powerless to stop.}

When a regulator must apply to a court for rescission remedies, the court’s restitution award should be guided by legal precedent created in private litigation cases under the same franchise law.\footnote{There are numerous examples of courts willing to be guided by decisions rendered by courts in other jurisdictions addressing similar facts.} In the handful of jurisdictions where the franchise statute empowers a franchise agency to hear enforcement cases and order rescission without prior judicial review, and when regulators broker consent agreements with franchisors, franchise agencies have a freer hand in deciding what a fair rescission remedy should be than they have as a plaintiff in a civil lawsuit.

The lack of practical guidance about a state’s regulatory attitudes towards rescission may confound a franchisor that finds itself the target of a regulatory investigation in multiple jurisdictions, each looking to recover rescission remedies for franchisees under their jurisdiction. This is especially sobering for a franchisor that wishes to explore a coordinated global solution by negotiating a settlement fashioned as a consent agreement with all prosecuting jurisdictions. There is no assurance that the franchisor will be able to align all of the franchise regulators to
agree to a common rescission award given the lack of any common stabilizing policy perspective about the remedy.

C. Comparing Regulatory Approaches to Rescission

The following summarizes some of the highlights of Appendix C regarding each jurisdiction’s authority to obtain rescission remedies for its citizens. Where the information was readily available, we highlight representative administrative enforcement actions since 2007 involving rescission remedies.229 Despite the fact that a franchise law may not expressly authorize the state franchise agency to recover rescission remedies, we found instances where regulatory agencies included rescission remedies as part of a cease and desist order.

1. FTC Rule

The FTC Act empowers the FTC (through its Bureau of Consumer Protection) to obtain “consumer redress” resulting from unfair or deceptive acts or practices. Section 436.9 of the Amended FTC Rule identifies nine different triggering events each as an unfair or deceptive act or practice.230

Consumer redress includes (without limitation) “rescission or reformation of contracts, the refund of money or return of property.” However, consumer redress requires initiating a formal court proceeding because the FTC lacks authority to issue rescission on its own. Proof of the plaintiff’s reliance is not required for consumer redress. However, the FTC must demonstrate that the franchisor’s conduct was such as “a reasonable man would have known under the circumstances was dishonest or fraudulent.”

While the FTC publishes enforcement actions on its website, we found no enforcement actions taken by the FTC against a business format franchise since the Amended FTC Rule went into effect in 2007, let alone any in which consumer redress in the form of rescission remedies were part of a consent order agreement or enforcement ruling.231 Since 2007, the few federal enforcement cases ordering rescission remedies have all involved unlawful business opportunities.

229 Not all states make their enforcement actions publicly available. Some states publish case names with little additional information relevant to whether a consent order or settlement included rescission. See Appendix C for further information. This section is confined to enforcement actions involving business format franchise and does not address enforcement actions securing rescission for purchasers of business opportunities.

230 The nine triggering events include: (i) making a claim that contradicts information required to be disclosed in the FDD; (ii) misrepresenting that a person bought a franchise or can provide independent and reliable information about their experience as a franchisee; (iii) providing information amounting to a financial performance representation (“FPR”) without having a reasonable basis or written substantiation for the information when the representation is made or without including specific disclosures required by the Amended FTC Rule; (iv) not providing written substantiation for FPRs to a prospective franchisee or the FTC upon reasonable request; (v) not providing an FDD to a prospective franchisee early in the sales process upon reasonable request; (vi) not providing quarterly updates to a prospective franchisee upon reasonable request; (vii) providing a prospective franchisee with a materially different form of franchise agreement for signing than the version attached to the FDD (unless the franchisor notifies the prospect about the material differences at least 7 days before signing); (viii) disclaiming or requiring a franchisee to disclaim reliance on representations in the FDD; and (ix) failing to refund any money according to refund terms disclosed in the FDD.

231 Cases and Proceedings, FTC.gov, https://www.ftc.gov/enforcement/cases-proceedings (last visited July 1, 2015). We tried several times to verify this information with someone in the FTC and, as of the date this paper was presented for publication, our efforts remained unsuccessful.
2. California

California is one of the few states where a state franchise law expressly vests the state franchise agency with authority to award “ancillary relief” for “rescission, restitution or disgorgement or damages” without formal court action. In civil (private) actions, reliance is not required for statutory violations involving failure to register; failure to make timely disclosure; failure of a large franchisor to comply with exemption conditions; material misstatements or omissions in a registration application; material misstatements or omissions of information required to be disclosed to a prospective franchisee; and violation of an exemption condition. Presumably, reliance is not required to obtain “ancillary relief” through an administrative hearing for the same predicate violations where the California statute dispenses of reliance in a civil lawsuit. California has a voluntary “notice of violation” process.232

The California Department of Business Oversight (the “CA DBO”) publishes concluded enforcement actions on its website.233 Notable enforcement decisions by the CA DBO since 2007 involving business format franchises in which the CA DBO addressed the rescission remedy include the following:

- http://www.dbo.ca.gov/ENF/pdf/2015/Quick%20Mart%20Holdings%20Inc%20-Stipulation%20and%20Agreement.pdf. Stipulation Agreement dated December, 17, 2014 between the CA DBO and Quick Mart Holdings and its control person imposing administrative penalties of $50,000 and cease and desist orders and additionally requiring respondents to offer a full refund of all fees paid by all existing or former franchisees (whether called “licensees” or otherwise) in California. For franchisees that had opened a convenience store, the Stipulation provides, “no credits or benefits paid to, or received by, a franchisee shall offset the Refund Payment.”

- http://www.dbo.ca.gov/ENF/AdminDecisions/pdf/2012090719.pdf. Decision of the CA DBO dated January 13, 2014 in the matter of Pho Citi Franchising Company and its owners. Despite finding numerous violations of the California Franchise Investment Law in connection with the sale of three different franchises including unregistered franchise sales, improper pre-sale disclosure and fraud, the CA DBO refused to order rescission or restitution. In two cases, regulatory relief was declined because two franchisees had filed their own civil actions which were pending, and in the third case, there was evidence of the franchisee’s own misconduct. The decision did impose administrative penalties, repayment of attorneys’ fees and standard cease and desist orders.

- http://www.dbo.ca.gov/ENF/pdf/p/PlayNTrade.pdf. Decision of the CA DBO dated April 14, 2009 in the matter of Play N Trade Franchise and its principal officers. The regulatory decision is notable for the severe punishment meted out by the CA DBO for multiple, but seemingly technical, omissions not involving active fraud.234 The compounding of multiple omissions by the same

232 See discussion in Section V, infra.

233 See Appendix C. For those state regulatory agencies that publish their enforcement actions on their website, Appendix C provides a link to the page with concluded enforcement actions.

234 See Rochelle Spandorf, Crouching Tiger, Franchise Regulators Pounce on Franchisors, 19 Bus. L. Today 49
operators infecting two different franchise systems led California's regulators to impose heavy fines, revoke each franchisor's right to sell franchises in California, and order the operators to offer all California franchisees the chance to rescind their franchise agreements and receive their franchise fees back even if the franchisee had not relied on a defective disclosure document.

- http://www.dbo.ca.gov/ENF/pdf/l/lvm_consentorder.pdf. The August 29, 2007 order against LVM Franchising, Inc. and its owner reduced a restitution order issued 4 months earlier from $60,000 based on a single unregistered franchise sale to just $22,500 “to achieve ultimate fairness.” The amended decision says the defendant presented evidence convincing the CA DBO that its initial restitution award was too high.

- http://www.dbo.ca.gov/ENF/pdf/2014/FHVending,LLC-StatementofIssues-StopOrder.pdf. In 2013, the CA DBO entered into a consent decree with franchisor, Fresh Healthy Vending, LLC, that revoked its registrations in 2011 and 2012, required restitution to franchisees in California, and denied its pending renewal application based on evidence of fraudulent sales practices. Sometime afterwards, the CA DBO discovered the franchisor had sold at least 3 new franchises in 2012 and advertised the availability of Fresh Healthy Vending franchises during a time when the franchisor was not registered. The CA DBO criticized the franchisor's management for shoddy oversight over franchise sales practices. It also found the franchisor's control person exposed “prospective franchisees to unreasonable risk” based on separate “currently-effective injunctive orders” issued by California, Washington and Australian franchise regulators against the control person for unlawful franchise sales activities. The 2013 decision suspended the franchisor’s right to register to sell franchises in California for two years.

- http://www.dbo.ca.gov/ENF/pdf/2010/GreenOnBlue_CDR.pdf. In the matter of Yogurberry Franchising Company, the franchisor and its control person were jointly and severally ordered to pay restitution of $2,339,400.00 based on 9 counts of unlawful franchise sales (unregistered franchises, failure to provide a FDD, and fraud) in addition to administrative penalties and other relief.

3. **Hawaii**

The only reference to rescission in the Hawaii statute is in the context of a civil (private) action. Despite the lack of any reference to an administrative rescission remedy in the Hawaii statute, the Hawaii website discloses an enforcement action in the matter of Shannon Fuller and [additional text].
E-Z Roadside, LLC, where the state issued a cease and desist order and ordered rescission after finding that the respondents had sold an unregistered franchise.\(^{235}\)

4. **Illinois**

The Illinois franchise law authorizes the Administrator to seek restitution by instituting proceedings in state court, but does not vest the franchise agency with authority to award or order rescission or restitution through an administrative proceeding.

5. **Indiana**

The Indiana franchise law authorizes the franchise agency to order restitution following an administrative hearing. While reasonable reliance is a necessary element for a civil private action for fraud, deceit or misrepresentation, it is unclear if a franchisee’s reasonable reliance is required in a regulatory enforcement action. The answer may depend on the nature of the underlying violation (e.g., reasonable reliance may be required when the violation is based on fraud, but not required when the violation is based on the sale of an unregistered franchise).

6. **Maryland**

Restitution is among the remedies available to a court in an action brought by the Maryland franchise agency for a statutory violation. The franchise agency lacks inherent authority to order restitution through an administrative agency proceeding.

7. **Michigan**

Restitution is among the remedies available to a court in a civil action brought by the Michigan Attorney General to enforce the Michigan statute. There is no provision in the statute vesting the Attorney General with authority to order restitution remedies by administrative order or at the conclusion of an administrative hearing. Reasonable reliance is a necessary element for a civil (private) action for statutory fraud and, since the Michigan Attorney General can only obtain rescission by initiating a lawsuit, it is assumed that reasonable reliance is also a necessary element of the state’s statutory fraud case. Michigan has a voluntary rescission process.\(^{236}\)

8. **Minnesota**

Although there is no reference in the Minnesota statute authorizing the state franchise agency to seek rescission remedies even through a court action, the Minnesota CARDS website lists numerous consent order agreements resolving enforcement actions by the Minnesota Department of Commerce in which a franchisor agreed to offer rescission to franchisees who bought unregistered franchises.\(^{237}\) In using “rescission,” the consent orders appear to have

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\(^{236}\) See discussion in Section V, *infra*.

required the franchisor to refund franchise fees to franchisees electing rescission although the orders themselves are not specific.

9. **North Dakota**

The franchise agency has authority to recover civil penalties, but nothing in the statute authorizes rescission in an action brought by the state. Rescission is only referenced in connection with civil (private) actions. North Dakota has a voluntary rescission process: see discussion in Section V.

10. **New York**

There is no process for administrative hearings in the New York statute. While the Department has broad investigatory authority, it must file a lawsuit to recover restitution. New York has a voluntary rescission process similar to Michigan’s, discussed in Section V.

11. **Oregon**

The state franchise agency may bring a state court action to recover any relief on behalf of injured parties that an individual could recover in civil (private) litigation, which includes an action for rescission. The implication is that the Oregon common law would inform the court’s calculation of the rescission remedy for violation of Oregon’s franchise law.

12. **Rhode Island**

A court may grant "appropriate ancillary relief" in any civil action brought by the state franchise agency. The statute cuts off claims 90 days after a franchisee receives “a rescission offer in a form approved by the franchise agency.”

Rhode Island publishes concluded enforcement actions on its website. Since 2007, the most interesting decision is a 2011 appellate ruling by the Rhode Island Department of Business Regulation involving CRD Enterprises (“CRD”), a Jan-Pro Cleaning Systems subfranchisor or area representative whose licensing rights required that it register to offer and sell Jan-Pro franchises in Rhode Island. CRD appealed an administrative decision ordering it to offer rescission to all Rhode Island franchisees that had purchased unregistered franchises during a three year period. CRD’s blamed the unregistered franchise sales on turnover in the staff position responsible for filing its franchise applications and the state’s failure to notify CRD that its registration had expired. CRD also argued that it should not have to offer rescission to franchisees who failed in business due to challenging economic conditions or poorly-run operations. The state rejected CRD’s excuses and said Rhode Island’s franchise law compelled it to order rescission for all 39 unregistered franchises sales regardless of the fact other reasons might explain the franchisees’ business failure. The state also showed no sympathy to the

238 *Rhode Island Department of Business Regulation: Department Decisions*, RI.gov, http://www.dbr.state.ri.us/decisions/decisions_securities.php?fran (last visited July 1, 2015). Several consent agreements show that franchisors found to have sold unregistered franchises agreed to offer rescission to the affected franchisee. The specific restitution order is not reflected in the consent agreement, but it is presumed that rescission, at a minimum, involved returning franchise fees to a franchisee. There is no indication whether rescission required the franchisor to cover the franchisee’s losses or other obligations incurred as a direct result of the illegal franchise or required the franchisee to give back any property to the franchisor or if the award was offset by the value of benefits received by the franchisee.
owner’s lament that it would face “financial ruin” by having to rescind all 39 unregistered franchises, noting “the statute does not evaluate whether rescission should be offered but rather already allows it when a franchisor was not registered” and “the Department would be remiss in enforcing its statutory obligations consistently and uniformly to all franchisors if it did not order such notice to be given.” Unfortunately, the decision sheds no light on the restitution calculation.

13. **South Dakota**

Rescission cannot be ordered as an administrative remedy. By filing a civil action, the Attorney General may recover the same relief as a private litigant, which includes the right to sue for rescission for specific violations. It does not appear that the violations supporting rescission include fraud. A call to Melita Hauge at the South Dakota Division of Securities confirms that the franchise agency does not publicly disclose enforcement actions.

14. **Virginia**

The state franchise agency may, by judgment entered after a hearing on 30 days’ notice to the defendant, “request” that the franchisor rescind a franchise and make restitution to the injured franchisee if the state proves the defendant has committed statutory fraud. The Commission does not need to commence a civil action. The franchisee also has certain statutory rights to void the franchise agreement as noted in Appendix C.

Virginia maintains a searchable database for franchise enforcement actions, but the information publicly available is limited to a very short summary that does not describe the underlying dispute or any details about the resolution reached by the state and respondents.239

15. **Washington**

The state franchise agency has authority to recover civil penalties, but nothing in the statute authorizes rescission in an action brought by the state either administratively or in court.

Washington maintains a searchable database for franchise enforcement actions, but the information publicly available does not describe the underlying dispute or any details about the resolution reached by the state and respondents.240

16. **Wisconsin**

The Attorney General or a district attorney may obtain restitution remedies by initiating a court proceeding. There is nothing in the statute that vests the state franchise agency with authority to issue restitution remedies as part of an administrative proceeding or otherwise, without initiating a court proceeding. The judgment by the court may include an order “to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action if proof of the pecuniary loss is submitted to the satisfaction of the court.”241 Restitution

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239 *SCC DocketSearch, SCC.VIRGINIA.GOV*, http://www.scc.virginia.gov/docketsearch (last visited July 1, 2015). The website reports the statutory provisions implicated in the state’s case against the franchisor parties and “settlement” without supplying any details about the case or the settlement.

240 *Enforcement Actions, WASHINGTON STATE DEPARTMENT OF FINANCIAL INSTITUTIONS*, http://www.dfi.wa.gov/laws-enforcement/dfi-enforcement-actions (last visited July 1, 2015). The website provides scant details regarding enforcement cases and whether rescission or restitution was ordered.

241 The only case that discusses the “pecuniary loss” language in the Wisconsin statute is *Lueck’s Home Imp., Inc. v.*
remedies are not available if the franchisor can show that the injured party was aware of facts that would prevent recovery of restitution in a civil action.

Wisconsin apparently posts its enforcement decisions online, but the database is not searchable.242

V. OFFENSIVE RESCISSION

In an informal survey conducted around 2004 asking state regulators to rate the significance of various factors that might influence their decision to bring a formal enforcement action against a franchisor found to have violated a franchise sales law, regulators ranked as the most important factor the franchisor’s self-reporting of the violation to the state regulator.243

This is not to say that self-reporting is always the right move when a franchisor becomes aware that it has, or might have, violated a franchise statute. The decision to self-report is actually quite complicated. Among the considerations in deciding whether to self-report are (i) whether the same violation has taken place in other states; (ii) whether the franchisor wants to expand using the same business model; (iii) whether the violation is technical or more fundamental (compare the sale of an unregistered franchise versus miscalculating the FDD delivery period by a day or two); (iv) whether the violation is an isolated event or a pervasive practice; (v) how well the potential franchisee claimants have performed in business (assuming they have opened for business); and (vi) whether evidence of the violation is clear-cut or conflicting and whether the franchisor may have legal defenses that a regulator may not be willing to explore.244

Early self-reporting may nip unlawful sales activities in the bud and reduce the franchisor’s overall liability risks. Some experienced practitioners suggest self-reporting will also result in a more lenient enforcement consequence.245 The downside of taking a proactive approach, however, is that a franchise regulator may condition resolution of the violation on the franchisor notifying every franchisee in the jurisdiction that may have suffered the same violation, even those that operate profitably or did not experience any damage because of the alleged violation. Suddenly the franchisor may have numerous rescission requests from

Seal Tite Nat., Inc., 419 N.W.2d 340, 342 Wis. (Ct. App. 1987), which described the restitution remedy under the Wisconsin Franchise Investment Law as an equitable remedy: the “concept of restitution is grounded on traditional equitable principle that once equity jurisdiction attaches the court may grant full and complete relief.”


243 Supra note 201, at 192.

244 Id. at 197-98. The article explores the countervailing considerations why a franchisor might choose not to self-report, noting “many factors come into play, and a judgment call cannot be made with any certainty as to the consequences.” See also Dale E. Cantone, Kim Lambert, and Karen C. Marciano, So It Really is a Franchise: Bringing Non-Compliant Franchisors Into Compliance, in ABA 37TH ANNUAL FORUM ON FRANCHISING W18, at 23-26 (2014).

245 Modell, Vines and Goodhard, supra note 202, at 42 ("In the authors' own experience and anecdotally, a franchisor who, in recognition of a violation, has made, or is prepared to make, a rescission offer to a franchisee affected by a violation often is able to satisfy regulator concerns about a violation quickly, and without further sanction other than, perhaps, a nominal administrative assessment.").
franchisees who might not otherwise have suspected that anything went wrong in the sales process.246

Other practitioners take a more cautionary view. The authors of the informal survey of state regulators note: “In some states, however, a self-disclosing franchisor will receive no different treatment than the franchisor that does not report its violation. Furthermore, the human factor cannot be overlooked: How the state responds may be a function of which state official is assigned to the case.”247

Bottom-line: whether to self-report or not involves a thorny judgment call. Nevertheless, once a violation is discovered, the franchisor should alert its legal counsel about the facts and together they should size up the situation by identifying the affected franchisees or prospective franchisees and learn more about their circumstances.248 At a minimum, the franchisor should take steps to prevent new violations from proliferating and weigh the pros and cons of self-reporting.

When a franchisor decides to self-report, depending on the states where affected franchisees are located, it may have the opportunity to significantly shorten the statute of limitations that the affected franchisee might otherwise have to bring a civil claim by delivering a written rescission offer to the affected franchisee. Appendix C identifies the states that formally recognize this process. In most states, in order to shorten the statute of limitations, the rescission offer must be approved by the franchise regulatory agency. Some states refer to the offer simply as a rescission offer (e.g., Michigan, New York, Rhode Island, South Dakota), while other states refer to it as a “Notice of Violation” process (e.g., California, Illinois, Wisconsin). In all cases, taking advantage of the process has immediate benefits: (i) it will significantly shorten the limitations period that the notified franchisee has to file a civil lawsuit arising out of the disclosed violation from potentially years to anywhere from 30 to 90 days; and (ii) the state may be willing to approve the rescission offer without issuing a formal consent order that would have

246 Id. at 198 (“a voluntary reporting of a violation, or a forced notification or rescission offer, could spread through the franchise network and provide disgruntled franchisees an opportunity to rescind their franchise agreements or bring claims for damages”). There are also disclosure implications of self-reporting. When self-reporting to State A leads to a consent order agreement with State A, the franchisor must disclose the consent order in its FDD. The disclosure may raise a red flag to prospective franchisees everywhere and hurt the franchisor’s recruiting efforts. It may also necessitate that the franchisor amend its registrations in other states thereby alerting franchise regulators in those states about the illegal activity in State A and placing the franchisor on other state regulators’ radar. State regulators have the authority to deny, suspend, or revoke a registration or exemption so the need to disclose a violation in State A may lead other regulators to investigate activities and take actions that might impair the franchisor’s registration status beyond State A.

247 Id. at 197.

248 See Cantone, Lambert and Marciano, supra note 241, at 24-25. The authors offer practical advice for assessing whether to self-report and utilize the voluntary rescission process where available, recommending that a franchisor determine: (i) the number of franchisees affected; (ii) the states in which they operate; (iii) when each offer was made and whether each franchise agreement was signed; (iv) whether the affected franchisee has signed a lease or made other binding third party commitments or taken other potentially detrimental actions following the purchase of the franchise; (v) whether the franchise is open for business; (vi) the amount that each affected franchisee had paid the franchisor in initial fees, royalties and other fees, for proprietary products and other things; (vii) the extent of each affected franchisee’s franchise-specific investments in the business; (viii) whether the affected franchisee is profitable or operating at a loss and whether losses can be estimated or verified; (ix) whether the affected franchisee is in compliance with the franchise agreement; and (x) the franchisor’s relationship with each affected franchisee, whether amicable or strained.
to be disclosed in the franchisor’s FDD thereby sparing the franchisor of the ill-effects of FDD disclosure.\textsuperscript{249}

In states where the franchise law does not have a formal voluntary rescission process, a franchisor is not foreclosed from making a rescission offer, and doing so may operate to shorten the statute of limitations by alerting the notified franchisee of the violation. A number of franchise statutes start the limitations period on the date when the plaintiff discovers facts constituting the violation.\textsuperscript{250} A voluntary rescission offer puts the affected franchisee on notice of a violation and may operate to extinguish civil claims earlier than would otherwise be the case.\textsuperscript{251}

Notifying a franchisee about a statutory violation or making a voluntary offer of rescission also provides a franchisor with a legal defense in civil litigation if the franchisee does nothing after being notified of the violation. Franchise statutes generally allow a franchisor to defeat a civil claim for statutory rescission based on fraud by proving the franchisee knew the facts constituting the untruth, omission or other violation.\textsuperscript{252}

Appendix C highlights differences among state franchise laws that expressly recognize a voluntary rescission process. Notably:

1. **California**

The voluntary rescission process fashioned as a “Notice of Violation” not only requires the franchisor to obtain the California DBO’s approval as to the form of the notice and the tendered rescission relief, it requires that the Notice of Violation be served along with a registered FDD. When the statutory violation being remediated is the sale of an unregistered franchise, this means that a franchisor that wishes to shorten the statute of limitations to 90 days must create a FDD. This may not be an attractive option for a company that does not plan to sell other franchises in California in the immediate future.\textsuperscript{253}

2. **Illinois**

Illinois’ franchise law provides alternative strategies. Under Section 26, a franchisor may offer to return the consideration paid less any net income received by the franchisee or repurchase the franchise. Either offer will cut off a franchisee’s claim for rescission if the franchisee fails to accept the offer within 30 days.\textsuperscript{254} By making the offer, the franchisor may require the franchisee to return all unsold goods, equipment, fixtures, leases and similar items bought from the franchisor. Section 26 does not specify that the rescission offer must be

\begin{itemize}
\item \textsuperscript{249} Supra note 243. Of course, the franchise regulator’s reaction cannot be predicted. The franchise agency is still empowered to fine a franchisor or take other enforcement measures against a franchisor that takes advantage of the voluntary rescission process.
\item \textsuperscript{250} See, e.g., Hawaii law where the limitations period for civil actions for violation of Hawaii’s franchise law is five years from the date of the violation or “two years subsequent to the discovery of facts constituting the violation.” Haw. Rev. Stat. § 483E-10.5 (2015).
\item \textsuperscript{251} Of course, a franchisor need not make a formal rescission offer in order to put an affected franchisee on notice of a violation: it may simply notify the affected franchisee of the facts and start the limitations period that way.
\item \textsuperscript{252} See Row # 6 in Appendix C.
\item \textsuperscript{254} 815 Ill. Comp. Stat. 705/26 (2015).
\end{itemize}
approved by the Illinois franchise regulatory agency first. Alternatively, under Section 27, the franchisor may serve a notice of violation which also need not be approved as to form by the Illinois franchise regulatory agency first. The notice need not include a rescission offer and will operate to reduce the limitations period to 90 days.

3. **Michigan**

   As discussed in Section III, Michigan has a voluntary rescission process that will operate to shorten the limitations period for a statutory violation to 30 days if the written offer complies with several statutory conditions.

4. **New York**

   New York’s franchise law expressly allows a franchisor to deduct from the calculation of the rescission offer any income a franchisee may have earned while operating the franchise business.

5. **North Dakota**

   North Dakota has a voluntary rescission process similar to Michigan’s except that the notice of rescission offer must be approved by the franchise regulatory agency before delivery in order to shorten the limitations period for a statutory violation to 30 days.

6. **Virginia**

   Virginia’s franchise law authorizes the franchise regulatory agency power to “request” that a franchisor voluntarily offer rescission and restitution to the franchisee. The statute provides that if the franchisor complies with the request, “the Commission shall consider such compliance in determining whether a penalty should be imposed on him on account of that illegal franchise, and if so, the amount of such penalty.”

   When a franchise is sold before registration, voluntarily offering rescission to the franchisee early in the relationship is an effective preemptive strategy since it involves the relatively uncomplicated process of returning the initial franchise fee (assuming, of course, the franchisor still has the funds on hand).

   As to the format of the written rescission offer, in those states that recognize a voluntary rescission process, practitioners should check the statute to determine if prescribed language must be incorporated. Other than this, the statutes themselves offer little guidance as to the format for the rescission offer.

   Prior ABA program materials include a number of sample voluntary rescission offers that are good exemplars of different approaches to preparing an effective rescission offer. These

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256 N.Y. GEN. BUS. LAW § 691(2) (McKinney 2015).
258 See Modell, Vines and Goodhard, supra note 216, at Appendix B; Cantone, Lambert and Marciano, supra note 241, at Appendix D.
examples illustrate that a single form may not fit all circumstances. The terms of the rescission offer must address the facts. For example, the substance of a rescission offer extended to a franchisee who has signed a franchise agreement and paid an initial franchise fee, but has invested no other time or money in the business, should be different from a rescission offer made to a franchisee who has completed training, executed a lease, or incurred other start-up costs, and each of these should differ from a rescission offer made to a franchisee that has operated the franchise business for a while.

The lack of specific instructions regarding the form that a voluntary rescission offer must take may actually benefit the franchisor since it allows a franchisor to explain the reason for any violation in its own words assuming, of course, where required, the franchise regulatory agency approves the form of rescission offer. Franchise regulators are generally flexible in approving voluntary rescission offers and allow practitioners freedom to incorporate relevant specificity as long as the offer identifies the facts that constitute the violation. Indeed, one author (Spandorf) has been successful in obtaining regulatory approval of a voluntary rescission offer titled “Notice of Possible Violation” and in incorporating language stating that the offer is being made “in an abundance of caution in the event that a violation of a state franchise law may have taken place” to avoid having a client willing to offer rescission be forced into making an admission against interest in the process.

7. Maryland

Maryland typically resolves franchise registration violations “through the entry of a formal Consent Order, coupled with a required form of rescission offer that does not have the effect of shortening the time a franchisee has to bring an action under the Maryland Franchise Law.” Most frequently, the rescission offer “requires a franchisor to return the initial franchise fees, with no deduction for any income a franchisee may have earned during the term of the franchise.”

Once the voluntary rescission offer is made, there is no guaranty the franchisee will find it acceptable. The beauty of taking advantage of the statutory voluntary rescission process is that in most states it will shorten the statute of limitations to a relatively short time frame within which the franchisee (or former franchisee) must retain legal counsel to evaluate bringing a case and make up its mind as to whether to pursue the claim in court, which is never a trivial decision even for sophisticated parties.

VI. CONCLUSION

Having insight into judicial and regulatory attitudes about the rescission remedy should bring about greater certainty for rescission outcomes regardless of which pathway to rescission – via common law claims, statute-based claims or regulatory enforcement – one takes. As explained in this paper, confusion about the rescission remedy has plagued jurisprudence since before modern franchising. This confusion has spawned irreconcilable judicial decisions about the rescission remedy in civil litigation and disuniform treatment by franchise laws as to whether

260 Id.
261 See Modell, Vines and Goodhard, supra note 216, at Appendix A. The authors provide two handy lists of issues to consider in evaluating a rescission proposal, one from the franchisor’s perspective and the other from the franchisee’s perspective.
private parties and regulators may secure recession at all and, if they can, what rescission should look like. While we hope the 2011 Restatement (Third) of Restitution and Unjust Enrichment will enlighten courts, regulators and practitioners to take a more disciplined approach to the rescission remedy, rescission may always remain untamed because, fundamentally, rescission is rooted in equitable principles which makes it highly susceptible to a court’s or regulator’s personal sense of justice.
## APPENDIX A

### Quick Reference Guide to Franchise Disclosure/Registration Provisions Pertinent to Private Causes of Action for Rescission

<table>
<thead>
<tr>
<th>State Statute</th>
<th>Grounds for Rescission</th>
<th>Rescission Offer Bars Civil Litigation</th>
<th>Defenses</th>
<th>General Damages</th>
<th>Fees and/or Interest</th>
<th>Statute of Limitation</th>
<th>Waiver Barred by Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>California</strong>&lt;br&gt;Cal. Corp. Code, § 31300, et seq.</td>
<td>§ 31300</td>
<td>N/A</td>
<td>§ 31400</td>
<td>N/A</td>
<td>N/A</td>
<td>§ 31303</td>
<td>§ 31512</td>
</tr>
<tr>
<td><strong>Hawaii</strong>&lt;br&gt;Haw. Rev. Stat. § 482E, et seq.</td>
<td>§ 482E-9(b)</td>
<td>N/A</td>
<td>§ 482E-9(b)</td>
<td>§ 482E-9(c)</td>
<td>§ 482E-9(c)</td>
<td>§ 482E-10.5(b)</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Illinois</strong>&lt;br&gt;815 Ill. Comp. Stat. 705, et seq.</td>
<td>§ 705/26</td>
<td>§ 705/26</td>
<td>§ 705/26</td>
<td>N/A</td>
<td>§ 705/26</td>
<td>§ 705/27</td>
<td>§ 705/41</td>
</tr>
<tr>
<td><strong>Maryland</strong>&lt;br&gt;Md. Code Ann., Bus. Reg. § 14-201, et seq.</td>
<td>§ 14-227(a)</td>
<td>N/A</td>
<td>§ 14-227(a)(2)</td>
<td>N/A</td>
<td>N/A</td>
<td>§ 14-227(e)</td>
<td>§ 14-226</td>
</tr>
<tr>
<td><strong>Minnesota</strong>&lt;br&gt;Minn. Stat. § 80C.01, et seq.</td>
<td>§ 80C.17(1)</td>
<td>N/A</td>
<td>§ 80C.17(2)</td>
<td>§ 80C.17(2)</td>
<td>§ 80C.17(2)</td>
<td>§ 80C.17(5)</td>
<td>§ 80C.21</td>
</tr>
<tr>
<td><strong>New York</strong>&lt;br&gt;N.Y. Gen. Bus. Law. § 680, et seq.</td>
<td>§ 691(1)</td>
<td>§ 691(2)</td>
<td>§ 691(3)</td>
<td>N/A</td>
<td>§ 691(1)</td>
<td>§ 691(4)</td>
<td>§ 691(5)</td>
</tr>
<tr>
<td><strong>Oregon</strong>&lt;br&gt;Or. Rev. Stat. § 650.020, et seq.</td>
<td>§ 650.020(1)</td>
<td>N/A</td>
<td>§ 650.020(2)</td>
<td>§ 650.020(3)</td>
<td>§ 650.020(3)- (4)</td>
<td>§ 650.020(6)</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>South Dakota</strong>&lt;br&gt;S.D. Codified Laws § 37-5B, et seq.</td>
<td>§ 37-5B-49</td>
<td>N/A</td>
<td>§ 37-5B-49</td>
<td>§ 37-5B-49</td>
<td>§ 37-5B-49</td>
<td>§ 37-5B-50</td>
<td>§ 37-5B-51</td>
</tr>
<tr>
<td>State Statute</td>
<td>Grounds for Rescission</td>
<td>Rescission Offer Bars Civil Litigation</td>
<td>Defenses</td>
<td>General Damages</td>
<td>Fees and/or Interest</td>
<td>Statute of Limitation</td>
<td>Waiver Barred by Statute</td>
</tr>
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<tr>
<td><strong>Virginia</strong></td>
<td>§ 13.1-565</td>
<td>N/A</td>
<td>N/A</td>
<td>§ 13.1-571(a)</td>
<td>§ 13.1-571(a)</td>
<td>§ 13.1-571(b)</td>
<td>§ 13.1-571(c)</td>
</tr>
<tr>
<td><strong>Washington</strong></td>
<td>§19.100.190(2)</td>
<td>N/A</td>
<td>§ 19.100.190(2)</td>
<td>§19.100.190(3)</td>
<td>§19.100.190(3)</td>
<td>§ 4.16.040</td>
<td>§ 19.200</td>
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<tr>
<td><strong>Wisconsin</strong></td>
<td>§ 553.51(2)</td>
<td>N/A</td>
<td>§ 553.51(3)</td>
<td>N/A</td>
<td>N/A</td>
<td>§ 553.51(4)</td>
<td>§ 553.76</td>
</tr>
<tr>
<td>Wis. Stat. § 553.01, <em>et seq.</em></td>
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</tbody>
</table>
## APPENDIX B

### Business Opportunity Laws Providing for Rescission and/or Restitution Rights

<table>
<thead>
<tr>
<th>State</th>
<th>Provision Providing for Rescission and/or Restitution</th>
<th>Rescission Rights</th>
<th>Restitution Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Alaska Stat. § 45.66.130</td>
<td>• 30 days after the sale for any reason.</td>
<td>• The seller shall refund to the buyer any payments, including payments for shipping costs, made by the buyer and terminate all financial obligations of the buyer under the contract.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• At any time if the seller:</td>
<td>• The buyer shall make available to the seller, at a reasonable time and place, any products, equipment, or supplies delivered by the seller.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. fails to comply with the disclosure or contract requirements;</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. used untrue, misleading, incomplete, or deceptive statements in connection with the advertising, promoting, selling, or offering;</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. failed to deliver goods necessary to begin operations within 30 days after the date specified in the contract; or</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. failed to provide a contractually required location.</td>
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</tr>
<tr>
<td></td>
<td></td>
<td>The seller shall refund to the buyer any payments, including payments for shipping costs, made by the buyer and terminate all financial obligations of the buyer under the contract.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>The buyer shall make available to the seller, at a reasonable time and place, any products, equipment, or supplies delivered by the seller.</td>
<td></td>
</tr>
<tr>
<td>Arizona</td>
<td>Ariz. Rev. Stat. § 44-1279</td>
<td>• At any time if the seller is unregistered.</td>
<td>• The buyer may recover any purchase monies paid to the unregistered seller, financial damages, and reasonable attorney fees and costs.</td>
</tr>
<tr>
<td>California</td>
<td>Cal. Civ. Code §§ 1812.208 and 1812.215</td>
<td>• 3 business days after the sale for any reason.</td>
<td>• The buyer shall be entitled to receive from the seller all sums paid to the seller when the buyer is able to return all equipment, supplies or products delivered by the seller.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Within 1 year from the sale if the seller:</td>
<td>• When complete return cannot be made, the buyer shall be entitled to receive from the seller all sums paid to the seller less the fair market value at the time of delivery of the equipment, supplies or products not returned by the buyer, but delivered by the seller.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. used any untrue or misleading statement in connection with the sale;</td>
<td>• Upon the receipt of such sums, the buyer shall make available to the seller the products, equipment or supplies received by the buyer from the seller.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. failed to file the disclosure documents;</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>or</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. failed to comply with the disclosure or contract requirements.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Within 30 days after delivery or before delivery, if seller failed to deliver product within 30 days of the delivery date stated in the contract, unless such delivery delay is beyond the control of the seller.</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Provision Providing for Rescission and/or Restitution</td>
<td>Rescission Rights</td>
<td>Restitution Rights</td>
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</tbody>
</table>
| Connecticut | Conn. Gen. Stat. § 36b-74                           | • Within 2 years of the contract if the seller:  
  1. used untrue, misleading, incomplete, or deceptive statements in connection with the sale;  
  2. failed to give the proper disclosure;  
  3. failed to deliver product or render the services necessary to begin operations within forty-five days of date specified in contract; or  
  4. failed to provide a compliant contract.                                                                                                                                   | • The buyer shall be entitled to receive from seller all sums paid to the seller. Upon receipt of such sums, such buyer shall make available to seller all products, equipment or supplies received by buyer  
  • The buyer shall not be entitled to unjust enrichment by exercising these remedies  
  • An injured buyer may bring an action for damages including reasonable attorney fees                                                                                                   |
| Florida   | Fla. Stat. § 559.813                                | • Within 1 year of the contract if the seller:  
  1. used untrue, misleading, incomplete, or deceptive statements in connection with the sale;  
  2. failed to give the proper disclosure;  
  3. failed to deliver product necessary to begin operations within forty-five days of date specified in contract; or  
  4. failed to deliver a compliant contract.                                                                                                                                   | • The buyer shall be entitled to receive from the seller all sums paid to seller. Upon receipt of such sums, the buyer shall make available to the seller all products, equipment, or supplies received by the buyer  
  • The buyer shall not be entitled to unjust enrichment by exercising these remedies  
  • An injured buyer may bring an action for damages including reasonable attorney fees                                                                                                   |
| Georgia   | Ga. Code Ann. § 10-1-417                            | • Within 1 year of the contract if the seller:  
  1. used untrue or misleading statements in connection with the sale;  
  2. failed to give the proper disclosure;  
  3. failed to deliver product necessary to begin operations within forty-five days of date specified in contract; or  
  4. failed to deliver a compliant contract.                                                                                                                                   | • The buyer shall be entitled to receive from the seller all sums paid to seller. Upon receipt of such sums, the buyer shall make available to the seller all products, equipment, or supplies received by the buyer  
  • The buyer shall not be entitled to unjust enrichment by exercising these remedies                                                                                                   |
<table>
<thead>
<tr>
<th>State</th>
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<th>Rescission Rights</th>
<th>Restitution Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>815 Ill. Comp. Stat. § 602/5-120</td>
<td>• Within 3 years from the sale (or other act constituting the violation) if the seller:</td>
<td>• The buyer may recover from the seller all money or other valuable consideration paid for the business opportunity, actual damages, together with interest at 10% per annum from the date of sale, reasonable attorney's fees, and court costs.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. failed to register the business opportunity;</td>
<td>• In addition to the above, if the seller made a misrepresentation or deceptive statement, the buyer may receive treble the actual damages.</td>
</tr>
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<td></td>
<td>2. failed to timely deliver a proper disclosure document or contract;</td>
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<td>3. failed to comply with net worth or bond requirements;</td>
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<td>4. employed any fraudulent or deceitful artifice or made a misrepresentation or omission of a material fact;</td>
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<td></td>
<td>5. made a misrepresentation regarding the effect of registering the business opportunity; or</td>
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<tr>
<td></td>
<td></td>
<td>6. made a misrepresentation or omission of a material fact in advertising.</td>
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</tr>
<tr>
<td>Indiana</td>
<td>Ind. Code §§ 24-5-8-15 through and 24-5-8-17</td>
<td>• Within 1 year of the contract if the seller:</td>
<td>• The buyer shall be entitled to receive from the seller all sums paid to seller. Upon receipt of such sums, the buyer shall make available to the seller all products, equipment, or supplies received by the buyer.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. used untrue, misleading, or deceptive statements in connection with the sale;</td>
<td>• The buyer shall not be entitled to unjust enrichment by exercising these remedies.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. failed to deliver product or services necessary to begin operations within forty-five days of date specified in contract; or</td>
<td>• An injured buyer may bring an action for recovery of actual damages including attorney fees.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. failed to deliver a compliant contract.</td>
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</tr>
<tr>
<td></td>
<td></td>
<td>• If the seller fails to comply with the disclosure requirements, the buyer may cancel by notifying the seller in any manner. No limitations period is specified in the statute.</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Provision Providing for Rescission and/or Restitution</td>
<td>Rescission Rights</td>
<td>Restitution Rights</td>
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</tbody>
</table>
| Iowa  | Iowa Code §§ 551A.6 and 551A.8                     | • 3 business days after the sale for any reason.  
• A seller who violates the disclosure or contract requirements is liable to the buyer in an action for rescission of the contract. Any such action must be brought within 3 years of the violation or within 1 year after the discovery of the facts constituting the violation, whichever is later. | • The seller may recover of all money or other valuable consideration paid for the business opportunity and actual damages together with interest at the legal rate from the date of sale, reasonable attorney fees, and court costs. |
| Kentucky | Ky. Rev. Stat. § 367.819 | • 30 days after the sale for any reason  
• At any time if the seller:  
  1. failed to provide locations as presented;  
  2. failed to deliver goods as presented; or  
  3. failed to include the registration number in any advertising. | • The seller shall refund to the buyer any payments, including payments for shipping costs, made by the buyer and terminate all financial obligations of the buyer under the contract.  
• The buyer shall make available to the seller any products, equipment, or supplies delivered by the seller. |
• A seller who violates the statute is liable to the buyer who may sue for rescission. No limitations period specified in the statute. | • If the buyer exercises its right to cancel the contract within 3 days, then within 20 days after the notice of avoidance is effective, the buyer must tender to the seller all goods delivered; and the seller must return to the buyer all sums paid, unless the buyer refuses to tender all goods.  
• The buyer may recover all money or other valuable consideration paid for the business opportunity and actual damages, together with interest at the legal rate from the date of sale, reasonable attorney fees and court costs. |
<table>
<thead>
<tr>
<th>State</th>
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<th>Rescission Rights</th>
<th>Restitution Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maryland</td>
<td>Md. Code Ann., Bus. Reg. § 14-126</td>
<td>- Within 1 year if in connection with the sale or offer the seller: 1. made an untrue statement or omitted a material fact; 2. engaged in a fraudulent act or practice; 3. did not properly substantiate a representation regarding income potential; 4. misused a trademark; 5. improperly referenced compliance outside of the disclosure document; or 6. failed to deliver product necessary to begin operations within 45 days of the contractual deadline.</td>
<td>- The buyer shall be entitled to receive from the seller all sums paid to seller. Upon receipt of such sums, the buyer shall make available to the seller all products, equipment, or supplies received by the buyer. - The buyer shall not be entitled to unjust enrichment by exercising these remedies. - An injured buyer may also sue for damages including attorney fees.</td>
</tr>
</tbody>
</table>
- Within 1 year from the sale if the seller: 1. used any untrue or misleading statement in connection with the sale; 2. failed to file the disclosure documents; or 3. failed to comply with the disclosure or contract requirements.  
- Within 30 days after delivery or before delivery, if seller failed to deliver product within 30 days of the delivery date stated in the contract, unless such delivery delay is beyond the control of the seller. | - The buyer shall be entitled to receive from the seller all sums paid to the seller when the buyer is able to return all equipment, supplies or products delivered by the seller.  
- When complete return cannot be made, the buyer shall be entitled to receive from the seller all sums paid to the seller less the fair market value at the time of delivery of the equipment, supplies or products not returned by the buyer, but delivered by the seller.  
- Upon the receipt of such sums, the buyer shall make available to the seller the products, equipment or supplies received by the buyer from the seller.  
- An injured buyer may bring an action for actual damages including reasonable attorney fees and costs. |
<table>
<thead>
<tr>
<th>State</th>
<th>Provision Providing for Rescission and/or Restitution</th>
<th>Rescission Rights</th>
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</tr>
</thead>
<tbody>
<tr>
<td>New Hampshire</td>
<td>N.H. Rev. Stat. Ann. § 358-E:6</td>
<td>• Within 90 days from discovering that the seller failed to register or provide a disclosure document</td>
<td>• Measure of restitution damages not addressed.</td>
</tr>
<tr>
<td></td>
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<td>• Statute grants seller the right to make an offer of rescission that must include an offer to return any consideration paid or to repurchase the distributorship for a price equal to the full amount paid together with 6 percent interest on said amount from the date of payment, less any income received by the distributor, and may require the distributor to return to the person making such offer all unsold goods, equipment, fixtures, leases and similar items received.</td>
</tr>
</tbody>
</table>
| North Carolina | N.C. Gen. Stat. § 66-100                            | • Within 1 year from the sale if the seller: 1. used any untrue or misleading statement in connection with the sale; 2. failed to give proper disclosures; 3. failed to deliver goods necessary for operation of business within 45 days of contract deadline; or 4. failed to deliver a compliant contract. | • The buyer shall be entitled to receive from seller all sums paid to the seller. Upon receipt of such sums, the buyer shall make available to seller all products, equipment or supplies received by buyer.  
• The buyer shall not be entitled to unjust enrichment by exercising these remedies.  
• An injured buyer may bring an action for the recovery of damages including reasonable attorney fees. |
| Ohio        | Ohio Rev. Code Ann. §§ 1334.05 and 1334.09           | • Within 5 days of the sale for any reason if the seller complied with the requirements for the contract. • Within 12 months of the sale for any reason if the seller failed to comply with the requirements for a contract. • Within 3 years of the sale if the seller violates the statute. | • All sums paid to the seller, less the fair market value of any goods that are not returned.  
• Upon the receipt of sums, the buyer shall make available to the seller the goods received by the buyer from the seller. A buyer is not entitled to unjust enrichment.  
• An injured buyer may recover three times the actual damages or $10,000.00, whichever is greater, and attorney fees. |
<table>
<thead>
<tr>
<th>State</th>
<th>Provision Providing for Rescission and/or Restitution</th>
<th>Rescission Rights</th>
<th>Restitution Rights</th>
</tr>
</thead>
</table>
| Oklahoma      | 71 Okla. Stat. §§ 824 and 826                        | • Within 3 years from the sale if the seller:  
  1. failed to register the business opportunity; or  
  2. failed to timely deliver proper disclosure document or contract.  
• Within 2 years from the sale (or act constituting a violation) if in connection with the offer or sale the seller:  
  1. employed any fraudulent or deceitful artifice or made a misrepresentation or omission of a material fact;  
  2. made a misrepresentation regarding the effect of registering the business opportunity; or  
  3. made a misrepresentation or omission of a material fact in advertising. | • All money and other valuable consideration paid for the business opportunity and for actual damages together with interest at the legal rate from the date of sale, reasonable attorney fees, and court costs. |
| South Carolina| S.C. Code Ann. § 39-57-80                            | • Within 1 year from the sale if the seller:  
  1. used any untrue or misleading statement in connection with the sale;  
  2. failed to give proper disclosures;  
  3. failed to deliver goods necessary for operation of business within 45 days of contract deadline; or  
  4. failed to deliver a compliant contract. | • The buyer shall be entitled to receive from seller all sums paid to the seller. Upon receipt of such sums, the buyer shall make available to seller all products, equipment or supplies received by buyer.  
• The buyer shall not be entitled to unjust enrichment by exercising these remedies.  
• An injured buyer may bring an action for the recovery of damages including reasonable attorney fees. |
<table>
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<tr>
<th>State</th>
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<th>Rescission Rights</th>
<th>Restitution Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Dakota</td>
<td>S.D. Codified Laws §§ 37-25A-48, 37-25A-49, 37-25A-52</td>
<td>• Within 3 years from the sale (or other act constituting the violation) if the seller: 1. failed to register the business opportunity; 2. failed to appoint director as agent for service of process; 3. failed to timely deliver proper disclosure document or contract; 4. failed to comply with net worth or bond requirements; 5. employed any fraudulent or deceitful artifice or made a misrepresentation or omission of a material fact; 6. made a misrepresentation regarding the effect of registering the business opportunity; or 7. made a misrepresentation or omission of a material fact in advertising.</td>
<td>• All money and other valuable consideration paid for the business opportunity and for actual damages together with interest at the legal rate form the date of sale, reasonable attorney fees, and court costs.</td>
</tr>
</tbody>
</table>
| Utah       | Utah Code Ann. § 13-15-6(2)                         | • If the seller does not comply with the Business Opportunity Disclosure Act, the buyer is entitled to bring a cause of action to rescind the contract. No limitations period is provided in the statute.                                                                                                                                                                           | • No measure of restitution damages is provided in the statute.  
• The buyer is entitled to an award of a reasonable attorney's fee and costs of court in an action to enforce the right of rescission, and to the amount of actual damages or $2,000, whichever is greater.                                                                                                                                                        |
| Virginia   | Va. Code Ann. § 59.1-268                             | • Within 1 year from the sale if the seller: 1. used any untrue or misleading statement in connection with the sale; 2. failed to give proper disclosures; 3. failed to deliver goods necessary for operation of business within 45 days of contract deadline; or 4. failed to deliver a compliant contract. | • The buyer shall be entitled to receive from seller all sums paid to the seller. Upon receipt of such sums, the buyer shall make available to seller all products, equipment or supplies received by buyer.  
• The buyer shall not be entitled to unjust enrichment by exercising these remedies.  
• An injured buyer may bring an action for the recovery of damages including reasonable attorney fees.                                                                                                                                                     |
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<thead>
<tr>
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</tr>
</thead>
</table>
| Washington| Wash. Rev. Code §§ 19.110.110 and 19.110.130          | - If the seller does not comply with the Business Opportunity Fraud Act, the buyer is entitled to bring a cause of action to rescind the contract. No limitations period is provided in the statute. | - The buyer may sue for actual damages, or an injunction, or rescission, or other relief. No measure of restitution damages is provided in the statute.  
- The buyer may also sue for costs of suit, including a reasonable attorney's fee. The court may increase the amount of damages awarded up to three times the amount of actual damages. |
### APPENDIX C

**Regulatory Authority Pertinent to Rescission Remedies**

<table>
<thead>
<tr>
<th></th>
<th>Federal: Amended FTC Rule</th>
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<tbody>
<tr>
<td>1</td>
<td>Reference to Statute</td>
</tr>
<tr>
<td></td>
<td>Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</td>
</tr>
<tr>
<td>2</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties?</td>
</tr>
<tr>
<td>3</td>
<td>Franchise Agency - Investigatory Authority</td>
</tr>
<tr>
<td>4</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
</tr>
<tr>
<td>5</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution?</td>
</tr>
<tr>
<td>6</td>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
</tr>
<tr>
<td>7</td>
<td>Voluntary Rescission</td>
</tr>
<tr>
<td>8</td>
<td>Public Disclosure of Concluded Case</td>
</tr>
</tbody>
</table>

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\(^{262}\) 15 U.S.C. § 57b(b).

\(^{263}\) 15 U.S.C. § 45(b). The FTC may publicize that it is conducting an industry-wide investigation, but must keep the identity of the investigation targets non-public. If the FTC commences a civil or administrative action, the information gathered by the FTC during an investigation may be obtained by the defendant through discovery or otherwise disclosed during a public proceeding.


<table>
<thead>
<tr>
<th></th>
<th>California: California Franchise Investment Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Reference to Statute&lt;br&gt;Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</td>
</tr>
<tr>
<td>2.</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
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<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
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<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
</tr>
<tr>
<td>6.</td>
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</tr>
<tr>
<td>7.</td>
<td>Voluntary Rescission</td>
</tr>
<tr>
<td>8.</td>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
</tr>
</tbody>
</table>

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267 CAL. CORP. CODE §§ 31400(a).
268 CAL. CORP. CODE §§ 31400(b), 31408(a).
269 CAL. CORP. CODE § 31401(a)-(b).
270 CAL. CORP. CODE §§ 31401(a)-(b), 31402, 31407.
271 CAL. GOVT. CODE § 11500 et. seq.
272 CAL. CORP. CODE § 31513 (“after such hearing before the Department …such person shall not be entitled to any further administrative remedy”).
273 CAL. CORP. CODE § 31408(a).
274 CAL. CORP. CODE §§ 31201.
275 10 CAL. CORP. CODE OF REGS. § 310.303 (when liability is based on a violation of CAL. CORP. CODE §§ 31300) and 10 CAL. CODES OF REGS. § 310.304 (when liability is based on a violation of CAL. CORP. CODE §§ 31300).
**Hawaii: Hawaii Franchise Investment Law**

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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td><strong>Reference to Statute</strong>&lt;br&gt;Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</td>
<td>HAW. REV. STAT. §§ 482e-1 - 12&lt;br&gt;Director of Commerce and Consumer Affairs (“Director”). However, enforcement on behalf of the Director is delegated to the Hawaii Securities Enforcement Branch.</td>
</tr>
<tr>
<td>2.</td>
<td><strong>May Franchise Agency Obtain Restitution for Injured Parties</strong></td>
<td>The statute refers to the Director having “discretion to determine the disposition of any executory contracts entered into by the respondent and shall specify in the order whether existing executory contracts shall be suspended or completed.”276 Otherwise, there is no express reference to rescission in the context of a regulatory (non-criminal) action and no indication that the Director has authority to order restitution of any kind other than as a part of a voluntary consent agreement. The section of the Hawaii statute authorizing criminal penalties provides for forfeiture of property on behalf of “innocent persons.”277</td>
</tr>
<tr>
<td>3.</td>
<td><strong>Franchise Agency - Investigatory Authority</strong></td>
<td>Investigatory powers are not specified. An administrative hearing must be held within 15 business days after a written request is made if the franchisor requests a hearing in writing within 30 days after being served with a cease and desist or stop order.278 While the statute does not specify a right to appeal an agency administrative action,279 final administrative orders can apparently be appealed to a state circuit (trial) court.280</td>
</tr>
<tr>
<td>4.</td>
<td><strong>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</strong></td>
<td>Hearings are public.281</td>
</tr>
<tr>
<td>5.</td>
<td><strong>Must Franchise Agency File Lawsuit in Order to Recover Restitution</strong></td>
<td>Unclear if the franchise agency may recover rescission in a civil lawsuit. Rescission is available as a remedy in private enforcement.282 The Director may bring a civil action to recover a penalty for violation of the act.283 The Director may obtain a temporary or permanent injunction and have affected a receiver appointed.284 However, there is no reference to the Director’s authority to apply to a court to recover damages or restitution for injured parties.285</td>
</tr>
<tr>
<td>6.</td>
<td><strong>Is reliance by injured party necessary for restitution in a regulatory proceeding?</strong></td>
<td>In a private action, reliance is required for civil liability predicated on general fraud, but is not required for other violations (e.g., failure to register; failure to make timely disclosure).286</td>
</tr>
<tr>
<td>7.</td>
<td><strong>Voluntary Rescission</strong></td>
<td>No procedure addressed in Hawaii statute.</td>
</tr>
<tr>
<td>8.</td>
<td><strong>Public Disclosure of Concluded Enforcement Actions; Other Notes</strong></td>
<td>Hawaii publishes enforcement actions on its website. See <a href="http://cca.hawaii.gov/sec/enforcement_actions/">http://cca.hawaii.gov/sec/enforcement_actions/</a> Violation of the Hawaii Franchise Investment Law is an unfair trade practice and the state AG may bring an action on behalf of injured parties for 3X actual damages. No reference in unfair trade practice statute to rescission as a remedy for an unfair trade practice.</td>
</tr>
</tbody>
</table>

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276 HAW. REV. STAT. § 482E-10.7(a).<br>277 HAW. REV. STAT. § 482E-10.6(d).<br>278 HAW. REV. STAT. § 482E-10.7(b).<br>279 HAW. REV. STAT. § 482E-10.7(c) (“After the hearing, the director shall issue a final order…”).<br>280 HAW. REV. STAT. § 91-14 (judicial review of contested cases). See Matsuyoshi v. Bus. Registration Div., Sec. Enforcement Branch, Office of Admin. Hearings, Dep’t of Commerce & Consumer Affairs, 133 Haw. 451, 330 P.3d 389 (Table) (Haw. Ct. App. 2014) (secondary appeal of circuit court decision to the Hawaii Court of Appeals).<br>281 HAW. REV. STAT. § 482E-10.7(d).<br>282 HAW. REV. STAT. § 482E-9(b).<br>283 HAW. REV. STAT. § 482E-10.5.<br>284 HAW. REV. STAT. § 483E-10.7(e).<br>285 HAW. REV. STAT. § 482E-10.7(e).<br>286 Id.
<table>
<thead>
<tr>
<th></th>
<th>Reference to Statute</th>
<th>Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</th>
<th>815 ILL. COMP. STAT. §§ 705/1 – 44. Illinois Attorney General (“Administrator”)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
<td>Yes – Illinois Franchise Disclosure Act authorizes the Administrator to seek rescission by instituting proceedings in state court. The statute does not appear to vest the Administrator with authority to award or order rescission or restitution in an administrative agency.</td>
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</tr>
<tr>
<td>2.</td>
<td>Franchise Agency - Investigatory Authority</td>
<td>The Administrator has broad discretionary powers to make both public and private investigations; exam witnesses; order document production; subpoena witnesses and administer oaths as required. An administrative hearing must be held within 10 days after written request is made if the franchisor requests a hearing in writing within 15 days after being served with a cease and desist or stop order.</td>
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</tr>
<tr>
<td>3.</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
<td>The Administrator may issue an order stopping or denying the sale or registration if such order is within the public interest and if prompt written notice is given to the person or entity affected. The Administrator may bring a civil action to prevent and restrain violations of the act and may seek injunction, revocation, forfeiture or suspension of the privileges of the business entity, dissolution of domestic corporations or associations, restitution or damages to the injured parties and reasonable attorney's fees and costs. The Administrator may also commence criminal prosecutions. Administrative decisions are subject to judicial review.</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
<td>Yes. See Row # 2.</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
<td>Yes. Justifiable reliance is a necessary element of a claim for statutory fraud.</td>
<td></td>
</tr>
<tr>
<td>6.</td>
<td>Voluntary Rescission</td>
<td>Illinois will often agree to resolve registration violations through the entry of an “Assurance of Voluntary Compliance” or through a rescission offer. The Assurance typically requires a franchisor to send a Notice of Violation to affected franchisees and pay a fine to the Illinois Attorney General.</td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
<td>Illinois maintains a searchable database of enforcement actions at <a href="http://www.ilsos.gov/adminactionssearch/">http://www.ilsos.gov/adminactionssearch/</a>. Unfortunately, the search features do not filter by topic (e.g., franchise), only by respondent’s name, file number and date.</td>
<td></td>
</tr>
</tbody>
</table>

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287 815 ILL. COMP. STAT. 705/22(b).
288 815 ILL. COMP. STAT. 705/23.
289 Id.
290 815 ILL. COMP. STAT. 705/22(b).
291 815 ILL. COMP. STAT. 705/25.
292 815 ILL. COMP. STAT. 705/34.
293 Bonnfield v. AAMCO Transmissions, Inc., 708 F. Supp. 867, 876 (N.D. Ill. 1989) (justifiable reliance is an element required in every statutory claim based on misrepresentations).
294 815 ILL. COMP. STAT. 705/31(j).
## Indiana: Indiana Franchise Act

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<thead>
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<tbody>
<tr>
<td>1.</td>
<td>Reference to Statute</td>
<td>IND. CODE §§ 23-2-2.5-1 et seq.</td>
</tr>
<tr>
<td></td>
<td>Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</td>
<td>Indiana Securities Commissioner (&quot;Commissioner&quot;) and Indiana Attorney General</td>
</tr>
<tr>
<td>2.</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
<td>Yes. &quot;After notice and an opportunity for hearing, the Commissioner may enter an order of rescission, restitution, or disgorgement, including interest at the rate of eight percent (8%) per year, directed to a person who has violated this chapter or a rule or order under this chapter.&quot;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A separate section of the Indiana codes forbids enumerated &quot;Deceptive Franchise Practices.&quot; This statute does not provide for regulatory agency enforcement. Only injured parties may bring actions for damages or to reform contracts that violate the statute. Of course, rescission would be available through a consent order agreement.</td>
</tr>
<tr>
<td>3.</td>
<td>Franchise Agency - Investigatory Authority</td>
<td>The Commissioner has discretionary powers to make both public and private investigations and may subpoena witnesses, compel their attendance, take evidence, and require document production. Upon written request, the Commissioner must hold a hearing regarding a stop order within 15 days and a cease and desist or other order within 45 days of the order’s issuance.</td>
</tr>
<tr>
<td>4.</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
<td>See Row # 3. The Commissioner may order restitution-type remedies only after the franchisor is offered the opportunity for a hearing.</td>
</tr>
<tr>
<td>5.</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
<td>No. The statute gives the Commissioner authority to order restitution-type remedies. The Commissioner may file a lawsuit to aid enforcement.</td>
</tr>
<tr>
<td>6.</td>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
<td>Reasonable reliance is a necessary element for a civil private action for fraud, deceit or misrepresentation. It is assumed, but unclear, if reasonable reliance is also necessary in a regulatory enforcement action ordering restitution.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>There is no private right of action for other violations of the Indiana law.</td>
</tr>
<tr>
<td>7.</td>
<td>Voluntary Rescission</td>
<td>No procedure addressed in Indiana statute.</td>
</tr>
<tr>
<td>8.</td>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
<td>Indiana publishes enforcement actions, but unfortunately the database is not readily searchable by key word.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>See <a href="https://myweb.in.gov/SOS/AAOnline/ShowAA.aspx">https://myweb.in.gov/SOS/AAOnline/ShowAA.aspx</a></td>
</tr>
</tbody>
</table>

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295 IND. CODE ANN. § 23-2-2.5-45.
296 IND. CODE ANN. § 23-2-2.5-34(a)(2).
298 IND. CODE § 23-2-2.5-33.
299 IND. CODE § 23-2-2.5-15.
300 IND. CODE § 23-2-2.5-34.
301 IND. CODE ANN. § 23-2-2.5-34(a)(2) ("In addition to all other remedies, the commissioner may bring an action in the name of and on behalf of the state against any person participating in or about to participate in a violation of this chapter, to enjoin the person from continuing or doing an act furthering a violation of this chapter and may obtain the appointment of a receiver or conservator. Upon a proper showing by the commissioner, the court shall enter an order of the commissioner directing rescission, restitution, or disgorgement against a person who has violated this chapter or a rule or order under this chapter.")
302 Hardee's of Maumelle, Ark., Inc. v. Hardee's Food Sys., Inc., 31 F.3d 573, 577 (7th Cir. 1994).
<table>
<thead>
<tr>
<th></th>
<th>Reference to Statute Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</th>
<th>MD, CODE ANN. Bus. REG. §§ 14-201-233 Security Commissioner (&quot;Commissioner&quot;) in the Office of the Attorney General</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
<td>Restitution is among the remedies available to a court in an action brought by the Commissioner for a violation. The Commissioner lacks inherent authority to order restitution-type remedies.</td>
</tr>
<tr>
<td>3</td>
<td>Franchise Agency - Investigatory Authority</td>
<td>The Commissioner may investigate violations, subpoena witnesses and information, administer oaths. The Commission may issue a cease and desist order and serve it on the franchisor or other respondents, who may then request a hearing, in which case the hearing must be held within 15 days from request. The statute provides that &quot;Unless there is a timely hearing, the cease and desist order is rescinded.&quot;</td>
</tr>
<tr>
<td>4</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
<td>The Commissioner has no authority to order restitution-type remedies at the conclusion of a hearing; only a court may issue restitution. Of course, rescission is available through a voluntary consent order agreement.</td>
</tr>
<tr>
<td>5</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
<td>Yes. See Row # 3.</td>
</tr>
<tr>
<td>6</td>
<td>Is reliance by injured party necessary for restitution in a regulatory</td>
<td>Reasonable reliance is a necessary element for a civil private action for statutory fraud. In Maryland, the Commissioner can only obtain rescission by initiating a lawsuit so it is assumed that reasonable reliance is also a necessary element of the Commissioner’s case.</td>
</tr>
</tbody>
</table>

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303 MD. CODE ANN. BUS. REG. § 14-210(b). The Commissioner lacks inherent authority to issue a cease and desist and must initiate a court action to enjoin a violation. If the court determines that a violation has been or is about to be committed, the court has broad equity powers including ordering restitution.

304 MD. CODE ANN. BUS. REG. § 14-208, 14-212.

305 MD. CODE ANN. BUS. REG. § 14-210(a)(4).

306 Maoz Vegetarian USA, Inc., 2014 WL 4852095 at *16 (reasonable reliance is an element of a statutory misrepresentation claim).
<table>
<thead>
<tr>
<th>Proceeding</th>
<th>Voluntary Rescission</th>
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<tbody>
<tr>
<td><strong>7</strong></td>
<td>Maryland has no formal procedure, but it has been reported that Maryland recognizes an informal procedure typically available for franchise registration violations through entry of a formal Consent Order coupled with a rescission offer approved by the state franchise agency. This approach will not operate to shorten the time a franchisee has to bring an action under the Maryland franchise law. As reported in 2014, the form of rescission offer used most frequently in Maryland requires a franchisor to return the initial franchise fees, with no deduction for any income a franchisee may have earned during the term of the franchise.(^{307})</td>
</tr>
</tbody>
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<tr>
<th><strong>8</strong></th>
<th>Public Disclosure of Concluded Enforcement Actions; Other Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The Securities Decision of the Maryland Attorney General Office posts enforcement actions online: <a href="http://cp.mcafee.com/d/1jWVIqdElcLnpvuvdTdLlzHLnsdLlzHLccCTTShRTHL6TTT74kkmjsoQJiP_y2H7QxVyhVYJFOVKNYEugAuvbIqskKhru_n23X_nVdZws-gerZuVtd5MQeY-ztBNNPBHEShhiKUDOEuvkzaT0QSyrdTV5xVysyMCgejitPo0aKAuFfp_OG7dQMo-PspiBZc4bJbm5c0Lw26URYbYY_Wbr12IngkwoDOVJDVUQsCMmd96y2fcPkZ0Qg4aE5zh1IQgbqjYjgrVJxjqqA9L">http://cp.mcafee.com/d/1jWVIqdElcLnpvuvdTdLlzHLnsdLlzHLccCTTShRTHL6TTT74kkmjsoQJiP_y2H7QxVyhVYJFOVKNYEugAuvbIqskKhru_n23X_nVdZws-gerZuVtd5MQeY-ztBNNPBHEShhiKUDOEuvkzaT0QSyrdTV5xVysyMCgejitPo0aKAuFfp_OG7dQMo-PspiBZc4bJbm5c0Lw26URYbYY_Wbr12IngkwoDOVJDVUQsCMmd96y2fcPkZ0Qg4aE5zh1IQgbqjYjgrVJxjqqA9L</a></td>
</tr>
</tbody>
</table>

\(^{307}\) See Cantone, Lambert, Marciano, *So It Really is a Franchise: Bringing Non-Compliant Franchisors Into Compliance*, in ABA 37TH ANNUAL FORUM ON FRANCHISING W18, at 31 (2014).
<table>
<thead>
<tr>
<th>Reference to Statute</th>
<th>MICH. COMP. LAWS § 445.1501-1546. Department of the Attorney General (the “Department”)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</td>
<td></td>
</tr>
<tr>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
<td>Restitution is among the remedies available to a court in an action brought by the Attorney General in a civil action enforcing the Michigan statute. However, there is no provision in the statute vesting the Attorney General or a state agency with authority to order restitution-type remedies by administrative order or at the conclusion of an administrative hearing.</td>
</tr>
<tr>
<td>Franchise Agency - Investigatory Authority</td>
<td>The Department has discretionary powers to make both public and private investigations and may subpoena witnesses and information and administer oaths as required.</td>
</tr>
<tr>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
<td>The Commissioner has no authority to order restitution-type remedies at the conclusion of a hearing; only a court may issue restitution. Of course, rescission is available through a voluntary consent order agreement.</td>
</tr>
<tr>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
<td>Yes. See Row # 3.</td>
</tr>
<tr>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
<td>Reasonable reliance is a necessary element for a civil private action for statutory fraud. In Michigan, the Attorney General can only obtain rescission by initiating a lawsuit so it is assumed that reasonable reliance is also a necessary element of the state’s case.</td>
</tr>
<tr>
<td>Voluntary Rescission</td>
<td>Yes. There is a statutory rescission process available to a franchisor which, if utilized, will cut off a claim for violation of the statute unless the franchisee rejects the rescission offer within 30 days after the rescission offer is made.</td>
</tr>
<tr>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
<td>In preparing this paper, we were informed that the Consumer Protection Division of the Michigan Department of Attorney General’s office does not maintain a public database of enforcement actions.</td>
</tr>
</tbody>
</table>

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308 MICH COMP. LAWS § 445.1535(1).

309 MICH. COMP. LAWS § 445.1536.

310 *Cook v. Little Caesar Enters., Inc.*, 210 F.3d 653 (6th Cir. 2000).

311 MICH. COMP. LAWS. § 445.1531(2) (“A person may not file or maintain suit under this section if the franchisee received a written offer before suit and at a time when the franchisee owned the franchise to refund the consideration paid together with interest from the date of purchase at 1 percentage point above the rate provided by subsection (1), less the amount of income received on the franchise, conditioned only upon tender by the person of all items received by the franchisee for the consideration and not sold, and failed to accept the offer within 30 days of its receipt, or if the franchisee received the offer before suit and at a time when the franchisee did not own the franchise, unless the franchisee rejected the offer in writing within 30 days of its receipt. The rescission offer shall recite the provisions of this section. If the franchise involves substantial building or substantial equipment and a significant period of time has elapsed since the sale of the franchise to the franchisee, the rescission offer may recognize depreciation, amortization, and other factors which bear upon the value of the franchise being returned to the franchisor.”)
| 1. | Reference to Statute | MINN. STAT. § 80C.01-30
Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal) | Commissioner of Commerce ("Commissioner") and Attorney General |
| 2. | May Franchise Agency Obtain Restitution for Injured Parties | Nothing in the statute authorizes rescission in an action brought by the state. The statute authorizes regulatory actions to recover fines (both civil and criminal), but not rescission, restitution or damages on behalf of injured parties. |
| 3. | Franchise Agency - Investigatory Authority | The Commissioner has authority to hold hearings and issue orders based upon its findings, but no investigatory or subpoena powers are specified. The Commissioner may issue a cease and desist order and an order denying, suspending or revoking any registration, amendment or exemption on finding a violation. When the order is issued without a hearing, the Commissioner must hold a hearing within 20 days of the order or within 15 days from request if requested within 30 days of the order. |
| 4. | Franchise Agency Hearing/Authority to Issue Restitution-type Remedies | Nothing in the statute authorizes restitution-type remedies either as an order following an administrative action or as part of the relief that the state may recover in a civil action brought by the state. Rescission is available through a voluntary consent order agreement. |
| 5. | Must Franchise Agency File Lawsuit in Order to Recover Restitution | See Row # 3. |
| 6. | Is reliance by injured party necessary for restitution in a regulatory proceeding? | In civil (private) litigation, reasonable reliance is required to recover rescission and damages for a violation of the Minnesota statute. As noted, there is no authority for the state to seek rescission even through a court action. |
| 7. | Voluntary Rescission | No procedure addressed in the Minnesota statute. |
| 8. | Public Disclosure of Concluded Enforcement Actions; Other Notes | Minnesota publishes enforcement actions on its CARDS website, which is readily searchable. See https://www.cards.commerce.state.mn.us/CARDS/ (search enforcement actions, which can be further filtered for franchise registrations). |

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312 MINN. STAT. § 80C.12.
313 MINN. STAT. § 80C.12-1.
314 Long John Silver's Inc. v. Nickleson, 923 F. Supp. 2d 1004, 1016-17 (W.D. Ky. 2013) (franchisee must establish reasonable reliance to merit an award of damages for statutory fraud … Without reliance, there can be no causation.").
<table>
<thead>
<tr>
<th></th>
<th>New York: New York Franchise Law</th>
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<tbody>
<tr>
<td></td>
<td>Prosecuting Agency For Filing</td>
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<tr>
<td></td>
<td>Enforcement Lawsuit (non-criminal)</td>
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<tr>
<td>2.</td>
<td>May Franchise Agency Obtain</td>
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<tr>
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<td>Restitution for Injured Parties</td>
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<tr>
<td>3.</td>
<td>Franchise Agency - Investigatory</td>
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<td></td>
<td>Authority</td>
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<tr>
<td>4.</td>
<td>Franchise Agency Hearing/Authority</td>
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<td></td>
<td>to Issue Restitution-type Remedies</td>
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<tr>
<td>5.</td>
<td>Must Franchise Agency File Lawsuit</td>
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<td>in Order to Recover Restitution</td>
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<tr>
<td>6.</td>
<td>Is reliance by injured party</td>
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<td>necessary for restitution in a</td>
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<td></td>
<td>regulatory proceeding?</td>
</tr>
<tr>
<td>7.</td>
<td>Voluntary Rescission</td>
</tr>
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315 N.Y. GEN. BUS. LAW § 692(2) ("Upon a showing by the department that a fraudulent practice as defined by this article has occurred, the department may include in an action under this article an application to direct restitution of any moneys or property obtained directly or indirectly by any such fraudulent practice.")

316 N.Y. GEN. BUS. LAW § 689(4).

317 N.Y. GEN. BUS. LAW § 688.

318 N.Y. GEN. BUS. LAW § 687.

319 N.Y. GEN. BUS. LAW § 681.10

10. "FRAUD," "fraudulent practice," and "deceit" are not limited to common law fraud or deceit, and include: (a) Any deception, concealment, suppression, device, scheme or artifice employed by a franchisor, franchise sales agent, subfranchisor or franchise salesman to obtain any money, promissory note, commitment or property by any false or visionary pretense, representation or promise; (b) Any material misrepresentation in any registered prospectus filed under this article; or (c) The omission of any material fact in any registered prospectus filed under this article.

320 N.Y. GEN. BUS. LAW § 691(2) ("The rescission offer must offer "to refund the consideration paid together with interest at six percent per year from the date of payment, less the amount of income earned by the franchisee from the franchise, conditioned only upon tender by the person of all items received by him for the consideration and not sold.")

321 Kroshnyi v. U.S. Pack Courier Servs., Inc., 771 F.3d 93, 107-08 (2d Cir. 2014) ("Furthermore, in deciding whether either plaintiff made a “net profit” on his franchise, the jury could properly consider the significant operational expenses that each plaintiff incurred in the course of running his franchise, such as the rental of a cargo vehicle, insurance premiums, vehicle maintenance, taxes, tolls, and fuel, as well as various other expenses like the rental of a radio and beeper, and the cost of uniforms and equipment. Indeed, the evidence at trial showed that [franchisor] deducted large sums from [franchisee’s] weekly commission checks for vehicle rental, vehicle maintenance, the lease of radios and beepers, and other charges. And while neither plaintiff testified about the specific amounts expended on fuel, insurance premiums, uniforms, equipment, taxes, and the like, the jury had before it the 1996 offering prospectus and SA, which stated that drivers bore responsibility for these expenses and provided an estimated cost range for each.")
<p>| Enforcement Actions; Other Notes | appeals and opinions, but efforts to find franchise enforcement matters were not successful. <a href="http://www.ag.ny.gov/appeals-and-opinions/subject-index#F">http://www.ag.ny.gov/appeals-and-opinions/subject-index#F</a> |</p>
<table>
<thead>
<tr>
<th></th>
<th>Reference to Statute</th>
<th>N.D. CENT. CODE § 51-01-17</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prosecuting Agency For Filing</td>
<td>North Dakota Securities Commissioner (“Commissioner”)</td>
</tr>
<tr>
<td></td>
<td>Enforcement Lawsuit (non-criminal)</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
<td>None specified. The Commissioner has authority to recover civil penalties, but nothing in the statute authorizes rescission in an action brought by the state. Rescission is only referenced in connection with civil (private) actions.</td>
</tr>
<tr>
<td>3</td>
<td>Franchise Agency - Investigatory Authority</td>
<td>The Commissioner has discretionary powers to make both public and private investigations and may subpoena witnesses and information and administer oaths as required. There will be a hearing related to the stop order within 15 days of a written request.</td>
</tr>
<tr>
<td>4</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
<td>Nothing in the statute authorizes restitution-type remedies either as an order following an administrative action or as part of the relief that the state may recover in a civil action brought by the state. Of course, rescission is available through a consent order agreement.</td>
</tr>
<tr>
<td>5</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
<td>See Row # 3. The Commissioner has authority to initiate civil actions to obtain other relief (injunction, restraining order, writ of mandamus, receiver), but no mention of actions to recover damages or restitution for injured parties.</td>
</tr>
<tr>
<td>6</td>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
<td>Yes. A franchisee waives its right to recover rescission in a private civil action if it continues to receive the benefits of the franchise program after knowing about the statutory violation.</td>
</tr>
<tr>
<td>7</td>
<td>Voluntary Rescission</td>
<td>Yes. “No franchisor or subfranchisor may file or maintain an action under this section if the person received a written offer before the action was commenced and at a time when the person owned the franchise to refund the consideration paid together with interest at the rate of seven percent per annum from the date of purchase, less the amount of income received on the franchise, conditioned only upon tender by the franchisee or subfranchisor of all items received by the person for the consideration and not sold, and failed to accept the offer within thirty days of its receipt or if the franchisee received the offer before the action was commenced and at a time when the person did not own the franchise, unless the person rejected the offer in writing within thirty days of its receipt; provided, that in either instance the offering documents and rescission prospectus must be submitted to the commissioner for approval at least fifteen days prior to submission to the franchisee or subfranchisor. The rescission offer must recite the provisions of this section.”</td>
</tr>
<tr>
<td>8</td>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
<td>In preparing this paper, we were informed by the North Dakota Securities Commissioner that its office does not maintain a public database of concluded enforcement actions and that there have not been any franchise enforcement actions since at least 2010.</td>
</tr>
</tbody>
</table>

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322 N.D. CENT. CODE § 51-19-12.
324 N.D. CENT. CODE § 51-19-09.
325 Id.
326 See Fargo Biltmore Motor Hotel Corp. v. Best W. Int’l, Inc., 563 F. Supp. 1022 (D.N.D. 1983) aff’d in part, remanded in part, 742 F.2d 459 (8th Cir. 1984) (franchisee waived right to rescind franchise agreement based on the sale of an unregistered franchise in violation of state franchise law and was “equitably estopped” to demand restitution when franchisee “after learning that membership corporation was not registered to sell franchises in North Dakota, continued to receive and accept services and membership benefits from the membership corporation, and paid for those services for several months, and by requesting that the membership not be terminated, hotel corporation expressly affirmed the agreement.”)
327 N.D. CENT. CODE § 51-19-12.
<table>
<thead>
<tr>
<th></th>
<th>Reference to Statute</th>
<th>OR. REV. STAT. §§ 650.005 to 650.100. Director of the Department of Consumer and Business Services (“Director”)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
<td>Yes. The Director may bring a state court action to recover any relief on behalf of injured parties that an individual could recover under Section 650.020, which includes “any amounts to which the franchisee would be entitled upon an action for a rescission.” The implication is that the Oregon common law would inform the court’s calculation of the rescission remedy for violation of the Oregon statute.</td>
</tr>
<tr>
<td>3.</td>
<td>Franchise Agency - Investigatory Authority</td>
<td>The Director of the Department of Consumer and Business Services has broad discretion to conduct investigations, require written statements to be filed, subpoena witnesses and information, and administer oaths as required.</td>
</tr>
<tr>
<td>4.</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
<td>There is no process for administrative hearings in the Oregon statute. While the Director has broad investigatory authority, it must file a lawsuit to recover restitution-type damages. Of course, rescission is available through a voluntary consent order agreement.</td>
</tr>
<tr>
<td>5.</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
<td>Yes. See Row # 2.</td>
</tr>
<tr>
<td>6.</td>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
<td>The franchisee’s knowledge of the untruth or omission is an affirmative defense to any action for legal or equitable remedies.</td>
</tr>
<tr>
<td>7.</td>
<td>Voluntary Rescission</td>
<td>No procedure addressed in the Oregon statute.</td>
</tr>
<tr>
<td>8.</td>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
<td>Oregon publishes enforcement actions on its website through there are few of them. <a href="http://www.dfcs.oregon.gov/ord_srch.html">http://www.dfcs.oregon.gov/ord_srch.html</a></td>
</tr>
</tbody>
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328 OR. REV. STAT. § 650.020(3).
329 OR. REV. STAT. §§ 650.055, 650.060.
330 OR. REV. STAT. § 650.020(2).
### Rhode Island: Rhode Island Franchise Investment Act

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| 1. | Reference to Statute  
Prosecuting Agency For Filing  
Enforcement Lawsuit (non-criminal) | R.I. GEN. LAWS §§ 19-28.1-1 – 19.28.1-34  
Director of Business Regulation (“Director”) |
| 2. | May Franchise Agency Obtain  
Restitution for Injured Parties | None specified, although the court can grant “appropriate ancillary relief” in any civil action brought by the Director.\(^{331}\)  
Rescission is available through a voluntary consent order agreement. |
| 3. | Franchise Agency - Investigatory Authority | The Director may make both public and private investigations, require the production of relevant documents, subpoena witnesses and information, and administer oaths as required.\(^{332}\) |
| 4. | Franchise Agency Hearing/Authority to Issue Restitution-type Remedies | The statute provides for a public hearing process.\(^{333}\) A hearing must be held within 30 days following a timely request made within 30 days after receiving an order. |
| 5. | Must Franchise Agency File Lawsuit in Order to Recover Restitution | Yes. See Row # 3. |
| 6. | Is reliance by injured party necessary for restitution in a regulatory proceeding? | The plaintiff’s knowledge of the facts constituting the violation is a defense to liability.\(^{334}\) |
| 7. | Voluntary Rescission | Yes. The statute cuts off claims 90 days after a franchisee receives “a rescission offer in a form approved by the director.”\(^{335}\) |
| 8. | Public Disclosure of Concluded Enforcement Actions; Other Notes | Rhode Island publishes enforcement actions on its website. See [http://www.dbr.state.ri.us/decisions/decisions_securities.php#fran](http://www.dbr.state.ri.us/decisions/decisions_securities.php#fran) |

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\(^{331}\) R.I. GEN. LAWS § 19-28.1-18(c)(2).  
\(^{333}\) R.I. GEN. LAWS § 19.28.1-25.  
<table>
<thead>
<tr>
<th></th>
<th>Reference to Statute</th>
<th>S.D. CODIFIED LAWS §§ 37-5B-1 – 37-5B-53</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</td>
<td>Director of the Division of Securities (&quot;Director&quot;); State Attorney General</td>
</tr>
<tr>
<td>2.</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
<td>Yes, but only by filing a civil action. Rescission cannot be ordered as an administrative remedy. By filing a civil action, the Attorney General may recover the same relief as a private litigant, which includes the right to sue for rescission for specific violations.336</td>
</tr>
<tr>
<td>3.</td>
<td>Franchise Agency - Investigatory Authority</td>
<td>The director may make both public and private investigations, require the production of relevant documents and other tangible things, subpoena witnesses and information, and administer oaths as required. Disobedience of a subpoena issued by the director is punishable by contempt.337</td>
</tr>
<tr>
<td>4.</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
<td>The statute refers to a hearing process, but does not authorize the Director to impose restitution-type remedies as an administrative remedy. Of course, rescission is available through a voluntary consent order agreement.</td>
</tr>
<tr>
<td>5.</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
<td>Yes. See Row # 3.</td>
</tr>
<tr>
<td>6.</td>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
<td>While the South Dakota statute allows for rescission for specific violations (failure to register; failure to update disclosures; failure to include proper financial statements; failure to deliver disclosure document in a timely manner; failure to make all required disclosures), proof that the plaintiff “affirmed the transaction with knowledge of the facts concerning the violation” is a defense to a claim for any type of statutory liability including rescission.</td>
</tr>
<tr>
<td>7.</td>
<td>Voluntary Rescission</td>
<td>Yes. The statute cuts off claims 90 days after a franchisee receives “a rescission offer in a form approved by the Director.”338</td>
</tr>
<tr>
<td>8.</td>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
<td>In preparing this paper, we were informed that the Division of Securities does not maintain a public database of enforcement actions.</td>
</tr>
</tbody>
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336 S. D. CODIFIED LAWS § 37-5B-49.
337 S. D. CODIFIED LAWS §§ 37-5B-35, 37-5B-36, 37-5B-37.
338 S. D. CODIFIED LAWS §§ 37-5B-50(3)
<table>
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<tr>
<th></th>
<th>Virginia: Virginia Retail Franchising Act</th>
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<tbody>
<tr>
<td></td>
<td>Prosecuting Agency For Filing</td>
</tr>
<tr>
<td>2.</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
</tr>
<tr>
<td></td>
<td>The Commission does not need to commence a civil action, and may instead hold a hearing on 30 days’ notice regarding a violation.</td>
</tr>
<tr>
<td>3.</td>
<td>Franchise Agency - Investigatory Authority</td>
</tr>
<tr>
<td>4.</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
</tr>
<tr>
<td>5.</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
</tr>
<tr>
<td>6.</td>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
</tr>
<tr>
<td>7.</td>
<td>Voluntary Rescission</td>
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<tr>
<td>8.</td>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
</tr>
</tbody>
</table>

³³⁹ VA. CODE ANN. § 13.1-570.
³⁴¹ VA. CODE ANN. § 13.1-562(B).
³⁴³ VA. CODE ANN. § 13.1-565. The franchisee must send a written notice declaring the franchise agreement void within the following timeframes: (1) unregistered franchise or fraud: within 72 hours after “discovery” and no more than 90 days after execution date; (2) franchisor’s refusal to negotiate: within 30 days after execution date; (3) failure to provide a disclosure document: within 72 hours after “discovery” and no more than 30 days after execution date.
# Washington: Washington Franchise Investment Protection Act

<table>
<thead>
<tr>
<th></th>
<th>Reference to Statute</th>
<th>WASH. REV. CODE §§ 19.100.010 - 19.100.940</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)</td>
<td>Director of Financial Institutions (“Director”)</td>
</tr>
<tr>
<td>2.</td>
<td>May Franchise Agency Obtain Restitution for Injured Parties</td>
<td>None specified. The Commissioner has authority to recover civil penalties, but nothing in the statute authorizes rescission in an action brought by the state either administratively or in court.</td>
</tr>
<tr>
<td>3.</td>
<td>Franchise Agency - Investigatory Authority</td>
<td>The director has discretionary powers to make, annually or more frequently, both public and private investigations; and may subpoena witnesses and information and administer oaths as required.&lt;sup&gt;346&lt;/sup&gt;</td>
</tr>
<tr>
<td>4.</td>
<td>Franchise Agency Hearing/Authority to Issue Restitution-type Remedies</td>
<td>Yes, but the relief available to the Director does not include ordering rescission. Of course, rescission is available through a voluntary consent order agreement.</td>
</tr>
<tr>
<td>5.</td>
<td>Must Franchise Agency File Lawsuit in Order to Recover Restitution</td>
<td>The statute does not expressly recognize rescission as a remedy available to the state. See Row # 2.</td>
</tr>
<tr>
<td>6.</td>
<td>Is reliance by injured party necessary for restitution in a regulatory proceeding?</td>
<td>In a civil (private) action, “rescission is not available to the plaintiff if the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know or if he or she had exercised reasonable care would not have known of the untruth or omission.”&lt;sup&gt;347&lt;/sup&gt;</td>
</tr>
<tr>
<td>8.</td>
<td>Public Disclosure of Concluded Enforcement Actions; Other Notes</td>
<td>Washington publishes enforcement actions on its website. See <a href="http://www.dfi.wa.gov/laws-enforcement/dfi-enforcement-actions">http://www.dfi.wa.gov/laws-enforcement/dfi-enforcement-actions</a> The statute recognizes a private litigant’s right to “rescission or other relief as the court may deem appropriate” upon proof of any “unfair or deceptive acts or practices or unfair methods of competition” in violation of the statute.&lt;sup&gt;348&lt;/sup&gt; However, there is nothing in the statute recognizing the state’s right to order rescission through an administrative hearing process or to recover rescission on behalf of injured parties in a civil enforcement action.&lt;sup&gt;349&lt;/sup&gt; Rescission is available through a voluntary consent order agreement.</td>
</tr>
</tbody>
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<sup>345</sup> WASH. REV. CODE §§ 19.100.230.<br><sup>346</sup> WASH. REV. CODE §§ 19.100.242, 19.100.245.<br><sup>347</sup> WASH. REV. CODE § 19.100.190(2).<br><sup>348</sup> Id.<br><sup>349</sup> WASH. REV. CODE § 19.100.210. The Attorney General or Director may apply to a court to obtain other forms of relief (injunctions, appointment of a receiver, civil penalties, prosecution of a felony), but rescission is not mentioned.
### Wisconsin: Wisconsin Franchise Investment Law

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</table>
| 1. | Reference to Statute | WIS. STAT. §§ 553.01 – 553.78  
Prosecuting Agency For Filing Enforcement Lawsuit (non-criminal)  
Division of Securities (“Division”) and Wisconsin Attorney General, Department of Justice |
| 2. | May Franchise Agency Obtain Restitution for Injured Parties | The Attorney General or a district attorney may obtain restitution-type remedies by initiating a court proceeding. There is nothing in the statute that vests the Division with authority to issue restitution-type remedies as part of an administrative proceeding or otherwise, without initiating a court proceeding. The judgment by the court may include an order “to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action if proof of the pecuniary loss is submitted to the satisfaction of the court.”  
350 WIS. STAT. § 553.54(2)(a).  
351 WIS. STAT. § 553.55.  
352 WIS. STAT. § 553.56(1), (2).  
353 WIS. STAT. § 553.56(4).  
354 WIS. STAT. § 553.56(5).  
355 The only case citing the “pecuniary loss” language in the franchise statute is Lueck’s Home Imp., Inc. v. Seal Tite Nat., Inc., 142 Wis. 2d 843, 847, 419 N.W.2d 340, 342 Wis.(Ct. App. 1987) (on appeal, court ruled decision denying restitution based on the franchisee’s alleged late filing of a schedule itemizing the items it was returning to the franchisor as part of the restitution remedy. In discussing the restitution remedy under the Wisconsin Franchise Investment Law, the court held that the remedy “invokes the court’s equitable powers.” … “concept of restitution is grounded on traditional equitable principle that once equity jurisdiction attaches the court may grant full and complete relief”).  
356 WIS. STAT. § 553.54(2)(a). |
| 3. | Franchise Agency - Investigatory Authority | The Division and Department of Justice may each conduct public or private investigations and may subpoena witnesses and information and administer oaths.  
351 WIS. STAT. § 553.55. |
| 4. | Franchise Agency Hearing/Authority to Issue Restitution-type Remedies | The Division has authority to conduct hearings and also to issue orders summarily (before a hearing).  
352 For orders issued before a hearing, an interested party has a prescribed timeframe to request a hearing (within 30 days after the Division has issued an order; the hearing must be scheduled within 10 days after the Division receives the written request and held within 60 days).  
353 Hearings are public.  
Orders by the Division are subject to judicial review, but orders entered without a hearing are only subject to judicial review if the party requesting judicial review has filed a timely request for a hearing.  
354 |
| 5. | Must Franchise Agency File Lawsuit in Order to Recover Restitution | Yes. See Row # 3. Although the Division and Department of Justice have the ability to secure certain remedies, rescission (specifically, an order “to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action”) can only be issued by a court based on the evidence presented of “pecuniary loss.”  
355 |
| 6. | Is reliance by injured party necessary for restitution in a regulatory proceeding? | Yes. Restitution-type remedies are not available if the franchisor can show that the injured party was aware of facts that would prevent recovery of restitution in a civil action.  
356 |
| 7. | Voluntary Rescission | Yes. The statute cuts off claims 90 days after a franchisee receive “a written notice from or on behalf of [the franchisor] that discloses any violation of this  
356 |
The statute does not require that the notice be approved by the Division; it only requires that the notice be filed with the Division before being delivered to the franchisee. This likely reflects the state’s protocol of accepting registration upon filing without review first.

<table>
<thead>
<tr>
<th>8. Public Disclosure of Concluded Enforcement Actions; Other Notes</th>
</tr>
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<tbody>
<tr>
<td>Wisconsin publishes enforcement actions. Unfortunately, the database is not searchable. See <a href="http://www.wdfi.org/newsroom/admin_orders/dos_default.htm">http://www.wdfi.org/newsroom/admin_orders/dos_default.htm</a> Rescission is mentioned in civil liability, but not identified as a remedy available to the state through an administrative proceeding absent a voluntary consent agreement.</td>
</tr>
</tbody>
</table>

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Wis. Stat. § 553.53(4).
SPEAKERS

Rochelle B. Spandorf

Rochelle B. Spandorf is a partner in the Los Angeles, California office of Davis Wright Tremaine where she helps companies in diverse industries, from start-ups to mature public companies, develop and expand their franchise and distribution networks successfully in the U.S. and foreign markets. She is nationally ranked by Chambers USA as one of the nation’s leading franchise attorneys and is a California State Bar Certified Specialist in Franchise and Distribution Law. In addition to helping franchisors structure and launch new franchise programs and comply with franchise sales laws, she counsels franchise systems on a wide-variety of operational issues, strategic initiatives and conflicts including the implementation of system-wide change, supplier programs, vicarious liability and joint employer legal risks, contract drafting and enforcement, franchisee association negotiations, relationship disputes, antitrust and pricing matters, terminations and transfers, mergers and acquisitions, and protection of intellectual property. Shelley has advised numerous companies on whether a particular commercial arrangement is a franchise or can be structured to avoid franchise regulations. She serves as an expert witness in franchise cases, supplies strategic litigation support in franchise cases, and represents clients in mediations and before government agencies in addition to serving as a mediator of franchise disputes. Shelley assists companies with strategic investments in franchise systems by providing franchise due diligence reviews and lead counsel services and, on behalf of franchisees and area developers, assists with the acquisition and sale of franchise rights and various transactional assignments.

Shelley has the distinction of being the first woman to chair the ABA Forum on Franchising, the nation’s preeminent association of franchise attorneys, and has twice chaired the California State Bar Franchise Law Committee.
**Julie Lusthaus**

A partner of Einbinder & Dunn, Julie Lusthaus has been practicing law since 1996. Julie has substantial experience representing franchise and business clients in transactions and disputes. For franchisor clients, she assists with the development of franchise business programs, the structuring of franchise business entities, the preparation and registration of franchise disclosure documents (FDDs), the filing of trademarks and the management and protection of clients’ intellectual property. For franchisee clients, Julie assists single unit and multi-unit operators with the acquisition of franchises and development territories, reviews FDDs, negotiates franchise agreements and renewals, leases and other contracts and represents franchisees in system-wide issues and disputes with franchisors. She also has extensive experience representing independent business owners and serial entrepreneurs, assisting them in all stages of growth. She provides legal advice and counsel to clients engaged in purchases and sales and she drafts all necessary agreements including operating agreements, shareholder agreements, asset acquisition agreements, non-compete agreements and others.

Julie is a frequent author and speaker on franchising topics for various professional and business organizations including the American Bar Association, the International Franchise Association and the New York State Bar Association. She is recognized by Franchise Times as a "Legal Eagle," having been nominated twice by her peers as a leading practitioner in the franchise field. Julie is immediate past Director of the Litigation and Dispute Resolution Division of the American Bar Association Forum on Franchising and is a guest columnist for the Westchester County Business Journal. She is also an active member of the American Bar Association Law Practice Management Section, the New York State Bar Association Committee on Franchise Distribution and Licensing Law, the International Franchise Association, the Westchester County Bar Association, the Westchester Business Council and the Westchester County Association.
Theresa Koller

Theresa Koller is a litigation partner in the Omaha, Nebraska office of Cline Williams Wright Johnson & Oldfather, L.L.P., and is a member of the firm’s Franchising and Distribution Practice Group. She has been practicing law since 2002, and has been actively engaged in franchise litigation since 2003. Teri has represented franchisors and franchisees with respect to a host of franchise relationship, intellectual property, and compliance issues. She has achieved a range of results for her clients including the recovery of damages, termination of franchise relationships, enforcement of non-competition and other post-termination covenants, the winding down of hold-over franchisees, and rescission of franchise agreements. She has also counseled start-up franchisors regarding franchise and business opportunity matters.

Teri has served as member of the American Bar Association Forum on Franchising Publications Committee since January 2012. She has also presented programs on franchise topics for state continuing education programs and seminars for individuals interested in establishing franchised businesses. She received a Bachelor of Science from the University of Nebraska (magna cum laude 1998) and her Juris Doctor from Creighton University School of Law (summa cum laude 2002).