LITIGATING INCURABLE DEFAULTS

RONALD T. COLEMAN, JR.
Parker, Hudson, Rainer & Dobbs LLP
Atlanta, Georgia

ALEJANDRO BRITO
Zarco Einhorn Salkowski & Brito, P.A.
Miami, Florida

October 13-15, 2010
The Hotel Del Coronado
San Diego, CA

© 2010 American Bar Association
TABLE OF CONTENTS

I. INTRODUCTION...........................................................................................................................1

II. DEFAULTS THAT MIGHT BE DEEMED "INCURABLE" .............................................................2
   A. Overview.................................................................................................................................2
   B. Most Common Types of Defaults That Might Be “Incurable” .................................................4
      1. Dishonesty.......................................................................................................................4
      2. Criminal Conduct...........................................................................................................7

III. COMMON LAW FRAMEWORK FOR ANALYZING DISPUTES OVER ALLEGEDLY INCURABLE DEFAULTS ...........................................................................................................8
   A. More Expansive Interpretation of Termination Rights- the “Williston View” .......................9
   B. More Limited Interpretation of Termination Rights- the “Corbin View” .............................13
   C. Termination Versus Rescission...........................................................................................17

IV. HOW STATE FRANCHISE RELATIONSHIP STATUTES AFFECT A FRANCHISOR’S ABILITY TO TERMINATE WITHOUT OPPORTUNITY TO CURE..........................................19
   A. Cases Where The Termination Was Deemed Proper............................................................19
   B. Cases Where The Termination Was Not Deemed Proper....................................................22

V. PRACTICAL TIPS ON HANDLING POSSIBLE TERMINATION WITHOUT THE OPPORTUNITY TO CURE.......................................................................................................23
   A. From The Franchisor’s Perspective.....................................................................................23
      1. Steps in the Franchisor’s Analysis....................................................................................23
      2. Preparing The Notice......................................................................................................26
   B. From The Franchisee’s Perspective.....................................................................................28
      1. Steps in the Franchisee’s Analysis....................................................................................28

VI. LITIGATION CONSIDERATIONS IN CASES INVOLVING INCURABLE DEFAULTS……...32
   A. From the Franchisor’s Perspective.....................................................................................32
      1. Securing The Forum..........................................................................................................33
      2. Injunctive Relief..............................................................................................................34
      3. Damages..........................................................................................................................35
   B. From the Franchisee’s Perspective.....................................................................................36
LITIGATING INCURABLE DEFAULTS

I. INTRODUCTION

Most franchise terminations occur after notice by the franchisor of a default or breach and an opportunity for the franchisee to cure or fix the problem. In certain situations, however, the franchisor may take the position that a default cannot be cured and desire to terminate the agreement immediately without any opportunity to cure. Most franchise agreements permit the franchisor to terminate the agreement without affording the franchisee the right to cure for certain kinds of defaults. Common law in many jurisdictions also has recognized that certain kinds of defaults justify immediate termination. These kinds of defaults are typically referred to as "incurable defaults."

Incurable defaults may include a failure to meet a scheduled deadline or performance standard, a franchisee's failure to operate its business on a continuing basis (typically referred to as abandonment of the franchise business), or the commission of a crime. In such situations, a "cure" either is not feasible or will not adequately remedy the harm caused to the franchisor and/or the relationship between the franchisor and franchisee. Certain franchise agreements specifically identify the factual instances that constitute an incurable default. In other cases, the franchise agreement might be silent as to certain circumstances that the franchisor to take the position that the franchisee's actions or inaction constitute an incurable default, thus permitting immediate termination of the franchise agreement.

Several states have relationship laws that impose restrictions on the termination of a franchise agreement without an opportunity to cure, usually requiring that such termination can occur only if the franchisor has "good cause" or similar grounds. Indeed, certain of these states have specifically defined what constitutes "good cause" or what circumstances will justify an immediate termination without opportunity to cure. Most states, however, do not address specifically the grounds that will expressly entitle a franchisor to terminate without an opportunity to cure. As a result, a franchisor may be restricted in its ability to terminate for an allegedly incurable default if the applicable state statute imposes conditions or restrictions on the termination. For example, the franchise agreement may be silent as to whether a specific event constitutes grounds for termination, yet the franchisor may believe that the event is so fundamentally egregious or injurious to the franchise relationship that it has no alternative but to terminate the agreement. But if a state relationship statute applies to that franchise, the franchisor might not be able to terminate without affording the franchisee an opportunity to cure. In any event, state relationship laws create another layer of necessary legal analysis and potential uncertainty for a franchisor.

This paper will first discuss certain types of defaults that might be deemed "incurable," using examples from franchise cases. Next, the paper will discuss common law frameworks for analyzing disputes over allegedly incurable defaults. The paper then will discuss the effect of state relationship laws on a franchisor's ability to terminate without giving opportunity to cure. The final sections of the paper provide practical tips on handling situations involving terminations for allegedly incurable defaults and litigation over such terminations from the franchisor's and the franchisee's perspectives.
II. DEFAULTS THAT MIGHT BE DEEMED "INCURABLE"

A. Overview

An allegedly "incurable" default can arise in a variety of circumstances. The most straightforward situation is where a certain event or type of conduct is identified in the franchise agreement as grounds for immediate termination with no right to cure. But franchise agreements, like other contracts, are not always so clear. Sometimes a franchise agreement will include a notice and opportunity to cure requirement that purports to be applicable to any default or breach of the agreement. A franchise agreement might expressly provide that certain defaults or breaches are subject to a notice and opportunity to cure requirement, but the non-breaching party believes that the conduct constituting the breach is already completed and thus cannot be cured. Or, the non-breaching party might deem the breaching conduct so egregious as to destroy the basic nature or purpose for the franchise relationship and thus justify immediate termination or cancellation of the contract.

These different contexts for allegedly incurable breaches implicate different interests and call for different legal analyses. Not surprisingly, most lawsuits involving an allegedly incurable breach arise in situations where the franchise agreement does not expressly authorize immediate termination without a right to cure, or where the franchisor desires to terminate immediately notwithstanding a contract provision arguably granting a right to cure the default.

The most clear cases are those where the franchisee has engaged in conduct that is expressly identified in the franchise agreement as grounds for immediate termination with no opportunity to cure. Franchise agreements often provide for immediate termination where the franchisee becomes insolvent, is convicted of a crime, abandons the franchise operations, or commits multiple similar breaches within a certain period of time. When the franchise agreement identifies specific defaults as incurable, the only contractual issue for resolution is whether the franchisee engaged in the proscribed conduct or whether the identified condition exist. In other words, resolution depends on the language of the contract rather than on the seriousness of the breach. An additional wrinkle might arise if a franchisee can claim the protection of a state franchise relationship law that imposes a notice and/or good cause requirement for termination. The impact of the state franchise relationship laws on a franchisor's right to terminate immediately is discussed in Section IV below.

Even if a franchise agreement does not expressly identify a default as incurable, certain defaults by their nature may not be curable because they are historical, completed acts that cannot be undone or changed. The best example of this kind of default is a franchisee's failure to meet a contractually required sales quota.\(^1\) If the contract required the franchisee to achieve a minimum level of sales during a particular period but the franchisee failed to do so, there is nothing the franchisee can do once that period has passed to change the historical fact of its deficient performance. In *Young Traveler Day Camps, Inc. v. Felson*,\(^2\) a licensee breached its contract with the licensor by failing to obtain the minimum required number of campers for the current camp

---

\(^1\) See *Manpower Inc. v. Mason*, 377 F. Supp. 2d 672, 677 (E.D.Wis. 2005) (defining "incurable breach" as "one that cannot logically be cured, such as a franchisee's failure to meet a sales quota within a specified time").

season. As that court noted, "[t]he breach was not merely material, it was irreparable; the campers which had not been obtained by the beginning of July could not be supplied thereafter."3

Other types of conduct might fall into this category. For example, the franchisee's commission of a crime might be deemed a complete act that cannot be undone.4 Abandonment or failure to operate a franchise or dealership location also might be deemed an historical fact that cannot be cured. In *In re Claremont Acquisition Corp.*,5 the court held that an auto dealer's failure to operate the business for seven consecutive business days, which the franchise agreement deemed to be a basis for termination, was an historical fact which by definition could not be cured.6 A similar concept exists under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq., and courts have held that failure to maintain station operating hours as required by the franchise agreement is an historical event that the franchisee cannot "undo" or cure.7

The most interesting - and therefore the most litigated - incurable default scenario is where the non-breaching party contends that the default is so egregious that it goes to the "root" or "essence" of the contract or relationship between the parties, and as such frustrates or destroys the purpose of the contract. A common example of this kind of breach is one where the franchisee acts dishonestly toward the franchisor or tries to cheat the franchisor out of the benefit of its bargain under the franchise agreement. For example, in *LJL Transportation, Inc. v. Pilot Air Freight Corp.*,8 the Pennsylvania Supreme Court upheld the franchisor's immediate termination without granting the franchisee a right to cure where the franchisee had diverted freight shipments that the franchise agreement required be shipped through the Pilot system to a competing company owned by the franchisee's owners. Underreporting sales is a similar kind of dishonesty that some courts have held goes to the "root" or the "essence" of the relationship and justifies termination or rescission of the contract without opportunity to cure.9

Cases applying this "essence of the contract" analysis rely on common law contract principles that are not unique to the franchise context. As with many common law doctrines, there are relatively few bright line rules on which a party can rely to determine whether certain conduct will be considered so egregious or significant that it will be deemed to go to the "essence" or "root" of the contract and thus justify termination with no opportunity to cure. Taking the position that a breach is so fundamental as to be incurable, in the absence of an express contractual right to do so, can be risky for a franchisor. With certain kinds of breaches, the franchisor might feel like it has no

---

3 *Id.* at 314

4 See, e.g., *Dunkin' Donuts, Inc. v. Gav-Stra Donuts, Inc.*, 139 F.Supp.2d 147 (D. Mass. 2001) (franchisee's conviction for tax evasion gave Dunkin's right to terminate immediately with no opportunity to cure); *Dunkin' Donuts, Inc. v. Chetminal, Inc.* Bus. Franchise Guide (CCH) ¶11, 290 (S.D. Fla. 1997) (sale of cigarettes to minors in violation of state law was historical act that could not be cured).

5 113 F.3d 1029 (3d Cir. 1997)

6 *Id.* at 1032

7 *See In re Deppe*, 110 B.R. 898, 904 (Bankr. D. Minn. 1990)

8 599 Pa. 546, 962 A.2d 639 (2009)

alternative but to terminate immediately, but the franchisor should not do so without careful legal advice and understanding of the uncertainties in this area of law.\(^\text{10}\)

B. Most Common Types of Defaults That Might Be “Incurable”

1. Dishonesty

Cases involving an alleged breach that goes directly to the heart and essence of the contract overwhelmingly involve instances of dishonesty in the business relationship. Among the multiple state and federal courts that have analyzed this issue in the franchise context, most rely on the seminal case of *Olin v. Central Indus., Inc.*\(^\text{11}\) In *Olin*, a fertilizer manufacturer would ship its product to a distribution firm for bagging and shipment to the manufacturer’s customers. The manufacturer discovered that its distributor was systematically “short-weighing” its 50 pound bags, resulting in customer complaints. The manufacturer also discovered that in addition to “short-weighing” the bags, the distributor was stockpiling the leftover fertilizer, selling it on the side, and keeping the proceeds. When the manufacturer obtained a directed verdict supporting its immediate termination of the distributor, the distributor appealed to the Fifth Circuit Court of Appeal, arguing that the manufacturer failed to provide notice and an opportunity to cure in accordance with the termination provisions of the contract. The contract contained a notice and cure provision, stating in relevant part:

> If default shall be made by either party in the performance or compliance with any of the covenants, agreements, terms or conditions of this Agreement and such default shall continue for a period of ninety (90) days after written notice thereof by the party not in default to the other, then this Agreement may be terminated at the option of the party not in default upon written notice, within one hundred twenty (120) days of the date of default, to the other party.[\(^\text{12}\)]

The issue before the appellate court was whether the language requiring a cure period of “any” breach of the contract prevented the manufacturer from unilaterally terminating if it did not first give the distributor and opportunity to cure. The court found that it did not. Applying general principles of Mississippi contract law, the Fifth Circuit held that “[u]nless a contract provision for termination for breach is in terms exclusive, it is a cumulative remedy and does not bar the ordinary remedy of termination for a breach which is material or which goes to the root of the matter or essence of the contract.”\(^\text{13}\) As to whether the distributor’s conduct would qualify as a breach going to the heart of the contract, the court declared, “We have no difficulty in concluding that a course of conduct by [the distributor] consisting of systematic misappropriation of such product and the delivery of short-weighted sacks to Olin’s customers would constitute such a breach.”\(^\text{14}\) Thus, notwithstanding

\(^{10}\) Litigation strategies and issues from the franchisor’s perspective are discussed in Section VI. A. below.

\(^{11}\) *Olin v. Central Indus., Inc.*, 576 F.2d 642 (5th Cir. 1978).

\(^{12}\) 576 F.2d at 647.

\(^{13}\) *Id*.

\(^{14}\) *Id*.
contractual provisions that may appear to require notice and cure for defaults, the Olin court found a virtually inalienable right to terminate when the breach is one at odds with good faith, fair dealing, and the fundamental purposes of the contract. Olin’s precedential holding has been cited with approval for decades since it has been decided.\(^{15}\)

One of the most common scenarios of business dishonesty that comes up in franchise cases is the failure to report or underreporting of sales by the franchisee. Courts confronted with this fact pattern have held that, if the allegations are shown to be true, the underreporting of sales by a franchisee constitutes a breach so egregious that it enables the franchisor to immediately terminate the franchise agreement with no notice and with no opportunity to cure.\(^{16}\)

In *The Southland Corp. v. Mir*,\(^ {17}\) several 7-Eleven franchisees were deliberately not reporting certain sales, and then diverting money orders to cover up the unreported sales, as well as for the franchisees’ personal use. In this way, the franchisees deprived the franchisor of its right to 50% of $155,000 in gross sales. The court found that, as a matter of New York law, the money order scheme went to the heart of the franchise agreement because “a fair reading of the contract implies a covenant not to engage in schemes that deprive Southland of its contractual right to its share of the gross profits.”\(^ {18}\) In *The Southland Corp. v. Froelich*,\(^ {19}\) another 7-Eleven franchisee was found to be engaging in a similar scheme to underreport sales to the franchisor. This time, the franchisee falsely over-stated the amount of Instant Lotto sales to cover up its failure to disclose sales on other inventory, in order to avoid paying royalties. The franchisee also sold some products at a higher price than what was reported to the franchisor, pocketing the difference. Upon learning of the franchisee’s fraudulent activities, Southland immediately sent a notice of termination without opportunity to cure. The franchisee, however, refused Southland’s demands to turn over control of the store. Southland sought a preliminary injunction to dispossess the franchisee, enjoin him from using the 7-Eleven trade and service marks, and seize the inventory of the store. A magistrate judge initially denied injunctive relief, not because the magistrate judge disagreed that Southland had the right to terminate without notice, but rather because (1) the franchisee denied his involvement in the scheme; and (2) the magistrate judge determined that, at least as compared to Mir, the duration of the scheme and the amount of money misappropriated (around $6,000 to $7,000) was not enough to justify an injunction. The Eastern District of New York disagreed that these points were sufficient to prevent Southland from obtaining an injunction, however, and granted all injunctive relief requested.\(^ {20}\) The Froelich court found the matter before it on all fours with Mir, and built upon the Mir court’s analysis by explicitly finding that the implied covenant “not to

---


\(^{17}\) *Mir*, 748 F. Supp. 2d 969.

\(^{18}\) Id. at 983.

\(^{19}\) 41 F. Supp. 2d 227.

\(^{20}\) 41 F. Supp. 2d at 249.
engage in schemes or gimmicks that deprive Southland of its contractual share of the gross profit” emanates from the common law covenant of good faith and fair dealing.  

Underreporting sales is not the only type of dishonest conduct that courts have found justify the termination of a franchise agreement with no opportunity to cure. In Larken Inc. v. Larken Iowa City Ltd. P’ship, a hotel owner discovered sundry offenses committed by its management company, but primarily based its immediate termination on the fact that the management company: (1) entered into an unauthorized telephone contract with a provider that was controlled by a principal of the management company, and (2) the management company kept rebates that rightfully should have been forwarded to the owner. When the hotel manager terminated the management agreement with no opportunity to cure, the management company sought a declaration that it could not be terminated without notice and an opportunity to cure as required by the management agreements. Initially, the trial court relied on a Minnesota state court decision between the same parties to hold that the core purpose of the management agreement was to make a profit; because the hotel was profitable, the purpose of the agreement was fulfilled and any breaches by the manager therefore “were not so material as to give [the owner] the right to terminate without notice and the right to cure.” The Supreme Court of Iowa reversed, disagreeing with the characterization that the sole purpose of the parties’ agreement was to turn a profit. Instead, the Larken court found that “one of the principal purposes of the management agreement… was to manage the hotel in the best interests of the owner and to be honest and forthright in its dealings.” The manager’s “breach of its implied duty of honesty and fidelity went to the heart of the contract.” The court went on: “Merely requiring [the manager] to retroactively undo its wrongdoings…would not be an adequate remedy” because “no amount of payment…by the franchisee could ever restore the business trust and confidence which the franchisor wanted[.]”

In LJL Transportation Inc. v. Pilot Air Freight Corp., the franchisee was diverting business away from the franchisor and into its own separate company that competed directly with the franchisor. The franchisor was engaged in an air-freight forwarding business, which expedited heavy-duty freight shipments to destinations across the company. The franchisor accomplished this through a network of corporate and franchised stations located at airports and other locations. The franchisor discovered, however, that the franchise had been deliberately and systematically diverting freight shipments meant for the franchise system, to a separate company that was a direct competitor of the franchisor and was owned by the principals of the franchisee; specifically encouraging employees to divert shipments to other company by offering employees a bonus when they did so; and referring to the franchisor as “our enemy” in front of employees. Relying upon, among other cases, the Olin and Larken decisions, the Supreme Court of Pennsylvania ratcheted up the rhetoric in finding that the franchisee’s dishonest conduct went to the heart of the contract and warranted immediate termination:

21 41 F. Supp. 2d at 247.

22 589 N.W.2d 700 (Iowa 1999).

23 589 N.W.2d at 701.

24 Id. at 704.

25 Id.

26 Id.

27 599 Pa. 546.
Requiring such notice before termination under such circumstances would be a useless gesture, as such a breach may not reasonably be cured. Such a breach is so fundamentally destructive, it understandably and inevitably causes the trust which is the bedrock foundation and veritable lifeblood of the parties’ contractual relationship to essentially evaporate.\(^{28}\)

2. Criminal Conduct

Most franchise agreements include a provision requiring the franchisee to abide by all federal and state laws and regulations. A breach of these provisions through violations of civil law may or may not be found to be incurable, depending on the language of the franchise agreement or the nature of the violation. Criminal violations, on the other hand, are routinely held to be incurable, whether or not the contract specifies it, and notwithstanding any potentially mitigating circumstances surrounding the violation.\(^{29}\) Courts usually conclude that a franchisee’s criminal conduct arising out of operation of the franchise is injurious and prejudicial to the franchisor’s goodwill.\(^{30}\)

In *Dunkin’ Donuts, Inc. v. Chetminal, Inc.*,\(^{31}\) a franchisee was arrested for selling cigarettes to minors out of his Dunkin’ Donuts store. The franchisor, Dunkin’ Donuts, Inc., immediately terminated the franchise agreement, but the franchisee refused to stop using the Dunkin’ Donuts proprietary marks. Dunkin Donuts sued and sought a preliminary injunction. The franchisee argued that it was entitled to cure pursuant to a provision in the franchise agreement providing a 24-hour cure period for “violation of any law, regulation, order or DUNKIN’ DONUTS standard relating to health, sanitation, or safety.” The court disagreed that the provision applied to the franchisee’s conduct, which “was willful criminal conduct that could not be cured.”\(^{32}\) The court did not find there to be much controversy on the issue, and granted the injunction in favor of Dunkin’ Donuts.

In another Dunkin’ Donuts case, the facts were a little more complicated. In *Dunkin’ Donuts, Inc. v. Gav-stra Donuts, Inc.*,\(^{33}\) George Stratis (“Stratis”) and Michael Gavriel (“Gavriel”) formed a partnership to open a Dunkin Donuts franchise, “GSDL.” Stratis, a Greek immigrant who spoke little English, met Gavriel when he was working as a baker at a Dunkin Donuts franchise owned by Gavriel. They became 50-50 partners; Stratis had managed to save $100,000, which he invested in the business, and Gavriel contributed his business expertise and ability to obtain financing. The franchise agreement named both partners collectively as “franchisees” and stated that, unless otherwise specified, the franchisee had a 30-day cure period to remedy breaches. However, no cure period was available if the franchisee “falsifies financial data.”

\(^{28}\) 599 Pa. at 567.


\(^{32}\) *Id.*, Docket No. 33, p. 5.

\(^{33}\) 139 F. Supp. 2d 147.
Two years after signing the franchise agreement, Stratis discovered suspicious transactions by Gavriel in the company financial records. Stratis filed suit in state court against Gavriel for breach of fiduciary duty. Stratis prevailed after a 14-day bench trial, winning both monetary compensation for the funds converted by Gavriel, as well as an order permanently enjoining Gavriel from interfering in any way in the Dunkin Donuts franchise. Stratis also notified the I.R.S. of Gavriel's criminal scheme. For the next several years, Stratis operated the Dunkin Donuts franchise without any involvement by Gavriel, and the business prospered.

Six years after Stratis successfully sued Gavriel, Gavriel pled guilty to tax fraud. Shortly afterward, in 1999, Dunkin Donuts issued the business a notice of termination for violation of the franchise agreement’s covenant not to do anything to harm Dunkin Donuts’ goodwill, and for violating the franchise agreement’s provision to abide by all laws. While Stratis did not dispute that Gavriel had breached the franchise agreement, Stratis vigorously asserted that he had cured any default caused by Gavriel by uncovering Gavriel’s illegal activity; obtaining a preliminary injunction in 1992 in state court; recovering all diverted monies and accounting for those monies for tax purposes; reporting Gavriel’s illegal conduct to Dunkin Donuts in 1992; and reporting Gavriel’s illegal conduct to the I.R.S. which resulted in Gavriel’s conviction. Dunkin Donuts was not moved, and asserted that the dishonesty of Gavriel’s acts constituted breaches diminishing the goodwill of Dunkin Donuts, and as such the breaches were incurable. The District Court of Massachusetts sided with Dunkin Donuts, and agreed that the nature of Gavriel’s criminal conduct caused incurable harm to Dunkin Donuts, notwithstanding Stratis' best efforts to cure the dishonesty. The court was even more persuaded, however, by the provision of the franchise agreement stating that no cure period is available if the franchisee falsifies financial data. Such a clause, the court held, “does not give even the innocent defendants an opportunity to cure the breach.”

Stratis made arguments alleging laches, equitable estoppel, and public policy to no avail. While acknowledging that Stratis was “a conscientious, honest franchisee,” the court ordered summary judgment for Dunkin Donuts, and the court enjoined GSDI from operating as a Dunkin Donuts. The court also awarded attorney’s fees in Dunkin Donuts’ favor pursuant to the franchise agreement. If any case demonstrates the indelible effect that a criminal conduct has on the franchise relationship, and its inability to be cured, Gav-stras is surely it.

III. COMMON LAW FRAMEWORK FOR ANALYZING DISPUTES OVER ALLEGEDLY INCURABLE DEFAULTS

As with any contract issue, analysis of whether a franchisor may properly terminate without giving an opportunity to cure begins with the language of the franchise agreement. As discussed in Section II above, franchise agreements sometimes identify particular defaults as being a basis for immediate termination with no right to cure. If the franchisor can prove that the contractually identified breach occurred or condition existed, and assuming there is no issues as to waiver or prior breach by the franchisor, there should be no contractual or common law impediment to an immediate termination. In that situation, only an applicable state franchise relationship law imposing a notice and/or good cause requirement would limit the franchisor's exercise of its contractual right.

A more difficult situation arises where the franchise agreement either does not expressly state that a particular default is incurable, or where the franchise agreement contains a cure provision but the franchisor nonetheless desires to terminate immediately. In those situations, courts sometimes look beyond the express contractual termination provisions to traditional common

34 139 F. Supp. 2d at 155.
law principles involving remedies for a contract breaches. The greater weight of case authority holds that unless the contract states that its termination remedies are exclusive, a non-breaching party may in certain situations be entitled to terminate immediately even if the contract includes an express provision granting the breaching party an opportunity to cure.

A. More Expansive Interpretation of Termination Rights - the "Williston View"

This expansive view of termination rights is best illustrated in the recent decision in *LJL Transportation, Inc. v. Pilot Air Freight Corp.* The franchisor, Pilot Air Freight, was engaged in the air freight forwarding business, and maintained a network of company-owned and franchised freight stations at airports and other sites around the country. Each franchisee entered into a standard franchise agreement that required the franchisee to place all freight shipments with the Pilot system, and the agreement prohibited the franchisee from operating another business from the franchise location or delivering through another carrier any freight that originated in the Pilot system. Pilot discovered that LJL had been deliberately diverting freight shipments that the franchise agreement required be shipped through the Pilot system to a separate trucking company that was a competitor of Pilot and was owned by the principals of the franchisee. The franchisee's principals admitted to this conduct and that they had failed to report these shipments to Pilot for "pricing reasons." The evidence showed that the franchisee diverted $3,000-$5,000 of business per month for at least a year.

The franchise agreement contained a termination provision providing that Pilot could terminate the agreement upon the occurrence of any of the following:

- "Franchisee fails to deal fairly and honestly with Pilot . . .;"
- "Franchisee fails to offer all services required by Pilot . . . or franchisee operates another business in conjunction with the franchise business;"
- "Franchisee fails to submit accurate invoices, daily business reports and other statements or documentation . . .;"
- "Franchisee picks up or delivers under a trade name or mark other than 'Pilot' any freight originating within the Pilot franchise system, or moves freight outside the Pilot system."

The termination section of the franchise agreement also contained a cure provision, providing that "Pilot shall allow franchisee an opportunity to cure a default within ninety (90) days of receipt of written notice of a particular default." Upon learning of LJL's conduct, Pilot sent written notice to the franchisee stating that it was terminating the franchise agreement immediately, and did not allow any opportunity to cure the default. The franchisee brought suit alleging breach of contract for wrongful termination and related claims, and Pilot counterclaimed for the franchisee's breach and to enforce the termination.

---

36 599 Pa. at 557.
37 Id. at 552.
The Pennsylvania Supreme Court framed the issue as follows: "Whether a party's conduct in breaching a contract may justify its immediate termination, even if the contract includes an express provision granting the breaching party the right to cure before the contract is terminated." 38

The franchisee contended that it had an unqualified right to cure based on the language of the termination provision quoted above. Pilot, on the other hand, argued that the franchisee and its principals had no right to cure because cure would be impossible under the circumstances, due to the fact that they had engaged in dishonest and improper conduct and, according to Pilot, the resulting breach of trust frustrated the essential purpose of the agreement by rendering it "meaningless and worthless." 39

The court began its analysis by applying the general contract law principle, established in cases from other jurisdictions, that "unless the termination provisions of the franchise agreement are, by their terms, exclusive, a termination clause affording the right to notice and cure is . . . merely a cumulative remedy which does not bar the non-breaching party from exercising other remedies available to it in the event of a breach by the other party going directly to the heart of the contract, and destroying the fundamental trust upon which the contractual relationship is built." 40

The Pennsylvania court relied on several older cases that adopted what has been termed the "Williston view" of contractual termination rights. Professor Williston was the original author of a well-known contract law treatise, now known as Williston on Contracts (4th ed.). The Williston treatise recognizes that under the common law of contracts, a non-breaching party is entitled to terminate the contract for a total or fundamental breach that goes to the essence of the parties' agreement. This right of termination exists independent of any contractual provisions addressing termination. Thus, unless a contract provision regarding termination for breach expressly provides that it is an exclusive remedy, the "Williston view" treats contractual termination rights as a cumulative remedy and one that does not bar the ordinary remedy of termination for "a breach which is material, or which goes to the root of the matter or the essence of the contract." 41

Many of the recent incurable default cases that adopt the "Williston view" of termination rights cite to the leading case of Olin Corp. v. Central Industries, Inc., 42 discussed in Section II. B.1. above. Olin, a fertilizer manufacturer, uncovered evidence that a storage company with which it had contracted to store and package fertilizer for sale to Olin's distributors was routinely "short-weighing" bags of fertilizer before passing on the bags to Olin's customers, and was keeping the difference for sale under the storage company's own name. Olin brought a declaratory judgment action seeking to declare the agreement terminated based on the storage company's breaches. The storage company defended by citing a contractual notice and cure provision, which provided that the agreement may be terminated for a default if "such default shall continue for a period of ninety (90) days after written notice thereof by the party not in default to the other . . ." The storage company argued that Olin was not entitled to terminate because it had not given this notice an opportunity to cure.

38 Id. at 550.
39 Id. at 552.
40 Id. at 560-61.
41 Id. at §44:55.
42 576 F.2d 642 (5th Cir. 1978).
The Olin court framed the issue as "whether inclusion of such a contractual provision thereby establishes the exclusive means of termination." The court adopted the "Williston view" and held that the termination provision in the parties' agreement "did not provide the exclusive means of termination in the event of a material breach which had the effect of substantially defeating the purpose of the contract." The court noted, however, that the issue of whether the breach in question "substantially defeat[ed] the purpose of the contract" was an issue for the jury on remand.

In another case from the franchise arena, the Iowa Supreme Court followed the "Williston view" and the holding of Olin to uphold the right of a hotel owner to terminate a management agreement with the hotel manager despite the existence of a contractual termination provision containing a 30-day notice and right to cure period. As hotel manager, Larken was responsible for purchasing equipment and maintaining the hotel to comply with Holiday Inn franchise requirements, accounting for receipts and expenses on behalf of the owner, and supervising employees at the hotel. The hotel owner discovered evidence that Larken had breached the management agreement by misappropriating rebates that should have been paid to the owner and by entering into a self-dealing maintenance contract with a company controlled by one of Larken's principals. After discovering these facts, the owner sent a notice of immediate termination based on these breaches of the management agreement and did not offer any opportunity to cure the defaults. The agreement contained a "termination for cause" provision that authorized termination "if the defaulting party fails to remedy such Event of Default within thirty (30) days after receipt of notice to remedy." The termination provision also contained a cumulative remedies provision stating: "The terms of this Article shall not be deemed to preclude or impair the right of any party to exercise any right or remedy, whether for damages, injunction, specific performance, or otherwise, upon any breach of any terms of this Agreement."

The question on appeal was "whether a contract may be terminated for a breach of an unexpressed duty of honesty and fidelity in the face of express contract language that requires notice and right to cure before termination." The owner contended that termination after notice and opportunity to cure was not the exclusive remedy. Larken argued that the owner's interpretation rendered the notice and opportunity to cure provision of the contract meaningless, and that the cumulative remedies provision in the contract merely meant that a termination did not preclude or impair other remedies for breach in the event of a termination following the contractual notice and cure process.

43 576 F.2d at 647.

44 Id. at 648.

45 The Olin court also relied on Young Traveler Day Camps, Inc. v. Felsen, 118 N.J. Super. 304, 287 A.2d 231 (1972) (licensor was entitled to terminate license agreement without providing five days written notice as required by the contractual termination provision based on licensee's failure to procure campers for the upcoming camp season, which constituted a material and irreparable breach of the contract); Foster-Porter Enterprises, Inc. v. De Mare, 198 Md. 20, 81 A.2d 325 (1951) (holding that contractual notice provision did not prevent non-breaching party from exercising its cumulative remedy to terminate the contract for a material breach).

46 Larken, Inc. v. Larken Iowa City Ltd. Partnership, 589 N.W.2d 700 (Iowa 1998).

47 589 N.W.2d at 701-02.
Larken also made the argument that the management agreement expressly identified breaches for which notice and opportunity to cure were not required, such as voluntary or involuntary dissolution, appointment of receiver or a bankruptcy filing, and in light of this specific enumeration of incurable defaults, all other alleged breaches must be subject to the notice and cure provisions. 48 Because the breaches alleged by the hotel owner - self-dealing and failure to pass along rebates - were not included as a basis for termination without notice, Larken argued that the owner's immediate termination was wrongful. This contract construction argument seems to have some merit - having expressly identified certain breaches as being "incurable" and a basis for immediate termination, a reasonable interpretation based on standard contract principles might have been that any other breaches must be subject to the 30 day notice and cure provision in the contract. Although the court noted this argument by Larken, it did not address the argument head on and instead focused almost exclusively on the "essence of the contract" analysis based on Olin and other similar cases.

The court ultimately rejected Larken's argument that the contractual termination provisions controlled, and applied the broader "Williston view" of contractual termination rights. The court concluded that "the acts of self-dealing found by the district court were so serious that they frustrated one of the principal purposes of the management agreement, which was to manage the hotel in the best interest of the owner and to be honest and forthright in its dealings." 49 According to the court, Larken's breach of its implied duty of honesty and fidelity went to the heart of the contract, and "[m]erely requiring Larken to retroactively undo its wrongdoings, as Larken urges, would not be an adequate remedy." 50

Another example of the "Williston view" of contract termination rights applied in the franchise context is Southland Corp. v. Mir. 51 The franchisor of 7-Eleven immediately terminated a franchisee, without an opportunity to cure, after discovering that the franchisee had underreported sales in the amount of money orders sold. As in Larken, the termination provisions of the franchise agreement allowed termination with no right to cure for certain limited kinds of conduct, but that list did not include the underreporting and fraud that was the basis for the termination in this case. The court relied on Olin in holding that unless a contractual termination provision is by its terms exclusive, it represents a cumulative remedy and does not bar the common law remedy of termination for a material breach that goes to the essence of contract. 52 The court then analyzed whether the money order scam conducted by the franchisee amounted to a breach that went to the "root" or "essence" of the contract. The court held that a "fair reading of the purpose of the contract implies a covenant not to engage in schemes that deprive Southland of its contractual right to its share of the gross profits." 53 The fact that the franchisee's scam went on for approximately a year and involved unreported sales of more than $150,000 during that period led the district court to find that the franchisee committed this misconduct knowingly and intending to deprive Southland of its right to its share of the profits under the agreement. The court therefore found that under New York

---

48 Id. at 702.

49 Id. at 704.

50 Id at 704-05.

51 748 at Supp. 969 (E.D.N.Y. 1990).

52 748 F.Supp. at 983.

53 Id.
law, the franchisee's breach went to the root or essence of the contract and justified the franchisor's termination without an opportunity to cure.\footnote{Id. at 984. See also Southland v. Froelich, 41 F. Supp. 2d 227 (E.D.N.Y. 1999) (finding that franchisees scheme to underreport sales revenues, occurring over five months constituted a breach that went to the root or essence of the contract and justified termination without opportunity to cure).}

Other courts have applied the "Williston view" of termination rights in situations not involving fraud or dishonesty against the franchisor, but where the franchisee committed a material breach of the contract that by its nature could not be cured. In \cite{Dunkin' Donuts Inc. v. Chetminal Inc.}, the franchisee was arrested for selling cigarettes to minors out of his Dunkin' Donuts shop. Upon learning of the franchisee's conduct, Dunkin' immediately terminated the franchise agreement and demanded that the former franchisee cease operations under the Dunkin' proprietary marks and system. Although the franchisee was never convicted of any crime, the court found sufficient evidence to establish the fact of the unlawful sales. The court rejected the former franchisee's argument that it should have been allowed to cure the violation, holding that such willful criminal conduct could not be cured.

The court in \cite{In re Best Film & Video Corp.}, \footnote{46 B.R. 861 (Bankr. E.D.N.Y. 1985).} applied a similar analysis in the context of a breach of a license agreement. Best Film, the bankrupt debtor, had contracted for distribution rights to a film, and the license contained certain restrictions and reservations of rights to the licensor. Best Film breached the license agreement by conducting an unauthorized screening of a foreign language version of the film and otherwise interfering with the licensor's distribution rights for the foreign language version. The contract provided that in the event of a default by Best Film that was not cured within a specified period after notice, the Licensor could terminate the contract in which event all distribution rights would revert to the licensor. The court held that notwithstanding the contractual notice and cure provision, the licensor was entitled "to declare the contract at an end under general principles of contract law." \footnote{46 B.R. at 874.} The court relied on \cite{Olin} and its analysis of the cumulative nature of contract termination remedies. The court went on to analyze whether the particular breach in question could be cured in any event, reasoning that "the notice provision assumes that the breach which could result in termination would be a curable breach." \footnote{Id. at 875.} The unauthorized exhibition of the foreign language version of the film was not a curable breach because "[n]othing that Best Film could do could recall that act or change its consequences. It was a vital breach." \footnote{Id.} The fact that the contract contained a termination right imposed no limitation on the licensor's ability to rescind the contract under general contract principles.

### B. More Limited Interpretation of Termination Rights - the "Corbin View"

Other commentators and courts, however, have rejected this expansive view of contract termination rights in situations where the parties have expressly set forth in their contract circumstances and procedures for exercising the right of termination. This more restrictive
approach is sometimes referred to as the "Corbin view" because it was reflected in the original version of the *Corbin on Contracts* treatise. As described by the court in *Olin*, the "Corbin view" holds that "where such a termination provision is included in a contract, it constitutes the exclusive means of terminating the contract." The *Olin* case sites to an older version of the *Corbin on Contracts* treatise, and the most current edition of the treatise states the issue in a different and less absolute way. The current edition explains that the "extent of a reserved power is determined by interpretation of the terms of the contract," which may be extremely limited or very broad in its coverage.  

The best case example applying the "Corbin view" in the franchise context is *Manpower Inc. v. Mason*. Manpower and a related entity, a franchisor of temporary personnel businesses, sued for a declaration that the franchisee and his related companies had breached their franchise agreements by failing to comply with federal immigration law requirements to complete and retain forms verifying each employee's eligibility for employment in the United States. The franchisee, Jonathan Mason and his companies, had been with Manpower for over twenty-five years and operated over two dozen Manpower offices in Canton, Ohio, Columbus, Ohio, and Florida. For many years, Manpower had been dissatisfied for multiple reasons with the operation of Mason's Columbus offices, which were run by Mason's son, Ryan Mason ("Ryan"). When an audit of the Columbus offices uncovered numerous instances of non-compliance with the I-9 provisions of the Immigration Reform and Control Act ("IRCA"), Manpower sent a letter terminating all of Mason's franchise agreements without notice or opportunity to cure.

The franchise agreements provided that if the franchisee was in material breach or default of any of the agreements terms, the franchisor "shall" give a written notice and 60 days to cure the breaches. The agreements also listed several grounds for immediate termination, but that list did not include the particular default asserted by Manpower here. Manpower sought declaratory judgment that its immediate terminations were valid, and the defendant franchisees counterclaimed for wrongful termination. The franchisees also sought a preliminary injunction to prevent the terminations arguing, among other things, that Manpower was not entitled to terminate for these alleged violations without giving the contractual notice and opportunity to cure.

Manpower argued that the franchisees' breaches were incurable as a matter of law because such breaches went "to the essence of the franchise relationship because [Manpower's] business is 'supplying legally qualified temporary help.'" The district court, however, rejected this definition of an incurable breach, holding:

> An incurable breach is not, as plaintiff's assert, a material breach that goes to the essence of the contract. Rather, an incurable breach is either one that the contract provides no opportunity to cure or one that cannot logically be cured, such as a franchisee's failure to meet a sales quota within a specified period of time.

---

60 *Olin*, 576 F.2d. at 647.

61 *Corbin on Contracts* §68.9 (2010).


63 377 F. Supp. 2d. at 677 (emphasis in original).

64 *Id.*
The court distinguished the remedy of termination from the separate contract remedy of rescission. While the right to terminate is governed by express termination provisions in the contract, the common law right of rescission is different and exists independently. The *Manpower* court explained: "Rescission is an alternative remedy to an action for damages, and is generally available where there has been a 'substantial or material' breach of the contract - that is, a breach that 'goes to the essence or root of the contract.'" The court distinguished the remedy of rescission from the remedy of termination which it described as a "reserved power" governed by the terms of the contract. While the existence of termination provisions in a contract will not displace the common law right to rescind for a material breach that goes to the essence of the contract, "whether a party may exercise a reserved power of termination depends on whether the conditions precedent to the exercise of such power had been satisfied. . . . In other words, a party can only exercise a power of termination reserved in a contract in a court with the contractual terms governing the exercise of such power." The distinction between termination and rescission was crucial in this case because Manpower sought to enforce, among other things, post-termination rights under the franchise agreement. While a proper termination would entitle Manpower to enforce the post-termination provisions such as non-compete clauses, the remedy of rescission would not because, upon rescission, the agreement including that post-termination provision would cease to exist. This distinction between the remedies of termination and rescission can be very important to both a franchisor and a franchisee, so the *Manpower* court's analysis merits careful consideration.

Five months later, the court granted Manpower's petition to dispossess Mason from the Columbus offices. What changed in five months? Soon after the court entered its first order, Manpower sent a letter to Mason rescinding the franchise agreements, and demanding that Mason cease using the "Manpower" name. This time, Manpower listed several additional incurable breaches in addition to the Columbus' offices' violations of the IRCA. Manpower's grievances centered upon Ryan's management of the Columbus offices. Not only was Ryan in charge of the offices with the IRCA violations, but apparently he had actively tried to cover up the violations, and retaliated against employees who attempted to bring the violations to his attention. There were also complaints of Ryan's immaturity, rudeness, and inability to control his temper. Furthermore, Ryan continued to do business outside the territory defined by the franchise agreements, despite having received warnings from Manpower to stop. Finally, Ryan established a consulting firm that he falsely represented was a "division of Manpower," in direct violation of franchise agreement provisions. Mason asserted that Manpower could not legally rescind the franchise agreements and refused to stop using the Manpower name.

Manpower again moved the Wisconsin Eastern District Court for injunctive relief. Taking into consideration the expanded record, the same judge ascertained, now that Manpower was seeking the proper remedy, rescission, that Manpower had demonstrated a high likelihood that it would succeed on the merits of its claims of incurable breach which destroyed the essential object

---

65 Id. at 678.
66 Id.
67 Id. at 679.
68 377 F. Supp. 2d. at 677 (emphasis in original).
of the franchise agreements, for the Columbus offices.\textsuperscript{69} Upon the depositing of a $7.5 million bond by Manpower, the court enjoined Mason’s Columbus offices from using the Manpower trade name, trademarks, and proprietary information.\textsuperscript{70} Thus, the proverbial second bite at the apple bore some fruit for this franchisor.

The most recent addition to the \textit{Corbin on Contracts} treatise emphasizes the distinction made by the \textit{Manpower} court between contractual termination rights and a party's right to rescind or cancel a contract for a total breach or breach that goes to the essence of the agreement. The treatise refers to the power of termination as one that may be expressly reserved to either or both of them.\textsuperscript{71} The treatise goes on to explain:

The power to terminate must, however, be distinguished from the right of an injured party to cancel the contract for a breach that is a total breach of contract or that goes to the essence of the agreement. While parties may state those limited contexts in which either or both of them may put an end to the agreement, . . . such a reservation does not limit the fundamental right of a party to put an end to the agreement by cancellation for the other's total breach of their agreement. The purposes and goals of limiting the right to terminate in the context of an exclusive dealing, distributorship, or franchise agreement are . . . clearly distinguishable from the right to cancel for a total breach of the agreement. These two rights coexist.\textsuperscript{72}

The treatise concludes this discussion by emphasizing that "the extent of a reserved power is determined by interpretation of the terms of the contract. The power reserved may be extremely limited or very broad in its coverage."\textsuperscript{73}

Thus, the "Corbin view" holds that a franchisor's right to terminate a franchise agreement is governed by the particular language of the contract - usually the express termination provisions. If those provisions require notice and an opportunity to cure, as in \textit{Manpower}, then the franchisor will have to follow those provisions and provide the applicable notice and cure period before effecting the termination. There might be some breaches that by their nature cannot be cured and thus might be grounds for immediate termination,\textsuperscript{74} but the Corbin treatise takes a narrow view of that category of breaches and does not extend that analysis to any breach that arguably go to the "essence of the contract."

\begin{flushright}
\textsuperscript{69} 405 F. Supp. 2d at 971.
\end{flushright}

\begin{flushright}
\textsuperscript{70} There was no evidence that Mason's Canton, Ohio or Florida offices had committed any breaches, and there was no cross-default provision in the franchise agreements. Thus the court found that with regard to these offices, Manpower had failed to demonstrate a likelihood of success that its rescission of the Canton and Florida agreements was valid. \textit{Id.}, at 975. In fact, the court enjoined Manpower from rescinding the Canton and the Florida agreements pending resolution of the issues.
\end{flushright}

\begin{flushright}
\textsuperscript{71} \textit{See Corbin on Contracts} §68.9 (2010).
\end{flushright}

\begin{flushright}
\textsuperscript{72} \textit{Id.} (emphasis added).
\end{flushright}

\begin{flushright}
\textsuperscript{73} \textit{Id.}
\end{flushright}

\begin{flushright}
\textsuperscript{74} Section II above.
\end{flushright}
It seems surprising that there are so few cases adopting the "Corbin view" in analyzing a party's right to terminate immediately and without opportunity to cure in the face of a contractual termination provision that expressly contains such a cure right. Many courts seem willing to imply duties, under the theory of good faith and fair dealing, that could be construed as allowing a party to avoid the express termination provisions in the contract. Such an application of the implied covenant of good faith and fair dealing might seem contrary to the black letter law in most jurisdictions that the implied covenant cannot be used to override express contractual rights. Moreover, the important distinction between the effect of termination for breach and the effect of a rescission or cancellation of the entire contract (see discussion below) has significant real-world ramifications for franchisors, but many courts do not take that next step to analyze or apply those distinctions in the franchise context. In any event, these issues seem to provide fertile ground for litigation in future cases.

C. Termination Versus Rescission

Treating a breach as authorizing a termination versus a rescission of a franchise agreement can have important ramifications for the parties. Interestingly, many courts have used these terms interchangeably, and have not analyzed the potentially important distinctions in how they might apply. It is important, however, that parties thoroughly analyze and argue these concepts, and that courts rigorously apply them.

The Manpower case is a good example of the outcome-determinative distinction between a termination and a rescission. That court explained that a "rescission" is "the unmaking of a contract. It is the renouncement of a contract and places the parties, as nearly as possible, in the same situation as existed just prior to the execution of the contract." Citing the Corbin treatise, the Manpower court treated the concepts of "rescission" and "cancellation" as substantially the same. The Manpower court went on to explain that the franchisor entities in that case:

do not seek simply to put an end to the franchise agreements but rather to require defendants to adhere to the agreements' post-termination provisions such as the non-compete clauses and the provisions requiring defendants to transfer their business to plaintiffs. If plaintiffs were seeking only rescission, they could not expect defendants to comply with the agreements' post-termination provisions since, upon rescission, such provisions would cease to exist.

Thus, while the franchisor might have been entitled to end the contractual relationship by rescission or cancellation, that remedy would have left the franchisees free to conduct themselves in the future without being bound by any post-termination contractual restrictions. But because the franchisor sought to enforce a termination where it had not complied with the contractual

---

75 See, e.g., Volvo Construction Equip. Co. v. CLM Equip. Co., 386 F.3d 581 (4th Cir. 2004); Burger King Corp. v. Weaver, 169 F.3d 1310 (11th Cir. 1999); Clark v. America's Favorite Chicken Co., 111 F.3d 295 (5th Cir. 1997).

76 377 F. Supp. 2d at 677 (internal quotations omitted).

77 Id. n.9.

78 Id. at 680.
termination notice and cure requirements, the court enjoined the termination and left the franchisor entities in serious jeopardy of not being able to enforce the contractual post-termination restrictions.

The significance of this "termination" versus "rescission" distinction can manifest itself in two primary ways. First, as in Manpower, it can impact the franchisor's ability to enforce post-termination provisions in a franchise agreement. The most common such provision is a post-term non-competition or non-solicitation agreement. Other similar provisions include a franchisor's right to repurchase the business, right to obtain assignment of telephone numbers, and other rights that would allow the franchisor to restrict the franchisee's ability to conduct a similar business at the former franchise location. These post-termination provisions can be very important in certain franchise systems, particularly where a franchisee's business location or its ongoing customer relationships are major drivers of the business.

Even under a "rescission" analysis, however, it is important to note that the franchisor has significant rights beyond the contract that could limit a franchisee's ability to take advantage of the former franchise relationship. The federal Lanham Act restricts a franchisee from using the franchisor's registered trademarks, or service marks, or similar marks that are likely to cause confusion among customers. The Lanham Act also prohibits a former franchisee from falsely representing its affiliation with sponsorship by the franchisor.

Trade secret law also provides a weapon for a franchisor against a former franchisee that is using the franchisor's proprietary information or processes. Forty-one states have adopted a version of the Uniform Trade Secrets Act, which broadly defines a trade secret as:

"Trade Secret: means information, including a formula, pattern, compilation, program, device, method, technique, and process that:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being generally ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Trade secret protection does not depend on the existence or enforceability of a contract prohibiting disclosure, and trade secret rights can be enforceable independently of any contract between the parties.

The second potential ramification of a rescission analysis versus a termination analysis involves the common law requirement in many jurisdictions that a party seeking to rescind a contract must tender back any benefits it has received under the contract. The Manpower case

---

82 See R. Milgrim, Milgrim on Trade Secrets § 3.01 (2009) (discussing protection of trade secrets by operation of law).
83 See, e.g., Restatement (Second) of Contracts § 384.
The key point is that a franchisor's election to proceed under the theory of termination versus the theory of rescission or cancellation can have significant consequences to its ability to control the franchisee's subsequent conduct. The franchisor might be able to end the franchise relationship, but it might not be able to enforce all of its contractual rights. Courts should be more careful in analyzing and applying the particular theory advanced by the franchisor and the corresponding defenses that might be raised by the franchisee. Focusing on the egregiousness or significance to the relationship of the franchisee's alleged misconduct certainly is important, but courts should analyze and apply the proper legal theories in determining the parties' rights and enforcing the parties' expectations as reflected in the language of their agreement.

IV. HOW STATE FRANCHISE RELATIONSHIP STATUTES AFFECT A FRANCHISOR'S ABILITY TO TERMINATE WITHOUT OPPORTUNITY TO CURE

With respect to those situations where a franchise statute affects the relationship between a franchisor and a franchisee, a franchisor must take these statutes into close consideration prior to terminating a franchise agreement. Nearly all of the state franchise statutes specifically require that the termination of a franchise relationship be premised upon "good cause," "reasonable cause," or "just cause." Two notable exceptions are the laws of the states of Mississippi and Missouri, which require that prior to the termination of a franchise relationship, the franchisor must provide 90 days prior written notice. However, an exception to this notice requirement exists when the termination is based upon alleged criminal misconduct, fraud, abandonment, bankruptcy, or insufficient payment.84

The state statutes which must be examined in the context of an "incurable" default are listed in Appendix 1.

Few reported decisions provide definitive guidance on what controls in a situation where a franchisor has terminated a franchisee for committing an "incurable" default and a state statute requiring good cause applies to the franchise relationship. Rather, most reported decisions have focused on whether the breach was considered "incurable" or "curable" in the eyes of the court. Below are some of the reported decisions addressing the relationship between an incurable default, the terms of a franchise agreement, and a state relationship statute.

A. Cases Where The Termination Was Deemed Proper

1. In Southland Corp. v. Froelich,85 the franchisor, Southland Corp. ("Southland"), sued its franchisee, Richard Froelich ("Froelich"), seeking a preliminary injunction based on claims for trademark infringement and interference with real property. As Froelich's rights to possess the real property at issue and use Southland's trademarks were created by the franchise agreement, whether Southland was entitled to a preliminary injunction compelling Froelich to surrender possession of his restaurant depended on the validity of the termination of the franchise agreement.

---

agreement. Southland argued that it was entitled to terminate the franchise agreement without opportunity for cure because the fraudulent, material breaches committed by Froelich went to the core of the franchise agreement. Southland demonstrated that Froelich routinely understated his merchandise sales, thereby depriving Southland of its contractual share of revenue, the very fruit of the contract. The Court held that due to the gravity of this breach, New York law entitled Southland to rescind the agreement without providing a cure period and that Southland was entitled to the issuance of a preliminary injunction in its favor.

2. In Heating & Air Specialists, Inc. v. Jones, the franchisee brought suit against the franchisor alleging wrongful termination of its franchise under the Arkansas Franchise Practices Act (AFPA). The franchisor had terminated the agreement as a result of the franchisee’s failure to pay monies due to the franchisor under the agreement. The AFPA explicitly prohibits a franchisor from cancelling a franchise without good cause. The provision contained within the parties’ dealer agreement that permitted either of them to terminate their relationship “without cause” was therefore invalid under AFPA. The Court held that the franchisor did have good cause to terminate the franchise agreement under AFPA because the franchisee failed to pay the franchisor within ten days after receipt of notice of sums past due. The franchisee’s allegations that the franchisor had breached the franchise agreement in failing to provide the franchisee with start-up costs and co-op payments had no effect on the “good cause” determination because the amount past due on the franchisee’s account far exceeded the amount of any payments it was entitled to receive.

3. In Crosthwait Equipment Co. v. John Deere Co., the Court held that the agricultural equipment company lawfully terminated its dealership agreement on the grounds that the dealer submitted fraudulent sales and credit documents to the equipment company. The dealer’s customers needed favorable financial data before the company would approve the credit they needed to finance purchases, and the dealer admitted that it submitted documents to the company which contained false credit information which customers did not supply or create. The dealer claimed that it was entitled to damages under the Mississippi Franchise Cancellation Statute (“MFCS”) because the franchisor terminated its dealership without notice. However, the court observed that the MFCS’s 90 day notice provision did not apply when fraud is the basis for termination so that the dealer was not entitled to damages. Additionally, the trial court, in deference to Mississippi law, allowed the dealer to continue its operations for 90 days after it was notified by the franchisor that it was being terminated.

4. In L.J.L. Transportation, Inc. v. Pilot, the franchisee’s conduct of diverting business to a company owned by the franchisee’s owners in order to avoid reporting revenue and paying royalties justified the franchisor’s immediate termination of franchise agreement, even though the contract included an express provision granting the franchisee the opportunity to cure a default within 90 days of the franchisor’s notice of default. The Court held that when there is a breach of contract going to the essence of the contract, which is so exceedingly grave as to irreparably damage the trust between the contracting parties, the non-breaching party may terminate the contract without notice despite contractual provisions providing an opportunity to cure.

86 180 F.3d 923 (8th Cir. 1999).
87 992 F.2d 525 (5th Cir. 1993).
88 962 A.2d 639 (Penn. 2009).
5. In Larken, Inc. v. Larken Iowa City L.P., a hotel owner had the right to terminate a management agreement for the manager’s acts of self-dealing, despite the express contract language requiring a notice and right to cure before termination. The manager entered into an unauthorized telephone maintenance contract with a provider controlled by a principal of the manager and misappropriated rebates that should have been paid to the owner. These breaches were so serious that they frustrated one of the principal purposes of the management agreement, i.e., the manager’s obligation to manage the hotel in the best interests of the owner and to be honest and forthright in its dealings. The Court held that breaches which violate the relationship of trust necessarily underlying such agreements are incurable.

6. In AAMCO Industries, Inc. v. DeWolf, the operator of chain of transmission service facility franchises brought an action against a franchisee for declaratory and injunctive relief after terminating the franchise subsequent to discovering evidence of consumer fraud. The franchisee argued that its franchise should have been reinstated because the franchisor did not provide a 24 hour cure period as required under the Minnesota Franchise Act. The Court found that the franchisor rightfully terminated the franchise because giving the franchisee a 24 hour cure period would have been a futile and fruitless act.

7. In International House of Pancakes v. Hajloo, the franchisee brought an action to vacate the arbitrator’s award in this matter, contending that the award violated California public policy because the arbitrator allowed the franchisor to terminate the franchise without providing notice or a right to cure. The franchisee cited to the California Business and Profession Code (“CBPC”) to support its proposition that there is a public policy against terminating franchise rights without advance notice and opportunity to cure. However, the CBPC only applied to “any franchise where either the franchisee is domiciled in this state or the franchised business is or has been operated in this state.” The parties were not domiciled in California and the franchise was located in Colorado. The Court denied the franchisee’s petition to vacate the arbitration award and determined that the franchisee identified no public policy which required the franchisor to give it notice and an opportunity to cure prior to terminating the franchise agreements. The Court also held that the arbitrator’s finding that an opportunity to cure did not need to be given for an incurable breach was not contrary to the express terms of the franchise agreement.

8. In Dunkin’ Donuts Inc. v. Panagakos, Dunkin’ Donuts Inc. (“Dunkin”) brought this action seeking a judicial confirmation of its decision to revoke Michael Panagakos’ (“Panagakos”) five Dunkin’ Donuts franchises. Panagakos had been convicted for tax fraud and, while he was in jail, Dunkin conducted an audit of his store and found that he had been under-reporting his sales. The Court had already determined that Panagakos’ convictions were acts injurious or prejudicial to the goodwill associated with Dunkin justifying the termination of his franchises. The remaining issues before the Court were whether Panagakos had a valid waiver or estoppel defense.

---

89 589 N.W2d 700 (Iowa 1998).
90 250 N.W.2d 835 (Minn. 1977).
The Court held that Dunkin did not waive its right to terminate the franchises following his conviction, which would have required an affirmative showing of Dunkin’s intent. Even though the franchisor allowed Panagakos to complete construction of and open a new outlet while Panagakos was in jail, and took other actions consistent with continuation of the franchise, Dunkin began an audit of Panagakos’ operations and terminated the franchise shortly after Panagakos got out of jail, which ran contrary to any alleged intent on Dunkin’s part to waive its termination rights. Additionally, there was a corporate policy allowing troubled franchisees to sell their shops as going concerns.

Panagakos contended that Dunkin’s general manager, Thomas Coba (“Coba”), waived Dunkin’s right to terminate by giving him oral assurances that the relationship would continue. However, Coba had no actual authority to effect such a waiver. Panagakos asserted that Coba was acting with apparent authority. The Court stated that the issue of apparent authority was relevant to the estoppel claim, but not the issue of waiver because an agent acting with apparent authority does not have the power to waive a contract term as waiver required a showing of Dunkin’s intent. Ultimately, Panagakos’s estoppel claim failed because he had unclean hands. Although he argued that his tax offenses were not directed against Dunkin, the Court emphasized that he lied to Dunkin about his guilt. If Panagakos had not lied about his guilt, Dunkin presumably would not have made the decision to allow Panagakos to construct a new Dunkin store.

B. Cases Where The Termination Was Not Deemed Proper

1. In Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc., a franchisee that provided temporary medical services brought an action against its franchisor following the termination of the franchise agreement. The termination was premised upon the franchisee’s failure to make royalty payments to the franchisor. The district court reasoned that so long as the franchisee violated a term of the franchise agreement, the franchisor had good cause to terminate. At the appellate level, the franchisee argued that she could not make the royalty payments because the national franchisor began usurping the franchisee’s territory. Indeed, the evidence indicated that the franchisor lured away at least two of the franchisee’s major clients by withholding account information from her. As a result, the Court of Appeals held that there was genuine issue of material fact as to whether the franchisor breached the implied covenant of good faith and fair dealing in terminating the franchise. The Court stated that this was the paradigmatic case of a contract party invoking a reasonable contract term dishonestly to achieve a purpose contrary to that for which the contract had been made. Such manipulation was deemed the essence of bad faith by the Court.

2. In Biomedical Instrument and Equipment Corp. v. Cordis Corp., a dealer appealed the lower court’s grant of summary judgment in favor of its principal for terminating its dealership agreement to distribute medical supplies. The Puerto Rico Dealers’ Contracts Act (“PRDCA”) forbids a manufacturer from ending its business relationship with a distributor unless there is “just cause” for doing so. “Just cause” under the PRDCA means “nonperformance of any of the essential obligations of the dealer’s contract.” The lower court granted the principal’s motion because the dealer failed to pay the principal’s bills on time. However, the Court determined that the course of dealing between the parties raised a genuine issue of material fact as to whether or not the parties considered the dealer’s failure to make timely payments “essential” within the terms of

---

93 225 F.3d 876 (7th Cir. 2000).

94 797 F.2d 16 (1st Cir. 1986).
the PRDCA. The evidence in the record demonstrated that the dealer was consistently late in its payments and that the amounts of these overdue balances were not a matter of serious concern to the parties. As such, a genuine issue of material fact existed, and the Court reversed the lower court's finding of summary judgment in favor of the principal.

3. In *Lippo v. Mobil Oil Corp.* 95 the Court held that Mobil Oil Corp. ("Mobil") was not entitled to terminate its franchisee for the default of selling non-Mobil gasoline because the franchise agreement permitted the franchisee to cure the default and it did. The issue was one of contract interpretation wherein the Court considered a variety of separate documents together. Paragraph 6 of the Retail Dealer Contract ("Paragraph 6") provided that Mobil was authorized to immediately terminate its franchisee upon a "violation" of the franchisee's obligations. However, Article 4A of the Supplemental Agreement ("Article 4A") stated that for any "default" of any obligation imposed by the Retail Dealer Contract, the defaulting party had ten days after written notice of the default to effect or commence corrective action.

Mobil argued that Paragraph 6 and Article 4A conflicted, and it invoked the principle that when there are two conflicting provisions the specific provision should control over the general one. Mobil contended that Paragraph 6 should have controlled because it was a specific "no cure" provision and Article 4A was a general "always cure" provision. However, the Court reconciled the two provisions and held that the franchisee was entitled to a cure period by construing the Paragraph 6 "violation" as signifying an uncorrected default.

V. PRACTICAL TIPS ON HANDLING POSSIBLE TERMINATIONS WITHOUT THE OPPORTUNITY TO CURE

A. From The Franchisor's Perspective

1. **Steps in the Franchisor's Analysis**

   The starting point for any default and termination analysis is the language of the franchise agreement. Virtually all franchise agreements contain specific default and termination provisions. If those provisions expressly authorize immediate termination without an opportunity to cure and if there is no valid waiver argument, then the contract analysis should be complete.

   But what if the franchise agreement does not specifically state, as to a certain default, that the franchisor is entitled to terminate immediately without notice? The franchise agreement might be silent as to the requirement of notice and an opportunity to cure. Or, the franchise agreement might authorize the franchisor to terminate without an opportunity to cure upon the occurrence of certain identified breaches or events, but the particular breach at issue is not included in that list. In either case, the franchisor and its legal counsel will have to go to the next level of contract law analysis to determine how it properly may proceed.

   The first thing the franchisor's counsel should look for is a cumulative remedies provision in the franchise agreement. The courts holding that a franchisor may immediately terminate the agreement even if the contract includes a provision granting the breaching party an opportunity to cure have relied on the existence of a cumulative remedies provision, which reflects that the parties did not intend for the contractual termination remedies to be exclusive. 96 The *Larken* case contains

95 776 F.2d 706 (7th Cir. 1985).

96 See, e.g., *LJL Transportation*, 599 Pa. at 562-63; *Larken*, 589 N.W.2d at 702-03.

- 23 -
perhaps the clearest such language, stating: "The terms of this Article [regarding termination] shall not be deemed to preclude or impair the right of any party to exercise any right or remedy, whether for damages, injunction, specific performance, or otherwise, upon any breach of any terms of this Agreement." The contractual provision in *LJL Transportation* was somewhat more ambiguous but still passed the test: "[The franchisor's] election to exercise any remedy available by law or contract shall not be deemed a waiver nor preclude exercise of any other remedy." The key point is to identify contract language making clear that any specified termination provisions or remedies under the contract are not intended to be exclusive of other common law contract rights available to a non-breaching party.

The next step in the contract analysis is to evaluate whether it is even possible for the franchisee to cure the default or breach. Often, the franchisee will not be able to cure, such as failing to meet a sales quota or other performance metric for a time period now over. Commission of or conviction for a crime likewise cannot be undone. If the default legitimately cannot be cured, the franchisor's case for immediate termination is stronger.

Underreporting of sales arguably presents a closer question on this issue. Although the underreporting could be considered as a past fact or event, the franchisee arguably could cure the underreporting by paying any amounts properly due and owing to the franchisor. The franchisee in *LJL Transportation* argued that it should be allowed to cure its diversion of shipments by paying the franchisor the amount of money the franchisor would have received if those shipments had been placed through the franchisor's system, as the contract required. The court did not reach this argument, however, because the franchisee had waived it by not raising this issue in the trial court.

If a cure is possible but the franchisor nonetheless does not want to give the franchisee the opportunity to cure, the franchisor then must analyze the significance of the default and whether the breaching conduct is of such a nature as to go to the "essence" or "root" of the agreement or franchise relationship. As discussed in Section III above, it appears that a majority of jurisdictions recognize the right of a non-breaching party to terminate a contract where the breaching conduct is so egregious that it undermines the "essence" of the parties' agreement or relationship. This is a potentially tricky area for a franchisor, however, because there are no bright line rules on which a franchisor can rely. The following types of conduct have been recognized by certain courts as meeting this standard:

- dishonesty, by underreporting sales or otherwise cheating the franchisor out of revenues to which it is entitled under the agreement;
- competition with the franchisor, by diverting sales or business to competing operations;
- self-dealing, by profiting from side deals without the franchisor's knowledge or approval;

---


98 599 Pa. at 557 n.3.

99 Id.
• violation of laws governing the operation of the franchised business; and
• other misconduct that adversely impacts the goodwill of the franchisor's business or marks.

Even if the franchisor believes it has evidence of misconduct falling into one of these categories, the franchisor rarely can be certain that its decision immediately to terminate will be upheld. The franchisor will have to make the best decision it can, in light of its business priorities, contract provisions and applicable law, but it must understand that judicial resolution of the legal merits of the franchisor's action will not occur until well after the fact.

Whether a particular default or breach goes to the "essence" or "root" of the parties' agreement or relationship usually will be a fact question, so the franchisor will have to prove the merits of its case to a jury, judge, or arbitrator. Much of the favorable case law recognizing a right to terminate immediately did not decide this issue as a matter of law, but rather arose in context such as motions for preliminary injunction or appeals of lower court decisions adverse to the franchisor's position. \footnote{See, e.g., Southland Corp. v. Froelich, 41 F.Supp.2d 227 (E.D. N.Y. 1999); Southland Corp. v. Mir, 748 F.Supp. 969 (E.D. N.Y. 1990).} One court's or jury's "essence" of the agreement might be another court's or jury's curable breach. For example, in Larken, the Iowa Supreme Court held that the hotel managers' dishonesty in pocketing rebates and self-dealing by contracting with affiliated entities without permission constituted a breach going to the "essence" of the agreement and thus justified termination with opportunity to cure. The Iowa court noted, however, that a Minnesota court in a related case between the same parties and involving similar misconduct held otherwise, concluding that the "core purpose" of the management agreement was to make a profit and because the hotel was profitable, the alleged breaches by the hotel operator were not so material as to give the owner the right to terminate without notice and an opportunity to cure. \footnote{589 N.W.2d at 701.}

It is possible, however, for a franchisor to convince a court that the franchisee's breaching conduct is so egregious that it meets the "essence" or "root" or the agreement standard as a matter of law. \footnote{See, e.g., LJL Transp., 599 Pa. 546 (affirming trial court's grant of summary judgment to franchisor enforcing termination for incurable default); Dunkin' Donut, Inc. v. Gav-stra Donuts, Inc., 139 F.Supp.2d 147 (D. Mass. 2001) (granting summary judgment to franchisor).} From the franchisor's perspective, there is little down side to seeking summary judgment on this issue, as the worst that is likely to happen is that the court denies the motion and allows the case to proceed to trial.

The final contract law issue that a franchisor must consider is the distinction between termination and rescission - both whether that distinction is important to the franchisor and whether a court in the applicable jurisdiction will treat those concepts differently. As evidenced in Manpower, Inc. v. Mason, \footnote{377 F. Supp. 2d 672 (E.D. Wis. 2005).} a court may recognize that the franchisor is entitled to declare the contract at an end based on the seriousness of the franchisee's default or breach, but only if the franchisor seeks to rescind or cancel the agreement. As discussed in Section III.C. above, the significance of ending the contract by rescission means the contract ceases to be in effect at all, and provisions such as post-term noncompetition covenants likewise are extinguished. If the
franchisor does not care about attempting to enforce contractual post-termination remedies, this distinction might not matter and the franchisor can attempt to proceed under either or both theories. The right to terminate versus rescind, however, could be very important if the franchisor wants to enforce a noncompetition covenant, a buy-back right, or other similar post-termination remedies.

Choice of law can be an important factor in the contractual termination rights analysis. Because contract interpretation is a state law issue, legal guidelines and their application may vary from state to state. Most franchise agreements contain a choice of law clause, but that clause might not be enforceable in all circumstances. Counsel for the franchisor should analyze the laws of all potentially applicable jurisdictions before moving forward with a termination without notice or opportunity to cure.

Finally, as explained in Section IV above, the existence of an applicable state franchise relationship law can significantly limit a franchisor’s right to terminate without notice or opportunity to cure even if the contract and/or common law would allow the franchisor to do so. Some relationship laws require only written notice a certain number of days prior to termination. Other statutes impose more substantive “good cause” requirements. Some statutes allow for immediate termination without an opportunity to cure for certain types of breaches. The key point is that counsel for a franchisor must determine whether there is an applicable state relationship law and, if so, what additional restrictions it might impose on the franchisor’s right to terminate immediately.

2. Preparing The Notice

If a franchisor seeks to terminate for an incurable breach, the written notice of termination is all the more important. The grounds set forth in the notice letter are likely to be the focal point of any subsequent challenge by the franchisee to the propriety of the termination. The notice letter must state in sufficient detail the franchisor’s factual and legal positions, because the franchise will no doubt try to argue that any later added grounds either were waived or could not have been material if the franchisor knew about them but failed to mention them in the initial notice. The same criteria for a well-drafted default or termination letter apply here, but additional important considerations apply.

First, the notice should be clear that the termination is effective immediately with no opportunity to cure. It is important to distinguish a notice of termination for an incurable breach from a notice of default that is subject to cure rights. If the franchise agreement itself provides that the particular default is not curable, the franchisor should refer specifically to that section of the agreement as the primary basis for its action. If the franchisor is taking the position that the default is incurable because it goes to the "essence" or "root" of the agreement, the franchisor should clearly explain that position.

Second, the notice should refer to the particular section and requirement of the franchise agreement that the franchisee has breached and, if applicable, the specific language of the termination or remedies section providing that this breach constitutes a default under the agreement. In the context of an incurable default, it is even more important to the franchisor to describe in reasonable detail the facts constituting the default or breach. The franchisor also should explain the significance of the breach, particularly where the franchisor is relying the "essence of the agreement" theory as a basis for immediate termination with no opportunity to cure. In subsequent litigation, franchisees often argue that the franchisor should be held to the bases set forth in its default or termination notice, and should not be allowed to argue subsequently added facts for breaches as a basis to justify its decision. This issue is more compelling in the context of an incurable breach; because the termination is effective immediately, the bases for the termination
must have existed at the time of the notice. The significance of the default or breach likewise must be apparent at the time of the notice to be a legitimate basis for an immediate termination.

This does not mean, however, that the franchisor cannot reserve its right to look for additional evidence of similar defaulting or breaching conduct, and the notice should clearly state the franchisor's reservation of its intent to do so. For example, the franchisor might learn initially of certain instances of dishonest conduct, like diversion of shipments outside the franchisor's system in *L.J.L. Transportation* or underreporting of sales in *Southland v. Mir*, which could provide a basis for immediate termination. Subsequent fact investigation or discovery in litigation might reveal additional instances of such misconduct, or a broader or longer lasting scheme to defraud the franchisor. Additional evidence of similar misconduct should be relevant to support the franchisor's decision to terminate without opportunity to cure.

As with all notices of default and termination, a termination notice for an incurable default should include language that the termination cannot be waived and that the franchisor preserves all other rights and remedies it might have against the franchisee. A "no waiver" statement is important to prevent an argument that a representative of the franchisor committed some act or made some statement after the termination that the franchisee contends waived or modified the written notice. A reservation of all other rights is also important to put the franchisee on notice that other contract provisions, statutes or common law obligations may require further action or impose additional limitations on a franchisee's subsequent conduct.

In most situations, the termination letter should expressly identify post-termination restrictions under the franchise agreement, the Lanham Act, or other applicable contracts or laws. At a minimum, the letter should demand that the franchisee return all of the franchisor's proprietary materials and logoed items bearing the franchisor's marks and names. If the franchise agreement imposes other restrictions or grants other rights to the franchisor, such as repurchase of the business or inventory, acquisition of the franchised premises, or transfer of the franchisee's telephone number, the notice letter also should specifically demand immediate compliance with those rights and duties. For example, the termination letter should notify the franchisee that, independent of any contractual provisions, the Lanham Act prohibits the franchisee from using the franchisor's trademarks or service marks, or any marks confusingly similar to such marks, and provides significant injunctive relief and damages remedies for violations. Depending on the nature of the franchisor's system and the operational information given to the franchisee, the franchisor also should identify applicable trade secret or other intellectual property laws that would require the franchisee to return materials, not to utilize certain proprietary information, or not to engage in certain conduct.

Proper delivery of the notice is also an important consideration. Of course, the franchisor must follow the method of delivery specified under the franchise agreement. But the franchisor also must ensure that notice is delivered as quickly as possible, so it should consider additional methods of delivery such as electronic mail, facsimile, and overnight mail if those methods are not specifically authorized under the contract. In this situation, it is crucial to put the franchisee on notice immediately in order to avoid any argument of waiver of the right to terminate, or a defense to a claim for immediate injunctive relief that the franchisor failed to act promptly upon notice of the breach.

Finally, the franchisor should act diligently after providing the notice to follow up and monitor the franchisee's compliance with the termination. A franchisor risks waiving its termination if it fails to act promptly and the franchisee subsequently begins to cure the default, even if the franchisor claims that the default is not curable. Moreover, the franchisor's claim of a default that is so
egregious as to go to the "essence" or "root" of the parties' agreement or relationship will be undermined if it fails to follow up aggressively to enforce the termination and its demanded post-termination remedies. The franchisor also risks losing its entitlement to temporary injunctive relief if it fails to act promptly to enforce the termination.

B. From The Franchisee's Perspective

1. Steps in the Franchisee's Analysis

For both a franchisor and a franchisee, the starting point to the discussion regarding the existence of an allegedly incurable default is the franchise agreement. As discussed above, nearly all franchise agreements specifically identify those circumstances that grant the franchisor the right to terminate a franchise agreement without providing the franchisee an opportunity to cure for instances, such as, for example, declaring bankruptcy, losing possession of the franchised business or business premises, abandoning the franchised business, being convicted of a crime or similar "bad acts," misrepresenting or omitting a material fact in the information it furnished to the franchisor in connection with the franchisor's decision to enter into the franchise agreement, and concealing revenues from the franchisor.

In those instances where the franchise agreement identifies the incurable defaults, a franchisee’s analysis does not necessarily cease simply because the franchisee has received a notice of termination from the franchisor. Assuming that the grounds for the immediate termination are factually challenged by the franchisee, immediate steps need to be taken by the franchisee to demonstrate that the termination was improper. Immediate action is imperative in order to avoid the appearance that the franchisor's grounds for immediate termination were justified or warranted. In most situations, the franchisor will have abundantly documented the circumstances leading up to the termination, whereas, the franchisee’s documentation of the events will not be as methodical and/or thorough. Responding to a termination notice without cure is a major opportunity for the franchisee to articulate its position on the subject events. A mere denial will not suffice. It is incumbent on the franchisee to immediately express the factual basis of his/her position in a detailed letter to the franchisor.

The letter serves as more than simply damage control. It identifies the franchisee’s position and serves to alert the franchisor that maybe, just maybe, the franchisor should not have terminated the agreement. At a minimum, the letter may trigger legitimate dialogue between the parties such that a remedy, other than termination, may be crafted which addresses the parties' respective objectives. An inadequate letter that simply denies the allegations but offers no substantive response may serve the generic goal of “papering the file,” but it does not typically accomplish much else.

The next step for a franchisee is to determine whether typical contract defenses apply, including, without limitation, waiver, prior breach, impossibility of performance, and/or unconscionability. A determination of whether any of these defenses apply requires a fact-intensive examination by the franchisee. A franchisee would be well advised to set forth any of these defenses in its written response to the franchisor’s letter of termination.

A different scenario exists where the grounds for the franchisor’s attempt to terminate the franchise agreement without an opportunity to cure are not specifically identified in the franchise agreement. In that scenario, a franchisee not only must proceed as identified above, but must also challenge the very essence of the grounds for termination, irrespective of the franchisor’s insistence that the alleged conduct necessarily constitutes grounds for immediate termination.
Many franchisors typically rely upon a “cumulative remedies” provision in the franchise agreement as an end-around approach in situations where the alleged misconduct is not specifically identified in the agreement as grounds for immediate termination. However, cumulative remedies provisions do not serve to inject otherwise absent language into an agreement. The purpose and intent of these provisions is to afford franchisors the opportunity to address specifically identified grounds through various remedies, including termination, injunction, or otherwise. These provisions, however, do not serve to grant rights to a franchisor that are otherwise not expressed in the franchise agreement. If the franchise agreement specifies that certain conduct is subject to immediate termination, common sense and well-established case law dictate that conduct which is not specifically enumerated as an incurable default was intentionally excluded by the parties prior the execution of the agreement. Moreover, to the extent that the agreement also contains language that grants the franchisee an opportunity to cure certain distinct defaults, once again, the courts must look to the express terms of the agreement and not expand a franchisor’s rights to immediately terminate an agreement through a cumulative remedies provision. Otherwise, those provisions in the agreement that do afford a franchisee with an opportunity to cure are rendered meaningless, which is disfavored as a matter of law.

For example, in *Lippo v. Mobil Oil Corp.*[^104] a Mobil gas-station franchisee was found by its franchisor to have palmed-off non-Mobil gas through Mobil branded equipment. Despite the apparent right of the franchisor to terminate the franchisee for a violation that the franchisor claimed was non-curable, the *Lippo* court found that the franchisee’s misbranding and commingling of non-Mobil gasoline was subject to the general provisions of a supplemental agreement that required notice and ten days to cure. The *Lippo* court went on to state that:

> But Mobil has only itself to blame for this, because it drafted the documents. It was Mobil that used the language “should either party default in the performance of any duty, responsibility or obligation imposed by . . . the Retail Dealer Contract” in providing that the defaulter would get ten days after notice to correct the default before termination could proceed, and that used the non-identical terms “default” and “violation.” If Mobil had wanted to be more precise it could have chosen to do so. And Mobil could have narrowed the provisions for “immediate termination” to matters in which good cause was clearly involved.

> We do not believe that a termination can be reasonable, even if based on an event for which termination would otherwise be reasonable, when the contract gives the franchisee a chance to correct that default.  

[^104]: 776 F.2d 706, 714 (7th Cir. 1985).

[^105]: 776 F.2d at 714, 721. Reflecting on its opinion, the *Lippo* court suggested that its interpretation of the parties’ agreements “is in accord with the principle that in franchise contracts there is an implicit covenant of good faith that restricts franchisor discretion in terminating a franchise agreement to those cases in which good cause exists” and that “[u]nder the public policy of Illinois “good cause” includes a failure of the franchisee to comply with a lawful provision of the franchise agreement” and to cure such default after being given notice thereof and a reasonable opportunity to cure.” 776 F.2d at 714. The *Lippo* court also stated that its “approach also considers the principle that contract language upon which a right of forfeiture is grounded be strictly and narrowly construed. Thus if there are two possible constructions, only one of which will work a forfeiture, the construction may be adopted that will avoid the forfeiture and preserve the rights of the parties.” *Id.* at 715.
Moreover, in *Milona Corp. v. Piece O’Pizza of America Corp.*, a franchisee entered into an equipment lease with the lessor that required the lessor give written notice to the franchisee of a default and the opportunity to cure. The franchise agreement existing between the plaintiff franchisee and the remaining franchisor defendant contained a provision whereby the termination of the equipment lease would also have justified termination of the contemporaneously executed franchise agreement. However, the franchise agreement expressly required the defendant franchisor give thirty days notice to the franchisee before the former exercised its right to terminate the franchise agreement. Although the *Milona* court found that the equipment lease had been terminated by the lessor after proper notice was given, the *Milona* court held that there was no merit to the defendant franchisor’s argument that the termination of the equipment lease automatically effected a termination of the franchise agreement or that the franchisor was not required to give the contractually agreed upon notice before it exercised its right:

Such a construction of the two instruments is not only unwarranted but is wholly unreasonable in that it would render meaningless the provision in the franchise agreement (absent from the equipment lease) requiring thirty days' notice in writing prior to Piece O’Pizza's exercise of its right to terminate for cause. We are not persuaded that Piece O’Pizza's noncompliance with the notice provision was a mere technical failure, because we read that provision as designed to give the plaintiffs an opportunity to cure their defaults and hence as imposing a condition precedent on Piece O’Pizza's power to terminate the agreement thereunder.

According to Professor Corbin, “[t]he agreement of the parties may reserve to one or both parties the right to terminate upon a specified period of notice...Notice within the designated time period is the condition precedent to the effective exercise of the power reserved. If a party who has a power of termination by notice fails to give the notice in the form and at the time required by the agreement, it is ineffective as a termination.” Professor Corbin’s rationale has been followed by several courts. Namely, in *Olin Corp. v. Central Indus., Inc.*, a fertilizer manufacturer engaged the services of Central to store, bag, and ship its fertilizer for distribution. The agreement contained three termination provisions. One provided that upon default by either party “in the performance or compliance with any of the covenants, terms, or condition ... and such default shall continue for a period of ninety (90) days after written notice ... [the] Agreement may be terminated at the option of the party ... upon written notice, within one hundred twenty (120) days of the date of default ...” Thereafter, the manufacturer discovered that Central was stealing fertilizer by short-weighting sacks and keeping the excess. It canceled their contract immediately and sued for conversion. The district court gave a directed verdict for Central because of failure to follow the contract procedure.

---


107 1 Mass. App. Ct. at 840, citing Corbin, *Contract*, § 1266. *Milona* is “[t]he leading case on the issue of notice and opportunity to cure in Massachusetts” and has been cited by the Supreme Judicial Court [of Massachusetts], the lower Massachusetts courts, and [the U.S. District Court for the District of Massachusetts] have cited it for the relevant principles.” *Cain v. Kramer*, 2002 U.S. Dist. LEXIS 1770 (D. Mass. 2002).

108 *Corbin on Contracts* § 68.9[3].

109 576 F.2d 642, 647 (5th Cir. 1978).
Similarly, albeit in a non-franchise context, in *Cain v. Kramer*, an individual brought a claim for negligence against his former attorney for the manner in which the attorney handled an underlying breach of contract action. The court found that the attorney’s negligence, even if true, was not the proximate cause of the plaintiff’s injuries in the underlying action. Instead, the court found that the plaintiff would still have been found liable in the underlying action for having breached a written contract by failing to afford the contracting party “a reasonable time within which to cure...” as provided in the parties’ agreement. According to the Cain court, interpreting Massachusetts law,

As a general proposition if a party who has the power of termination fails to give notice in the form and the time required by his reservation, it is ineffective as a termination....Because the agreement expressly stated that the purpose of the notice provision was to give the Buyer a chance to cure any default if possible, Cain’s failure to comply with the written notice requirement constituted breach of that cure provision.

Certain franchisors have expanded the intent and meaning of “obey all laws” clauses in franchise agreements for the express purpose of creating a “catch-all” provision given the glaring absence of express language directed at the specific conduct at issue. Both strategies are prone to overreaching and subject to denial by courts. Namely, inherent in these approaches is the franchisor’s attempts to have a court infer language into a franchise agreement that does not exist and which, if permitted, would endorse the franchisor’s termination. Yet, this approach ignores the most basic rule of contractual construction. It is well settled that if the terms of a contract are unambiguous, then the contract must be enforced according to its terms, in accordance with its ordinary and usual sense. A court cannot ignore the basic rule of construction and must give effect to the parties’ intentions and construe the language to give it reasonable meaning whenever possible.

As expressed in these cases, the issue from a franchisee’s perspective is not whether the alleged breach goes to the very essence of the franchise agreement, as franchisors are prone to argue, but whether the franchisor possesses the right to terminate the agreement without affording the franchisee with a right to cure the alleged breach. Situations involving underreporting are

---


111 *Id.*, at 47-48.

112 *Id.*, at 47-48, citing Corbin, 6 *Corbin on Contracts*, § 1266 at p.64 (1962). See also, *Jasty v. Wright Med. Tech., Inc.*, 2006 U.S. Dist. LEXIS 18216 (D. Mass. 2006)(When parties expressly reference cure in their contract the court reads that provision as designed to give [parties] an opportunity to cure their defaults and hence as imposing a condition precedent on [the other party]) (internal citations/quotations omitted); *In re John J. Sullivan, Inc.*, 128 B.R. 7, 11 (D. Mass. 1990)(“If a party who has power of termination by notice fails to give the notice in the form and the time required by his reservation, it is ineffective as a termination.”); *Seagram Distillers Co. v. Alcoholic Beverages Control Com.*, 401 Mass. 713, 722 (Mass. 1988)(contract between the parties remained in force since one party failed to give the other party 30 days advance notice as required by the terms of the agreement); *Priestley v. Sharaf’s, Inc.*, 4 Mass. App. Ct. 218, 221-222 (Mass. App. Ct. 1976)(Where an indemnity clause under a lease is rendered inoperative by failure to give proper notice, the Plaintiff landlord has no right to recover rent or use and occupancy for the period subsequent to the tenant’s vacating the premises); *University Emergency Med. Found. v. Rapier Invs., Ltd.*, 197 F.3d 18, 20-21 (1st Cir. 1999)(strictly enforcing a four month notice requirement, noting that “the difference of one day in the giving of notice is small, in one view, but it is the distance across a necessary boundary in relations under the contract, and must be taken as decisive, or there can be no boundary.”) (internal citations omitted); *Irwin v. Carpenters Health & Welfare Trust Fund*, 745 F.2d 553, 557 (9th Cir. 1984)(“The time and manner of exercising a power of termination [of a contract] may be specified in the contract; in such case an attempt to exercise it otherwise will be ineffective (emphasis added).” (internal citations/quotations omitted).
commonly breeding grounds for these disputes. In *Dunkin' Donuts, Inc. v. N.A.S.T., Inc.* 113 the court was asked to decide whether Plaintiffs should be granted summary judgment on the defendant franchisee’s counterclaim alleging breach of contract for failing to grant defendants thirty days to cure a default involving an intentional underreporting of sales. Finding that the Plaintiffs were not entitled to summary judgment because they did not provide defendants sufficient notice and the requisite thirty days to cure, the court referenced the notice of default and termination send by Plaintiffs, and stated:

Obviously (and logically) some time—some actual opportunity to fix the default—had to be allowed between the notice of default and the termination. Just as obviously Dunkin’ did not afford Cherian that opportunity. Its Notice, received by Cherian on February 21, 2002, informed him that Dunkin’ had “hereby, without further notice, terminated” his franchises and instructed him to “immediately take such actions as are necessary to comply with [his] post-termination obligations”. No pretermination opportunity to cure was provided—instead the "opportunity" that was offered could come only after the termination, predicated on a "determination as a matter of law that [Cherian’s] defaults are curable". *Any purported opportunity to cure that arises only after termination, and only after suit has been filed, is no opportunity at all* (see *Smoot v. Mobil Oil Corp.*, 722 F.Supp. 849, 855 n.4 (D. Mass. 1989))(emphasis added).114

Moreover, another argument that franchisee counsel can advance in the face of a termination for conduct not enumerated in the agreement as being incurable is the fact that, as franchisors routinely remind franchisees and their counsel, in order for a breach of a franchise agreement to exist, an express contractual provision in the franchise agreement must be breached. Absent such an express breach, a franchisor cannot seek to create its own pseudo-implied covenant of good faith and fair dealing breach.

Obviously, franchisee counsel must pay deliberate attention to the existence and applicability of state statutes when dealing with a termination without notice. As noted above, requirements of “good,” “just,” or “reasonable” cause must be met in order for termination to be appropriate. Additional restrictions are found in these state statutes which limit a franchisor’s ability to immediately terminate the agreement.

VI. LITIGATION CONSIDERATIONS IN CASES INVOLVING INCURABLE DEFAULTS

A. From the Franchisor’s Perspective

Termination based on an allegedly incurable default is even more likely to lead to litigation than the average franchise termination. If the franchisor declares the agreement is over and it will not allow the franchisee any opportunity to save the relationship, the franchisee has little incentive not to seek legal action. Indeed, the franchisee might view a lawsuit as its only hope to preserve its business, or at least to get compensation through a large damages award. A franchisor therefore must be thinking about litigation strategies at the same time it is evaluating and implementing its decision to terminate.

---


1. **Securing The Forum**

The first consideration for a franchisor should be to secure the most favorable venue for any lawsuit. Most franchise agreements contain a forum selection clause, usually in the franchisor's home forum. At least in federal courts, the general rule is to enforce contractual forum selection clauses.\(^{115}\) The burden is on the party challenging a forum selection clause to show that enforcing the clause would be unfair, unreasonable, or sufficiently inconvenient to justify retention of the suit.\(^{116}\) As a practical matter, if the franchisor gets to court first in the contractually specified forum, the franchisee will have an uphill battle to prevent the action from proceeding in that venue.

Although forum selection clauses are usually enforced, they do not prevent a franchisee who wants to seize the initiative from suing first in the franchisee's local forum. Then, at best, the franchisor will have to incur the time and expense to move to dismiss or transfer the case to the contractually chosen forum. At worst, the court in the initial action might find a basis on which it can keep the action resulting in the franchisee's loss of its desired forum. Further, if the franchisee finds a sympathetic judge in its favored forum, that court might grant preliminary injunctive relief regarding the attempted termination, and that injunction likely would transfer with the case even if the franchisor succeeded in enforcing the forum selection clause.

For these reasons, a franchisor should seriously consider initiating litigation to secure its preferred venue to resolve the dispute. Depending on the facts, a franchisor in this situation might have several litigation options. If the franchisee refuses immediately to acknowledge the termination, the franchisor can bring a declaratory judgment action to validate and enforce its right to terminate. The federal declaratory judgment statute\(^ {117}\) allows a party to bring an action to declare the rights and other legal relations of any interested party, which would include the issue of whether a contract has properly been terminated. Most states have similar statutes authorizing declaratory relief.

If the franchisee disregards the termination and continues to operate its business, the franchisor may have a direct action for injunctive relief and/or for damages. A franchisor can sue under the Lanham Act if the franchisee continues to operate its business using the same or similar marks as the franchisor, or otherwise continues to hold itself out as sponsored by or affiliated with the franchisor. In *Southland Corp. v. Froelich*,\(^ {118}\) the court granted the franchisor's motion for preliminary injunction under the Lanham Act. The court upheld the franchisor's right to terminate immediately without any opportunity to cure, and on that basis it enjoined the franchisee from continuing to operate the business using the franchisor's name and marks.\(^ {119}\) The franchise may also sue to enforce post-termination contractual restrictions. In either case, a court would first have to determine the validity of the termination in order to evaluate whether the franchisor is entitled to the particular relief being sought.

---

\(^{115}\) See *Stewart Org’n, Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (clause should be "given controlling weight in all but the most exceptional cases").


\(^{118}\) 41 F. Supp. 2d (E.D. N.Y. 1999).

2. Injunctive Relief

Injunctive relief is the most common remedy in any franchise termination lawsuit brought by a franchisor. To obtain preliminary injunctive relief in most jurisdictions, a franchisor must satisfy the traditional four-part test and establish: (1) a likelihood of success on the merits of its claims, (2) irreparable harm if the injunction is not granted, (3) that the balance of the hardships between the parties favors the grant of injunctive relief, and (4) that injunctive relief will serve (or at least will not disserve) the public interest.

The first step in the injunctive relief analysis is the franchisor's likelihood of success on the merits of its claim, and the main issue here is for the franchisor to establish that its termination was valid. This requires analysis of both the contract law issues discussed in Section III and any potentially applicable state relationship laws as discussed in Section IV. It is fair to say that establishing a strong case for the validity of the termination is essential to the franchisor's success in any litigation.

The franchisor also must prove that it is likely to suffer irreparable harm in the absence of an injunction. Historically, courts usually have presumed irreparable harm in trademark cases under the Lanham Act once the plaintiff established a likelihood of confusion from the unauthorized use of the same or similar trademark. \(^\text{120}\) That analysis has been called into question, however, by the United States Supreme Court's decision in eBay, Inc. v. MercExchange, LLC. \(^\text{121}\) In eBay, the Court rejected the presumption of irreparable harm traditionally applied in patent cases once infringement was found. Lower courts have applied the eBay rationale to reject presumptions of irreparable harm in cases involving other forms of intellectual property. The Second Circuit Court of Appeals recently applied the eBay rationale to a claim for preliminary injunctive relief based on copyright infringement, holding that a copyright holder who proves likelihood of confusion also must prove irreparable harm from the defendant's infringing conduct before being entitled to a preliminary injunction. \(^\text{122}\) This application of eBay does not seem limited to the patent or copyright contents. Indeed, the Salinger court stated: "although today we are not called upon to extend eBay beyond the context of copyright cases, we see no reason that eBay would not apply with equal force to an injunction in any type of case." \(^\text{123}\) Thus, a franchisor seeking injunctive relief must be prepared to present actual evidence of the harm to its trademarks or system from the terminated franchisee's unauthorized use.

Another important factor in obtaining injunctive relief is the balance of the hardships - \textit{i.e.}, the balance of harm to the plaintiff if the injunctive relief is not granted compared to the harm to defendant if the injunctive relief is granted. A terminated franchisee will often argue that harm to its business interests from enforcing the termination before a final judgment greatly outweighs any harm to the franchisor from allowing continued operation. This argument typically arises whether the franchisor is seeking a preliminary injunction to enforce the termination or whether the franchisee, by counterclaim or through its own first-filed action, is seeking to enjoin the termination. In Manpower, Inc. v. Mason, the federal district court concluded that the irreparable harm and

\(^{120}\) See, \textit{e.g.}, Burger King Corp. v. Mason, 710 F.2d 1480 (11th Cir. 1984).

\(^{121}\) 547 U.S. 388 (2006).


\(^{123}\) \textit{Id.} n. 7 (emphasis in original).
balance of the hardships factors together favored the purportedly terminated franchisees because the relief requested by the franchisor would require the franchisees to shut down their businesses pending trial and, pursuant to the restrictive covenants in the franchise agreements, prohibit them from even being associated with the operation of any temporary help business for two years. The court therefore granted the franchisees' motion for a preliminary injunction against enforcement of the termination.

In sum, whether expressly stated or not, courts evaluating incurable default cases seem to place the most weight on the propriety of the franchisor's termination. Where the franchisor has a strong case for immediate termination, either based on an express contractual right or on an egregious breach that goes to the "essence" of the parties' agreement, courts tend to find that the other factors such as irreparable harm and balance of the hardships also favor the franchisor. In such situations, a court will often find that any harm or hardship alleged by the franchisee was self-inflicted and results from the franchisee's own improper conduct. Thus, the franchisor's primary focus should be on making convincing showing of the validity of its termination and the egregiousness of the franchisee's misconduct on which the termination is based. But where the franchisor's case for immediate termination without cure is more dubious, the irreparable harm and balance of the hardships factors become more important.

3. Damages

Although injunctive relief to enforce a termination is often the franchisor's most immediate goal, the franchisor also can seek damages in some instances. The Lanham Act allows a trademark owner to recover any damages it has sustained from the infringement (including potentially lost profits) in some cases, the profits of the infringer as well as attorney fees. If a terminated franchisee defeats the franchisor's motion for preliminary injunction but ultimately loses the case on the merits, this Lanham Act damages remedy can be quite substantial. In franchise termination actions, franchisors sometimes seek lost future royalties for the remainder of the franchise agreements term. Although the authors could not located any reported cases discussing or ruling on lost future royalties specifically in a case involving an incurable default, there appears to be no legal reason why the issue of lost future royalties should be treated any differently in this context (assuming that the franchisor's termination was valid) than in the context of a termination after the franchisee was given an opportunity to cure. On this issue, however, the legal theory supporting the franchisee's right to end the contract immediately could be very important. If the franchisor is entitled to terminate for an incurable breach, traditional contract remedies including, in some jurisdictions, lost future profits, would apply. If, however, the court employed a rescission theory, the non-breaching party arguably would not be entitled to the benefit of its bargain as if the contract had been performed.

---

124 See, e.g., Southland, Inc. v. Froelich, 41 F. Supp. 2d 222, 247 (E.D.N.Y. 1999) (finding that franchisee "knowing and willfully" engaged in misconduct that violated the essence of the agreement).


126 See, e.g., Burger King Corp. v. Weaver, 169 F.3d 1310 (11th Cir. 1999) (affirming award of franchisee's profits based on unauthorized use of franchisor's marks in addition to recovery of royalty fees during time of infringement); Precision Tune Auto Care v. Pinole Auto Care, No. CA-00-1748 (E.D. Va. 2001) (awarding damages of more than $6 million).
Another wrinkle in the damages analysis for a termination without opportunity to cure is the rationale of *Postal Instant Press, Inc. v. Sealy*. In *Sealy*, the court held that the franchisor which terminated a franchisee for failure to make royalty payments could not recover damages in the form of lost future profits, because the court viewed the franchisor’s decision to terminate as the cause for the franchisor’s loss of future royalties under the contract. The *Sealy* rationale has not been followed in all jurisdictions, but it is an argument that franchisees have made with success in certain jurisdictions. Even in a jurisdiction that follows *Sealy*, a franchisor also might try to avoid its application by arguing that certain incurable defaults actually constitute the franchisee terminating the agreement by its own actions or decisions, such as abandoning the business or committing an act that makes its no longer possible to continue the business.

An argument based on *Sealy*, however, arguably would be attractive in the context of a termination without any opportunity to cure, because the franchisor is making a unilateral choice to terminate immediately and not to allow the franchisee to remedy the default and repair the relationship. The authors have not identified any cases applying the *Sealy* rationale in the situation where a franchisor terminated immediately for an allegedly incurable default, but a franchisor should consider this issue in evaluating both the decision to terminate without an opportunity to cure and its remedy sought in litigation arising from such a termination.

B. From the Franchisee’s Perspective

If the franchisee disputes or desires to challenge a termination without opportunity to cure, the franchisee should consider several factors in its decision to litigate. If the franchisee disputes the substantive basis for the default, then it should be prepared to support its contention, document the circumstances and be immediately ready to provide evidence that it did not commit the alleged default. Once the franchisee has been backed into this corner of the franchise relationship, there is little room for misstep.

Once a termination notice has been delivered and litigation/arbitration an inevitability, the franchisee must focus upon eliminating or reducing the overriding presumption typically held by the fact finder that a default actually did occur and that the franchisor accurately documented the circumstances leading up to the default. If a franchisee is incapable of surmounting this presumption, the ensuing litigation/arbitration will be an arduous path. However, if the franchisee is diligent in documenting the factual circumstances as well as any instances overreaching by the franchisor, a victory on behalf of the franchisor is not a foregone conclusion. One of the realities for a franchisee is that typically by the time that he/she has learned of the termination, the franchisor has had days, if not weeks, in which to prepare its case in the posture most favorable to the franchisor. A franchisor may have crafted a default/termination letter in such a manner that may limit a franchisee’s ability to defend against the termination. Moreover, the franchisor may have already initiated an action against the franchisee concurrent with the termination notice in order to gain a tactical advantage in an advantageous forum. Faced with this backdrop, every step of the franchisee’s plan of defense/attack must be deliberate and focused. Any form of inaction or pause is tantamount to failure.

---


A primary focus must be immediately shifted towards an examination of the applicability of a state statute of general applicability or specific within the particular industry. If a statute applies and the franchisor has not yet initiated legal action, a franchisee may be well served in immediately filing an action against the franchisor for wrongful termination in violation of the applicable statute. Armed with a favorable statute, a franchisee should given due consideration to seeking immediate injunctive relief preventing the purported termination in order to disarm the franchisor’s claim.

In the event that the franchisor has proceeded in seeking injunctive relief (which will typically be geared towards enjoining a purported violation of the Lanham Act after the termination has been effectuated and the franchisee continues to operate the franchise), the franchisor must establish the following elements: (1) a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant is greater than any damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, will not be adverse to the public interest. Existing caselaw has established that a franchisor is not entitled to preliminary injunctive relief absent a determination by the Court that its termination of the franchise agreement was valid. \(^{129}\) In Robertson, the Eleventh Circuit adopted the analysis of the Third Circuit in S & R Corp. v. Jiffy Lube Int'l, Inc.,\(^{130}\) and held that before a preliminary injunction may issue, a determination must be made that the franchisor properly terminated such franchise. Specifically, the Court stated:

In considering this issue for the first time, we find that the Lanham Act's requirement that a franchisor demonstrate that unauthorized trademark use occurred to prevail on the merits of a trademark infringement claim against a franchisee necessitates some type of showing that the franchisor properly terminated the contract purporting to authorize the trademarks' use, thus resulting in the unauthorized use of trademarks by the former franchisee. Consequently, we are persuaded by the Third Circuit's analysis and conclude that the district court correctly required McDonald's to make a showing that it properly terminated the franchise agreement.\(^{131}\)

The Eleventh Circuit's opinion in Robertson is of notable importance to franchisors and franchisees alike. In requiring franchisors to prove that a termination was proper, franchisees are protected from unscrupulous franchisors who may seek to terminate a franchise agreement for illegitimate reasons. Moreover, under the reasoning in Robertson, a franchisor's motivation for terminating a franchise agreement is, indeed, relevant to the determination involving a preliminary injunction if the franchisor cannot meet its burden of proof that the termination of the franchisee's contract was proper.

As such, the franchisee must focus considerable attention towards disproving the factual basis for the termination. In addition, a franchisee is also equipped with the statutory defenses to a claim for violation of the Lanham Act in defending against a claim for injunctive relief by the franchisor.

\(^{129}\) See McDonald's Corp. v. Robertson, 147 F.3d 1301, 1308 (11th Cir. 1998) ("Robertson").

\(^{130}\) 968 F.2d 371, 379 (3rd Cir. 1992).

\(^{131}\) Id.
With respect to the underlying claim for damages that either or both sides would be pursuing in a termination claim, a franchisee can seek to pursue all damages suffered as a result of the termination, including lost future profits, if it is determined that the termination was wrongful.

In order to effectively seek to recover lost future profits, a franchisee typically should demonstrate a history of past performance, and credible expert testimony on future performance. Yet, several notable cases have demonstrates that courts do not require a specific formula for demonstrating the entitlement to recover lost future profits. In Canyon Country Store v. Bracey, plaintiffs based lost profits on a “hypothetical” number of customers, with no actual evidence from similar businesses. The court found the evidence sufficient to support a jury award of lost profits. While it is true that this case may represent an aberration, case law generally does not favor disturbing jury verdicts where at least some relevant evidence has been presented to support its finding. In certain instances, courts have not even required the testimony of an expert witness where a business owner himself can present the evidence of lost future profits. For example, the Eighth Circuit in Pullman v. Land O'Lakes, Inc. approved lay testimony from a business owner as sufficient to establish claim for lost profits. Pullman was later followed in Diesel Mach., Inc. v. B.R. Lee Indus., where testimony from a business owner alone was also found to be a sufficient basis for the calculation of lost profits, where the business owner had a degree in business and relevant work experience.

---

132 781 P.2d 414, 419 (Utah 1989).
133 262 F.3d 759, 765 (8th Cir. 2001).
Appendix 1

| Arkansas Franchise Practices Act | Ark. Code Ann. §§4-72-201 et seq. 135 |
| California Franchise Relations Act | Cal. Bus & Prof. Code §§20000 et seq. 136 |

135 Ark. Code Ann. § 4-72-204(a): “It shall be a violation of this subchapter for a franchisor to: (1) Terminate or cancel a franchise without good cause; or (2) Fail to renew a franchise except for good cause or except in accordance with the current policies, practices, and standards established by the franchisor which in their establishment, operation, or application are not arbitrary or capricious.” See also Ark. Code Ann. § 4-72-202(7); “Good cause” means: “(A) Failure by a franchisee to comply substantially with the requirements imposed upon him or her by the franchisor, or sought to be imposed by the franchisor, which requirements are not discriminatory as compared with the requirements imposed on other similarly situated franchisees, either by their terms or in the manner of their enforcement; or (B) The failure by the franchisee to act in good faith and in a commercially reasonable manner in carrying out the terms of the franchise; or (C) Voluntary abandonment of the franchise; or (D) Conviction of the franchisee in a court of competent jurisdiction of an offense punishable by a term of imprisonment in excess of one (1) year, substantially related to the business conducted pursuant to the franchise; or (E) Any act by a franchisee which substantially impairs the franchisor’s trademark or trade name; or (F) The institution of insolvency or bankruptcy proceedings by or against a franchisee, or any assignment or attempted assignment by a franchisee of the franchisee of the franchise or the assets of the franchise for the benefit of the creditors; or (G) Loss of the franchisor’s or franchisee’s right to occupy the premises from which the franchise business is operated; or (H) Failure of the franchisee to pay to the franchisor within ten(10) days after receipt of notice of any sums past due the franchisor and relating to the franchise....”

136 Cal. Bus. & Prof. Code: “Except as otherwise provided by this chapter, no franchisor may terminate a franchise prior to the expiration of its term, except for good cause. Good cause shall include, but not be limited to, the failure of the franchisee to comply with any lawful requirement of the franchise agreement after being given notice thereof and a reasonable opportunity, which in no event need be more than 30 days, to cure the failure.” See also Cal. Bus. & Prof. § 20021: “If during the period in which the franchise is in effect, there occurs any of the following events which is relevant to the franchise, immediate notice of termination without an opportunity to cure, shall be deemed reasonable: (a) The franchisee or the business to which the franchise relates has been the subject of an order for relief in bankruptcy, judicially determined to be insolvent, or all or a substantial part of the assets thereof are assigned to or for the benefit of any creditor, or the franchisee admits his or her inability to pay his or her debts as they come due; (b) The franchisee abandons the franchise by failing to operate the business for five consecutive days during which the franchise is required to operate the business under the terms of the franchise, or any shorter period after which it is not unreasonable under the facts and circumstances for the franchisor to conclude that the franchisee does not intend to continue to operate the franchise, unless such failure to operate is due to fire, flood, earthquake or other similar causes beyond the franchisee’s control; (c) The franchisor and franchisee agree in writing to terminate the franchise; (d) The franchisee makes any material misrepresentations relating to the acquisition of the franchise business or the franchisee engages in conduct which reflects materially and unfavorably upon the operation and reputation of the franchise business or system; (e) The franchisee fails for a period of 10 days after notification of noncompliance, to comply with any federal, state, or local law or regulation applicable to the operation of the franchise; (f) The franchisee, after curing any failure in accordance with Section 20020 engages in the same noncompliance is corrected after notice; (g) The franchisee repeatedly fails to comply with one or more requirements of the franchise, whether or not corrected after notice; (h) The franchised business or business premises of the franchise are seized, taken over, or foreclosed by a government official in the exercise of his or her duties, or seized, taken over, or foreclosed by a creditor, lienholder or lessor, provided that a final judgment against the franchisee remains unsatisfied for 30 days (unless a supersedeas or other appeal bond has been filed); or a levy of execution has been made upon the license granted by the franchise agreement or upon any property used in the franchise business, and is not discharged within five days of such levy; (i) The franchisee is convicted of a felony or any other criminal misconduct which is relevant to the operation of the franchise; (j) The franchisee fails to pay any franchise fees or other amounts due to the franchisor or its affiliate within five days after receiving written notice that such fees are overdue; or (k) The franchisor makes a reasonable determination that continued operation of the franchise by the franchisee will result in an imminent danger to public health or safety.”
<table>
<thead>
<tr>
<th>Connecticut Franchise Act</th>
<th>Conn. Gen. Stat. §§42-133e to 42-133h</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware Franchise Security Law</td>
<td>Del. Code Ann. Tit. 6 §§2551 to 2556</td>
</tr>
<tr>
<td>Illinois Franchise Disclosure Act</td>
<td>815 Ill. Comp. Stat §§705/1 et seq.</td>
</tr>
</tbody>
</table>

137 Conn. Gen. Stat. § 42-133f(a): *No franchisor shall, directly, or through any officer, agent or employee, terminate, cancel or fail to renew a franchise, except for good cause which shall include, but not be limited to the franchisee’s refusal or failure to comply substantially with any material and reasonable obligation of the franchise agreement or for the reasons stated in the subsection (e) of this section. The franchisor shall give the franchisee written notice of such termination, cancellation, or failure to renew with the cause stated thereon; provided, in the event the franchisor elects to renew at least sixty days in advance to such termination, cancellation, or failure to renew with the cause stated thereon; provided, in the event the franchisee pursuant to subsection (e) of this section, the franchisor shall give the franchisee written notice of such intent not to renew at least six months prior to the expiration of the current franchise agreement. The provisions of this section shall not apply (1) where the alleged grounds are voluntary abandonment by the franchisee of the franchise relationship, in which event, such notice may be given thirty days in advance of such termination, cancellation, or failure to renew, or (2) where the alleged grounds are the conviction of the franchisee in a court of competent jurisdiction of an offense punishable by a term of imprisonment in excess of one year and directly related to the business conducted pursuant to the franchise, in which event, such notice may be given at any time following such conviction and shall be effective upon delivery and written receipt of such notice. See also Conn. Gen. Stat. § 42-133f(e): *A franchisor may elect not to renew a franchise which involves the lease by the franchisor of real property and improvement, in the event the franchisor (1) sells or leases such real property and improvements to other than a subsidiary or affiliate of the franchisor for any use; or (2) sells or leases such real property to a subsidiary or affiliate of the franchisor, except such subsidiary or affiliate of the franchisor, except such subsidiary or affiliate shall not use such real property for the operation of the same business of the franchisee; or (3) converts such real property and improvements to a use not covered by the franchise agreement; or (4) has leased such real property from a person not the franchisee and such lease from such person is terminated or not renewed."

138 Del. Code Ann. Tit 6, §2552: *(a) Termination of a franchise by a franchisor shall be deemed to be “unjust,” or to have been made “unjustly,” if such termination is without good cause or in bad faith. Any termination of a franchise which is not unjust shall be deemed to be “just”, or to have been made “justly.” *(g) No franchisor may unjustly terminate a franchise."

139 Haw.Rev.Stat. § 482E-6: “Without limiting the other provisions of this chapter, the following specific rights and prohibitions shall govern the relation between the franchisor or subfranchisor and its franchisees: …(2) For the purposes of this chapter and without limiting its general application, it shall be an unfair method of competition for a franchisor or subfranchisor to: …(H) Terminate or refuse to renew a franchise except for good cause, or in accordance with the current terms and standards established by the franchisor then equally applicable to all franchisees, unless and to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is reasonable, is based on proper and justifiable distinctions considering the purposes of this chapter, and is not arbitrary. For purposes of this paragraph, good cause in termination case shall include, but not be limited to, the failure of the franchisee to comply with any lawful, material provision of the franchise agreement after having been given written notice thereof and an opportunity to cure the failure within a reasonable period of time."
franchise business; (2) voluntarily abandons the franchise business; (3) in convicted of a felony or other crime which substantially impairs the goodwill associated with the franchisor’s trademark, service mark, trade name or commercial symbol; or (4) repeatedly fails to comply with the lawful provisions of the franchise or other agreement.”

141 Ind. Code § 23-2-2.7-1: “It is unlawful for any franchise agreement entered into between any franchisor and a franchisee who is either a resident of Indiana or a nonresident who will be operating a franchise in Indiana to contain any of the following provisions: … (7) Permitting unilateral termination of the franchise if such termination is without good cause or in bad faith. Good cause within the meaning of this subdivision includes any material violation of the franchise agreement.”

142 Iowa Code § 537A.10(a): “Except as otherwise provided by this chapter, a franchisor shall not terminate a franchise prior to the expiration of its term except for good cause. For purposes of this section, “good cause” is cause based upon a legitimate business reason. “Good cause” includes the failure of the franchisee to comply with any material lawful requirement of the franchise agreement, provided that the termination by the franchisor is not arbitrary or capricious when compared to the actions of the franchisor in other similar circumstances. The burden of proof showing that action of the franchisor is arbitrary or capricious shall rest with the franchisee.” See also Iowa Code § 537A.10(c): “Notwithstanding paragraph ‘b’, a franchisor may terminate a franchise upon written notice and without an opportunity to cure if any of the following apply: (1) The franchisee or other to which the franchise relates is declared bankrupt or judicially determines to be insolvent; (2) All or a substantial part of the assets of the franchise or the business to which the franchise relates are assigned to or for the benefit of any creditor which is subject to chapter 681. An assignment for the benefit of any creditor pursuant to this subparagraph does not include the granting of a security interest in the normal course of business; (3) The franchisee voluntarily abandons the franchise by failing to operate the business for five consecutive business days during which the franchisee is required to operate the business under the terms of the franchise, or any shorter period after which it is unreasonable under the facts and circumstances for the franchisor to conclude that the franchisee does not intend to continue to operate the franchise, unless the failure to operate is due to circumstances beyond the control of the franchisee; (4) The franchisor and franchisee agree in writing to terminate the franchise; (5) The franchisee knowing makes any material representations or knowingly omits to state any material facts relating relating to the acquisition or ownership or operation of the franchise business; (6) The franchisee repeatedly fails to comply with one or more material provisions of the franchise agreement, when the enforcement of such material provisions is not arbitrary or capricious, whether or not the franchise complies after receiving notice of the failure to comply; (7) The franchisee operates the franchised business in a manner that imminently endangers the public health and safety.”

143 Mich. Comp. Laws § 445.1527: “Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise:… (c) A provision that permits a franchisor to terminate a franchise prior to the expiration of its term except for good cause. Good cause shall include the failure of the franchisee to comply with any lawful provision of the franchise agreement and to cure such failure after being given written notice thereof and a reasonable opportunity, which in no event need be more than 30 days, to cure such failure.”

144 Minn. Stat. § 80C.14(3)(b): “No person may terminate or cancel a franchise except for good cause. “Good cause” means failure by the franchisee to substantially comply with the material and reasonable franchise requirements imposed
<table>
<thead>
<tr>
<th>Franchise Statute</th>
<th>Code/Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mississippi Franchise Cancellation Statute</td>
<td>Miss. Code Ann. §§75-24-51 to 75-24-63^145</td>
</tr>
<tr>
<td>Missouri Franchise Law</td>
<td>Mo. Rev. Stat §§407.400 to 407.420^146</td>
</tr>
<tr>
<td>Nebraska Franchise Practices Act</td>
<td>Neb. Rev. Stat §§87-401 to 87-410^147</td>
</tr>
<tr>
<td>New Jersey Franchise Practices Act</td>
<td>N.J. State Ann. §§56.10-1 to 56:10-12^148</td>
</tr>
</tbody>
</table>

by the franchisor including, but not limited to: (1) the bankruptcy or insolvency of the franchisee; (2) assignment for the benefit of creditors or similar disposition of the assets of the franchise business; (3) voluntary abandonment of the franchise business; (4) conviction or plea of guilty or no contest to a charge of violating any law relating to the franchise business; or (5) any act by or conduct of the franchisee which materially impairs the goodwill associated with the franchisor's trademark, trade name, service mark, logotype or other commercial symbol.” See also Minn. Stat. § 80C.14(3)(a): “No person may terminate or cancel a franchise unless: (i) that person has given written notice setting forth all the reasons for the termination or cancellation at least 90 days in advance of termination or cancellation, and (ii) the recipient of the notice fails to correct the reasons stated for termination or cancellation in the notice within 60 days of receipt of the notice; except that the notice is effective immediately upon receipt where the alleged grounds for termination or cancellation are (1) voluntarily abandonment of the franchise relationship by the franchisee; (2) the conviction of the franchisee of an offense directly related to the business conducted pursuant to the franchise; or (3) failure to cure a default under the franchise agreement which materially impairs the goodwill associated with the franchisor’s trade name, trademark, service mark, logotype or other commercial symbol after the franchise has received written notice to cure of at least 24 hours in advance thereof.”

^145 Miss. Code Ann. § 75-24-53: "...No person who has granted a franchise to another person shall cancel or otherwise terminate such franchise agreement without notifying such person of cancellation, termination or failure to renew in writing at least ninety (90) days in advance of the cancellation, termination of failure to renew, except that when criminal misconduct, fraud, abandonment, bankruptcy or insolvency of the franchisee, or the giving of a no account or insufficient funds check is the basis or grounds for cancellation or termination, the ninety-day notice shall not be required."

^146 Mo. Rev. Stat. § 407.405: "...No person who has granted a franchise to another person shall cancel or otherwise terminate any such franchise agreement without notifying such person of the cancellation, termination or failure to renew in writing at least ninety days in advance of the cancellation, termination or failure to renew, except when criminal misconduct, fraud, abandonment, bankruptcy or insolvency of the franchisee, or the giving of a no account or insufficient funds check is the basis or grounds for cancellation or termination, the ninety days’ notice shall not be required."

^147 Neb. Rev. Stat. § 87-404: "It shall be a violation of sections 87-401 to 87-410 for any franchisor directly or indirectly through any officer, agent, or employee to terminate, cancel, or fail to renew a franchise without having first given written notice setting forth all the reasons for such termination, cancellation, or failure to renew, except (1) when the alleged are voluntary abandonment by the franchisee of the franchise relationship in which event the written notice may be given fifteen days in advance of such termination, cancellation, or failure to renew; and (2) when the alleged grounds are (a) the conviction of the franchisee in a court of competent jurisdiction of an indictable offense directly related to the business conducted pursuant to the franchise, (b) insolvency, the institution of bankruptcy or receivership proceedings, (c) default in payment of an obligation or failure to account for the proceeds of a sale of goods by the franchisee to the franchisor or a subsidiary of the franchisor, (d) falsification of records or reports required by the franchisor, (e) the existence of an imminent danger to public health or safety, or (f) loss of the right to occupy the premises from which the franchise is operated by either the franchisee or the franchisor, in which event such termination, cancellation or failure to renew may be effective immediately upon the delivery and receipt of written notice of the same. It shall be a violation of sections 87-401 to 87-410 for a franchisor to terminate, cancel or fail to renew a franchise without good cause. This section shall not prohibit a franchise from providing that the franchise is not renewable or that the franchise is only renewable if the franchisor or franchisee meets certain reasonable conditions."
<table>
<thead>
<tr>
<th>State</th>
<th>Act</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island</td>
<td>Fair Dealership Act</td>
<td>R.I. Gen. Laws §§ 6-50-1 to 6-50-9</td>
</tr>
</tbody>
</table>

148 N.J. Stat. Ann. § 56:10-5: "It shall be a violation of this act for any franchisor directly or indirectly through any officer, agent, or employee to terminate, cancel, or fail to renew a franchise without having first given written notice setting forth all the reasons for such termination, cancellation, or intent not to renew to the franchisee at least 60 days in advance of such termination, cancellation, or failure to renew, except (1) where the alleged grounds are voluntary abandonment by the franchisee of the franchise relationship in which event the aforementioned written notice may be given 15 days in advance of such termination, cancellation, or failure to renew; and (2) where the alleged grounds are the conviction of the franchisee in a court of competent jurisdiction of an indictable offense directly related to the business conducted pursuant to the franchisee in which event the aforementioned termination, cancellation or failure to renew may be effective immediately upon the delivery and receipt of written notice of same at any time following the aforementioned conviction. It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, canceling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise."

149 R.I. Gen. Laws § 6-50-2(4): "Good cause' means for the purposes of this act, good cause for terminating, canceling or nonrenewal shall include, but not be limited to, failure by the dealer to comply with the reasonable requirements imposed by the grantor or any of the reasons listed in subdivisions 6-50-4(a)(1) through (a)(6)." See also R.I. Gen. Laws 66-50-4(a): "Notwithstanding the terms, provisions, or conditions of any agreement to the contrary, a grantor shall provide a dealer sixty (60) days prior to written notice of termination, cancellation, or nonrenewal. The notice shall state all the reasons for termination, cancellation, or nonrenewal and shall provide that the dealer has thirty (30) days in which to cure any claimed deficiency; provided that a dealer has a right to cure three (3) times in any twelve (12) month period during the period of the dealership agreement. The sixty (60) day notice provisions of this section shall not apply and the termination, cancellation or nonrenewal may be made effective immediately upon written notice, if the reason for termination, cancellation or non renewal is in the event the dealer: (1) voluntarily abandons the dealership relationship; (2) is convicted of a felony offense related to the business conducted pursuant to the dealership; (3) engages in any substantial act which tends to materially impair the goodwill of the grantor's trade name, trademark, service mark, logotype or other commercial symbol; (4) makes a material misrepresentation of fact to the grantor relating to the dealership; (5) attempts to transfer the dealership (or a portion thereof) without authorization of the grantor; or (6) is insolvent, flies or suffers to be filed against it any voluntary or involuntarily bankruptcy petition, or makes an assignment for the benefit of creditors or similar disposition of assets of the dealer business."

150 Va. Code Ann. § 13.1-564: "It shall be unlawful for a franchisor to cancel a franchise without reasonable cause or to use undue influence to induce a franchisee to surrender any right given to him by any provision contained in the franchise."

151 Wash. Rev. Code § 19.100.180(2): "For the purposes of this chapter and without limiting its general application, it shall be unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to:…(j) Terminate a franchise prior to the expiration of its term except for good cause. Good cause shall include, without limitation, the failure of the franchisee to comply with lawful material provisions of the franchise or other agreement between the franchisor and the franchisee and to cure such default after being given written notice thereof and a reasonable opportunity, which in no event need be more than thirty days, to cure such default, or if such default cannot reasonably be cured within thirty days, the failure of the franchisee to initiate within thirty days substantial and continuing action to cure such default: Provided, That after three willful and material breaches of the same term of the franchise agreement occurring within a twelve-month period, for which the franchisee has been given notice and an opportunity to cure as provided in the subsection, the franchisor may terminate the agreement upon any subsequent willful and material breach of the same term within the twelve-month period without providing notice or opportunity to cure.
<table>
<thead>
<tr>
<th>Wisconsin Fair Dealership Law</th>
<th>Wis. Stat. Ann. §§135.01 to 135.14&lt;sup&gt;152&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Puerto Rico Dealers’ Contracts Law</td>
<td>P.R. Laws Ann. Tit. 10, §§278 to 278e&lt;sup&gt;153&lt;/sup&gt;</td>
</tr>
<tr>
<td>Virgin Islands Consumer Protection Law</td>
<td>V.I. Code Ann. Tit. 12A, §§131 to 139&lt;sup&gt;154&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>152</sup> Wis. Stat. Ann. § 135.03: “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.” See also Wis. Stat. Ann. § 135.02(4): “Good cause” means: (a) Failure by a dealer to comply substantially with essential and reasonable requirements imposed upon the dealer by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement; or (b) Bad faith by the dealer in carrying out the terms of the dealership.”

<sup>153</sup> P.R. Laws Ann. tit. 10, § 278a: “Notwithstanding the existence in a dealer’s contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause.” See also P.R. Laws Ann. tit. 10, § 278d: “Just cause- Non performance 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.”

<sup>154</sup> V.I. Code Ann. Tit. 12A, § 132: “Notwithstanding the terms, provisions, or conditions of any franchise, except as provided in section 133, it shall be a violation of this subchapter for any franchisor directly or through any officer, agent, or employee to terminate, cancel, or fail to renew a franchise except that it shall be a complete defense under this subchapter for the franchisor to prove that the cancellation was for good cause. For purposes of this subchapter, good cause for terminating, canceling, or failing to renew a franchise shall be: (1) failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise which requirements are both essential and reasonable; or (2) use of bad faith by the franchisee in carrying out the terms of the franchise.”
Alejandro Brito

Alejandro Brito is a partner at Zarco Einhorn Salkowski & Brito, P.A., a Miami based franchise law firm. The firm represents franchise and distribution clients in litigation and other forms of dispute resolution throughout the United States. The firm has represented franchisees from almost every major franchise system in the hotel, restaurant, and service industries. The firm has also represented franchise clients from Mexico, France, Holland, Germany, Australia, New Zealand and throughout the Caribbean.

Alex obtained his Juris Doctor degree from the George Washington University in 1996. Alex graduated from Florida International University with a Bachelor of Arts degree in 1993. Currently, Alex litigates franchise, distribution and general commercial disputes in state and federal courts. In addition, Alex has handled numerous franchise disputes in arbitration proceedings throughout the country. Alex has also served as an arbitrator in actions between franchisees and franchisors. He is a member of the Florida Bar and is admitted to practice in United States District Courts for the Southern District of Florida, Middle District of Florida, Northern District of Illinois, and the Eastern District of Wisconsin, as well as the United States Court of Appeals for the Fifth Circuit, Sixth Circuit, Ninth Circuit, and Eleventh Circuit.

Alex has been listed in "The Best Lawyers in America" publication since 2006 and has received a Peer Review rating of "AV" by Martindale-Hubbell, indicating the highest level of legal ability and ethics. Alex has been recognized in the South Florida Legal Guide's Top Lawyers and Florida Trend Magazine's Legal Elite.

Since joining Zarco Einhorn Salkowski & Brito, P.A., Alex has authored several articles discussing legal issues at the forefront of the franchise industry. He is also a member of the Antitrust, Franchise & Trade Regulation Committee of the Business Law Section of the Florida Bar and previously served as its Vice-Chair. Alex is currently the Vice-Chair of the Florida Bar Business Law Section’s Diversity Committee. Alex has also had the privilege of serving as a Director of the Florida Bar Foundation, a 501(c)(3) public charity, and the only statewide organization that provides financial support for legal aid and promotes improvements in addressing the civil legal needs of the poor.
Ronald T. Coleman, Jr.

Ron Coleman is a litigation partner with Parker, Hudson, Rainer & Dobbs in Atlanta, Georgia. He focuses his practice on complex business litigation, particularly in the areas of franchise, intellectual property, and trade regulation litigation. Ron regularly represents franchise clients in a wide variety of matters, including cases involving breach of franchise agreements, good faith and fair dealing, fraud, RICO and antitrust claims, constitutional challenges to state statutes, enforcement of terminations, and intellectual property rights. He also has represented clients in numerous arbitrations, mediations, mini-trials, and other types of ADR processes.

Mr. Coleman has been selected as one of Georgia’s “Super Lawyers” in the area of business litigation by Law & Politics Media since its inception in 2004, based on a survey of other lawyers and evaluation by an independent panel. He also has been selected for Best Lawyers in America (2006-present) and The International Who’s Who of Business Lawyers (2004-present) in the franchise area. He was recognized by Chambers USA 2010 in the area of commercial litigation, and was named one of Georgia’s “Legal Elite” by Georgia Trend magazine in December 2004.

Mr. Coleman has written and spoken extensively on topics in the franchise, intellectual property, and general litigation areas. Mr. Coleman is a member of the American Bar Association's Sections of Litigation and Intellectual Property Law, and the ABA's Forum Committee on Franchising. He has served as a member of the Steering Committee of the Forum on Franchising’s Litigation and Dispute Resolution Division and as a member of the 2006 nominating committee for the Forum’s Board of Governors. He is currently an Associate Editor of the Franchise Law Journal.

Mr. Coleman received his A.B. degree, cum laude, from Duke University in 1983 and his J.D. degree, with honors, in 1986 from the Duke University School of Law, where he was a member of the Editorial Board of the Duke Law Journal. He served as a law clerk to the Honorable James C. Hill, United States Court of Appeals for the Eleventh Circuit in 1986-1987.