WHEN THE FRANCHISE AGREEMENT ENDS
BUT THE RELATIONSHIP CONTINUES

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WHEN THE FRANCHISE AGREEMENT ENDS BUT THE RELATIONSHIP CONTINUES

I. INTRODUCTION

No one wants to contemplate the end of a dream, what happens after the protagonist rides into the sunset. But, at some point, the horse will tire, night will fall, and the rolling credits will end. That end is what franchisors and franchisees are tasked with not only contemplating but determining, subject to state laws and common-law good faith requirements. Both parties can prepare for the expiration of their franchise terms through a well-drafted franchise agreement that clearly sets forth their respective rights and obligations. Included in the considerations of how the relationship may end is what would happen if the franchise agreement expires by its terms but the franchisee or a third party continues to operate, either unilaterally or with some level of knowledge, consent, or participation from the franchisor.

This paper defines and distinguishes the expiration of a franchise agreement, as opposed to its termination prior to the end of its term, and addresses the typical rights and obligations of both franchisors and franchisees upon expiration. Next, the paper addresses the various state laws governing rights and obligations upon expiration of a franchise agreement, including any contractual renewal rights and obligations. Surprisingly, courts continue to adjudicate franchise agreements and relationships that are not governed by an express expiration term. The paper addresses how courts determine the rights and obligations of the parties under those circumstances, the types of claims and defenses asserted, and the terms or conditions courts may impose. Finally, the paper outlines practical drafting considerations and other post-expiration issues, including franchise transfers.

II. DEFINING EXPIRATION AND IMMEDIATE RIGHTS AND DUTIES UPON EXPIRATION

A. Distinguishing Between Expiration and Termination

Many franchise agreements use the terms “terminate” or “termination” to describe the end of the agreement or relationship, regardless of whether an affirmative act ends the relationship or the agreement naturally expires. Other franchise agreements carefully distinguish a “termination” event from an “expiration.” Recent cases show the need for clear definitions of what constitutes “termination” and “expiration,” as well as the rights of each party depending on how the agreement ends.

In Hamden v. Total Car Franchising Corp., the issue before the Court was “whether the natural end of the contract qualifies as termination.”1 The question was necessitated by the terms of the franchise agreement which provided that “[f]or 2 years following the termination of this Agreement,” Hamden would be prohibited from participating in a paint restoration business. Hamden became a Total Car Franchising (“TCF”) franchisee in 1996, signing a fifteen-year franchise agreement.2 During that time, Hamden performed paintless dent repair as a TCF franchisee. He continued operating as a franchisee even after the franchise agreement expired by its terms on May 9, 2011. Hamden contended that he did not realize the fifteen-year term had ended.3 Only after TCF alerted Hamden about the expiration did Hamden decide to end the

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1 548 F. App’x 842, 843 (4th Cir. 2013).
2 Id. at 845.
3 Id.
franchise relationship and to pursue his own business in the same industry.\(^4\) TCF terminated Hamden as a franchisee on December 3, 2011, and, as a result of his allegedly competitive business, threatened to pursue an injunction and damages.\(^5\) Hamden filed a declaratory judgment action in the U.S. District Court for the Western District of Virginia. After a one-day bench trial, the court held that the franchise agreement's restrictive covenants did not bind Hamden because that provision only applied to a termination and the franchise agreement had expired at the end of its term, not terminated.

In making its determination, the district court disregarded arguments that the "threshold issue may be resolved by a straightforward application of dictionary definitions and cases finding no difference between 'terminate' and 'expire' when construing a contract" and "that the language of the contract as a whole presents an expansive definition of termination, evidenced by its use of the broad modifier 'any' when referring to termination."\(^6\) After reviewing Black's Law Dictionary's definitions of the terms "termination" and "expiration," the district court stated:

Viewed as a whole, however, the contract provides support for the notion that termination correlates to an affirmative act and the terms are thus distinct here.\(^7\)

The Court went on to state:

Turning to the case sub judice, Section 8 [of the franchise agreement] indicates that termination occurs upon an action: either Hamden's violation of the Franchise Agreement or his notice of his intent to terminate. Applying Clinch Valley's principles, the Franchise Agreement's failure to indicate that termination arises passively through expiration, which it recognizes as a separate event in Section 2, indicates that expiration does not trigger the restrictive covenants. Cf. Specialty Rental Tools & Supply, LP v. Shoemaker, 553 F.3d 415, 421 (5th Cir. 2008) (limiting "terminate" to an affirmative act rather than the mere passage of time where the contract referred to the end of the employment "as 'ending'-not as 'terminating'" on a particular date, and the section defining termination only listed a number of affirmative acts, available to both parties, necessary to end the agreement).\(^8\)

Although the U.S. Court of Appeals for the Fourth Circuit found that "termination," as used in the agreements before [it, did] not encompass expiration," and thus affirmed the district court's ruling that the restrictive covenant did not apply to Hamden, the Fourth Circuit reversed the district court's ruling that a certain non-disclosure clause in the franchise agreement did not

\(^4\) Id.

\(^5\) Id.

\(^6\) Id. at 846.

\(^7\) Id.

\(^8\) Id. at 847-48.
Thus, Hamden was barred at any time after entering into the franchise agreement from communicating, directly or indirectly, or divulging or using for Hamden's benefit or the benefit of any other person or legal entity, TCF's proprietary and confidential trade secrets. The Fourth Circuit also stated:

To conclude, we find that termination did not encompass expiration at the end of the fifteen-year term. However, part of the non-disclosure covenant applies upon expiration. Hence, Hamden remains bound by the first sentence of the non-disclosure provision.

The lesson from *Hamden* is that it is important to use precise language in a franchise agreement when setting forth the specific rights and obligations of the parties both after the premature termination of the franchise agreement as well as upon its natural ending.

Other courts have not necessarily followed *Hamden*. In *Frye v. Wild Bird Centers of America*, the U.S. District Court for the District of Maryland affirmed an arbitration award that enforced a two-year, non-competition provision against the franchisee petitioners that was included in the parties' franchise agreement. The arbitrators specifically ordered the petitioners to cease violating the non-competition provision for two years beginning on the date petitioners began to comply with the provision. In *Frye*, the franchisee petitioners entered into a franchise agreement with Wild Bird Centers of America ("WCBA") to operate a Wild Bird Center store in Boulder, Colorado. The parties' franchise agreement included the following "Restrictions":

For a period of 24 months after termination of this Agreement for any reason, you will not engage in or acquire any financial or beneficial interest . . . in, or become a landlord of any retail business which is similar to the Store, within the Licensed Territory or within the licensed territory of any other Wild Bird Center franchisee or any Wild Bird Crossing franchisee or within a 20-mile radius of the perimeter of the Licensed Territory or the licensed territory of any other Wild Bird Center franchisee or any Wild Bird Crossing franchisee, or within a 20-mile radius of any Wild Bird Center or Wild Bird Crossing store which we or any of our affiliates operate.

A second, relevant provision of the parties' franchise agreement provided:

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9 Id. at 848.
10 Id. at 850.
11 Id. at 850-51.
13 Id.
14 Id.
15 Id. at 305.
A. In the event of termination or expiration of this Agreement for any reason, or in the event that you desire prior to the termination of this Agreement, to discontinue the operation of the Store for any reason other than a sale to a third person who has been approved by us, you agree to perform the following obligations:

** * **

(11) You will comply with your obligations under [the non-competition provisions] . . . .

As the expiration of the franchise agreement approached, WBCA sent additional, follow-up correspondence to the franchisees advising them that the franchise agreement would expire on December 31, 2014. The letter also cited the non-competition obligations under the franchise agreement. After the franchise expired, and for the first half of 2015, the franchisee continued to operate the store as a WBCA Center. The parties engaged in an unsuccessful mediation during this holdover period. Later, WBCA filed a demand for arbitration to collect unpaid fees and to enforce the non-competition restrictions of the parties' franchise agreement. After holding a five-day evidentiary hearing in August 2016, the arbitrator issued a twelve-page ruling in favor of WBCA on the non-competition restrictions, but did not award WBCA any unpaid fees. The franchisee filed a petition in district court to vacate the arbitration award.

Notably, the district court's ultimate decision in Frye relied heavily on law under the Federal Arbitration Act ("FAA"), where "[a]n arbitrator's interpretation of the law, including contract interpretation, is entitled to great deference and 'may only be overturned where it is in manifest disregard of the law.'" Thus, it is questionable whether, had the court heard the matter initially, instead of on appeal from an arbitrator's decision, the result would have been the same. In fact, in holding that it is not necessary to decide whether "termination" or "expiration" triggers the non-competition provisions, the Court wrote:

> [T]he pertinent question is not whether the arbitrator's interpretation of the contract is the "best or most accurate reading of the contract," but whether the arbitration award draws its essence from the contract . . . As long as the arbitrator is even


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16 Id.
17 Id.
18 Id.
19 Id. at 306.
20 Id.
21 Id.
22 Id.
23 Id. at 307 (internal citations omitted).
arguably construing or applying the contract, a court may not vacate the arbitrator's judgment.\(^{24}\)

Rather, the court concluded, “the Court’s task is to determine whether the arbitrator’s decision draws from the essence of the Franchise Agreement.”\(^{25}\) Thus, in confirming the arbitrator’s award, the court held:

The arbitrator’s 12-page written decision reflects a reasoned application of the Franchise Agreement. The arbitrator’s imposition of the specific non-competition restrictions contained in Paragraph 14(B) plainly derived from the terms of the Franchise Agreement, and his conclusion that those restrictions would apply even when the Franchise Agreement terminated based on expiration is a plausible reading of the Franchise Agreement, particularly because Paragraph 24 specifically applies the restrictions in Paragraph 14(B) in the event of “termination or expiration.” The award therefore drew from the essence of the Franchise Agreement and was not based on the arbitrator’s “personal notions of right and wrong.” and did not otherwise demonstrate a “manifest disregard of the law[.]” Thus, under the deferential standard of review, there is no basis to vacate this aspect of the arbitration award.\(^{26}\)

The Frye court also distinguished Hamden, finding that: (i) the Hamden franchise agreement contained prefatory language not existing in the Frye franchise agreement; and (ii) more importantly, “Hamden did not involve review of an arbitration award; rather, the court’s task in Hamden was to resolve breach of contract claims in the first instance.”\(^{27}\) Although the Frye decision is more about deference to arbitrators than an analysis of the implications of the use of “expiration” versus “termination,” the court’s limited discussion is instructive. The Frye franchise agreement’s broader and more encompassing language, as opposed to Hamden’s language, expressing the rights and obligations of the parties upon termination for any reason, as well as the subsequent inclusion of language spelling out obligations after “termination” or “expiration” for any reason, supported the differences in the rulings between the two cases.

The franchisor WBCA possibly could have avoided the issue altogether by including that same language (i.e., “termination or expiration of this Agreement for any reason”) in the first sentence of the non-competition provision. Importantly, in Frye, the underlying arbitration award could have concluded that the non-competition provision applied only to a termination because (1) that provision failed to reference expiration, and (2) the drafters clearly understood expiration to be a separate and independent concept as it was specifically used later in the agreement. Under those circumstances, the district court would have been just as likely to enforce the award as “drawing its essence from the agreement.” Thus, it is critically incumbent upon drafters

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\(^{24}\) Id. at 308.

\(^{25}\) Id.

\(^{26}\) Id. at 308-9.

\(^{27}\) Id. at 309.
to ensure that the franchise agreement language is clear and incapable of such diametrically inapposite outcomes.

Notwithstanding the rulings in Hamden and Frye, in Sleepy's LLC v. Select Comfort Wholesale Corp., the U.S. Court of Appeals for the Second Circuit conducted an in-depth review of the "expiration"-"termination" distinction when it overturned the U.S. District Court for the Eastern District of New York's treatment of the two terms as interchangeable in the parties' dealer agreement.\(^{28}\) The parties' entered into an agreement for Sleepy's to sell one line of Select Comfort's Sleep Number bed until the expiration of the agreement on September 30, 2006.\(^{29}\) The agreement provided for termination under specified circumstances and with written notice. Those termination provisions were followed by a "Waiver of Termination" provision:

Waiver of Termination. The conduct by either of the parties after termination of this Agreement, including without limitation any sale of the Products, will not be construed as a waiver of the termination of this Agreement or as an extension or continuation of the term of this Agreement beyond the period specified in the notice of termination; any such termination of this Agreement may only be waived by an express written waiver of termination signed by the terminating party.\(^{30}\)

The relationship continued beyond the agreement's expiration date without a renewal or agreement on continued terms. Later, Sleepy's discovered through secret shopper reports that Select Comfort's salespeople were disparaging Sleepy's and the one Select Comfort line that Sleepy's sold, but there was no evidence that any disparaging remarks occurred prior to the expiration date.\(^{31}\) The district court concluded that the agreement had expired and, in the absence of a written agreement to continue, its terms were no longer binding on the parties. Thus, the subsequent disparagement and other hostile conduct could not be a breach of the contract, unfair competition, or a breach of the implied covenant of good faith and fair dealing.\(^{32}\)

The Second Circuit, however, took a completely different view of the interplay between "termination" and "expiration" as used in the agreement. The Second Circuit found that the agreement distinguished between "expiration" ("arrival of the date contractually specified as the end of the contract's term") and "termination" ("the act of a party, relying on a contractual justification, to bring the contract term to a premature end").\(^{33}\) The court concluded that the

\(^{28}\) 779 F. 3d 191, 196 (2d Cir. 2015). This case involves a dispute between a manufacturer and a retailer, and thus it is not precisely like the franchise agreements generally addressed in this paper, but the authors found it valuable because it provides a detailed analysis of expiration and termination in a contract that was not automatically renewable under its terms like many dealership agreements.

\(^{29}\) The agreement did contain a renewal provision, but the parties never renewed the agreement pursuant to that provision. Id. at 196 and n.5.

\(^{30}\) Id. and n.4

\(^{31}\) Id. at 194.

\(^{32}\) Id. at 196.

\(^{33}\) Id. at 196-97.
waiver of termination provision made no sense as applied to the expiration of the agreement, nor did it prevent the parties from extending the agreement through their conduct.34

In the absence of carefully crafted language and defined terms, these cases demonstrate that franchisors and franchisees are at the mercy of the decision-maker and can only hope that an arbitrator or judge gets it right.35 It is important for parties to accurately and unambiguously define and utilize the terms “expiration” and “termination” to avoid unnecessary and potentially devastating litigation consequences. To the extent the terms are not clearly defined in the franchise agreement, and the franchisor will not tailor the agreement to add those definitions, a franchisee should make every effort to get clarification in writing, especially if it appears the end of the agreement may become an issue. Both Sleepy’s and Frye demonstrate that this can be a costly misinterpretation.

B. Typical Franchisor Contractual Rights on Expiration

A franchisor generally does not need to do anything to effectuate the natural expiration of a franchise agreement, subject to the relationship laws discussed in Section 11.C. In some franchise agreements, however, expiration could trigger the franchisor’s obligations or options to purchase the franchisee’s assets or inventory, or to assume a lease.

1. Lease Assumption

In Pearle Vision, Inc. v. Adler, the franchisor Pearle Vision, Inc. (“PVI”) sought a preliminary injunction enjoining the former franchisee from assigning or transferring his lease to others and, instead, requiring the franchisee to assign the lease to PVI.36 In moving for injunctive relief, PVI relied on the “Effect of Expiration or Termination” provision in the parties’ franchise agreement, which provided, in pertinent part:

PVI will also have the right to lease from Franchisee or assume Franchisee’s third-party lease. In the event that PVI exercises such right, PVI shall also have the right to immediate possession of the Location. Franchisee agrees that the Location will be surrendered to PVI in as good condition as when received by Franchisee, reasonable wear and tear excepted.37

The franchisee conceded that this provision granted PVI the right to assume the lease, but argued that the court should not enforce the provision on the equitable bases of waiver and modification.38 The court found waiver likely would not apply because the evidence showed that

34 Id. at 197.

35 Following the Second Circuit’s decision, the case was remanded to the Eastern District and the bench trial completed before a different judge. That judge found in favor of Select Comfort on all counts and ultimately awarded Select Comfort attorneys’ fees and costs totaling $2,630,541.04. See Sleepy’s LLC v. Select Comfort Wholesale Corp., 222 F. Supp. 3d 169, 180 (E.D.N.Y. 2016).


37 Id.

38 Id. at *4.
PVI did not intend to relinquish its rights.\textsuperscript{39} Alternatively, the franchisee argued that a previously-entered lease assignment to a third-party was a modification, under the theory that it contained beneficial language that was not in the franchise agreement itself. The court was unconvinced, finding that the lease assignment agreement did not expressly modify the franchise agreement and certainly did not negate the provision permitting lease assumption in the franchise agreement.\textsuperscript{40}

2. Telephone Assignment

Another common provision requires the franchisee to assign its telephone numbers to the franchisor. In \textit{Domino's Pizza Franchising, LLC v. VTM Pizza, Inc.}, upon the termination of the franchise agreement, the U.S. District Court for the Eastern District of Michigan ordered the former franchisee to assign its telephone numbers to Domino's.\textsuperscript{41} If a franchise agreement does not address what happens to the telephone numbers upon its expiration, this detail can also become the subject of litigation.

3. De-identification

Other provisions include requiring franchisees to de-identify their former franchised business (even if the franchisee does not intend to continue operating). In \textit{Big O Tires, LLC v. Felix Bros., Inc.}, the parties' franchise agreement contained a provision requiring the franchisee to de-identify their Big O franchise and return proprietary materials upon termination or expiration.\textsuperscript{42} Big O sued the former franchisee for trademark infringement after the parties' franchise agreement expired. In the three months between the expiration of the agreement and the lawsuit, the defendants held off removing the plaintiff's trademarks from their business "on account of ongoing negotiations with [the plaintiff] regarding the possibility of ... a buyout."\textsuperscript{43} The U.S. District Court for the District of Colorado denied summary judgment, finding that plaintiff was "at a minimum, sending mixed signals," and thus that there was a genuine dispute of material fact regarding whether Big O "acquiesced in the use of its marks during the ongoing negotiations."\textsuperscript{44} Of note, the court focused on the fact that Big O negotiated an extension of the franchise agreement after a previous expiration, and that

[There is] no indication that defendants were expected to de-identify [i.e., remove plaintiff's trademark from their store] during those earlier negotiations, only to re-identify upon a granting of the extension. To the extent plaintiff was aware of the continued operation of the business and was actively engaging in discussion regarding the possibility of the [location] remaining [plaintiff's] franchise in some form or another, a jury could conclude that

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.} at *7.


\textsuperscript{43} \textit{Id.} at *1.

\textsuperscript{44} \textit{Id.} at *7.
plaintiff implied that it would not assert its trademark and trade
dress rights until all negotiations over termination of [defendant’s
location] were complete.\textsuperscript{45}

Thus, franchisors should uniformly and aggressively enforce their post-expiration
provisions or otherwise risk an adverse ruling as a result of their post-expiration interactions,
inactions, or conduct with the former franchisee. Separately, absent statutory intervention,
franchise agreements rarely provide any post-expiration provisions helpful to franchisees except possibly
the right to renew. But, even common renewal provisions may require a franchisee to
sign a general release, agree to an altered territory, or commit to other different terms than
those set forth in the expiring franchise agreement.

C. \textbf{Rights and Limitations on Expiration Under Franchise Relationship Laws}

In the majority of states, parties can ordinarily agree to any post-expiration and non-
renewal terms they wish.\textsuperscript{46} However, a number of states have “relationship” laws that may
restrict a franchisor’s ability to refuse to renew a franchise agreement or provide certain criteria
that a franchisor must meet before refusing to renew at the time of expiration. For instance, the
franchise relationship laws of Delaware, Hawaii, Iowa, New Jersey, Rhode Island, and
Wisconsin require good cause for nonrenewal by the franchisor.\textsuperscript{47} In varying degrees, other
states contain renewal provisions that do not necessarily require “good cause.”

A summary of the relationship laws addressing this expiration-renewal issue established
by various states follows:

- Arkansas – The Arkansas Franchise Practices Act prohibits franchisors from failing
to renew a franchise except for good cause or except in accordance with current
policies, practices, and standards established by the franchisor which are not
arbitrary or capricious. A franchisor is also required to provide ninety days’ written
notice of its intention not to renew. Notably, however, if the reason for failure to
renew is for repeated deficiencies within a twelve-month period, the franchisee has
ten days to rectify the repeated deficiencies and thereby void the notice.\textsuperscript{48}

\textsuperscript{45} Id.

\textsuperscript{46} See 140 Matthew Bender, \textit{FRANCHISING} § 9.03(14)(b). Most franchisors include conditions precedent to renewal,
including the following:

\begin{quote}
The Franchisee will sign the Franchisor’s then-current form of Franchise
Agreement, which agreement may contain terms materially different than the
terms of this Agreement.
\end{quote}

This is generally in addition to the payment of a fee, appropriate notice, and related requirements. For more
information about the “then-current form of Franchise Agreement” language, \textit{see Keith J. Kanouse, Evan M.
Goldman, and Scott D. Salmon, Are Material Changes Subject to Renewal Franchise Agreements Subject to the
Implied Covenant of Good Faith and Fair Dealing?, FRANCHISE L. J., Vol. 36 (Spring 2017).}

\textsuperscript{47} Thomas M. Pitegoff and W. Michael Garner, \textit{Ch. 5: Franchise Relationship Laws,} \textit{FUNDAMENTALS OF FRANCHISING}
185 (Rupert M. Barkoff and Andrew C. Selden, eds. 2008).

\textsuperscript{48} \textit{ARK. CODE ANN.} § 4-72-204.
• California – While the California Franchise Relations Act permits non-renewal without cause, a franchisor is required to provide the franchisee 180 days to sell its business to a purchaser meeting the franchisor's requirements for purchasing a franchise. A franchisor may refuse to renew where the franchisee fails to agree to changes or additions to the terms and conditions of the franchise agreement, if such changes or additions would result in renewal of the franchise agreement on substantially the same terms and conditions on which the franchisor is then customarily granting new and renewal franchises, or if the franchisor is not granting a significant number of renewal franchises on the terms and conditions then-given to original franchisees. Franchisors are barred, however, from refusing to renew a franchise for the purpose of converting the franchisee's business to a company-owned operation.

• Connecticut – The Connecticut Franchise Act bars franchisors from failing to renew a franchise, except for good cause, which includes the franchisee's refusal or failure to comply substantially with any material and reasonable obligation of the franchise agreement. Moreover, when a franchisor decides to not renew a franchise, the franchisor is required to provide six months' written notice, with limited exceptions. With respect to a franchisor who leases real property to the franchisor, nonrenewal is permitted where the franchisor: (1) sells or leases the real property to a non-affiliated entity; (2) sells or leases the real property to an affiliated entity, except that such entity shall not use the property for the operation of the same business of the franchisee; (3) converts the real property to a use not covered by the franchise agreement; or (4) where the franchisor leased the property from a third-party that terminates or does not renew the lease.

• Delaware – The Delaware Franchise Security Law provides that the failure of a franchisor to renew a franchise shall be deemed to be "unjust," or to have been made "unjustly," if such failure to renew is without good cause or in bad faith. Of special importance in Delaware is that a franchisor cannot unjustly refuse to deal with a franchisee with whom the franchisor has been dealing for at least two years. The franchise agreement must specify the grounds upon which a franchisor may fail to renew. If grounds are not included, the franchise agreement will be construed to permit only "just" terminations. Moreover, a franchisor that leases property to a franchisee cannot be unreasonable or excessive in renegotiating the lease. For instance, a franchisor cannot unjustly terminate a lease that effectively terminates the franchise, otherwise it will be deemed an unjust termination of the franchise.

• Florida – It is unlawful for a franchisor, without due cause, to: (i) fail to renew a franchise on terms then equally available to all of its franchisees; (ii) terminate a franchise; or restrict the transfer of a franchise unless the franchisee receives fair and reasonable compensation for the inventory of the business.

49 CAL. BUS. & PROF. CODE § 20025.
50 CONN. GEN. STAT. § 42-133f.
51 DEL. CODE ANN. TIT. 6, § 2552.
52 FLA. STAT. § 686.409.
• Hawaii – Hawaii’s Franchise Investment Law prohibits the non-renewal of a franchise except for good cause, or in accordance with the terms and standards established by the franchisor, which must apply equally to all franchisees, unless the franchisor proves that treating a specific franchisee differently is reasonable, proper and justified, and not arbitrary. If the franchisor fails to renew a franchisee, the franchisor must compensate the franchisee for the fair market value of the franchisee’s inventory, supplies, equipment and furnishings that were purchased from the franchisor or a designated supplier. Moreover, if the franchise is not renewed so that the franchisor can convert and operate the business, the franchisor must also compensate the franchisee for the loss of good will.53

• Illinois – The Franchise Disclosure Act of 1987 states that it is a violation for a franchisor to refuse to renew a franchise without compensating the franchisee by either repurchase or by other means for the diminution in the value of the franchise business caused by the expiration of the franchise where: (i) the franchisee is barred from continuing to conduct substantially the same business under the intellectual property; or (ii) the franchisee has not been sent notice of the franchisor’s intent not to renew at least 6 months before the expiration date of the franchise.54

• Indiana – The Indiana Deceptive Franchise Practices Act provides that a franchisor that elects not to renew a franchise must provide at least 90 days’ written notice.55

• Iowa – Iowa has two franchise laws in effect: one that applies to agreements entered into prior to July 1, 2000 (the “1992 Act”) and one applicable to agreements made after July 1, 2000 (the “2000 Act”). With respect to renewing franchise agreements, the 1992 Act and 2000 Act (collectively, the “Iowa Acts”) are similar. Under the Iowa Acts, a franchisor is barred from failing to renew a franchise unless: (i) the franchisor has provided at least six months’ written notice to the franchisee of its intent not to renew; and (ii) any of the following circumstances exist: (a) good cause exists, provided that the refusal is based on legitimate business interests and is not arbitrary and capricious; (b) the franchisor and franchisee agree not to renew; or (c) the franchisor completely withdraws from the geographic area (under this scenario, a franchisor cannot seek to enforce any post-termination covenants not to compete). Notably, however, under the Iowa Acts, a franchisor may require a renewing franchisee to sign a franchise agreement with the then-current requirements for franchisees, which may include different terms and fees than the expiring agreement.56

• Michigan – Under the Michigan Franchise Investment Law, it is unlawful for a franchisor to refuse to renew a franchise without fairly compensating the franchisee, by repurchase or other means, for the fair market value of the franchisee’s inventory, supplies, equipment, fixtures, and furnishings. This provision only applies, however, where the term of the franchise agreement is less than 5 years, and where the

53 HRS § 482E-6.
54 815 ILCS 705/20.
55 IND. CODE § 23-2-2.7-3.
56 IOWA CODE § 523H.8; see also IOWA CODE § 237A.10(8).
franchisee is prohibited by the franchise agreement from continuing to conduct substantially the same business under other intellectual property, or where the franchisee does not receive at least six months’ advance notice of the franchisor’s intent not to renew the franchise. It is also a violation of Michigan law to refuse to renew a franchise on terms generally available to other franchisees of the same class or type under similar circumstances.\textsuperscript{57}

- Minnesota – The Minnesota Franchise Act prohibits a franchisor from refusing to renew a franchise unless based on good cause, as therein defined, and where the franchisee has failed to correct the deficiencies. Furthermore, a franchisor is barred from failing to renew a franchise unless (1) the franchisee has been given written notice at least 180 days in advance, and (2) the franchisee has been given an opportunity to operate over a sufficient period of time to enable the franchisee to recover the fair market value of the franchise as a going concern. Minnesota also expressly prohibits a franchise from refusing to renew a franchise for the purpose of converting the franchisee’s business to a franchisor-operated business.\textsuperscript{58}

- Mississippi – Under Mississippi law, franchisors cannot fail to renew a franchise without notifying the franchisee of the non-renewal, in writing, at least ninety days in advance, with limited exception.\textsuperscript{59}

- Missouri – Under the Missouri Franchise Law, franchisors cannot fail to renew a franchise without notifying the franchisee of the non-renewal, in writing, at least ninety days in advance, with limited exception.\textsuperscript{60}

- Nebraska – The Nebraska Franchise Law bars a franchisor from failing to renew a franchise without giving notice at least sixty days in advance of renewal, with limited exception. Nebraska explicitly permits, however, a franchisor to not renew a franchise if the franchisee is unable or unwilling to meet reasonable renewal conditions.\textsuperscript{61}

- New Jersey – It is a violation of the New Jersey Franchise Practices Act for a franchisor to fail to renew a franchise without first giving written notice setting forth all the reasons for its intent to not renew at least sixty days in advance of the expiration of the franchise agreement, with limited exception. Under New Jersey law, good cause is limited to the franchisee’s failure to comply with the requirements imposed by the franchisor.\textsuperscript{62}

Federal courts addressing the sixty-day statutory notice period

\textsuperscript{57} MICH. COMP. L. § 445.1527.

\textsuperscript{58} MINN. STAT. § 80C.14.

\textsuperscript{59} MISS. CODE § 75-24-53.

\textsuperscript{60} V.A.M.S. § 407.405.

\textsuperscript{61} NEB. REV. STAT. § 87-404.

\textsuperscript{62} N.J.S.A. § 56:10-5.
have expressed differing views, albeit in dicta, as to whether such period is simply a notice period or a notice and cure period.63

- Puerto Rico – The Puerto Rico Dealer’s Act of 1964 bars a franchisor—regardless of any contractual provision to the contrary—from refusing to renew a franchise agreement on its normal expiration, except for just cause, which is defined to include “[n]onperformance of any of the essential obligations of the dealer’s contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service.”64

- Rhode Island – The Rhode Island Fair Dealership Act requires that, notwithstanding the terms of any franchise agreement, and with limited exception, the franchisor shall provide the franchisee sixty days’ prior written notice of nonrenewal, and shall provide at least thirty days in which to cure any claimed deficiency.65

- U.S. Virgin Islands – The Virgin Islands Franchise Act prohibits a franchisor from failing to renew a franchise unless based on good cause, which includes the failure of a franchisee to substantially comply with the terms of the franchise agreement, or comply with the terms in bad faith.66

- Washington – The Washington Franchise Investment Protection Act provides that it is unlawful for a franchisor to refuse to renew a franchise without fairly compensating the franchisee for the fair market value of the franchisee’s good will and inventory, supplies, equipment, and furnishings purchased from the franchisor. The franchisor may wholly avoid this requirement if it: (i) gives the franchisee one year’s notice of nonrenewal; and (ii) agrees not to enforce any covenant which restrains the franchisee from competing with the franchisor.67 In addition, a violation of the nonrenewal provisions is a violation of the Washington Unfair or Deceptive Practices Act.68

- Wisconsin – No grantor, directly or through any officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause. The burden of proving good cause is on the grantor.69


64 10 L.P.R.A. § 278, et seq.


66 2A V.I.C. § 132.

67 RCW § 19.100.180.

68 RCW § 19.100.180; see also RCW § 19.86, et seq.

69 Wisc. Stat. § 135.03.
Therefore, careful drafting and administration of the franchise relationship, especially towards the end of the term of the franchise agreement, are key for franchisees in states that have statutes restricting a franchisor's renewal rights upon expiration.

III. RIGHTS AND DUTIES FOLLOWING EXPIRATION OF FRANCHISE AGREEMENT WITH NO RENEWAL RIGHTS

Subject to applicable state franchise relationship and disclosure laws, some franchise agreements expressly provide for no renewal rights and specify what a franchisee’s duties are following expiration without renewal. With the exception of issues raised by Hamden v. Total Car Franchising Corp., discussed above, most franchisees with an expired agreement are bound by the same terms and conditions as a terminated franchise agreement—namely, various post-termination obligations, return of franchisor property or equipment, complete de-identification and covenants not to compete. Some franchisors may provide one renewal term but refuse to permit indefinite terms or an unlimited number of renewals. For instance, in Bayit Care Corp. v. Tender Loving Care Healthcare Services of Nassau Suffolk, LLC, the parties’ franchise agreement provided:

If Franchisee wishes to exercise its right to enter into a renewal Franchise Agreement, it shall do so by executing Franchisor's then-current form of Franchise Agreement, which agreement shall supersede this Agreement and be modified to provide that Franchisee shall have no right to renew the franchise upon expiration of the Renewal Term. If upon the expiration of the Renewal Term, the Franchisee wishes to continue to operate the Franchised Business for an additional term (the "Additional Term"), then, subject to Franchisor's absolute discretion, and in the manner prescribed by Franchisor, Franchisee may be permitted to enter into Franchisor's then-current form of Franchise Agreement, provided that, at a minimum, Franchisee shall have fulfilled the conditions set forth in Paragraph 3.03(a)—(h) hereof.\(^70\)

Thus, franchisors may impose new conditions on a renewing franchisee not required under the original (or even one subsequent) franchise term. Because franchisors often retain significant control and discretion over the renewal process, it is critical that franchisees understand, before entering into a franchise agreement, the provisions in the agreement that address its expiration, nonrenewal, and post-expiration obligations.

IV. POST-EXPIRATION WRITTEN EXTENSION AGREEMENTS

A. Contractual Claims

In some cases, rather than enter into a wholly-new franchise agreement (or, occasionally, while negotiating a new franchise agreement), the parties will enter into a written extension agreement upon expiration of the original agreement. The case of Tinder Box Intern., Ltd. v. Patterson is illustrative of the issues that can arise in such situations.\(^71\) In Tinder Box, the


franchisees—the Pattersons—signed a ten-year franchise agreement on October 10, 1996.\textsuperscript{72} Neither the franchisees nor the franchisors noticed that the franchise agreement expired in October 2006, and the franchise relationship continued.\textsuperscript{73} In fact, the franchisor did not notice until February 2007.\textsuperscript{74} On March 2, 2007, the franchisor wrote to the Pattersons, acknowledging that they had continued to operate the business “[d]espite not having formally renewed the franchise.”\textsuperscript{75} Although not a duly-executed extension agreement, the letter was a written acknowledgment that, for the time being, the franchisor expected and understood that the franchisees would continue to operate. Shortly thereafter, Tinder Box circulated a proposed, new franchise agreement, which the Pattersons refused to sign.\textsuperscript{76}

Tinder Box filed a complaint approximately eight months later, in November 2007, alleging seven causes of action, which included four contract-based claims, two Lanham Act-based claims, and one tortious interference-style claim.\textsuperscript{77} The U.S. District Court for the Eastern District of Pennsylvania, following a bench trial on liability, concluded that the parties’ conduct following the expiration of the franchise agreement did not renew, extend, or alter its terms.\textsuperscript{78} The district court disregarded the franchisor’s argument that, “where parties maintain their business relations after their contract lapses, the provisions of that contract continue to govern the relationship.”\textsuperscript{79} Instead, the court held that that principle only applied if the contract failed to indicate what would happen upon expiration, termination, or nonrenewal. The court offered no explanation of what terms governed the months between expiration and discontinued operations.\textsuperscript{80} In addition, the court dismissed the contract and tortious interference claims based on the parties’ contractual limitation of suit provision, which required suit to be brought within one year of a parties' knowledge of facts or circumstances reasonably indicating the existence of its claims.\textsuperscript{81} Notwithstanding the franchisor employees’ “neglect,” as stated by the court, knowledge of the expiration of the agreement was imputed to the franchisor because the franchisor’s president signed the franchise agreement and had three employees responsible for administering franchise agreements.\textsuperscript{82} The court wrote:

The inattention of plaintiff’s employees does not alter the fact they were aware of defendants’ continued operation, which

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at *1.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at *2.
\textsuperscript{82} Id.
unequivocally indicated a breach of the franchise agreement. The limitation of suit provision, then, bars plaintiff's breach-of-contract claims, including Counts III, IV, V, and VI of plaintiff's complaint.83

The court dismissed Tinder Box's tort-based claims too, but found in favor of the franchisor on Lanham Act claims and set the matter for a trial on damages.84

Another case related to contract extensions is Bayit Care Corp.65 The parties entered into a ten-year franchise agreement in 1992 that provided the franchisee ("Bayit") with the conditional option to renew for five years.66 Effective April 1, 2002, notwithstanding the express terms of the franchise agreement, the parties entered into a "Renewal Franchise Agreement" that provided in pertinent part:

1. Franchisor hereby grants to Franchisee a Renewal Franchise Agreement for additional consecutive terms of ten (10) years, commencing April 1, 2002, and at the election of Franchisee, an option to renew for an additional consecutive term of five (5) years.

2. Except as provided herein, the Franchise Agreement and all provisions contained therein shall remain in full force and effect.87

The Renewal Franchise Agreement did not contain a renewal notice provision as did the original 1992 Agreement, which required at least six months' notice to begin the renewal process. As the Renewal Franchise Agreement neared expiration, on January 10, 2012, Bayit sent a letter to its franchisor, advising that "we hereby exercise our option to renew our franchise agreement for an additional five year term pursuant to Paragraph 1 of the Renewal Franchise Agreement made effective as of April 1, 2002."88 The franchisor did not want to renew and deemed the request to renew untimely. Bayit then sought a temporary restraining order and preliminary injunction to force the franchisor to continue performing under the terms of the agreement, to enjoin the franchisor from deeming the agreement expired, and to require the recognition of the five-year extension or renewal of the agreement.89

In refusing to issue a temporary restraining order or preliminary injunction, the court found that the 1992 Agreement's notice of renewal provisions were "part and parcel of the agreement underlying the present dispute," and Bayit failed to timely seek renewal.90 The court

83 Id. at *3.
84 Id. at *3.
85 2012 WL 1079042 at *1.
86 Id. at *1-2. One such condition was that the franchisee provide between six and eight months' notice prior to the expiration of the Initial Term (or the Renewal Term). Id. at *2.
87 Id. at *3.
88 Id. at *4.
89 Id. at *1.
90 Id. at *6.
stated that its decision was based on "literal, common sense reading of paragraphs '1' and '2' [quoted above] of the 2002 Renewal Franchise Agreement." Accordingly, Bayit failed to demonstrate that it was entitled to a temporary restraining order or preliminary injunction, and Bayit was forced to discontinue the operation of its franchised business after twenty years.\(^91\)

This case presents another stark example of the potential fallout from parties having a lack of clarity around expiration and renewal rights. Here, it would have been advisable for the franchisee to take the more cautious approach of providing written notice of its intent to renew in accordance with the 1992 Agreement, even if it was not required. And the franchisor, although it avoided the injunction, arguably could have avoided the litigation if it had given the franchisee prior notice that there would be no opportunity for a renewal.

B. **Statutory Disclosure Mandates on Renewal, Extensions, or Other New Agreements**

One issue often facing franchisors is what disclosure obligations it may have when the franchise agreement ends and the parties want to enter into a written extension agreement or a new franchise agreement. The Franchise Rule, promulgated by the Federal Trade Commission ("FTC") provides, in pertinent part:

> In connection with the offer or sale of a franchise to be located in the United States of America or its territories, unless the transaction is exempted under subpart E of this part, it is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act:

(a) For any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor's current disclosure document, as described in subparts C and D of this part, at least 14 calendar-days before the prospective franchisee signs a binding agreement with, or makes any payment to, the franchisor or an affiliate in connection with the proposed franchise sale.\(^92\)

"Prospective franchisee" is further defined as "any person (including any agent, representative, or employee) who approaches or is approached by a franchise seller to discuss the possible establishment of a franchise relationship."\(^93\) Additionally, the FTC’s Compliance Guide provides:

A franchisor is not required to provide a disclosure document to a franchisee exercising a right under the franchise agreement to establish any new outlets (as opposed to selling outlets to others), nor to a franchisee who chooses to keep its existing outlet post-term either by extending its present franchise agreement or by entering into a new agreement, unless the new relationship is

\(^91\) Id. at *7.

\(^92\) 16 C.F.R. 436.2.

\(^93\) See 16 C.F.R. 436.1(r).
under terms and conditions materially different from the present agreement.94

Thus, so long as the terms of the extension or renewal agreement are not materially different from the terms of the expired or expiring franchise agreement, the Franchise Rule does not obligate franchisors to present a franchisee with a new disclosure. However, if the terms governing the renewal relationship are materially different from those set forth in the original franchise agreement, a franchisor should provide disclosure as required under the Franchise Rule.

Franchisors also must consider state franchise disclosure laws when considering renewals or extensions. The following states have laws that govern disclosure and/or registration in connection with renewals:

- California – Under Section 31018 of California’s Franchise Investment Law, "[t]he terms defined in this section do not include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee; provided, that a material modification of an existing franchise, whether upon renewal or otherwise, is a ‘sale’ within the meaning of this section."95

- Hawaii – Under Section 482E-4 of Hawaii’s Franchise Investment Law, the law’s disclosure obligations "shall not apply to: (5) [t]he extension or renewal of an existing franchise or the exchange or substitution of a modified or amended franchise agreement or the transfer of the location of a franchise where there is no interruption in the operation of the franchise business of the franchisee, and no material change in the franchise relationship."96

- Illinois – Under 815 ILCS 705/7, there is a disclosure exemption for "the extension or renewal of an existing franchise or the exchange or substitution of a modified or amended franchise agreement where there is no interruption in the operation of the franchise business by the franchisee."97

- Indiana – Under the Indiana Franchise Act, the term "‘offer to sell’ does not include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee."98

- Maryland – Under the Maryland Franchise Disclosure Act, a franchisor’s disclosure obligation “does not apply to the renewal or extension of an existing franchise if there is no interruption in the operation of the franchised business.”99

95 CAL. BUS. & PROF. CODE § 31018.
96 HRS § 482E-4.
97 815 ILCS 705/7.
98 IND. CODE § 23-2-2.5-1(g).
99 MD. CODE. ANN. § 14-203(c).
• Michigan – Under Michigan’s Franchise Investment Law, there is no obligation to provide a disclosure document where “[t]here is an extension or renewal of an existing franchise or the exchange or substitution of a modified or amended franchise agreement where there is no interruption in the operation of the franchise business of the franchisee, and no material change in the franchise relationship.”¹⁰⁰

• Minnesota – Under the Minnesota Franchise Act, the statute’s registration requirements do not apply to “the offer or sale of a franchise owned by that franchisee” . . . “¹⁰¹

• New York – Under the New York Franchise Sales Act, “[t]erms ‘offer’ and ‘offer to sell’ do not include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee.”¹⁰²

• North Dakota – Under the North Dakota Franchise Investment Law, the terms “offer” and “offer to sell” “do not include the renewal or extension of an existing franchise where there is no interruption of the operation of the franchised business by the franchisee.”¹⁰³

• Rhode Island – Under the Rhode Island’s Franchise Investment Act, there is an exemption from registration where “[t]he offer or sale of a franchise involve[es] a renewal, extension, modification, or amendment of an existing franchise agreement if there is no interruption in the operation of the franchised business and there is no material change in the franchise relationship. For purposes of this subdivision, an interruption in the operation of the franchised business solely for the purpose of renovating or relocating that business is not a material change in the franchise relationship or an interruption in the operation of the franchised business.”¹⁰⁴

• Virginia – Under Virginia’s Retail Franchising Act, “[t]he offer or sale of a franchise involving a renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business, and there is no material change in the franchise relationship, is exempt [from registration]. For purposes of this subdivision, an interruption in the franchised business solely for the purpose of renovating or relocating that business is not a material change in the franchise relationship or an interruption in the operation of the franchised business.”¹⁰⁵

• Washington – Under Washington’s Franchise Investment Protection statute, the registration requirements do not apply to “[t]he offer or sale of an additional franchise to an existing franchisee of the franchisor for the franchisee’s own account that is

¹⁰¹ Minn. Stat. § 80C.03.
¹⁰³ NDCC 51-19-02(14)(a)(2).
¹⁰⁴ RIGL 19-28.1-6(6).
¹⁰⁵ 21VAC § 5-110-75(2).
substantially the same as the franchise that the franchisee has operated for at least two years at the time of the offer or sale, provided the prior sale to the franchisee was pursuant to a franchise offering that was registered in the state of Washington.\textsuperscript{106}

- Wisconsin – Under the Wisconsin Franchise Investment Law, the term "offer to sell" "does not include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee."\textsuperscript{107}

Most of the state disclosure statutes are implicated only if there is "an interruption in the operation of the franchise business by the franchisee." In most reported cases, there are no interruptions in the operation of the franchised businesses by the franchisees.\textsuperscript{108} But if a franchisee takes down the trademark signs, stops paying royalties, or otherwise ceases to operate the business as a franchise, then any renewal or continuation agreement will likely not be exempt from disclosure on this ground.

Several state disclosure laws also require disclosure if the terms of the renewed relationship differ "materially" from the previous franchise term. Case law has not adequately defined this provision. One case applying New York state law involved allegations that an amended franchise agreement "fundamentally altered the financial structure" but the franchisee failed to cite any legal authority for the proposition that such financial structure changes could be "so radical as to essentially remake the franchise relationship entirely, thereby implicating [ ] disclosure requirements."\textsuperscript{109} Similarly, a subsequent franchise agreement signed by the franchisee which changed only the term of the existing franchise agreement was not a material change requiring disclosure under the FTC Franchise Rule, and the New York disclosure statute examines only whether there has been a continuation of the business by the franchisee.\textsuperscript{110} A Washington Court of Appeals returned an alleged franchise renewal violation claim under the Washington Franchise Investment Protection Act to the trial court:

\begin{quote}
We hold that the trier of fact must examine the proposed changes in a new franchise offer and determine whether the new terms vary so substantially from those in the original franchise agreement and so significantly diminish the franchisees' rights thereunder as to constitute new agreements, not renewals, of existing agreements.\textsuperscript{111}
\end{quote}

\textsuperscript{106} RCW § 19.100.030(6).
\textsuperscript{107} WISC. STAT. § 553.03(11).
\textsuperscript{109} Bayit, 843 F. Supp. 2d at 385.
\textsuperscript{110} Rich Food Servs., 98 F. App'x at 209-210.
On appeal, the Supreme Court of Washington affirmed the trial court’s grant of summary judgment in favor of the franchisor and found, as a matter of law, that the changes did not constitute nonrenewal or termination of the franchise agreement under Washington law. In light of the potentially divergent interpretations and the differing requirements under the Franchise Rule and various state laws, it is important for a franchisor to carefully analyze the federal and state law requirements and how they implicate the renewal process prior to continuing the franchise relationship beyond the original term.

V. WHAT HAPPENS WHEN THE PARTIES HAVE NO RENEWAL TERMS AND NO NEW WRITTEN AGREEMENT?

Modern franchise agreements are unlikely to fail completely to address term limits, expiration, or renewal. To the extent that this may occur, it is more likely to arise under supplier-distributor agreements that may not include a specific term length, and thus contain no provisions for expiration or renewal. Such distribution agreements are not the subject of this paper, which focuses on traditional franchise relationships that provide for expiration by their terms. In the absence of any enforceable written provisions governing renewal of the term of a franchise agreement, parties may sometimes simply continue operating with express, mutual consent based on correspondence or conduct. Alternatively, the parties might say nothing and continue the status quo without addressing the expiration of the term. Or, a franchisor may object to a franchisee’s continued operations yet fail to shut down those operations for any number of reasons. In each of these circumstances, the path forward when one party finally does demand a formal resolution can vary based on language in the agreement, the parties’ prior conduct, state law, and the nature of the relief sought.

A. Mutual Consent Through Post-Expiration Correspondence or Conduct

Parties continue relationships after expiration for a myriad reasons, and courts are not uniform in explaining the legal consequences of that conduct. Thus, open questions remain as to what constitutes mutual consent and to what terms the parties are consenting by continued operations following the stated expiration date.

1. Conduct Constituting Consent

In Emerging Vision, Inc. v. Main Place Optical, Inc., the Supreme Court of New York held that “where after the expiration of a contract the parties continue to conduct their business under the terms of the expired agreement, an implication arises that the parties have agreed to a new contract containing the terms as were contained in the old contract.” In Emerging Vision, the franchise agreement was for a ten-year term, but the parties continued to conduct business under the terms of the expired agreement until a subsequent termination event two years later. The court offered no explanation for why the parties did not formally renew the agreement.
agreement. Moreover, the court offered no explanation of the terms under which the parties operated during the two years between expiration and termination, or the operative terms at the time of termination. Instead, determining only the propriety of a preliminary injunction, the court focused on the circumstances of the termination, the alleged defaults by both parties, and the allegations of unlawful trademark use in a preliminary injunction motion. Upon considering the franchisor's preliminary injunction motion, the Court granted same, in part, enjoining the franchisees from using the Sterling Optical trade name, trade and service marks, signs and/or commercial symbols in connection with the operation of their former franchise location, from operating a non-Sterling Optical retail optical store at the location of their former franchise location, and from using the telephone number and telephone listing for their former franchise location, during the pendency of the action.

A similar question was left unanswered in ServiceMaster Residential/Commercial Services, L.P. v. Westchester Cleaning Services, Inc. by the U.S. District Court for the Southern District of New York. There, the franchisor petitioned for a preliminary injunction against the franchisee's continued use of the franchisor's trademarks and operation of a competing cleaning business in violation of a non-compete provision. The court held that the non-compete covenant in the franchise agreement (a one-year prohibition on owning or engaging in any similar business within former territory) was reasonable in time and geographic scope. The franchisee's objection, however, was that the one-year non-compete restriction had already ended because three years had passed between the expiration of the contract and its final termination. The court found that the parties impliedly agreed to renew the five-year franchise agreement upon expiration. Accordingly, the court enjoined the franchisee from competing for one year from the date of termination of the "renewed" agreement, and not from the original contractual date of expiration. The court did not address whether the impliedly renewed agreement was for a five-year term or terminable at will.

The U.S. District Court for the Western District of Tennessee, in AmeriSpec, LLC v. Omni Enterprises, Inc., in granting a preliminary injunction to enforce a non-compete covenant against a franchisee, delved a little further into the issue of how to interpret the parties' relationship post-expiration based on their course of conduct. The parties entered into a franchise agreement with a ten-year term, but following the expiration of the franchise term, "the parties continued to operate as if the contract remained in full force and effect." The franchisee continued to use the trademarks and to remit royalties to the franchisor, and the

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116 Id. at *4-5. Upon reconsideration, the court granted the franchisor's "new" request for a preliminary injunction enjoining the franchisees from operating a competing optical center at the same mall location or anywhere within a five-mile radius. Emerging Vision, Inc. v. Main Place Optical, Inc., 11 Misc. 3d 1057(A), 815 N.Y.S.2d 494 (Sup. Ct. 2006).


118 Id.

119 Id.

120 Id. at *4 n.2.


122 Id. at *3.
franchisor took no action nor made any demands. For almost two and a half years, the parties discussed amendments extending the expiration date or proposals for a new franchise agreement.\textsuperscript{123} The court noted that the franchisee never expressed an intent not to renew during that time. One of the principals of the franchisee even actively participated in the system's franchise council and attended national conventions during the time after the expiration of the franchise agreement. Furthermore, the franchisee did not follow any of the nonrenewal or post-termination notice or other requirements.\textsuperscript{124} The court, citing Tennessee state law, held that "when parties continue to perform the same services after a contract for a definite term has expired, it is presumed that they are operating under a new contract having the same terms and conditions as the original one."\textsuperscript{125} But, as in \textit{ServiceMaster} and \textit{Emerging Vision}, the court did not determine whether the new contract had a new ten-year term, like the original agreement, or was month-to-month.\textsuperscript{126}

A court may rely on the parties' historical conduct as well in determining whether a contractual relationship exists between them. In \textit{Miller Construction Equipment Sales, Inc. v. Clark Equipment Co.}, the franchisee argued that the franchisor had a practice of not meeting to negotiate a new annual distribution agreement until after the expiration of the prior year's agreement.\textsuperscript{127} According to the plaintiff-franchisee, the parties would continue their prior course of dealing until that new agreement was reached.\textsuperscript{128} The court relied on those facts in determining that the defendant-franchisor was not entitled to injunctive relief because the franchisee operated for only six weeks after it became clear that the parties would not negotiate a new agreement, and thus, the franchisor could not establish adequate irreparable harm during that limited time frame.

Generally, if a franchisor does not send warnings or notices of termination based on the expiration of the agreement and simply continues to accept fees and to permit a franchisee's use of the franchise system and trademarks in the operation of its business for an extended period of time, the franchisor is likely to have consented to the extension or renewal of some or all of the key terms of the initial franchise agreement. But, the critical question that the cases usually do not answer remains—what are the terms of the implied, new agreement?

\textsuperscript{123} \textit{Id.} The parties did enter into one amendment to extend the expiration date of the franchise agreement to May 1, 2017, but then continued to operate as before.

\textsuperscript{124} \textit{Id.} at *5.

\textsuperscript{125} \textit{Id.}, citing BSG, LLC \textit{v. Check Velocity, Inc.}, 395 S.W.3d 90, 94 (Tenn. 2012) (quotation omitted). See also \textit{Astral Health & Beauty, Inc. v. Aloette of Mid-Miss., Inc.}, 895 F. Supp. 2d 1280, 1282-83 (N.D. Ga. 2012) (citing New York law, after acknowledging lack of precedent under Georgia law, that "the fact that the parties continue to deal under some sort of informal arrangement does not, without more, mean that \textit{all} the terms of the expired formal contract continue to apply") (emphasis added). The \textit{Astral} decision went on to note, however, "the parties' actions could create an implied contract under which their rights and obligations should continue to be measured as provided in the old contract." \textit{Id.} The issue came before the U.S. District Court for the Northern District of Georgia on the franchisor-plaintiff's motion for judgment on the pleadings on its breach of contract claim, so the court did not expound further after determining that a question of fact existed about whether the parties had an existing contract at the time or if it had expired.

\textsuperscript{126} \textit{Astral}, 895 F. Supp. 2d at 1283.


\textsuperscript{128} \textit{Id.} at *1.
2. Terms of an Implied Contract Based on Post-Termination Mutual Assent

Once a court has determined that an implied contract exists post-expiration, at least some of the terms related to the material rights and obligations may have to be clarified. Does the implied contract have the same renewal terms or post-termination obligations? Does the implied contract have the same restrictive covenants? Does the implied contract have the same royalty rates? In *Hamden v. Total Car Franchising Corporation*, discussed at the outset, the U.S. Court of Appeals for the Fourth Circuit determined that some of the terms did not survive the expiration of a fifteen-year-term franchise agreement (as opposed to termination). The franchise agreement contained a two-year, post-term non-competition clause that only referenced the "expiration" of the agreement in the heading of the franchise agreement section and not in the language of the covenant itself. A separate, additional restrictive covenant agreement solely referenced what would happen upon "termination" of the agreement prior to its expiration date. For five months following the expiration of the agreement, the franchisee continued to operate. The franchisor sent a notice of the expiration of the agreement and of the franchisee's opportunity to renew. The Fourth Circuit upheld the lower court's decision that the restrictive covenants in the underlying agreement—in large part—did not bind the franchisee. In *Hamden*, the franchisee did not want to continue the agreement and the non-compete covenant only restricted providing a service that the franchisee did not intend to provide. However, this decision may mean that a restrictive covenant in the original agreement would not be applicable under any circumstances when the parties continue their relationship following an expiration, regardless of the length of the holdover because the court did not imply a renewed or continued agreement.

In *Donut Holdings, Inc. v. Risberg*, the Nebraska Supreme Court addressed a franchise agreement that had a ten-year term with a provision for extending the initial term by written request. The question before the court was whether a franchisor could sustain a breach of contract claim against a holdover franchisee failing to make payments required under the agreement. When the term expired, the franchisor sent, what the lower court believed to be a letter acknowledging the expiration and termination of the franchise agreement. Specifically, the June 2009 letter advised that the franchise agreement had expired in 2004, and that the franchisee should review the provisions of the franchise agreement relating to its obligations under the expiration of the franchise. However, the franchisee continued to operate and pay royalties and advertising fees to the franchisor for five more years, and the franchisor accepted those payments without opposition. Then, the franchisee stopped making payments but continued operating for three more years. The court affirmed that the franchisor could not recover lost fees under a breach of contract theory after the franchisor had given clear notice that the agreement had expired and seemed to advise that it was ending the franchise.

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129 548 F. App'x at 843.
130 Id. at 844.
131 Id.
132 Id. at 849-851.
133 294 Neb. 861, 862-63, 885 N.W.2d 670, 672 (2016).
134 Id. at 862, 885 N.W.2d at 671.
relationship. Based upon the lower court’s interpretation of the franchisor’s letter, it found no contract existed on which to collect fees. Because the notice letter did not expressly terminate the original or an implied agreement, it was surprising that the lower court would not permit the implied agreement to continue for the entire holdover period. But the appellate court considered that a finding of fact—not to be overturned absent clear error. The court also did not determine that the implied agreement created or renewed a second ten-year term.

The arbitration provision contained in the expired distribution agreement in *C.B. Sullivan Co. v. Graham Webb Int’l, Inc.* expressly stated that it survived “any termination” of the agreement. The court found that the parties’ continued operation following expiration of the agreement, however, would have required enforcement of the arbitration provision regardless of the survivability statement because the parties had an implied-in-fact contract that continued the same terms. Notably, the agreement used the phrase “any termination,” presumably to include all ways in which the agreement could have ended. The court treated the phrase as including expiration without discussion. This and other cases confirm that courts may indeed enforce arbitration clauses contained in franchise agreements that have expired.

**B. Neither Consent Nor Opposition from Franchisor**

As discussed above, the franchisor and franchisee may agree by their conduct to keep an expired franchise agreement alive. However, if the franchisor does not take any action to support or oppose a revived agreement, that failure to establish a position will also have consequences for how a court construes the post-termination rights and obligations and the terms of any implied or renewed agreement.

In *Prudence Corp. v. Shred-It-Am., Inc.*, an unpublished decision, the U.S. Court of Appeals for the Ninth Circuit held that a franchisor’s failure to timely submit proposed renewal terms to the franchisee constituted a breach of the franchise agreement and justified specific

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135 The franchisor arguably should have asserted additional tort or quasi-contract claims to recover the fees that the franchisee failed to pay during the last three years of its holdover operations.

136 *id.* at 869, 885 N.W.2d at 875.


138 *Id.* at *2.

139 *Id.* at *3.

140 But see *Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226 (2002)* (making predispute arbitration clauses in motor vehicle franchise contracts unenforceable under the FAA unless both parties consent post-dispute); see also Carl J. Chiappa and David Stoelting, *Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration Act, 22 FRANCHISE L.J. 219* (Spring 2003). The U.S. District Court for the District of Massachusetts addressed the survivability of an embedded arbitration provision following the expiration of a franchise agreement in *Gaston Andrey of Framingham, Inc. v. Ferrari N. Am., Inc.*, 983 F. Supp. 18, 20-21 (D. Mass. 1997). The court held that the survivability of an embedded arbitration provision following the expiration of a franchise agreement in *Ferrari and one of its dealers had formed an agreement that expired, but a subsequent agreement mandated arbitration, regardless of the existence or status of any dealer agreement. Once the court confirmed the existence of an arbitration agreement, it was compelled to send the dispute to arbitration. *Id.* See also *Phil Singer Assocs. v. Philips Oral Healthcare, Inc.*, No. CIV.A. 03-3578 (FLW), 2003 WL 23208271, at *4 (D.N.J. Dec. 16, 2003) (where arbitration clause in the expired agreement extended to any controversy or dispute arising out of the agreement (including out of the alleged oral representations relating to termination and renewal), arbitration provision applied).
enforcement of the renewal provision at the original royalty rate.\textsuperscript{141} The franchise agreement contained an express right of renewal and a term approving specific performance as a remedy when a party improperly withholds approval of any action provided for in the contract.\textsuperscript{142} The trial court emphasized that it was not writing a new contract for the parties, but merely enforcing the existing contract terms in light of the franchisor's unreasonable failure to provide any renewal terms, which the trial court found was due to the franchisor's desire to press for its own advantage to the detriment of the franchisee.\textsuperscript{143}

On the other hand, in a case reviewing a franchise agreement with a ten-year term with no renewal options, the franchisee sought to have the agreement renewed for a second, ten-year term.\textsuperscript{144} The U.S. Bankruptcy Court for the Middle District of Pennsylvania treated as an option contract an earlier communication from the franchisor notifying the franchisee of its right to extend the franchise agreement under certain conditions.\textsuperscript{145} The franchisee failed to comply with the renewal conditions prior to the expiration of the franchise agreement, and thus, the option contract expired.\textsuperscript{146} Although fewer facts regarding the particular conduct and motives of the parties are available in Roswog, it is apparent that courts view favorably efforts by either party to comply in good faith with renewal procedures.

In an older example, the U.S. District Court for the Eastern District of Wisconsin agreed that an expired license agreement existed as a month-to-month agreement pending execution of a new agreement.\textsuperscript{147} There, the licensee, Wisconsin Music Network, Inc. ("Wisconsin Music"), filed suit against the licensor, Muzak Limited Partnership ("Muzak"), seeking injunctive relief for various statutory and common-law violations. The most recent license agreement between the parties contained a clause that required Muzak to give two years' notice of an intent to non-renew or to offer the then-current license agreement.\textsuperscript{148} At the time of the expiration of the license agreement, however, Muzak was negotiating with an association of its licensees for a new agreement. As a result, Muzak offered Wisconsin Music (and its other licensees) the opportunity to continue the expired agreement on a month-to-month basis.\textsuperscript{149} Wisconsin Music never executed the new agreement, despite months of negotiations and notice that Muzak would construe the failure to execute the new agreement as an intent by Wisconsin Music to

\begin{itemize}
\item \textsuperscript{141} 365 F. App'x 859, 860-61 (9th Cir. 2010).
\item \textsuperscript{142} Id.
\item \textsuperscript{143} No. SACV07555AGRNBX, 2008 WL 11342748, at *1-2 (C.D. Cal. Sept. 30, 2008), aff'd sub nom. Prudence Corp. v. Shred-It Am., Inc., 365 F. App'x 859 (9th Cir. 2010).
\item \textsuperscript{144} In re Roswog, 48 B.R. 689 (Bankr. M.D. Pa. 1985).
\item \textsuperscript{145} Id. at 692.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Wis. Music Network, Inc. v. Muzak L.P., 822 F. Supp. 1332 (E.D. Wis. 1992). See also Agar Truck Sales, Inc. v. Daimler Trucks N. Am., LLC, No. 13-cv-5471 (NSR), 2014 WL 1318383 (S.D.N.Y. Apr. 1, 2014) (holding the parties did not have a renewed contract in existence and granting motion to dismiss seeking specific performance of franchise agreement; finding continued business was only day-to-day business transactions).
\item \textsuperscript{148} Id. at 1335.
\item \textsuperscript{149} Id.
\end{itemize}
terminate the relationship.\textsuperscript{150} The court concluded that those facts could only establish that Wisconsin Music's refusal is what caused the "termination" and held that Muzak's requirement to sign the then-current agreement was reasonable and non-discriminatory.\textsuperscript{151}

To reduce disagreement between the parties and limit the divergent interpretations of the court or an arbitrator, franchisors and franchisees should address their post-expiration expectations concerning renewals in the underlying franchise agreement. If such measures have not been taken, however, the parties should be clear as to their expectations post-expiration, setting forth in writing their respective rights and obligations. Furthermore, the parties should be mindful of their conduct with one another post-expiration, because in the absence of a clear written agreement, their course of conduct can lead to an unintended relationship, or lack of a relationship, that otherwise could have been avoided had the parties clearly set forth their expectations.

VI. FRANCHISORS' POST-EXPIRATION RELIEF

In most instances, upon expiration of a franchise agreement, a franchisor does not allow its franchisee to continue status quo operations post-expiration in silence.\textsuperscript{152} If a franchise agreement has expired and lacks an automatic renewal process, and the franchisor proceeds properly with exercising and documenting the decision to not continue the relationship with the franchisee, then a court is likely to enforce the expiration and nonrenewal, or at least grant a motion for a preliminary injunction to restrict continued use of the franchisor's trademarks or otherwise unfair competitive activities.\textsuperscript{153} On the other hand, a franchisor that permits the relationship to continue beyond an expired agreement for an extensive period of time, or without a clear interim agreement, can find it difficult to seek relief from the franchisee's continued operations.\textsuperscript{154}

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 1336-1338.


\textsuperscript{153} See Merry Maids, 2006 WL 1720487 at *12 (granting franchisor a preliminary injunction commensurate with a full-year of non-competition from the date of the order, instead of from the date of the expiration of the franchise agreement, because the franchisee was not abiding by the post-expiration terms during that time); ServiceMaster, 2001 WL 396520 at *4 (granting franchisor's application for preliminary injunction to enforce the noncompete clause); U.S. Lawns, 2016 WL 9526340 at *11 (granting preliminary injunction enforcing noncompete for two years from post-expiration termination letter instead of from date of agreement expiration); but see AmeriSpec, 2018 WL 2248459 at *8 (granting preliminary injunction enforcing noncompete for one year from date of termination, not from date of injunction).

\textsuperscript{154} See Miller Constr., 2016 WL 2626803 at *11 (equipment manufacturer spent several months after the expiration of the dealer agreement attempting to negotiate a new agreement, and thus, the period of unauthorized use of the marks was only six weeks, which the court found insufficient to establish irreparable harm); see also Prudence Corp., 2008 WL 11342748, at *1-2 (franchisor's failure to timely submit proposed renewal terms, and resultant harm to franchisee, resulted in finding of renewal on original agreement terms).
The claims franchisors assert to enforce post-expiration obligations under a franchise agreement do not differ significantly from the claims asserted following a typical termination—trademark infringement and breach of contract, including breach of noncompete covenants and failure to pay various fees or to return the franchisor's property. These issues are generally raised through a motion for preliminary injunctive relief or a declaratory judgment. Because preliminary injunctive relief requires a showing of irreparable harm, a franchisor may have difficulty establishing that it suffered irreparable harm after it has permitted a franchisee to operate post-expiration. Disputes often arise, however, only after one of the parties has rejected the express or implied holdover or renewal terms.

Although many post-expiration cases do not extend beyond a motion for preliminary injunctive relief, theoretically, a franchisor's breach of contract claims could be impacted by a court's finding that the original contract terms apply, instead of updated terms, which might have applied if the agreement had been renewed. For example, if a franchisor offered a renewed franchise agreement with a higher royalty rate and marketing fees, but a court finds that the parties did not agree to a renewal and thus the original terms applied, any damages pursuant to a breach of contract claim may be limited to the damages available under the original agreement terms. Similarly, depending on whether the original or a subsequent agreement governs the franchise relationship could impact the enforceability of a new arbitration provision.

From a franchisee's perspective, post-expiration claims against a franchisor could include state statutory violations, constructive termination, breach of contract (including breach of the implied obligation of good faith and fair dealing), failure to repurchase the business or its assets, unfair trade practices, or injunctive relief to halt a termination. It is often difficult for the franchisee to prevail on these claims because, upon realizing a franchise agreement has expired, a franchisor typically takes steps to terminate, or can easily establish a subsequent right to terminate.

In *The Tutoring Ctr. Franchise Corp. v. Smith*, the franchisor ("TCFC") notified the defendant-franchisees that they were in default under the terms of the franchise agreement. The franchisees did not respond to the default letter, so TCFC terminated the franchise agreement. The franchisees nonetheless continued to operate the facility using TCFC's trademarks. TCFC subsequently filed suit against the franchisees, asserting claims for breach of contract, service mark infringement and unfair competition in violation of the Lanham Act, misappropriation of

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156 Miller Constr., 2016 WL 2626803 at *11.

157 See Bradley v. Harris Research, Inc., 275 F.3d 884, 888 (9th Cir. 2001). In Bradley, the parties entered into franchise agreements in 1983, which expired in 1988 but were subject to five-year conditional renewals. In 1988, the parties extended the 1983 agreements to 1998. The franchisee then executed new agreements in 1998, which contained arbitration clauses not included in the 1983 agreements. The United States Court of Appeals for the Ninth Circuit held that the 1998 franchise agreements were binding because the franchisee signed them (despite its reservation of rights to contest the agreements), and the arbitration could be held in Utah (as set forth in the franchise agreements) because California's § 20040.5 was preempted by the Federal Arbitration Act. Id. at 890.

158 The Tutoring Ctr. Franchise Corp. v. Smith, No. 12-cv-00733, 2012 WL 12892301 (C.D. Cal. June 19, 2012). This case is not an expiration case, but it provides a comprehensive example of a franchisor's post-termination enforcement strategy, which is likely to be the same as any post-expiration enforcement strategy.
trade secrets, and unfair business practices in violation of Cal. Bus. & Prof. Code § 17200, unjust enrichment, an accounting and injunctive relief.\textsuperscript{159} Because defendants continued to operate their facility as a TCFC franchise after termination, TCFC also sought a preliminary injunction.

The court found that the franchisee was using the franchisor's trademarks post-termination, in the identical location to where the business operated while a franchised location, without the franchisor's consent.\textsuperscript{160} Not only did the court determine the franchisor was likely to prevail on its state law misappropriation of trade secrets claim as a result of the former franchisee's continued use of the marks, tutoring methods, advertising techniques and business practices, but the court also found that the defendants' continued use of the marks and system after termination would likely result in a finding of unjust enrichment.\textsuperscript{161} More fundamentally, the court stated that courts generally have found that a franchisor's inability to control its trademarks after termination of a franchise agreement causes irreparable reputational harm, damaging the goodwill of the franchisor.\textsuperscript{162} Despite this ruling, parties to a franchise agreement should be wary of whether a court would likewise find that such irreparable harm would exist if the franchisor permitted the franchisee to use the marks for some period of time post-expiration or post-termination. It is prudent that a franchisor actively protect its system and marks promptly after the termination or expiration of a franchise agreement. Otherwise, it faces the risk of losing a petition for preliminary injunctive relief to stop the franchisee from continuing to operate a facility as a system unit; a franchisor also may face the real possibility of affirmative claims by a franchisee resulting from the franchisor's lax conduct.

VII. FRANCHISEE DEFENSES

Franchisors generally have the upper hand on the enforcement of post-expiration obligations after a franchise agreement expires, but there are defenses that franchisees can raise, albeit with limited success. A franchisee can argue that the franchisor waived its right to enforce certain expiration notice requirements or post-expiration obligations, failed to properly modify the terms of a written agreement, or acted beyond a contractual or statutory limitations period.

A. Waiver by Franchisor

As noted above, in \textit{Pearle Vision}, the franchisee argued waiver and modification as a defense to the franchisor's efforts to require the franchisee to assign its lease to PVI.\textsuperscript{163} In discussion of this equitable defense, the U.S. District Court for the Southern District of Ohio wrote:

\begin{footnotes}
\textsuperscript{159} Id. at *6.
\textsuperscript{160} Id. at *10-11.
\textsuperscript{161} Id. at *11-12.
\textsuperscript{162} Id. at *13; but see eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 392, 126 S. Ct. 1837 (2006) (erasing presumption of irreparable harm in patent cases and raising concern that automatic irreparable harm finding may no longer exist in trademark infringement cases as well).
\textsuperscript{163} 2008 WL 2704407 at *4.
\end{footnotes}
Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional. Waiver may occur expressly, in writing or orally, or impliedly by the acts and conduct of the parties. To establish the affirmative defense of waiver, Defendant Adler must show that PVI had: (1) an existing right, benefit or advantage; (2) actual or constructive knowledge of the existence of such right, benefit or advantage; and (3) an intention to relinquish this right by consenting to the terms of the Lease Assignment.¹⁶⁴

In rejecting the franchisee’s waiver argument, the Court held that the lease-assignment obligations were enforceable because, in part, the parties’ franchise agreement contained a non-waiver clause.¹⁶⁵ For these reasons, franchisees may have difficulty asserting equitable defenses where, in most cases, the franchise agreement contains both specific and general non-waiver provisions.

In Sunni, LLC v. Edible Arrangements, Inc., the plaintiff owned three Edible Arrangements franchises in New York City, commencing with his first store in 2003 (and subsequently two additional stores in 2007 and 2009).¹⁶⁶ In 2012, the plaintiff-franchisee, individually and as member of the LLC, pleaded guilty to criminal tax fraud. Edible Arrangements was provided a copy of the plea agreement. However, it was incomplete and failed to include plaintiff’s allocution to stealing the sales taxes from his brother’s Edible Arrangements locations. Notwithstanding the plaintiff’s guilty plea, or perhaps because Edible Arrangements continued working with the plaintiff to renew his franchise agreement. Subsequently, Edible Arrangements received a complete copy of the guilty plea agreement and, on October 10, 2014, sent notice to the plaintiff that it would not renew the 2003 agreement and intended to terminate the 2007 and 2009 agreements. Edible Arrangements also gave the franchisee until January 17, 2014 to sell his Edible Arrangements stores. Unable to sell, on January 16, 2014, the plaintiff requested a “show cause” order as to why the franchises should not be allowed to operate during the pendancy of the arbitration proceedings.¹⁶⁷ Edible Arrangements then removed the matter to the U.S. District Court for the Southern District of New York. The franchisee filed a motion for a preliminary injunction, seeking to enjoin the termination of its franchises and the cessation of services from the franchisor. The franchisee’s argument was two-fold: (i) for all the franchises, Edible Arrangements waived enforcement of the franchise agreements; and (ii) the 2003 agreement was renewed because there was a meeting of the minds between the franchisee and Edible Arrangements. Ultimately, the district court denied the preliminary injunction application finding, inter alia, that the franchisee failed to demonstrate a likelihood of success on the merits.¹⁶⁸

¹⁶⁴ Id. (internal citations and quotations omitted).

¹⁶⁵ Id. at *5.


¹⁶⁷ Id. at *5.

¹⁶⁸ Id.
With respect to the franchisee's waiver argument, the court held:

Contractual rights may be waived if they are intentionally relinquished or abandoned. However, the Agreements expressly provided that "EA [would] not waive or impair any right ... because of any custom or practice at variance with this Agreement's terms." Such clauses have been upheld and enforced by Connecticut courts, whose law governs the Agreements. See, e.g., Webster Bank v. Oakley, 265 Conn. 539, 550 (2003) ("While inconsistent conduct may, under certain circumstances, be deemed a waiver of a right to acceleration, the insertion of a nonwaiver clause is designed to avoid exactly such an inference").

Sarju Patel testified that although EA's policy is to terminate its franchise agreements with those franchisees convicted of felonies, for its protection, EA waited to obtain a final copy of the plea agreement before taking any action with respect to Hinnawi. Though the Court would have preferred that EA have exercised more diligence, the Agreements shielded EA from waiver in precisely such a situation. Accordingly, EA cannot be deemed to have waived enforcement of the Agreements and Plaintiffs' argument fails in this respect.169

Thus, even when there is a lengthy delay between provisional notice and the franchisor's actions, courts may side with franchisors and not allow franchisees to invoke the equitable defense of waiver.

B. No "Meeting of the Minds" on Renewal

One issue that sometimes arises post-termination is whether there was, in fact, a renewal franchise agreement. For instance, in Sunni, discussed above, the franchisee argued that the franchisor had renewed the franchise agreement based on a "meeting of the minds" theory, even though a renewal agreement had not been executed. In rejecting the franchisee's argument, the court wrote:

Plaintiffs argue that the parties agreed on the essential terms, as evidenced by the draft agreement, and by Sunni, LLC's refurbishing of the store. However, Sunni, LLC was required to refurbish the store irrespective of whether it sold or renewed the franchise. More importantly, the correspondence between Hinnawi and EA repeatedly and clearly indicated EA's intent not to be bound until a final closing. Lastly, even if the contract was orally renewed, it would be unenforceable. Connecticut's statute of frauds requires that all contracts lasting for more than one year be written and signed: this was a 10-year franchise agreement that was unsigned by either party. See Conn. Gen. Stat. § 52-550(a)(5). Because there was no meeting of the minds, and even

169 Id. (internal citations omitted).

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if there were, the contract would be unenforceable, Plaintiffs have shown no likelihood of success on the merits of this claim.\textsuperscript{170}

Much like the other equitable defenses often asserted by franchisees, meeting of the minds may also be a difficult defense for a franchisee to assert.

C. \textbf{Failure to Modify Agreement in Writing}

A modification must satisfy the elements of a contract: a meeting of the minds supported by consideration.\textsuperscript{171} Notably, in some jurisdictions, a provision that an agreement may only be amended by a written instrument does not automatically bar oral modification of the contract.\textsuperscript{172} For instance, in \textit{G.L.M. Sec. \& Sounds Inc. v. LoJack Corp.}, the Court noted that it could infer from the parties' conduct and other circumstances that there was a mutual agreement to modify the requirement of a writing, but the proof of any oral modification "must be of sufficient force to overcome the presumption that the integrated and complete agreement, which requires written consent to modification, expresses the intent of the parties."\textsuperscript{173} \textit{G.L.M.} is not a post-expiration franchise case, but it demonstrates the nuances in the law regarding modification and the manner in which state law may affect the analysis. The lesson learned is that parties should strive to modify a franchise agreement in writing to avoid any ambiguities as to whether a modification has occurred, or more fundamentally, whether the parties have had a meeting of the minds. Furthermore, the parties may not always be able to rely fully upon provisions that preclude oral modification of a written contract when engaging, willingly or negligently, in a course of conduct that is inconsistent with the franchise agreement's terms.

D. \textbf{Statute of Limitations}

A franchisee may be able to assert either a statutory or contractual limitations period as a defense against a franchisor's breach of contract or other claim related to post-expiration conduct. \textit{Tinder Box}, discussed above, is an example of a franchisee asserting a contractual limitations period defense against a franchisor's breach of contract claims.\textsuperscript{174} As in \textit{Tinder Box}, many franchise agreements contain provisions that truncate the statute of limitations applicable under the governing law in the relevant jurisdiction.\textsuperscript{175} A generic (and franchisor-friendly) provision may include something to the effect of:

\begin{itemize}
\item[\textsuperscript{170}]2014 WL 1226210 at *15 (citations omitted).
\item[\textsuperscript{173}]\textit{Id.} (cit. omitted).
\item[\textsuperscript{174}2010 WL 2302298 at **2-3.
\item[\textsuperscript{175}]The district court agreed with the franchisee’s argument that under Pennsylvania law, a contractual modification of the ordinary statute of limitations is valid and enforceable, provided it is not manifestly unreasonable. See Defendants' Post-Trial Memorandum at 10, No. 07-cv-05014-JF, 2009 WL 479761 (E.D. Pa. Jan. 8, 2009), decision rptd. at 2010 WL 2302298.
\end{itemize}
You may not maintain an arbitration against the Franchisor or its Related Parties unless: (a) You deliver written notice of any claim to the other party within one hundred eighty (180) days after the event complained of becomes known to You, or when you should have known of said event had you been reasonably diligent, (b) thereafter, You must follow the negotiation and mediation procedures described above, and (c) You file an arbitration within one (1) year after the notice is delivered. While this Section may limit the generally applicable statutes of limitation, it is not intended and shall not be construed to extend any generally applicable statutes of limitation in any way. The limitations set forth in this Section shall not apply to Franchisor, its affiliates, or its Related Parties.

An alternative is to include a provision that restricts the limitations period for either party. The provision in the franchise agreement at issue in *Tinder Box* read as follows:

The parties further agree that no cause of action arising out of or under this Agreement may be maintained by either party hereto against the other unless brought before the expiration of two (2) years after the fact, transaction or occurrence upon which such action is based or the expiration of one (1) year after such party becomes aware of facts or circumstances reasonably indicating that such party may have a claim against the other party hereunder, whichever period of time shall first expire, and that any action not so brought shall be barred, whether as a claim, counterclaim, defense or setoff.  

These provisions are generally permissible. For instance, the Supreme Judicial Court of Massachusetts held, in *Creative Playthings Franchising, Corp. v. Reiser*, that contractual limitations periods shorter than the statute of limitations are permissible so long as they are reasonable and there is no controlling statute to the contrary. Conversely, in some jurisdictions, such as Florida, such provisions are impermissible. Thus, franchisees should be aware that they may be able to use statutory and contractual limitations periods both offensively when asserting claims against a franchisor, and also defensively to block claims by a franchisor.

**VIII. POST-EXPIRATION UNAUTHORIZED TRANSFERS**

Franchise agreements may contain language that provides franchisees the ability to transfer or assign their rights to third parties, so long as the franchisor consents to such transfer or assignment. When a franchisee/seller of a franchised facility (the “transferor”) wishes to sell the business to a third party/buyer (the “transferee”), the franchisor often requires that the transferee sign the franchisor’s current form franchise agreement, which may or may not include

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176 Id.


178 *See F.L.A. STAT. § 95.03* ("Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.").
provisions that are different than those in the agreement held by the transferor, as well as meet certain conditions. For a transfer to be considered, the transferee (or transferor, if a stock transfer is involved) typically must first complete and submit an application with the franchisor, qualify to be a franchisee under the franchisor’s criteria, provide the same supporting documents as a new franchise applicant, pay an application and a license, relicense or a transfer fee, enter into a new franchise agreement and be prepared to renovate the facility in accordance with system standards in effect at the time of the transfer. At times, the franchisor may allow the transferee to assume the transferor’s current franchise agreement. However, when the transferee does not sign a new franchise agreement, or does not assume the transferor’s agreement, both the transferee and the transferor may face liability as a result of an unauthorized transfer of the facility.

A. Actions Against the Transferor

The most common claim a franchisor would make against a former franchisee/transferor for an unauthorized transfer of the franchise is for breach of contract. In *Ramada Franchise Sys., Inc. v. Hanna Hotel Enterprises*, 179 Hanna Hotel (the franchisee) and Karcho (the guarantor) sold a hotel to a third party (Southwyck Hotels) which continued to run the facility as a Ramada hotel without the franchisor’s (“Ramada”) prior consent.180 Ramada sued both the transferor and the guarantor for breach of contract and moved for summary judgment. The franchisee argued that Ramada was precluded from recovering under a breach of contract claim, because Ramada did not notify the guarantor of any alleged default by the franchisee.181 The guarantor argued that the guaranty agreement required, as a condition precedent to her obligations, that Ramada immediately notify her of the franchisee’s default. The court disagreed, finding that the guarantor waived the right to receive notice of the franchisee’s default in the guaranty agreement.182 The court granted summary judgment in favor of Ramada as a result of the franchisee’s unauthorized transfer, awarding it, among other relief, liquidated damages.183

B. Actions Against the Transferee

The franchisor can also bring a Lanham Act claim against the transferee with which it does not have a contractual relationship, if the transferee continues to use or display the franchisor’s trademarks without entering into a franchise agreement. In *Days Inn Worldwide, Inc. v. Adrian Motel Co., LLC*, 184 the franchisor (Days Inn) sued its former franchisee (Adrian Motel Company, LLC), its guarantors (the Karmo Defendants) and third-party transferees of the franchised business (Lenawee Hotel, Inc. and Adrian Properties, LLC) for breach of contract and Lanham Act violations as a result of the transfer of the franchise to the transferees without Days Inn’s consent. None of the defendants told Days Inn that the transferees were operating

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180 Id. at 847.

181 Id.

182 Id.

183 Id. at 848.

the facility. While payment of recurring fees pursuant to the franchise agreement continued for more than two years after the unauthorized transfer, the transferees ultimately stopped paying Days Inns but continued to run the facility as a Days Inn hotel for eighteen months.\textsuperscript{185}

It was not until Days Inn sued the franchisee and the guarantors for past due fees that the franchisee told Days Inn that the facility had been transferred to the transferees that were operating it.\textsuperscript{186} As a result, Days Inn amended the complaint to add claims against the transferees.\textsuperscript{187}

While the franchisee argued that Days Inn should have known the transfer took place when it started accepting checks from the transferees, the court, in awarding summary judgement to Days Inn, found that the franchise agreement was clear that the franchisor had to provide explicit consent to the transfer, which had not occurred.\textsuperscript{188} Furthermore, the court found that pursuant to the terms of the franchise agreement, the franchisee and guarantors were not relieved of their obligations under the franchise agreement or guaranty as a result of the transfer, and the franchisee and guarantors' argument that the franchisor somehow waived its rights against them were unavailing, pursuant to the express terms of the franchise agreement.\textsuperscript{189}

As for Days Inn's claims against the transferees for willful trademark infringement, the court found that, during the period of the unauthorized transfer of the facility, the transferees willfully used the Days Inn marks without a license.\textsuperscript{190} The court found the elements of trademark infringement, unfair competition and dilution under the Lanham Act had been satisfied.\textsuperscript{191} However, the court declined to grant summary judgment in Days Inn's favor against the principal of the transferee because there was a genuine issue of material fact as to whether he had the right and ability to supervise the infringing activity or otherwise participated in the activity to warrant finding him personally liable.\textsuperscript{192} Despite this finding, the court concluded that the transferee was liable for treble damages and Days Inn's attorneys' fees as a result of its intentional trademark infringement.\textsuperscript{193}

C. **Self-Help Remedies**

In an effort to reduce the chances of the unauthorized use of a franchisor's marks once a franchisee sells the property or ceases operating under the franchisor's system, as a result of

\textsuperscript{185} Id. at *10.
\textsuperscript{186} Id. at *11.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at *16-17.
\textsuperscript{189} Id. at *17-19.
\textsuperscript{190} Id at *25.
\textsuperscript{191} Id. at *25-32.
\textsuperscript{192} Id. at *34-35.
\textsuperscript{193} Id. at *48-50.
the expiration of the agreement or otherwise, the franchisor can include self-help provisions in its franchise agreements. Self-help provisions allow the franchisor to take unilateral action upon the termination of the franchise agreement if the former franchisee fails to adhere to certain post-termination obligations.

Franchisors often invoke their rights to self-help once it has been determined that a franchisee will not de-identify its property from its former franchise affiliation. Typically, after a reasonable period of time has passed and efforts to get the franchisee to de-identify the property on its own appear fruitless, the franchisor will send a letter to the franchisee. The letter may explain that under the terms of the franchise agreement, the franchisor has arranged for a contractor to visit the property to remove all signage that bears the franchisor’s trade names, service marks and trademarks. The letter may also express that the cost of such self-help will be paid by the former franchisee. In situations where the parties do not have a contractual relationship, the franchisor may still send a self-help letter to the owner of the property. Notably, if the former franchisee, or unauthorized transferee refuses access to the property in response to the self-help letter, it is advisable to not proceed with self-help, but instead file a complaint against the infringing party in order to obtain a court order allowing the franchisor to remove the signage and avoid trespassing claims.

IX. DRAFTING CONSIDERATIONS

A. Termination Provisions in Franchise Agreements

Providing clear and concise language regarding termination rights and obligations in a franchise agreement are key for avoiding unintended contract interpretations or bad faith claims which may arise post-termination (including disputes over whether the franchise relationship has been terminated). The franchise agreement should clearly delineate (a) which terms are binding and which are not; (b) the rights and responsibilities of each party during the term of the franchise relationship; (c) the obligations of each party regarding expiration, renewal, and termination; and (d) the continuing obligations that survive the expiration or termination of the franchise agreement (for instance, and without limitation, the right to seek indemnification for third party claims arising during the term of the agreement, the right to pursue past due account balances and liquidated damages, etc.). For example, the following language clearly sets forth the franchisee’s obligations upon the end of the franchise agreement:\textsuperscript{194}

Your Duties At and After Termination. When this Agreement terminates for any reason whatsoever:

System Unit Ceases. You will immediately stop using the System to operate and identify the Facility. You will remove all signage bearing any Marks and follow the other steps detailed in the System Standards Manual for changing the identification of the Facility. You will promptly paint over or remove distinctive System trade dress, color schemes and architectural features. You shall not identify the Facility with a confusingly similar mark or name, or use the same colors as the System trade dress for signage,

\textsuperscript{194} The sample language used in this paper for various provisions and/or correspondence is for illustrative purposes only and is not intended to represent complete sections or provisions of a franchise agreement or correspondence. Capitalized terms in the sample language represents terms that would be more fully defined in the franchise agreement.
printed materials and painted surfaces. You will cease all Internet marketing using any Marks to identify the Facility.

**Other Duties.** You will pay all amounts owed to us under this Agreement within 10 days after termination. You will owe us **fees** accruing while the Facility is identified as a **brand**. We may notify third parties that the Facility is no longer associated with the **brand**. We may also, to the extent permitted by applicable law, and without prior notice enter the Facility, and any other parcels, remove software, all copies of the System Standards Manual, Confidential Information, equipment and all other personal property of ours, and paint over or remove and purchase for $10.00, all or part of any interior or exterior Mark-bearing signage (or signage face plates), including billboards, whether or not located at the Facility, that you have not removed or obliterated within five days after termination. You will promptly pay or reimburse us for the cost of removing such items, net of the $10.00 purchase price for signage. We will exercise reasonable care in removing or painting over signage. We will have no obligation or liability to restore the Facility to its condition prior to removing the signage. We shall have the right, but not the obligation, to purchase some or all of the Facility's Mark-bearing FF&E and supplies at the lower of their cost or net book value, with the right to set off their aggregate purchase price against the sums then owed to us by you.

In considering more specific de-identification procedures to provide to a terminated franchisee, remember to consider generally (in addition to other items that may be unique to a particular system or brand): (a) removal and replacement of interior and exterior signage, (b) changing road signage and billboard advertising, (c) no longer identifying the facility as a branded facility on the telephone, in print, or on the internet, and (d) removing and destroying items bearing the brand name from customer facing materials.

**B. The Termination Notice**

In addition to setting forth post-termination obligations in the franchise agreement, when the parties’ relationship ends, the franchisor should document in writing to the franchisee each of its post-termination or post-expiration obligations. This correspondence should also specify the de-identification procedures and set a date certain for completion. An example of language that should be included in a notice of termination includes the following:

We write to give you formal notice of termination of the Franchise granted under the Agreement to operate the Facility as part of the **brand** system (the “Notice”). This termination is a result of **explain basis for termination, prior notices(s) of default (if applicable) and failure to cure (if applicable)**. Because the Agreement has terminated, you must perform your post-termination obligations such as the removal of all items that display or refer to the **brand** at the Facility. The de-identification procedures are specified in the attachment to this
Notice (outline the specific de-identification procedures). These de-identification procedures must be completed within <<number of days>> from the Termination Date.

You must also immediately pay us the full amount of all outstanding fees and charges, including <<list all fees and other charges owed>> owed through the date you complete the de-identification process (attach itemized statement). (If applicable) Additionally, you must pay us Liquidated Damages of <<enter amount>> as specified in Section ___ of the Agreement.

(If self-help de-identification is provided for in the franchise agreement) If within the <<number of days>> day period described above, you do not timely remove the exterior signage which bears the <<brand>> name and Marks, we may exercise our rights under the Agreement and send an independent contractor to the Facility to remove all such signage at and around the Facility. The cost of signage removal will be added to your final invoice from us. If you object to the removal of the signage by our independent contractor, you must notify us within <<number of days>> days after the Termination Date.

If you do not timely complete each of these post-termination obligations, we will refer this matter to our legal department to ensure that we recover from you all amounts owed and that all of your post-termination obligations to us are performed.

C. Other Notices

Franchisors should document franchisee defaults, opportunities to cure, and consequences for failing to cure in a written notice. The default letter should identify if a default cannot be cured for any reason, and should specify whether termination will follow automatically in the absence of a cure (if applicable) or whether the termination will be effective upon the issuance of a subsequent notice of termination. If the default letter serves as the notice of termination if the default is not cured, the franchisor should explicitly state the franchisee’s post-termination obligations.\(^{195}\) The notice should indicate the consequences for failing to comply with the post-termination obligations, such as exposure to claims under the Lanham Act if the former franchisee continues to represent the property as being affiliated with the brand after termination.\(^{196}\) Default letters may serve to rebut subsequent accusations that a nonrenewal or post-expiration termination is contrived or pretextual, or that a termination event has not occurred.

Franchisors should also consider sending letters that remind the franchisee of the impending expiration date of the franchise agreement, in order to maintain good franchise relations and to clearly document support for its position on post-termination obligations if the franchisee ignores the reminder and/or the decision is made to not renew the relationship post-


\(^{196}\) Id.
expiration. Proper notices further bolster the franchisor’s argument that a franchisee is operating a franchised location without authorization after the expiration or termination of the franchise. Franchisors should respond in writing to a franchisee that wishes to end the franchise relationship prematurely (whether or not under a previously established early termination right). Sample language regarding post termination obligations in these various letters would include the following:

The Agreement also requires you to perform certain post-termination obligations. In addition to any other obligations specified in the Agreement, by no later than <<number of days>> days after the date the Agreement is terminated, you must (a) remove all signage and other items bearing the <<brand>> Marks; (b) perform all post-termination obligations specified in the System Standards Manual; (c) change all signs, billboards, and listings in telephone directories, travel guides, indexes and similar materials in which the Facility is identified as a <<brand>> facility; and (d) remove any <<brand>> Marks from any advertising or promotional activities on, around or directed towards the Facility, including any web sites, web pages or search engines. You must cooperate fully with us regarding any post-termination inspections by us to verify that the Facility has been properly de-identified. You must return to us all training documents, operating manuals and other proprietary material.

When a former franchisee continues to operate the facility using the brand’s trademarks or tradename, the franchisor should send a letter to the former franchisee noting the unauthorized use of the marks and demanding de-identification and the completion of other post-termination obligations. Language for such a letter may include the following:

We write on behalf of <<brand>> to demand that you immediately cease and desist the misuse of the <<brand>> trade name, trademarks and service marks (collectively, the “<<brand>> Marks”), and/or names and marks that are confusingly similar to the <<brand>> Marks. Furthermore, we demand that you immediately cease to represent that you have a continued relationship with <<brand>>.

The Franchise Agreement between you and <<brand>> terminated on <<date>>. Pursuant to the Franchise Agreement, the Facility was required to immediately cease the use of the <<brand>> Marks. In violation of <<brand’s>> trademark rights, since the termination of the Franchise Agreement, the Facility has used the <<brand>> Marks without authorization by, among other things, failing to remove the <<brand>> signage and continuing to use the <<brand>> Marks throughout the Facility.

(If self-help is provided for under the license agreement) Under the provisions contained in Section ___ of the Franchise Agreement, we will be sending an independent contractor to the Facility to remove all signage at and around the Facility that bears the <<brand>> Marks. The sign contractor will remove from the
Facility all exterior signage bearing the <<brand>> tradenames, service marks, and trademarks on <<date>>. The cost of sign removal will be added to your final invoice from us.

In addition to the language set forth above, the franchisor should consider identifying the Lanham Act violations associated with the unauthorized use of the Marks post-termination, as well as any additional post-termination obligations that need to be addressed.

X. CONCLUSION

The solution to the conflicting rights and obligations upon expiration as opposed to termination is neither sexy nor exciting; it is careful, thoughtful drafting and consistent processes and documentation. The focus for franchisors, franchisees, and their counsel must be on anticipating how they would like a post-expiration situation handled, subject to state law, and then drafting the franchise agreement to mandate that result. The second most important factor is follow-through and consistency. Consistency does not have to mean that a franchisor does not make exceptions or permit operation post-expiration, but it does mean that there should be a writing to document any extensions, exceptions, or allowances of post-expiration operations. Similarly, the franchisor should have clear documentation of any disallowance of post-expiration operations. On the other hand, the cases prove that it is equally important for franchisees to heed the expiration dates and any notices from the franchisor—and not to rely on a "supposed" or undocumented plan to extend the terms of the franchise agreement.
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Mr. Goldman advises his franchisee clients in connection with the negotiation of franchise and license agreements, and related documents, and reviews voluminous disclosure documents provided to prospective franchisees. Mr. Goldman assists franchisor clients in drafting and registering disclosure documents, franchise agreements and related documents, and provides negotiating assistance on behalf of franchisor clients when entering into franchise relationships.

In addition to litigation in franchise matters, Mr. Goldman handles numerous other business disputes, partnership disputes, and construction cases. Mr. Goldman also has extensive experience representing employers and employees in labor disputes and discrimination matters.

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Ms. Treadwell counsels franchisors regarding disclosure documents, franchise agreements, franchisee terminations, and other issues. As a litigator, she represents franchisors in actions to enforce franchise agreements against franchisees or to defend franchisors in actions by third parties asserting vicarious liability. Ms. Treadwell is a frequent speaker at state and national conferences regarding franchise issues. She is currently an Associate Editor for the Franchise Law Journal; she is a contributing author to the upcoming publication, The Annotated Franchise Agreement; she co-delivered the Annual Judicial Update for the International Franchise Association’s Legal Symposium in 2013; and she was the ABA Forum on Franchising’s Rising Star in 2015. Locally, she was the president of the Franchise and Distribution Section for the State Bar of Georgia.

Ms. Treadwell’s employment practice made her uniquely qualified to address the significant joint employment issues that franchise systems have been struggling with for the last few years. As part of that practice, Ms. Treadwell provides counseling and general advice on employment-related issues. She has represented clients before the Equal Employment Opportunity Commission, the Georgia Department of Labor, and FINRA, as well as in state and federal courts and in arbitrations. Representative engagements include claims for discrimination and retaliation based on age, gender, race, religion, and disability; breach of employment agreements; alleged violations of federal and state wage and hour and leave laws; and advice regarding employment handbooks, policies, trade secrets, non-competes and other restrictive covenants, and executive and employee agreements.

Ms. Treadwell is a graduate of Oglethorpe University (Atlanta, GA), where she is currently on the Board of Trustees. After graduation, she taught middle school and high school before attending Georgia State University College of Law, where she graduated cum laude, was Student Writing Associate Editor of the Law Review, and served as president of the Student Bar Association. She continues her service to her law school as a member of the Board of Visitors. Ms. Treadwell also currently serves as Board Chair for the non-profit Trees Atlanta. She remains actively involved in local, state, and national bar associations, including her past service as a long-time member of the planning committee and former president of the Leadership Institute for Women of Color Attorneys. She also has contributed a significant amount of time to pro bono work.