INVASION OF THE BURGER DOMOS: WHY THE PEOPLE WHO BROUGHT YOU THE BIG MAC HATE UNIFORMITY IN FRANCHISE RELATIONSHIP LAWS

Dave Olson
MIP Research Paper
Spring Semester 1994

Professor William O. Hennessey
Franklin Pierce Law Center
Concord, New Hampshire 03301

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD, N. H.

JUL 18 1997

I. INTRODUCTION

If one were searching for the perfect all-purpose symbol for the postwar American economy, it would not be a microchip or a Japanese car, it would be the hamburger. [FN1] The hamburger would symbolize the explosive growth of franchising businesses, which include not only the fast-food giants like McDonald's Burger King and Kentucky Fried Chicken, but also a dizzying array of services: motel chains, hair salons, muffler shops, real estate brokers, dry cleaners and even tanning parlors. [FN2] The spread of franchising has paralleled, even made possible, the epochal shift in the American economy from goods to services. [FN3]

Franchising is one of the most remarkable business phenomena of the 20th century. Ninety percent of Americans over twelve eat fast food regularly. [FN4] More than 540,000 franchised businesses dot the American landscape today, with sales totaling more than $758 billion, which equals about one-third of the nation's retail market. [FN5] And it should come as no surprise that franchising has expanded dramatically around the world in the past two decades.

In Beijing, within the sight of Mao's tomb, Kentucky Fried Chicken operates the world's largest fast-food restaurant. [FN6] Domino's Pizza delivers on motor scooters in Tokyo. [FN7] And if you have a burning desire to enjoy a submarine sandwich in Bahrain, there is a Subway outlet to satisfy your craving.

The benefits of franchising may be simply stated, The franchisee, without the expenditure of any capital whatsoever, but instead with an infusion of capital, may engage in rapid system expansion and market penetration. [FN8] This rapidity of growth is normally measured in years rather than decades, as had previously been the case.

The franchisee acquires many benefits as well. He or she is given know-how, training, supervision, name recognition, advertising and (with other franchisees) a collective buying power that otherwise would be nearly impossible to obtain. [FN9] The benefits of franchising for franchisees may perhaps be best illustrated by an amazing statistic: while the average rate of failure for new businesses is 65% within five years from inception, less than 5% of all franchised businesses are discontinued in any year, and frequently for reasons other than failure, such as death, retirement or resale to a third party. [FN9]

Although the franchise revolution does have its critics, it is not the function of this paper to engage in an extensive discussion of its allegedly deleterious effects. It is sufficient to note that one author has asserted: "they (franchises) have helped to rob small towns of their character. They have developed a fast-food diet that ranges from bland to abominable." [FN10]

II. HOW FRANCHISING GOT STARTED

Franchising did not begin with the construction of the first Golden Arches. What Ray Kroc and McDonald's did was to revolutionize a system that had existed for years. Franchising developed in the 1850's. The Singer Sewing Machine Company is generally acknowledged as the first retail franchisor. [FN11] In 1853, Singer established a network of salesmen/dealers who paid Singer for the right to distribute sewing machines in a particular region. Although these arrangements were discontinued after 10 years, the seeds had been sown for the future growth of franchising.

Soft drink bottling, dating back to the 1890's was another early example of a "product franchise." In the early 1900's, automobile dealerships and gas stations developed as additional examples of product franchises.

A second variety of franchising, "business format" franchises took hold and proliferated after 1950. A business format franchise includes a marketing strategy or plan, operating manuals and a uniform business concept. McDonald's is perhaps the best known example of a business format franchise.

III. MODERN FRANCHISING'S SEEDY EARLY DAYS

Although franchising has become widely accepted in the corporate world, it still retains a somewhat unfavorable image with some people primarily because of flagrant early abuses in the 1960's and early 1970's when a number of dubious sellers of franchises cheated investors and consumers.

One franchise failure that received a fairly large amount of media coverage, including an investigative report by the television show "60 Minutes" was that of Wild Bill's, a hamburger franchise that swindled many hopeful franchisees. [FN12] The promoters opened one restaurant, then sold franchises for many others, which were never opened because there was no real support forthcoming from the franchisor. [FN13]

A few of these franchising swindles or mismanagements became front page news, with stories of people being bilked of their life savings and tarnishing the names of unsuspecting backers, notably entertainment figures such as Minnie Pearl and Jerry Lewis. [FN14]

The Minnie Pearl chain never established a strong, standardized operations format. Additionally, its promoters treated money coming in from sales of franchises as current income, thereby creating an erroneous impression of the chain's prosperity. In fact, the accounting practices employed by these promoters

became known as "Minnie Pearling it," a phrase that The Wall Street Journal said may be the company's most lasting contribution to fast food. [FN15]

Some of the largest scams were the pyramid schemes that became something of a fad in the late 1960's and early 1970's. In 1972 Business Week estimated that there were 125 pyramids operating around the country. [FN16] In these schemes, the parent company would sell distributorships to franchisees who purchased the right to sell the dealerships to other subfranchisees. Like a chain letter, each new distributorship paid a fee that was divided between the parent company at the top and the franchisee who made the sale. Eventually, the pyramids collapsed when it was discovered that the companies sold few, if any products. [FN17]

Two of the more infamous examples of pyramid schemes were Holiday Magic and Koscot. The enigmatic and controversial Glenn Turner was the driving force behind Koscot. Turner sold thousands of franchises before he decided what product the company would handle. After reading that mink oil is the closest thing to human skin oil, he found a mink supplier and launched his Koscot brand of cosmetics. [FN18]

Some state attorneys general accused Turner of fraud, contending that with so many distributorships, he had to realize his franchisees stood no chance of earning their money back. Turner promised distributors they would make $100,000 a year, a feat the New York Attorney General later calculated would require franchisees in the state to sell 50,000,000 distributorships in two years. [FN19] New York won a consent decree forcing Koscot to repay 1,604 investors. [FN20] Other states carried out similar actions.

IV. WHAT IS A FRANCHISE?

What is a franchise? Most states consider a franchise to exist whenever a franchisee, in return for a "franchise fee", is granted the right to sell goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and the operation of the franchisee's business pursuant to that marketing plan or system is "substantially associated" with the franchisor's trademark, service mark or other commercial symbol. [FN21]

Seventeen states have adopted franchise relationship laws. [FN22] Although each state's law has a different definition of the term "franchise," most definitions have a combination of the following elements:

1. a marketing plan or community of interest element;
2. a trademark element;
3. a fee element.

Appendix A gives a state-by-state breakdown of the definitional elements of each

franchise relationship law.

The definition of what constitutes a "franchise" varies widely among the various relationship laws. For example, Wisconsin [FN23] covers many dealership and distribution arrangements that would normally nor be considered to be franchises. The relationship laws of Arkansas, Connecticut, Missouri, New Jersey, Virginia and Wisconsin define the term "franchise" without a fee element.
[FN24] Arkansas and Delaware define "franchise" without a marketing plan or community of interest element. [FN25]

It is amazing that such diversity is tolerable to franchisors and franchisees. Compliance under a uniform system of laws would certainly be cheaper than the present patchwork quilt of regulation.

V. THE FTC RULE AND STATE LEGISLATION

Most franchise relationship laws were passed in the mid-1970's, at the same time that several states were enacting laws to protect prospective franchisees concerning the offer and sale of franchises. [FN26] The latter laws are generally referred to as "registration" and/or "disclosure" laws because they require a number of disclosures in the form of a franchise offering circular, and some also require state registration of franchise offerings. [FN27]

While a federal franchise relationship law was proposed as early as 1971, [FN28] no such law has ever been adopted at the federal level. Moreover, there is no federal registration requirement for the sale of franchises.

The Federal Trade Commission (FTC) failed to promulgate a trade regulation on franchising until October 21, 1979, after nearly a decade of proposals and hearings. The FTC determined that the most serious abuses by franchisors related to misrepresentation and failure to disclose material facts. [FN29] The remedy contained in the FTC Rule was pre-sale disclosure. [FN30] The FTC Rule does not require registration, nor does it regulate the relationship between franchisors and franchisees after the purchase of the franchise. [FN31]

Disclosure can be made via a format prescribed by the FTC or by use of the comprehensive 23 item Uniform Franchise Offering Circular ("UFOC") guidelines. [FN32] Compared with the numerous state laws enacted during the 1970's, there has been relatively little new state legislation since the promulgation of the FTC Rule. In fact, some franchisors and commentators contend that the FTC Rule has eliminated the need for state regulation. [FN33]

However, as previously mentioned, the FTC Rule neither regulates franchising practices nor requires registration, the two key aspects of numerous state regulatory schemes. [FN34] The FTC Rule is inadequate because many franchising problems

arise during the relationship, not just at its formation. [FN35] Moreover, while disclosure is a fundamental step toward providing some information to prospective franchisees, only franchisor registration provides for public exposure and gives authorities the chance to examine franchisor information to ensure that it meets the disclosure standards. [FN36]

Relatively little new franchise legislation was enacted during the 1980's, although many bills were introduced both at the state and federal levels. Instead, there has been a legislative reaction to the patchwork of inconsistent state legislation enacted in the 1970's. [FN37] Two state actually repealed the administrative review and registration requirements of their franchise disclosure laws: Michigan in 1984 and Illinois in 1987. [FN38] Both states now have simple notice filing requirements.

In 1983, The National Conference of Commissioners on Uniform State Laws ("NCCUSL"), author of the Uniform Commercial Code ("U.C.C.") initiated an effort to create uniformity among the state franchise laws. The NCCUSL approved the final version of the Uniform Franchise and Business Opportunities Act ("UFBOA") in 1987. [FN39] UFBOA requires a simple notice filing with the appropriate state agency in connection with franchise sales and includes a private cause of action for violation of the Act, which does not exist for violation of the FTC Rule. In the area of franchise relationships, the Act codifies the common law covenant of good faith and fair dealing rather than mandating good cause and procedural requirements similar to those contained in a number of existing state franchise relationship laws. [FN40]

Passage of UFBOA by those states that have franchise laws would go a long way toward eliminating the inconsistencies in franchise regulation and reducing the high cost of compliance for franchisors. [FN41]

Unfortunately, the NCCUSL is unlikely to enjoy the success in the field of franchising that it achieved in the field of commercial law with the U.C.C. To date, no state has adopted UFBOA. [FN42] Prior to adoption, UFBOA underwent many revisions and is the subject of harsh criticism from many commentators, regulators, franchisees and franchisors. Even many of UFBOA's proponents acknowledge that "absent further federal intervention, uniformity is a mythical goal." [FN43]

One commentator wrote, "While the Uniform Act received intense scrutiny during its fabrication, its many compromises engendered opposition from virtually every quarter. Therefore, it has no constituency to advocate its enactment, and its reception to date in the state legislatures has been uniformly negative." [FN44]

In remarks at the American Bar Association's Fifth Annual Forum on Franchising in 1982, one speaker criticized the regulatory environment as "a maze with minimal benefits to the public" and listed seven interest groups - franchisors, franchisees, state legislators, state franchise administrators, state securities laws

administrators, the FTC and Congress - as being predisposed against change, "like a street gang...out to protect its turf." [FN45] Twelve years later these comments still ring true. It is not realistic to hope that such ideological gridlock will be broken anytime soon.

Franchisors object to good cause requirements as an intrusion on their right to contract freely. They need to exercise quality control. Franchise agreements are almost always trademark license agreements. Franchisors contend that a trademark license must require quality control if the licensor is to maintain its trademark rights. The threat of termination or nonrenewal is the "stick" whereby the franchisor enforces quality and protects the trademark. The relationship laws place the burden on the franchisor to prove there was good cause. This makes termination more difficult and costly even where good cause exists.

Neither franchisors nor franchisees value uniformity if it comes at the expense of what they consider generally more favorable, though diverse state laws. [FN46] This conclusion is demonstrated emphatically by franchisor and franchisee opposition to UFBOA. Fear of an uncertain, potentially unfavorable franchising law exceeds their desire to reform the existing patchwork quilt of disclosure and registration statutes.

VI. PROPOSED FEDERAL FRANCHISE DISCLOSURE AND RELATIONSHIP LEGISLATION

Over the past several years, Representative John LaFalce, D-N.Y., Chairman of the House Small Business Committee, has been conducting hearings concerning fraudulent and abusive franchise practices. The products of those hearings are the Federal Disclosure and and Consumer Protection Act (H.R. 5232) and the Federal Fair Franchise Practices Act (H.R. 5233), both of which were introduced in the U.S. House of Representatives on May 21, 1993.

The proposed Federal Franchise Disclosure and Consumer Protection would expand on the current requirements of the FTC Rule. This law would provide a federal civil right of action to persons injured by fraud, deceptive practices, misrepresentations, discrimination or violation of various disclosure requirements. This private right of action does not exist under the FTC Rule. This proposed law would also require franchisors to include some form of earnings representation in their franchise disclosure documents.

The proposed Federal Fair Franchise Practices Act would also create a federal private right of action for violations, would impose a duty on all parties to the franchise agreement to act in good faith, and would impose upon franchisors a duty to exercise due care and common standards of competence in all aspects of its relationships with its franchisees. This Act would also prohibit termination without good cause and limit the right of franchisors to require purchases from

designated sources.

It goes without saying that the International Franchise Federation is adamantly opposed to both bills. They contend such legislation will undermine the ability of small and emerging companies to use franchising as a method of distributing their products or services. They are also critical of additional government regulation and its associated costs. Franchisees and consumer groups assert that these two bills merely create a level playing field.

VII. THE GOOD CAUSE REQUIREMENT FOR FRANCHISE TERMINATION

Most of the franchise relationship laws require that the franchisor have "good cause" before terminating a franchise agreement. This requirement is a source of friction between franchisors and franchisees resulting in occasional litigation.

Good cause is defined in Minnesota, New Jersey and Wisconsin as failure by the franchisee to "substantially comply" with the requirements imposed by the franchisor. [FN47] The new Iowa Franchise Act defines good cause as a franchisee's failure to comply with any "material lawful requirement" of the franchise agreement. [FN48] The Virginia Retail Franchising Act prohibits termination without "reasonable cause." [FN49] The Delaware Franchise Security Law prohibits "unjust" termination, which means termination without good cause or in bad faith. [FN50] Mississippi and Missouri do not have a good cause requirement for franchise termination, but do have a notice requirement of 90 days. [FN51]

VIII. CASES INTERPRETING THE GOOD CAUSE REQUIREMENT

The two major areas where disputes arise between franchisors and franchisees in states whose franchise laws have a good cause requirement are payment of royalties and problems concerning quality control.

In Hacienda Mexican Restaurant of Kalamazoo Corp. v. Hacienda Franchise Group, Inc., [FN52] the franchisor terminated its franchisees for defaulting on royalty payments. According to the terms of the franchise agreement, the franchisor had the unilateral right to terminate the franchises upon three defaults in any 18 month period without giving the franchisees notice or an opportunity to cure. The franchisees defaulted by making three late royalty payments approximately three months after their franchise restaurant opened. In each instance the franchisees paid their royalties at least seven days later than the due date.

When the third royalty payment was late, the franchisor notified the franchisee that their agreement was terminated because of the defaults. The franchisees brought their royalty payments current and continued operations. However, the franchisor sued and was granted a preliminary injunction enjoining the franchisees

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD N. H.

from operating a Hacienda restaurant.

On appeal to the Indiana Court of Appeals, the franchisees claimed that termination for late royalty payments was not "good cause" as defined by the Indiana Deceptive Practices Act. [FN53]

The court rejected the franchisees' argument and affirmed the injunction. Noting that the Indiana statute permitted contractual provisions allowing unilateral termination for "good cause" and that the statute did not limit good cause to material violations, the court held:

> "The franchisees had breached the agreement by defaulting three times; therefore, [the franchisor] demonstrated that it had properly terminated the franchise agreement." [FN54]

Proponents of franchise relationship laws where termination for good cause is only permitted for "substantial" or "material" violations of the franchise agreement contend that the Hacienda decision allows a franchisor to terminate its franchisee without judicial intervention whenever the franchisee fails to comply with a contractual provision, regardless of its substance.

After all, if good cause includes, but is not limited to, material violations, a court would conceivably never have to define materiality. Assuming that the purpose of the Indiana Deceptive Practices Act is to protect franchisees from arbitrary and capricious termination by franchisors, franchisee protection is somewhat illusory.

Similarly, an Illinois federal district court was presented with the same question in Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd. [FN55] In Great American, the franchise agreement allowed termination upon three contractually defined material breaches or defaults during a 12 month period. After three notices of default concerning late payment of royalties, quality control problems and underreporting of sales (upon which royalties are based), the franchisor terminated the franchise agreement. However, the former franchisee continued to sell cookies, even when it ran out of Great American batter (referred to as "counterfeit cookies" in the court's opinion). [FN56]

Great American filed suit alleging unauthorized use of its trademark and breach of contract. River Valley (the franchisee) counterclaimed, alleging that Great American violated the Illinois Franchise Disclosure Act (IFDA) [FN57] by improperly terminating its franchise. The court granted a preliminary injunction to River Valley based upon an interpretation of the good cause standard articulated in another Illinois case, Dayan v. McDonald's Corp. [FN58] Dayan held that "good cause" means failure to substantially comply with obligations under the franchise agreement and centers on a determination of "commercial reasonability."

the legislature on the other side." [FN62]

Rejecting the dissent's interpretation of the facts, Judge Posner vigorously asserts that such views are unrealistic and counter-productive. He contends as follows:

> The more difficult it is to cancel a franchise, the higher the price that franchisors will charge for franchises. So in the end the franchisees will pay for judicial liberality and everyone will pay for the loss of legal certainty that ensues when legal principles are bent however futilely to redistributive ends.
> The idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power. It comes from failing to consider the full consequences of of legal decisions.
> Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future, because franchisors will demand compensation for bearing onerous terms" [FN63]

The rejection of the "commercial reasonability" test in Great American is a major blow to franchisees and places them at a distinct disadvantage in disputes over what constitutes "good cause" for termination of a franchise. It would seem obvious that enactment of uniform state or federal franchise legislation defining "good cause" might well reduce franchisor-franchisee litigation concerning termination of the franchise relationship.

It is lamentable that there is no groundswell of public opinion for such legislation. However, as previously demonstrated, perceived economic self-interest seems to have prevailed over logic on this particular point.

IX. ENCROACHMENT: THE PENALTY FOR BEING TOO SUCCESSFUL

Relationship laws in several states extend beyond issues of termination and non-renewal and address such aspects of the franchise relationship as discrimination among franchises, the right to join franchisee associations and encroachment. [FN64] Mature franchise systems that are fortunate enough to achieve market penetration and enjoy significant name recognition and consumer goodwill often confront a new problem - encroachment.

Franchisees who once demanded additional unit development suddenly object to the development of any additional units on grounds that they will have a negative impact on the sales or profitability of existing units. [FN65] Franchisors are

experiencing increasing difficulty in determining when a new unit is deemed to encroach on an existing unit. This trend would appear to contradict a statement attributed to Ray Kroc: "Saturation is for sponges." [FN66]

Until recently, a franchisor whose franchise contract provided that the franchisee was not granted an exclusive or protected area within which the franchisor would not develop additional units could be relatively confident that it could develop units without fear of liability for encroachment. A franchisor was thus able to direct its efforts toward enhancing name recognition and consumer goodwill in an effort to meet competition. [FN67] Recently, however, the Iowa Franchise Act as well as a number of court decisions have injected an element of uncertainty into the concept of encroachment.

Section 6 of the Iowa Franchise Act states that notwithstanding the terms of a franchise agreement, if a franchisor seeks to establish a new outlet within an "unreasonable proximity" of an existing franchisee, the existing franchisee, at the option of the franchisor, shall have a right of first refusal with respect to the proposed new outlet, or a right to compensation for market share diverted by the new outlet. [FN68] As applied to a food service establishment franchisor, "unreasonable proximity" includes but is not limited to "the shortest distance as measured by the following methods":

1. a three-mile radius, using a straight line measurement, from the center of an already existing franchise;

2. a circular radius, using a straight line measurement, from the center of an already existing franchise business which comprises a population of thirty thousand or greater. [FN69]

It must be noted that while a United States District Court in McDonald's Corp. v. Nelson [FN70] barred retroactive application of the Iowa Franchise Act, it also upheld the constitutionality of the the nation's first statutory standard concerning encroachment. Whether the franchise relationship laws of other states incorporate such a standard remains to be seen. It is certain, however, that if and when they take such action, there will be no uniform standard. Once again, "marvelous diversity" will likely be the order of the day.

Several recent court decisions have dealt with the issue of encroachment. In Scheck v. Burger King Corp., [FN71] the court held that a general release given by a franchisee did not bar claims based on an implied non-encroachment clause of the franchise agreement, because those claims had not matured at the time the general release was executed. The court held that the duty of non-encroachment was implied by the terms of the franchise agreement although the contract did not grant an exclusive territory.

The court also held that the franchisor's opening of a new franchise two miles away from plaintiff's store might have breached the implied covenant of good faith and fair dealing. Even though the franchise agreement expressly denied the grant of any exclusive territory, the provision was held not to allow the franchisor to open additional stores regardless of the impact they might have on the operations of an existing franchisee. The court stated that:

> The express denial of an exclusive territorial interest to Scheck does not imply a wholly different right to Burger King - the right to open other proximate franchises at will regardless of their effect on the Plaintiff's operations. It is clear that while Scheck is not entitled to an exclusive territory, he is entitled to expect that Burger King will not act to destroy the right of the franchisee to enjoy the fruits of the contract. [FN72]

In Re/Max of Georgia, Inc. v. Real Estate Group on Peachtree, Inc. [FN73], the court held that a franchisor had breached its agreement with a franchisee by failing to protect the franchisee's exclusive territory against encroachment by another franchisee. The court held that the franchisor had a duty to protect the franchisee against encroachment on its territory by another franchisee, even though the other franchisee did not operate its office within the exclusive territory under the Re/Max name.

Encroachment has the potential to be one of franchising's most litigated issues in the future as franchisors seek to maximize the number of units and franchisees perceive such a development as unfair competition. The dearth of statutes or regulations covering this subject would seem to guarantee frequent litigation over what constitutes encroachment. Although franchisors and some franchisees may not be happy with the encroachment standard embodied in the Iowa Franchise Act, it at least provides a tangible definition easily understood by all parties involved.

X. CONCLUSION

The exponential growth of franchising has outpaced the development of a legal theory to deal with the franchisor-franchisee relationship. Most observers agree that it is inefficient and expensive for regulation of franchise relationships to vary so much from state to state. Multistate franchisors are forced to run a gauntlet of disclosure formats, registration requirements and franchise relationship laws. Unfortunately, a fear of change by the parties involved guarantees continuation of this diverse state regulation.

The best solution is to adopt federal legislation that will preempt all state regulation. It is time to enact both the proposed Federal Franchise Disclosure and

Consumer Protection Act as well as the Federal Fair Franchise Practices Act. Adoption of uniform national regulation will provide certainty not found in the present regulatory environment and will reduce the cost of compliance for franchisors.

FN1. S. Luxenberg, Roadside Empires: How The Chains Franchised America (1985), jacket notes.

FN2. Id.

FN3. Id. As Daniel Bell points out in The Coming of Post-Industrial Society, at the turn of the century 7 out of 10 American workers were engaged in production of goods, laboring in fields, mines and factories. The other 30 percent of workers were in the service sector, attending to goods produced by others. After 1920 the number of jobs in industry increased, but the percentage of jobs claimed by the goods sector declined. By 1950, employment was evenly divided between goods and services.

FN4. C. Shook and R.L. Shook, Franchising - The Business Strategy That Changed The World (1993), at page 1.

FN5. Id.

FN6. J. Naisbitt and P. Aburdene, Megatrends 2000: Ten New Directions For The 1990's (1990), at page 123.

FN7. Id. at 124.

FN8. D.J. Kaufman, An Introduction To Franchising and Franchise Law (1992), at page 5.

FN9. International Franchise Association, "Answers to the 21 Most Commonly Asked Questions About Franchising" (1984) citing Department of Commerce and Small Business Administration figures.

FN10. Luxenberg, supra note 1, at 9.

FN11. D. Boroian and P. Boroian, The Franchise Advantage (1987), at page 28.

FN12. Id. at 32.

FN13. Id.

FN14. Luxenberg, supra note 1, at page 222.

FN15. Id. at 224.

FN16. Id.

FN17. Id. at 225.

FN18. Id.

FN19. Id. at 227.

FN20. Id. at 228.

FN21. Kaufman, Introduction to Franchising and Franchise Law, supra, at page 16.

FN22. Seventeen states have statutes governing franchise termination. Ark. Code Ann. ss 4-72-202 (7) - 204 (a) (1) (Michie 1991); Cal Bus. & Prof. Code s 20,020 (West 1989); Conn. Gen. Stat. Ann. s 42-133f (a) (West 1989); Del. Code Ann. tit. 6, s 2552 (a) (1990); D.C. Code Ann. ss 29-1201 - 1208 (1989); Haw. Rev. Stat. s 482E-6 (1988); Ill. Rev. Stat. ch. 121 1/2 para. 1718-20 (Smith-Hurd Supp. 1991); Ind. Code Ann. s 23-2-2.7-1 (1991); Ia. Rev. Code tit. 20, ss 523B.1 et seq (1990); Mich. Comp. Laws s 445.1527 (West 1992); Minn Stat. s 80C.14 (1993); Miss. Code Ann. s 75-24-53 (1987); Mo. Rev. Stat. ss 407.400 to .420 (Vernon 1990); Neb. Rev. Stat. ss 87-401 to -410 (1989); N.J. Rev. Stat. ss 56:10-1 to :10-12 (West 1991); Va. Code Ann. 13.1-557 (Michie 1989); Wash. Rev. Code Ann. s 19.100.180 (West 1992); Wis. Stat. Ann. ss 135.02 (4), -.03 (West 1989).

FN23. See, e.g. Bush v. National School Studios, 139 Wis. 2d 635, 407 N.W. 2d 883 (Wis. 1987) holding that a school portrait photographer was a "dealer" under the Wisconsin Fair Dealership Law ("WDFL") even though the company under whose name he worked considered him to be an employee.

FN24. Ark Code Ann. ss 4-72-202 (7) - 204 (a) (1) (Michie 1991); Conn. Gen. Stat. Ann. s 42-133f (a) (West 1989); Mo. Rev. Stat. ss 407.400 to .420 (Vernon 1990); N.J. Rev. Stat. ss 56:10-1 to :10-12 (West 1989); Va. Code Ann. 13.1-557 (Michie 1989); Wis. Stat. Ann. ss 135.02 (4), -.03 (West 1989).

FN25. Ark. Code Ann. ss 4-72-202 (7) - 204 (a) (1); Del. Code Ann. tit. 6, s 2552 (a) (1990).

FN26. Franchise relationship laws reflect a legislative perception that franchisors possess most of the bargaining leverage and may abuse this power. These regulatory statutes typically give franchisees some protection against arbitrary and capricious termination. In most cases, these laws bar franchisors from cancelling or refusing to renew franchises except for "good cause".

FN27. The California Franchise Investment Law, passed in 1970, was the first

registration and disclosure law governing franchise sales. A number of other states also enacted franchise registration and disclosure laws during the 1970's. Most of the state relationship laws were enacted in the 1970's as well, either separately or as part of the registration and disclosure laws.

FN28. See Lockerby, Franchise Termination Restrictions: A Guide for Practitioners and Policy Makers, 30 Antitrust Bull. 791, 802 (1985).

FN29. R.W. Emerson, Franchising and the Collective Rights of Franchisees (1990), at page 5.

FN30. 16 C.F.R. ss 436.1 - 436.3 (1990).

FN31. T.M. Pitigoff, Franchise Relationship Laws: A Minefield For Franchisors (1989), at page 2.

FN32. The UFOC was adopted on September 2, 1975 by the Midwest Securities Commissioners Association, now the North American Securities Administrators Association. See Appendix B for a complete list of required disclosures in UFOC.

FN33. See, e.g., Downs, Franchise Regulation: Comprehensive State Regulation Now Unnecessary, 49 UMKC L. Rev. 292 (1981).

FN34. Emerson, supra note 29, at 5.

FN35. Id.

FN36. Id.

FN37. Pitigoff, supra note 31, at 2.

FN38. Id.

FN39. Id.

FN40. Id. at 3.

FN41. Id.

FN42. Id.

FN43. R. Barkoff, Walking the Uniform Franchise and Business Opportunities Act to and Through the State Legislatures, Franchise L.J. (Winter 1988), at page 7.

FN44. Selden, Public Regulation of Franchising: Choking the Goose that Lays the

Golden Eggs?, Franchise L.J. (Fall 1989), at page 1.

FN45. R. Barkoff, Franchise Sales Regulation: A Revisionist's Approach, Remarks at the ABA's Fifth Annual Forum on Franchising (November 4, 1982).

FN46. Emerson, supra note 29, at 6.

FN47. Minn. Stat. Ann. s 80C.14 (b) (West 1993); N.J. Rev. Stat. s 56:10-5 (1991); Wis. Stat. Ann. s 135.02 (4) (1989).

FN48. Iowa Code Ann. ch 523H, s 7 (1) (1992).
FN49. Va. Code Ann. s 13.1-564 (1989).

FN50. Del. Code Ann. tit. 6 s 2552 (b) (1990).

FN51. Miss. Code Ann. s 75-24-53 (1990); Mo. Rev. Stat. ss 407.400 to .420 (1989).

FN52. 569 N.E. 2d 661 (In. Ct. of App. 1991).

FN53. Id. at 665.

FN54. Id. at 667.

FN55. 970 F. 2d 273 (7th Cir. 1992).

FN56. Id. at 282.

FN57. Ill. Ann. Stat. ch 121 1/2 para. 1719 (Smith-Hurd Supp. 1991). Termination of a franchise except for "good cause" violates the statute. "Good cause" is defined according to whether notice and an opportunity to cure a default is required. In this case, the court applied P 1719 (c) (4): "Good cause shall include, but without the requirement of notice and an opportunity to cure, situations in which the franchisee...repeatedly fails to comply with the lawful provisions of the franchise or other agreement."

FN58. 466 N.E. 2d 958 (App. Ct. of Ill. 1984).

FN59. Id. at 964.

FN60. 970 F. 273, supra, at 278.

FN61. Id. at 278 - 279.

FN62. Id. at 282.

FN63. Id.

FN64. G.L. Knack and T.A. Bader, Franchisor Liability in the Market Development and Site-Selection Process: Location, Location...Liability? Franchise L.J. (Fall 1993), at page 41.

FN65. Id.

FN66. Boroian, supra note 11, at 149.

FN67. Knack and Bader, supra, note 64, at 41.
FN68. Iowa Stat. Ann. s 523H.6. (1992).

FN69. Id. at sub. (1).

FN70. 822 F. Supp. 597 (S.D. Iowa 1993).

FN71. 756 F. Supp. 543 (S.D. Fla. 1991), motion for reconsideration denied, 798 F. Supp 692 (S.D. Fla. 1992).

FN72. Id. at 548.

FN73. 415 S.E. 2d 698 (Ga. App. 1991).

Appendix A

ELEMENTS OF FRANCHISE RELATIONSHIP LAWS

	Trademark License	Marketing Plan/ Community of Interest	Franchise Fee
Arkansas	Y	N	N
California	N	Y	Y
Connecticut	Y	Y	N
Delaware	N	N	Y
D.C.	Y	Y	Y
Hawaii	Y	Y	Y
Illinois	N	Y	Y
Indiana	N	Y	Y
Iowa	Y	Y	Y
Michigan	N	Y	Y
Minnesota	N	Y	Y
Mississippi	Y	Y	Y
Missouri	Y	Y	N
Nebraska	Y	Y	Y

New Jersey	Y	Y	N
Virginia	N	Y	N
Washington	Y	Y	Y
Wisconsin	N	Y	Y

Appendix B

REQUIRED DISCLOSURES IN UFOC

1. The franchisor and predecessors.

2. Identity and business experience of persons affiliated with the franchisor: franchise brokers.

3. Litigation.

4. Bankruptcy.

5. Franchisee's initial franchise fee or other initial payment.

6. Other fees.

7. Franchisee's initial investment. –

8. Obligations of franchisee to purchase or lease from designated sources.

9. Obligations of franchisee to purchase or lease in accordance with specifications.

10. Financing arrangements.

11. Obligations of the franchisor; other supervision and/or assistance on services.

12. Exclusive area or territory.

13. Trademarks, service marks, trade names, logotypes and commercial symbols.

14. Patents and copyrights.

15. Obligation of the franchisee to participate in the actual operation of the franchise business.

16. Restrictions on goods and services offered by franchisee.

17. Renewal, termination, repurchase modification and assignment of the franchise agreement and related information.

18. Arrangements with public figures.

19. Actual, average, projected or forecasted franchisee sales, profits or earnings.

20. Information regarding franchises of the franchisor.

21. Financial statements.

22. Contracts.

23. Acknowledgement of receipt by prospective franchisee.