

# FRANCHISE LAW JOURNAL

## 2018–2019 EDITORIAL BOARD

### EDITOR-IN-CHIEF

Daniel J. Oates (2021)  
*Miller Nash Graham & Dunn LLP*  
[dan.oates@millernash.com](mailto:dan.oates@millernash.com)

### ASSOCIATE EDITORS

Trishanda L. Treadwell (2020)  
*Parker, Hudson, Rainer & Dobbs LLP*  
[ttreadwell@pbrd.com](mailto:ttreadwell@pbrd.com)

Kevin M. Shelley (2019)  
*Kaufmann Gildin & Robbins LLP*  
[ksbelley@kaufmanngildin.com](mailto:ksbelley@kaufmanngildin.com)

Earsa Jackson (2021)  
*Clark Hill Strasburger*  
[earsa.jackson@clarkhillstrasburger.com](mailto:earsa.jackson@clarkhillstrasburger.com)

C. Griffith Towle (2020)  
*Bartko, Zankel, Tarrant & Miller*  
[gtowle@bztm.com](mailto:gtowle@bztm.com)

Jason Binford (2021)  
*Foley & Lardner LLP*  
[jbinford@foley.com](mailto:jbinford@foley.com)

### TOPIC & ARTICLE EDITORS

Emily I. Bridges (2019)  
*Fox Rothschild LLP*  
[ebridges@foxrothschild.com](mailto:ebridges@foxrothschild.com)

John M. Doroghazi (2019)  
*Wiggin and Dana LLP*  
[jdoroghazi@wiggin.com](mailto:jdoroghazi@wiggin.com)

William M. Bryner (2019)  
*Kilpatrick Townsend & Stockton*  
[bbryner@kilpatricktownsend.com](mailto:bbryner@kilpatricktownsend.com)

Matthew Gruenberg (2019)  
*DLA Piper LLP (US)*  
[matthew.gruenberg@dlapiper.com](mailto:matthew.gruenberg@dlapiper.com)

Marlén Cortez Morris (2019)  
*Barnes & Thornburg LLP*  
[mcortez@btlaw.com](mailto:mcortez@btlaw.com)

Maral Kilejian (2019)  
*Haynes and Boone, LLP*  
[maral.kilejian@haynesboone.com](mailto:maral.kilejian@haynesboone.com)

Larry M. Weinberg (2019)  
*Cassels Brock*  
[lweinberg@casselsbrock.com](mailto:lweinberg@casselsbrock.com)

### MANAGING EDITOR

Julie Roberts Furgerson  
*ABA Publishing*  
*American Bar Association*  
[julie.furgerson@americanbar.org](mailto:julie.furgerson@americanbar.org)

## STATEMENT OF OWNERSHIP

*Franchise Law Journal* (ISSN: 8756-7962) is published quarterly, by season, by the American Bar Association Forum on Franchising, 321 North Clark Street, Chicago, Illinois 60654-7598. *Franchise Law Journal* seeks to inform and educate members of the bar by publishing articles, columns, and reviews concerning legal developments relevant to franchising as a method of distributing products and services. *Franchise Law Journal* is indexed in the *Current Law Index* under the citation FRANCHISING.

Requests for permission to reproduce or republish any material from the *Franchise Law Journal* should be sent to [copyright@americanbar.org](mailto:copyright@americanbar.org). Address corrections should be sent to [coa@americanbar.org](mailto:coa@americanbar.org). The opinions expressed in the articles presented in *Franchise Law Journal* are those of the authors and shall not be construed to represent the policies of the American Bar Association and the Forum on Franchising. Copyright © 2019 American Bar Association. Produced by ABA Publishing.

# FRANCHISE LAW JOURNAL

VOLUME 38, NUMBER 3

WINTER 2019

## TABLE OF CONTENTS

From the Editor-In-Chief <i>Daniel J. Oates</i>	v
--	---

### ARTICLES

Drawing Lines in Franchisor Support—Is It Necessary and Where Are the Lines to Draw in Today’s Joint-Employment Environment? <i>Joyce Mazero, Karen Boring Satterlee, Eric H. Karp, Leonard H. MacPhee, Jess A. Dance &amp; William W. Sentell</i>	327
Issues in Growth by Multi-Unit Franchising <i>David B. Ramsey &amp; Michelle Murray-Bertrand</i>	359
Not Your Mama’s Advertising Fund: Best Practices in the Use of Franchise System Advertising Funds <i>Lauren Smith Madden</i>	379
Not Just Between Us: Strategies for Disclosure of Settlement Agreements in the FDD <i>Briar Siljander</i>	401
A Primer on Franchising in Canada <i>Larry Weinberg &amp; Geoffrey B. Shaw</i>	417
Nuts and Bolts of International Arbitration <i>Craig R. Tractenberg</i>	451

### FEATURE

Franchising & Distribution Currents <i>Griff Towle, Larry Weinberg &amp; John Doroghazi</i>	469
--	-----



---

---

# From the Editor-In-Chief

---

Daniel J. Oates

Winter is here.<sup>1</sup> For the industrious among us, the leaves have all been cleared from the ground; for others, they form a slick mat, buried beneath the cold snow. Fireplaces merrily pipe smoke while we grasp our respective mugs of hot cocoa. Children play out in the cold, rosy-cheeked and full of mischief. Unless you are out playing too,<sup>2</sup> there is no better time than to sit back, snuggle up, and enjoy the latest edition of the *Franchise Law Journal*.



Mr. Oates

I would like to start with two exciting announcements. First, I am proud to formally announce the rollout of a brand-new series of articles for those of you interested in international franchising. Unbeknownst to you, our series kicked off with the publication of an article on franchising in the United Kingdom in our summer 2018 edition.<sup>3</sup> Surprise!(?) The series continues this edition with an article by *FLJ* editor Larry Weinberg and Geoffrey B. Shaw dissecting the law of franchising in Canada. With the able assistance of my colleague Mr. Weinberg, you can expect this series to continue with a large number of authors committing to contribute pieces to future editions about their home jurisdictions. We hope to be able to have a new article for each future issue dedicated to the law of a different nation. For those of you with flight anxiety or moderately controlled agoraphobia, get ready to experience the world through the pages of the *Journal*, one franchising jurisdiction at a time.

Second, in this issue we are proud to present the Edward Wood Dunham Rising Scholar Award-winning article by Lauren Smith Madden.

---

1. *Game of Thrones* music intensifies.

2. The author concedes, without fully admitting to anything, that the drafting of this editorial may have been punctuated by several interludes of outdoor playtime. Life is too short, people.

3. John Pratt & James Barrett, *Franchising in the United Kingdom*, 38 *FRANCHISE L.J.* 1 (2018).

---

---

*Daniel J. Oates (dan.oates@millernash.com) is a partner in the Seattle office of Miller Nash Graham & Dunn LLP. Dan focuses his practice on franchising and distribution litigation. Feel free to reach out to Dan directly for comments on this editorial or matters related to the Franchise Law Journal.*

---

---

Ms. Madden's article was selected by a panel of franchise and editorial experts,<sup>4</sup> and she was presented with the award at the 41st Annual Forum on Franchising in Nashville, Tennessee. I encourage all of you to congratulate Ms. Madden for her work, as it was a deserving win. "We will watch your career with great interest."<sup>5</sup>

As you take the time to read Ms. Madden's engaging article on advertising funds, also consider that you should encourage your associates and junior colleagues to contribute a paper for consideration for next year's award. We are currently receiving applicants' submissions, and now is a great time to get your colleague's or friend's name into the hopper. Authors with less than seven years' practice experience out of law school are eligible for the award, and the winner will be recognized with an award at the Annual Forum in Denver. The winner is also entitled to reimbursement for the expense of traveling to the Forum for the awards presentation, along with a waiver of the registration fee. Also, for the higher-minded crowd: sweet, sweet glory.

With these announcements complete, I would like to turn to a more serious editorial exercise, as is my prerogative as Editor-in-Chief.<sup>6</sup> As most of our readers are aware, regulators in my home state of Washington are currently engaged in a concerted effort to rid all agreements in the franchise industry of so-called no-poaching provisions.<sup>7</sup> I pass no judgment on the legality or propriety of these provisions.<sup>8</sup> I do, however, pass judgment on the far-reaching exercise of power by the state of Washington in the absence of empirical evidence demonstrating that no-poaching agreements are causing harm.

First, the state's methods in pursuing franchisors that utilize no-poaching provisions are heavy-handed. Washington State regulators have insisted that franchisors cease using no-poaching agreements nationwide.<sup>9</sup> To avoid a lawsuit from the state, these franchisors have been forced to agree to make system-wide changes, despite the fact that only about two percent of their franchised outlets are located in the state of Washington.<sup>10</sup>

Second, one would ordinarily expect that major interventions by government into private commerce would be preceded by complaints, supported by scientific investigations or data-driven analysis of trends and injuries.

---

4. Oh, and me for some reason.

5. Supreme Chancellor Sheev Palpatine, *STAR WARS: EPISODE I—THE PHANTOM MENACE* (20th Century Fox 1999).

6. Because, you know, my opinion is probably important to you. That's my working assumption anyway.

7. This issue is covered in great depth by an article published in the fall edition of the *Journal*. See Josh M. Piper & Erik Ruda, *Recent Developments in No-Poaching Provisions*, 38 *FRANCHISE L.J.* 185 (2018).

8. There appear to be several different ways that these agreements have been structured by franchisors, some of which have been accused of violating antitrust laws. See *id.* at 190–97.

9. See *WASH. ATTORNEY GEN., AG FERGUSON ANNOUNCES FAST-FOOD CHAINS WILL END RESTRICTIONS ON LOW-WAGE WORKERS NATIONWIDE* (July 12, 2018), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers>.

10. See *id.* (noting that the first eight franchisors that agreed to eliminate no-poaching provisions had 557 outlets in Washington, despite collectively having 26,697 franchises nationwide).

Where are the studies demonstrating that no-poaching provisions drive down worker wages? Where are the investigations that reveal increases in consumer pricing as a result of depressed worker mobility? The only real scientific analysis of the issue as of the date of this writing seems to conclude that insufficient data exist to draw any actual conclusions.<sup>11</sup>

It is entirely possible that no-poaching provisions have created very real, very serious problems that require correction. There can be no dispute that income inequality is on the rise and that it poses a significant obstacle to sustained economic growth.<sup>12</sup> But without data about the effect that no-poaching provisions have on this and other problems, it is impossible to know whether no-poaching provisions are a contributing factor. Indeed, many franchisors argue that no-poaching provisions improve economic efficiency by decreasing intra-brand competition so that brands can focus their efforts on competing with one another and driving down costs. Is this true? I have no idea! And, unfortunately, neither does anyone else.

In the absence of data demonstrating the existence of a problem, Washington State's aggressive effort to eliminate no-poaching provisions appears to be driven by anecdotal evidence and the precautionary principle. But given the compliance costs with making system-wide changes, and the unknown consequences of eliminating provisions that have (by all accounts) become a routine fixture of franchise agreements, further study is necessary to determine what effect, if any, no-poaching provisions have on economic development and wage growth.

---

11. ALAN B. KRUEGER & ORLEY ASHENFELTER, PRINCETON UNIV., *THEORY AND EVIDENCE ON EMPLOYER COLLUSION IN THE FRANCHISE SECTOR* (2017) (“[S]ystematic evidence on the impact of no-poaching agreements on workers’ pay and within-franchise job mobility is unavailable.”), <https://dataspace.princeton.edu/jspui/bitstream/88435/dsp014f16c547g/3/614.pdf>. A subsequent study done by Alan Krueger and Eric A. Posner noted that the percentage of franchisors including no-poaching provisions in their franchise agreements increased from one-third to slightly more than one-half between 1996 and 2016. ALAN B. KRUEGER & ERIC A. POSNER, HAMILTON PROJECT, *A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION* (Feb. 2018), [http://www.hamiltonproject.org/assets/files/protecting\\_low\\_income\\_workers\\_from\\_monopsony\\_collusion\\_krueger\\_posner\\_pp.pdf](http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf). Based on this solitary observation, the report concludes: “In all likelihood, the proliferation of no-poaching agreements has increased franchise companies monopsony power over workers. . . .” *Id.* This perfunctory conclusion represents the classic confusion between correlation and causation.

12. *See, e.g.*, FEDERICO CINGANO, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *TRENDS IN INCOME INEQUALITY AND ITS IMPACT ON ECONOMIC GROWTH* (2014) (noting that the gap between rich and poor is at its highest level in thirty years, and finding that rise in income inequality in the United States from 1990–2010 reduced growth in GDP per capita by five percent).

