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A m e r i c a n   B a r   A s s o c i a t i o n   •   F o r u m   o n   F r a n c h i s i n g

## Message from the Chair

Eric H. Karp, Witmer Karp Warner and Ryan, LLP



**ERIC H. KARP**  
Witmer Karp Warner and  
Ryan, LLP

**A**s you read this, planning for the 41st Annual Forum on Franchising at the Omni Hotel and Resort in Nashville, Tennessee is well underway. The plenary and workshop programs have been finalized, speakers have been chosen and venues for our social events have been locked down. This year's co-chairs, Mike Gray and Julie Lusthaus, are doing a wonderful job and we are all looking forward to seeing you in Nashville, October 10 – 13, 2018 for what promises to be a highly informative and innovative Annual Forum.

In my most recent Message in this space, I delivered the second installment of the Transparency Initiative, explaining how the Governing Committee, working closely with its Planning Committee, chooses the speakers for the Annual Forum. The goal of the Transparency Initiative is to deliver more detailed information on how the Governing Committee operates as a steward of the Forum's guiding principles of providing high quality continuing legal education marked by rigorous scholarship, thorough research and outstanding writing, as well as engaging and rewarding network opportunities.

This third installment of the Transparency Initiative will focus on how the Forum manages its financial resources in order to fulfill its mission.

The American Bar Association's practice specific-entities are generally organized based on the size of their membership and include 21 Sections, seven Divisions and six Forums. Each entity has a finance or budget officer responsible for preparing a budget and reporting on revenues and expenses. The fiscal year of the ABA and of the Forum ends on August 31 of each year. The Forum's current Finance Officer is Mike Gray. The Forum Chair and Finance Officer attend an annual meeting of the ABA Section Officers Counsel each year in September, giving the Finance Officer the opportunity to stay informed

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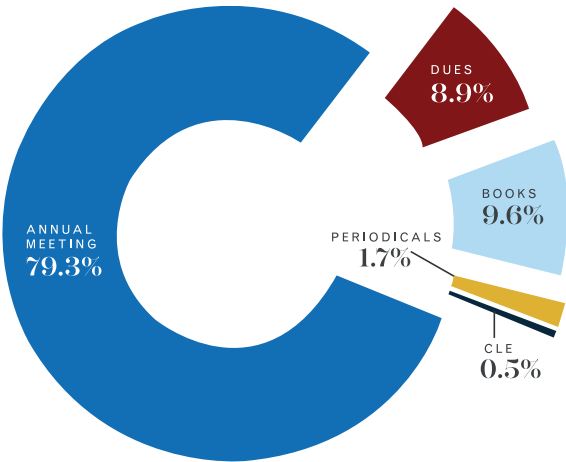
about ABA financial reporting and to compare best practices with other finance officers.

The Forum’s goal is to manage its finances in a responsible and conservative fashion that maximizes its opportunities to deliver value to its members. What follows is an overview of the Forum’s revenue and expenses based on our fiscal year 2018 budget.

The largest single source of our revenue is the Annual Forum. It is the centerpiece of our year and we are fortunate to attract more than 50% of our lawyer members to our Annual Forum every year. There is no other Section, Division or Forum in the American Bar Association that can rival that achievement. Not surprisingly, we devote the preponderance of our expenses and our energy to that event, which consistently achieves high ratings from its attendees. For example, respondents to our Palm Desert Annual Forum survey were asked, on a scale of 1 to 10, whether they were likely to recommend that others attend the next Annual Forum. The mean score was 8.96.

As the chart below demonstrates, dues account for approximately 9% of our revenue. These funds are derived from the extra \$50 that each of our members pay to the ABA in order to belong to the Forum.

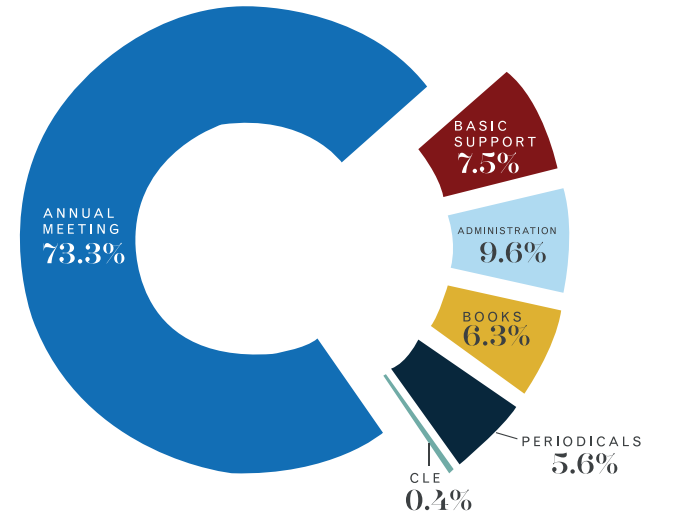
FORUM ON FRANCHISING REVENUE



Our books generate just under 10% of our revenue and our periodicals about 1.7%. CLE revenue, mainly derived from webinars, accounts for less than 1% of revenue.

The Annual Forum consumes 73% of our expenses, but it is intended to provide a modest profit which helps fund other vital functions of the Forum. In addition, our expenditures on books are 5.6% of our expenses, and our periodicals 6.3%, meaning that books generate a modest profit and periodicals a modest deficit, which more or less cancel each other out. The balance of the Forum’s expenses relate to allocations for Basic Support (ABA staff salaries and office overhead) as well as Administration expenses associated with the operation of the Governing Committee. Administration expenses include those associated with the Planning Committee meeting in December of each year, a midwinter meeting devoted to planning the Annual Forum, and a Spring site visit

FORUM ON FRANCHISING EXPENSES



to choose future Forum venues. These expenses are summarized on the chart which appears above.

It is my hope that you will find this information informative and that the Transparency Initiative will allow all members of the Forum to gain a better understanding of how this organization operates in a fashion to fulfill its stated mission, to be the preeminent forum to study and discuss the legal aspects of franchising.

I earnestly solicit your input, questions and suggestions on this Transparency Initiative or on any other aspect of the Forum’s events, publications, periodicals or other activities. I can always be reached by email at [ekarp@wkwrlaw.com](mailto:ekarp@wkwrlaw.com).





# SAVE THE DATE

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MARK  
YOUR  
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FOR THE

## 41<sup>st</sup> Annual Forum on Franchising

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NASHVILLE, TN | Oct 10-12 2018

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# Brexit and Franchising: Top 5 Considerations for Franchisors in 2018

By Gordon Drakes, Fieldfisher LLP

INTERNATIONAL  
SPOTLIGHT

Since the United Kingdom (“UK”) voted to leave the European Union (“EU”) on June 23, 2016, “Brexit” and what it may or may not mean has dominated the national conversation. Terms such as “Hard Brexit,” “Soft Brexit,” and even “Red, White and Blue Brexit” have entered the lexicon. But almost 18 months after the vote to leave, we are still some way from knowing what Brexit will look like and the impact it is going to have on franchisors doing business in the UK.

At the beginning of this year, the UK Government signaled for the first time that the UK will be looking to leave the single market (referred to as the “European Economic Area” or “EEA”) and possibly some or all of the customs union (which will free the UK to enter into its own trade deals), whilst trying to retain as much access as is possible to the EEA.

On March 30, 2017, the UK Government published the Great Repeal Bill (the “Bill”). The Bill will repeal the 1972 European Communities Act, which took the UK into the EU and meant that European law took precedence over laws passed in the British parliament. The Bill will also end the jurisdiction of the Court of Justice of the European Union (“CJEU”). If the Bill passes into legislation—and at the time of writing this is dominating the legislative process in the UK—any existing EU law which has effect in the UK will continue to do so after Brexit.

In September 2017, in an attempt to provide greater certainty on a variety of issues, the EU Commission Task Force, which focuses on the preparation and conduct of negotiations with the UK, issued a position paper on IP and Brexit (the “Paper”). Based on the Paper and the Bill, this article identifies five key Brexit issues which all franchisors doing business in the UK and/or EU should be considering now.

## 1. THE POTENTIAL IMPACT ON INTELLECTUAL PROPERTY RIGHTS

### Trademarks and Design Rights

The jurisdictional scope of both the European Union

Trademark (“EUTM,” formerly Community Trademark) and the Registered Community Design (“RCD”) are defined by reference to the Member States of the European Union. This means that on leaving the European Union, the UK will no longer form part of the EUTM and RCD systems.

New EUTM and RCD filings made following a Brexit will not cover the UK. Separate national applications would be needed to secure protection in the UK. This is likely to lead to additional costs for businesses that will now need to make two separate applications to obtain protection in the EU and UK where previously a single application was sufficient. There is also likely to be an increased burden on the UK intellectual property office due to the increased number of UK trademark and design applications. This may create administrative pressures and delays. However, it is possible that many trademark applications would proceed via the Madrid Protocol and possibly be based on existing or new EUTMs.

There are many existing EUTMs and RCDs that currently cover the UK. The Paper takes the position that any intellectual property right granted prior to the UK’s exit should still be enforceable in relation to the UK. What happens in the long term is not clear, since the holders of national rights in the UK will be unable to challenge EUTMs and will therefore be prejudiced by such an arrangement. In the longer term it is likely that there will be a grace period during which existing EUTMs may be re-registered as national UK trademarks with no loss of priority. This is similar to the solution adopted in other cases where a country has seceded from a multi-jurisdictional trademark system.

Brexit may also affect the validity of EUTM marks that have only been used in the UK. Assuming the UK does leave the system, if a EUTM is more than five years from registration it will be vulnerable to cancellation from the EUTM register and will not be enforceable if it is not in genuine use in any other EU territory, as the UK use will no longer maintain it. If keeping a EUTM enforceable and maintaining its priority is important to a business then they might



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consider putting the EUTM registration into use by way of a franchise arrangement in an EU member state. An interest in maintaining the EUTM by showing genuine use in the EU may affect plans or decisions about franchise partners in the EU.

Finally, the rules on exhaustion of trademark and design rights currently apply across the EEA. These rules prohibit intellectual property owners from prohibiting the resale of goods using their intellectual property within the EEA. However, if the UK is not part of the EEA, then EUTMs and RCDs, as well as rights in force within EU Member States, could be used to prevent goods placed on the market in the UK from being resold in EU Member States, which is likely to lead to price differentials. However, the Paper has the stated position of ensuring that intellectual property rights which were exhausted in the EU prior to Brexit should remain exhausted in the EU and in the UK territory.

### Copyright and Case Law

There are no copyright registrations in the UK, so issues regarding the conversion of EU registrations do not arise. However, copyright laws are still at least partly harmonized across the EU with a number of EU Directives and a large amount of CJEU case law on key issues. The European Commission has also launched its “Digital Single Market” strategy, which includes a set of copyright reforms aimed at a more harmonized regime.

As seems likely, if the UK post-Brexit will not be party to the EEA and EFTA, its judges would no longer be required to interpret its legislation in line with EU Directives and guidance from the CJEU and EFTA courts. In some areas, the UK courts might be content to continue to apply the CJEU guidance and keep UK case law in line with the rest of Europe. However, this would no longer be a requirement and we would likely see a gradual divergence of UK law in other areas. This would also be the case for patents, trademarks and designs where much case law is harmonized through the CJEU. This divergence would also be exacerbated by the UK not being party to the EU’s policy changes such as the current Digital Single Market reforms and push for a harmonized trade secrets law.

### Trade Secrets

Brexit should have minimal impact on the current legal framework in the UK governing confidential information, and its subset of trade secrets. The law in this area has principally developed through English

case law and as such remains largely uninfluenced by EU legislation. The UK provides a high standard of protection for confidential information.

EU Member States are in the process of implementing the Trade Secrets Directive, which seeks to implement new rules to increase protection of trade secrets and undisclosed business information in the EU. Such measures will include the power to remove goods from the market that have been made using illegally obtained trade secrets. Measures will also address compensation for owners. The UK Government will not be enacting any national laws to implement the new Directive and so UK law may start to diverge over time from EU law, but all businesses will benefit from improved and better harmonized enforcement measures across the remaining Member States.

## 2. DATA PROTECTION

The underlying commercial arrangements governed by many franchise agreements will include the collection and use of data from European citizens. Businesses, whether established in the EU or not, should already be aware that the legal landscape changed with the introduction of the EU General Data Protection Regulation (“GDPR”), which will become effective on May 25, 2018. While this is an EU Regulation, the UK Government has confirmed its intention to apply the GDPR despite Brexit. When it comes into effect, the GDPR will apply to every business, whether in the EU or not, that offers goods and services to EU citizens or that monitors EU citizens’ behavior. Therefore, international franchise businesses operating across the UK and the EU will be subject to the GDPR requirements.

If the UK doesn’t stay part of the EEA, then it will in effect become a “third country” for data protection purposes—meaning that data transfers from the EEA to the UK could be restricted in the same way as data exports from the EEA to the US. Or, more accurately, they’ll be restricted unless the EU Commission decides that the UK provides “adequate” protection for data it imports from the EEA, as is the case currently with countries like Canada and New Zealand. This strengthens the case for the UK to continue down the path of implementing the GDPR and resisting any temptation to develop a watered down version of the regulation, otherwise it will risk not achieving “adequacy” recognition by the EU, seriously impacting data flows between the UK and the EU.

### 3. ANTITRUST/COMPETITION LAW

EU competition law prohibits anti-competitive agreements and abuses of a dominant position. In the context of franchising, EU competition law most commonly has an impact on:

- Territorial and customer restrictions that franchisors wish to impose on franchisees. While franchisees can be protected within exclusive territories from active sales by other franchisees in their territories, franchisees cannot be prevented from engaging in passive sales (responding to unsolicited orders) from anywhere within the EEA. Online sales also cannot be restricted within the EEA.
- Pricing restrictions on franchisees. Requiring franchisees to comply with fixed or minimum resale prices is strictly prohibited except in certain very limited circumstances.
- In-term and post-term non-compete clauses. These are permitted in order to protect the know-how transmitted by the franchisor to the franchisee provided that, in the case of post-term restrictions, they are reasonable in duration and scope.

Post-Brexit, these rules will continue to apply to any franchising agreement that has or may have an effect on trade between the remaining EU Member States. This could include agreements with a UK element if they cover, or could have effects, in multiple EU Member States.

For purely UK agreements, it would be open to the UK to depart from the strictures of EU competition law and adopt a more or less onerous regime. At present the UK Government's intentions for the future of competition law in the post-Brexit era are not known. However, it is thought unlikely that in the short term post-Brexit there is likely to be significant change. UK competition law, as embodied in the Competition Act 1998, is largely based on EU competition law and the case law based on that Act draws heavily on EU case law. Absent a major legislative change, it will take some time for any material changes of interpretation to feed through into case law once judges are freed from the need to strictly follow the EU approach.

An area in which divergence is perhaps most likely to arise is territorial and/or online restrictions. The EU competition law rules on

territorial and online restrictions are driven by the overriding objective of the EU to promote and complete the EEA. Outside the EEA, such considerations will no longer be of relevance to the UK. It would be open to the UK to take a more economically liberal approach and allow franchisors to offer much greater territorial protection to franchisees and/or regain greater control over online activities. Whether this will occur remains to be seen.

### 4. JURISDICTION AND ENFORCEMENT

The UK is currently party to various regulations and conventions that ensure that the courts of EU member states apply jurisdictional rules to determine when they will accept jurisdiction over a dispute and that a judgment given in one member state will, subject to certain exceptions, be enforceable in all other participating states. Many franchisors doing business in the EU elect for English courts to have exclusive jurisdiction over their franchise agreements and for good reason; they are world renowned for a reputation of quality and for supporting the needs of modern commerce.

But one result of Brexit could be that franchisors must replace these arrangements or face the prospect of its courts' judgments becoming less effective across Europe.

Brexit will also have an impact on the way that intellectual property judgments are recognized and enforced across the EU. In particular, the UK will no longer have EUTM Courts so the UK Courts would no longer be available as a venue for resolving EUTM disputes or obtaining pan-European injunctions. This could well lead to a multiplicity of proceedings and additional costs for litigants seeking to enforce rights across the EU. On the other hand, litigants would no longer have the cost and delay involved in CJEU referrals.

For franchisors which elect English law as the governing law of their contracts, it is still too early and uncertain to be considering whether Brexit should change their approach to something as important as jurisdiction/forum clauses. No-one knows how Brexit will play out and it will take years for the UK to attain even a degree of detachment from existing legal recognition/enforcement arrangements even if that is the outcome of Brexit.

It seems likely that English law will continue to be selected by businesses for certainty as the choice of law for most commercial arrangements.

## 5. CONTRACTUAL PROVISIONS

One outcome of Brexit will be that franchisors need to carefully examine the legal contracts which underpin their existing relationships with franchisees and suppliers.

Franchisors should audit their existing legal agreements in order to ascertain whether any express terms need to be amended or varied as a result of Brexit. For example, references to a defined territory of the European Union and/or EEA will need to be updated to accurately reflect the UK's new position. Going forward, parties may want to clarify whether the term EU refers to its constitution at the time of the agreement or its constitution from "time to time." Equally, references to EU regulations may need to be amended, depending upon the application of such laws to the UK going forward.

However, perhaps of most significance is whether or not Brexit will frustrate areas of contractual performance, or render the commercial bargain as unviable to either or both parties. One obvious area where this could apply is in relation to the imposition of trade tariffs on goods flowing between the UK and EU. It is unlikely that existing force majeure clauses could be relied on as means of terminating a contract on these grounds, but it poses the question of whether franchisors which have identified potential vulnerabilities should consider building in an express "adverse change of law" clause or right of termination or re-negotiation to mitigate this risk. If they do, careful drafting will be

required around pricing mechanisms or describing the events which would activate the new contractual rights.

The challenge that franchisors seeking this flexibility may face from franchisees is that franchising is a long-term relationship which requires a high degree of contractual certainty—operating on shorter terms or building in unilateral or mutual early termination clauses is likely to have a detrimental impact on a franchisor's ability to attract and retain long term franchisees who are willing to invest in their business concept. Introducing this type of flexibility is arguably more realistic within a franchisor's supply chain, which will typically operate under shorter term agreements.

## Conclusion

2017 did bring some clarity on the process and the likely look of Brexit. During 2018, we will start to see the shape emerge of a potential new trade deal between the UK and EU. In March 2019, the UK will officially leave the EU, but it is currently expected that there will be a "transition period" of up to two years during which the UK and EU will continue to trade as before.

For better or for worse, Brexit will undoubtedly continue to dominate the national conversation over the months and years to come. Franchise businesses should start preparing for the potential impact of Brexit by auditing their intellectual rights in the EU and assessing their key franchise relationships. Preparations for GDPR should continue and a watchful eye should be kept on events as they unfold—if the last 18 months has taught us anything, it is to expect the unexpected!■

# Triggering a Franchise Termination Based on an Incurable Default

By John J. McNutt & Frank J. Sciremammano, Gray Plant Mooty

Franchise agreements typically include provisions authorizing immediate termination as a result of an incurable default. Most franchise agreements include a list of specific acts or events that constitute a default under the agreement. Often, the agreement will differentiate between defaults that can be

cured within a specific period of time following notice and defaults that can result in immediate termination without an opportunity to cure. This article explores situations in which a franchisor elects to pursue termination of the franchise agreement based on an alleged incurable default and the key considerations associated therewith.



## Common Scenarios

The most common scenario implicating a potential incurable default involves an event, a condition, or a type of conduct that is specifically identified in a franchise agreement as grounds for immediate termination without a right to cure. Another frequent scenario involves a franchise agreement that includes a cure provision that applies to any default or breach of the agreement, but the franchisor nonetheless terminates the franchise agreement following a certain type of default without affording the franchisee an opportunity to cure. In another context, a franchisor might deem certain intentional bad acts or malicious wrongful conduct by a franchisee so egregious that the basic nature or purpose of the business relationship is destroyed. Of course, not all of these are clear cut incurable default scenarios; rather, they are typical scenarios in which a franchisor may allege an incurable default.

Each of these scenarios requires an analysis by the franchisor and the franchisee of their respective rights and obligations under the franchise agreement and under the laws of whatever state(s) may have jurisdiction over disputes between them. Both franchisors and franchisees face considerable risk in the event that a franchisor attempts to terminate a franchise agreement based on an alleged incurable default. Any miscalculation on the part of a franchisor in seeking such relief, or on the part of a franchisee in responding to such an action, could result in substantial reputational and financial harm. Legal and financial risks for both the franchisor and the franchisee arise when a franchisor alleges the existence of an incurable default justifying immediate termination of the franchise agreement. For franchisees, an allegation of an incurable default triggers a potentially catastrophic loss of the franchise business. For franchisors, in some situations, the misconduct of a franchisee may harm the brand or franchise system and as such may justify immediate termination. In most circumstances, a wrongfully terminated franchise agreement can give rise to the right of the franchisee to sue the franchisor for damages.

## The Basic Analysis

For both franchisors and franchisees, the analysis regarding the existence of an allegedly incurable default starts with the language in

the franchise agreement itself. If the franchise agreement's specific default and termination provisions expressly authorize immediate termination without an opportunity to cure, then the points of contention will be whether the factual predicate for termination actually occurred, and whether any typical contract defenses apply, including waiver, laches, estoppel, prior breach, impossibility of performance, or unconscionability.

In addition to analyzing the language of the franchise agreement, franchisors and franchisees must also consider whether state law restricts termination of a franchise agreement based on an incurable default. Numerous states have enacted statutes that protect franchisees and limit the ways in which a franchisor can terminate a franchise agreement. Many of these statutes require compliance with strict notice and cure periods, and almost all require good, reasonable, or just cause.

For example, the California Franchise Relations Act requires good cause and a cure period of not less than sixty days after written notice of noncompliance. Cal. Bus. & Prof. Code § 20020. Some statutes, including California's, also include exceptions to the cure requirements when the termination is based upon certain conduct. The California Franchise Relations Act includes a laundry list of nine separate defined occurrences allowing for termination upon notice. Cal. Bus. & Prof. Code § 20021. The Minnesota Franchise Act, in contrast, includes only three specific situations that allow for immediate termination upon notice. Minn. Stat. Ann. § 80C.14 Subd. 3(a)(ii). And the Arkansas Franchise Practices Act includes six occurrences allowing for immediate termination upon notice. Ark. Code Ann. §§ 4-72-202(7) and 4-72-204(b).

These statutes vary across jurisdiction and individualized research is necessary, but common themes that allow for termination upon notice include criminal behavior related to the franchised business, bankruptcy, abandonment, or a history of delinquent payment. In addition to statutory protections, courts have developed common law doctrines to restrict termination of franchise agreements based on incurable defaults, and franchisors and franchisees need to be aware of any such doctrines in the applicable jurisdictions.



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## Advanced Considerations

A more advanced analysis is necessary in a scenario where a franchise agreement does not specifically authorize immediate termination under the given circumstances. Sometimes the franchise agreement is silent as to the requirement of notice or opportunity to cure. Sometimes the franchise agreement identifies certain defaults as incurable, but the specific default faced is not included on that list of defaults. Occasionally, a franchise agreement will include a provision granting the franchisee an opportunity to cure no matter what breach is involved. In any of the foregoing scenarios, the parties will have to conduct a deeper analysis of the facts and relevant law to determine how to proceed.

First, the parties need to consider whether it is even possible for the breaching party to cure the default or breach. Occasionally, a default cannot be cured because its occurrence is a historical fact—such as when a franchisee engages in criminal conduct or fails to meet a sales quota within a given period of time. These types of breaches cannot be undone, regardless of whether a cure period is granted or not. The franchisor's case for immediate termination is stronger if the default cannot be cured. On the other hand, from a franchisee's perspective, almost any breach can arguably be remedied after-the-fact by quantifying and paying monetary damages to the franchisor.

Courts around the country disagree about the meaning of historical defaults and whether certain one-off events are sufficient to justify termination of a franchise agreement. For example, in a non-franchise case, *Kyung Sik Kim v. Idylwood, N.Y., LLC*, 66 A.D.3d 528, 529 (N.Y. App. Div. 4th Dept. 2009), the court held that a commercial tenant's failure to maintain insurance, as required under a lease agreement, amounted to "a material breach of the lease" and, in the circumstances, "an incurable violation" because a prospective policy did "not protect defendant against the unknown universe of any claims arising during the period of no insurance coverage." One could easily imagine a court in another jurisdiction, however, coming to an opposite conclusion, because no harm was suffered by the franchisor or because it constitutes a technical, minor breach that is not material and therefore cannot be used as the basis for termination of a franchise agreement.

If a cure is possible, but the franchisor nonetheless does not want to accord the franchisee the opportunity to cure, the parties must consider the significance of the default and whether the default goes to the essence of the contract or relationship. In *LHL Transp., Inc. v. Pilot Air Freight Corp.*, 599 Pa. 546 (Penn. 2009), for example, a franchisee secretly created a competing business and diverted clients to it in an attempt to avoid paying franchise royalties. While the franchisee was entitled to a cure period under the plain language of the franchise agreement, the court held that the franchisor could terminate the franchise agreement immediately upon notice because the breach went directly to the essence of the contract and was so exceedingly grave as to irreparably damage the trust between the franchisor and the franchisee.

Other courts will refuse to disregard the specific default and termination provisions in the contract, or will only allow for rescission or cancellation in such circumstances. For instance, in *Manpower Inc. v. Mason*, 377 F. Supp. 2d 672 (E.D. Wis. 2005), the court ruled that a franchisee had to be given its contractual 60-day opportunity to cure when the franchisor found evidence of non-compliance with immigration laws. Specifically, the franchisor found evidence that the franchisee had failed to comply with provisions of the Immigration Reform and Control Act requiring employers to complete and retain I-9 forms verifying each employee's eligibility for employment in the United States. The franchisor argued the breach went to the very essence of the franchise agreement, and thus it could be terminated immediately. The court sided with the franchisee and held that the franchisor's argument was inconsistent with the common law theory of termination, and that a breach that went to the very essence of the agreement could only give rise to rescission, which the franchisor was not seeking.

The existence of an exclusive remedies provision in the franchise agreement may also impact the parties' arguments. Under the common law of some jurisdictions, such as New Jersey, Pennsylvania, and Florida, a non-breaching party can terminate a contract for a total breach that goes to the essence of the parties' agreement, even if such termination is not expressly authorized in the contract. In

those jurisdictions, the common law right to terminate exists independent of any contractual provisions concerning termination, and unless the contract's termination provisions are identified as the exclusive remedy, courts will treat them as a cumulative remedy and will not bar the ordinary common law remedy.

For example, in *7-Eleven, Inc. v. Kapoor Bros. Inc.*, 977 F. Supp. 2d 1211 (M.D. Fla. 2013), the court held that a franchise agreement could be terminated immediately despite a cure provision because the franchise agreement included a non-exclusive remedies provision and the breach went to the essence of the parties' agreement. Other jurisdictions, such as Wisconsin, reject this expansive view of contract termination rights. In those jurisdictions, courts typically reason that where a termination provision is included in a contract, it is the exclusive means of terminating the contract. See, e.g., *Manpower Inc.*, 377 F. Supp. 2d at 672 (“[I]f a contract does not authorize a party to terminate the contract when the other party commits a breach that goes to the essence of the contract, the nonbreaching party may not exercise such a power.”).

Accordingly, depending on the jurisdiction, franchisors may argue that the presence of a cumulative remedies provision in a franchise agreement gives rise to an alternative approach in situations where the alleged default or breach is not specifically identified in the agreement as incurable. Franchisees, on the other hand, may argue that cumulative remedies provisions do not provide a basis to read otherwise absent language into an agreement and should not operate to grant rights to a franchisor to which it otherwise is not expressly entitled.

In that same vein, the parties should also consider the difference between termination and rescission. Rescinding a contract requires that all parties be returned to their original states, as though the contract had never been formed in the first place, so that no provisions of the agreement remain in force. Some courts will only recognize a non-breaching party's common law right to extinguish a contract, based on a total breach, if the non-breaching party elects for rescission or cancellation as its remedy. In such circumstances, provisions such as post-term noncompetition covenants and buy-back rights are unenforceable.

Choice of law is also an important issue for parties in these types of disputes to consider. State law governs contract interpretation, so legal principles and their application will vary from jurisdiction to jurisdiction. While franchise agreements typically include a choice of law provision, that provision might not be enforceable in all circumstances. Given the foregoing, franchisors and franchisees must analyze not only the enforceability of their applicable choice of law provision, but also the laws of all potentially applicable jurisdictions before proceeding with or responding to an incurable default situation.

Finally, as discussed above, regardless of the terms of the franchise agreement or the relevant common law, an applicable state franchise relationship law can considerably alter a franchisor's right to and a franchisee's protection from termination without an opportunity to cure. Franchisors and franchisees must take these statutes into consideration and determine what additional restrictions and protections they may impose in the event a franchisor seeks to terminate a franchise agreement immediately.

## Conclusion

The potential pitfalls when faced with an incurable default scenario are numerous for both franchisors and franchisees. Franchisors should remain wary when terminating a franchise agreement due to an allegedly incurable breach because there are few bright line rules on which a franchisor can rely. And, in defending against such a termination, franchisees should carefully analyze the franchise agreement and the specific facts of the case, as there is often an argument to be made that many types of bad conduct are not expressly prohibited by the franchise agreement and thus cannot constitute a legitimate basis for immediate termination. Franchisors and franchisees must scrutinize the contract, the applicable common law, and the applicable state relationship law (if any), to avoid making mistakes in pursuing or resisting termination of a franchise agreement based on an incurable default. ■

# Precision in Drafting Franchise Agreements: Expiration Versus Termination

By Benjamin B. Reed, Plave Koch PLC

In litigating cases involving the end of a franchise relationship—be it holdover situations, efforts to enforce post-term noncompetes, or disputes over the parties' respective rights and obligations after the agreement ends—the question of whether the relationship has actually ended can often be at issue. A franchisee might contend that the franchisor had no right to terminate the agreement, that the reason given for the termination was a pretext, or that the parties agreed by conduct to continue the relationship after expiration of the initial term. A franchisor might assert that its termination complied with the letter of the franchise agreement, that the franchisee cannot undermine the right to terminate by asserting prior breach by the franchisor, or that the franchisee must comply with certain post-termination obligations.

While franchise litigators commonly deal with issues concerning whether the agreement has properly ended or not (and the impact of that conclusion on the parties' rights and obligations), another related question can have ramifications on cases involving the end of the relationship: how the relationship ended. In this context, "how" does not mean the actions that led to the end of the relationship. Rather, "how" means whether the agreement ended as a result of the running of the term of the agreement—expiration—or as a result of some affirmative act or omission giving one party or the other the right to declare the agreement at an end prior to the running of the term—termination.

In a number of agreements, the term "terminates" or "termination" is often used to generally cover any end of the relationship, be it affirmatively ending the agreement or through expiration of the term. So, for example, provisions in a franchise agreement setting out the obligations that a franchisee has when an agreement ends often read "upon termination of this Agreement" or "after this Agreement terminates." In other situations, agreements specify similar obligations "upon termination or expiration" or "if this Agreement expires or terminates." The distinction between provisions that rely only on the word "termination" and those that also use the term "expiration" may appear to be form over substance.

However, the precision in which an agreement defines the ending event on which certain rights or obligations are triggered can be an issue. An example comes from two cases from the Fourth Circuit.

In the first, *Hamden v. Total Car Franchising Corp.*, 548 Fed. Appx. 842 (4th Cir. 2013), the Fourth Circuit Court of Appeals examined the use of the terms "termination" and "expiration" in deciding the application of restrictive covenants after the end of a franchise relationship. In the franchise agreement at issue *Hamden*, a section entitled "Rights and Duties of Parties upon Expiration, Termination, or Non-renewal" included a post-term noncompete that was to run "for 2 years following termination of this Agreement." *Id.* at 844. It also required the franchisee to return certain proprietary materials on termination "for any reason." *Id.* Separately, the parties executed a separate confidentiality and noncompetition agreement, incorporated by reference into the Franchise Agreement, which included three additional restrictive covenants:

- The first covenant provided that if the franchise agreement "terminated before its expiration" that the franchise owner would not "for a period of two years after termination" own or engage in a similar business to the franchised business within a certain area. *Id.*
- The second covenant was a nondisclosure provision that applied "during the term of the Franchise Agreement and thereafter" and prohibited the franchise owner from using confidential information "if there is any termination of this Agreement." *Id.*
- The third covenant restricted the franchise owner from soliciting or diverting customers "during the term of the Franchise Agreement and for 2 years after its termination." *Id.*

When the franchisee decided not to renew his franchise agreement at the end of its term, the agreement expired. The franchisee continued to



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operate his business as an independent business, and the franchisor sued to enforce the post-term noncompete. *Id.* at 845.

The franchisor asserted that the post-term noncompete applied to the franchisee's continued operation after the expiration of the franchise agreement. The franchisor argued that there was no difference between the terms "terminate" or "expire" when construing a contract. *Id.* at 846. The court agreed that a termination would include expiration, citing the Black's Law Dictionary definitions of termination and expiration. And the court noted that the use of both terms in the agreements did not establish on its own that the terms had different meanings. *Id.*

However, the court refused to rely solely on the definitions, and instead looked at how the terms were actually used in the parties' agreements. The court noted that the renewal provisions of the franchise agreement discussed events surrounding expiration (and did not use the term "termination"), and that a separate section described events that would result in termination prior to the expiration of the term. Because the terms were not used together or interchangeably, the term "termination, as used in the agreements before us, does not encompass expiration." *Id.* at 849. Notably, the court ignored the title of the section including the noncompete: "Rights and Duties of Parties upon Expiration, Termination, or Non-renewal." As a result, the court concluded that the non-solicitation, noncompetition, and a portion of the nondisclosure covenants—which were triggered by "termination before expiration," "if the agreements terminated," "following the termination of this Agreement," or "if there is any termination"—did not apply following expiration of the franchise agreement and could not be enforced to prevent the former franchisees post-term operation of a competing business.

In the second case, *Frye v. Wild Bird Centers of America, Inc.*, 237 F. Supp. 2d 302 (D. Md. 2017), a Maryland federal court refused to vacate an arbitration award that ordered a former franchisee to comply with a two-year post-term noncompete. The noncompete in *Frye* prohibited competition by the franchisee for "a period of 24 months after termination" of the franchise agreement. 237 F. Supp. 2d at 305. As a result, the franchisee, relying heavily on the *Hamden* decision, argued that the noncompete was

not applicable because, as in *Hamden*, the franchise agreement had expired rather than terminated. *Id.* at 309. However, the *Frye* franchise agreement also contained a separate section setting forth the parties' obligations upon termination of the franchise agreement, which included the following language:

In the event of termination or expiration of this Agreement for any reason . . . you agree to perform the following obligations: . . . [y]ou will comply with your obligations under [the noncompetition covenant].

*Id.* at 305.

The arbitrator had relied on this language to conclude that compliance with the noncompete was required upon termination or expiration, and that "termination" as used in the noncompete encompassed both affirmative acts of termination prior to the end of the term and to termination via expiration of the term. Because the court's review was limited to the high standard necessary to vacate an arbitration award (to wit, did the arbitrator's award draw its essence from the contract), the court refused to vacate the award because the arbitrator's interpretation was plausible, drew from the essence of the contract, and was not in manifest disregard of the law.

Obviously, the standard of review applied in *Frye* prevents us from knowing whether or not the court agreed with the arbitrator's interpretation on the merits. Perhaps the court, viewing the case as the finder of fact, would have followed the *Hamden* decision. Regardless, these cases—and experience from the trenches—teach that the terms "expire" and "terminate" in a franchise agreement should not be viewed as automatically interchangeable, even in the section headings. As a franchisor, in drafting provisions that will come into play after the agreement ends—for whatever reason—precision is needed to ensure that those provisions are applicable under all of the right circumstances. At the same time, franchisees should carefully review and assess whether their franchise agreements distinguish between obligations that only arise from a franchisor's termination, expiration, or either. ■

# Pure Hearts and Franchise Terminations: The Role of Good Faith under State Relationship Laws

By A. Christopher Young and Erica Hall Dressler, Pepper Hamilton

In a recent decision, the United States Court of Appeals for the Third Circuit affirmed the dismissal of a franchisee's claim that the franchisor's termination decision violated the New Jersey Franchise Practices Act ("NJFPA") because it was motivated by racial animus. While that decision is limited to the NJFPA, it raises the question whether other statutes require analysis of a franchisor's subjective motivation or good faith for a termination decision. The answer is that very few do, but courts in some states will also imply an obligation even if not explicitly written into the statute. This article will identify and analyze which state relationship laws expressly require a franchisor to show its termination decision was made in good faith and which jurisdictions' courts have fashioned a good faith requirement under the statute.

## STATES WITH STATUTORY GOOD FAITH PROVISIONS

### Connecticut

Under the Connecticut Franchise Act ("CFA"), a franchise cannot be terminated unless the manufacturer or distributor has: (1) satisfied the notice requirements of the statute; (2) good cause; and (3) has acted in good faith. Conn. Gen. Stat. § 42-133v(a). "The manufacturer or distributor shall have the burden of proof under this section." Conn. Gen. Stat. § 42-133v(c). Several Connecticut federal court decisions illustrate the parameters of the statutory good faith element. While the decisions are not comprehensive in nature, they do make clear that a franchisor's subjective motivation alone may not be enough to constitute bad faith. The courts looked to whether the franchisor frustrated the franchisee's ability to perform the agreement and also considered prior accommodations to the franchisee as evidence of good faith.

In *Chic Miller's Chevrolet, Inc. v. GMC*, the U.S. District Court for the District of Connecticut

granted a franchisor's motion for summary judgment as to a claim for a violation of the CFA because the franchisee failed to offer evidence that the franchisor acted without good cause or good faith. 352 F. Supp. 2d 251, 260 (D. Conn. 2005). The court found that there was good cause for the termination because the franchisee breached the dealership contract when it was unable to obtain new vehicle financing. *Id.* The court rejected the franchisee's argument that the franchisor acted in bad faith because it allegedly had a plan to reduce the market place from three to two dealers. *Id.* The court concluded that "a long term plan that called for reducing the number of dealerships in a possibly oversaturated market is not alone evidence of bad faith." *Id.* Further, the Court found that the franchisor extended the term of the franchise agreement several times to allow the franchisee to find a replacement loan evidencing "good faith." *Id.*

In a similar case, the court observed that the elements of good faith and good cause should be considered together when a franchisee alleges improper motive. See *Central Sports, Inc. v. Yamaha Motor Corp., U.S.A.*, 477 F. Supp. 2d 503, 505 (D. Conn. 2007). There, the franchisee entered into an agreement with the franchisor to sell motorcycles, snowmobiles, and related products. The franchise agreement required the franchisee "to maintain adequate working capital and lines of wholesale credit through floorplan financing agreements in order to maintain an inventory of defendant's products." *Id.* at 505-06. The franchisee struggled to meet these requirements over the course of five years, and the franchisor sent several termination letters outlining the franchisee's material breaches. *Id.* at 507.

Though it was clear the franchisor had satisfied the statutory first requirement of providing notice, and the franchisee admitted that it had failed to maintain the adequate



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line of credit required by the agreement, the franchisee argued that the financing requirements were unreasonable and that the franchisor improperly restricted potential sources of financing. *Id.* at 509. The court cited *Chic Miller's Chevrolet* and observed that if an agreement requires floor plan financing, a lack of such financing is good cause for termination. *Id.* The court then observed that bad faith termination may have been established if the franchisee could show that the franchisor rejected a fully conforming line of credit from a financier other than the one designated by the franchisor. *Id.* However, there was no evidence that the franchisee was able to obtain sufficient alternative financing or presented an alternative to the franchisor. *Id.* Lastly, the court found that throughout their relationship, the franchisor provided some accommodations to the franchisee instead of immediately seeking termination. *Id.* at 510. For all of these reasons, the court concluded that no reasonable fact-finder could find that the franchisor breached the CFA based on lack of good cause or good faith in terminating the franchise agreement. *Id.*

## Delaware

Under the Delaware Franchise Security Law, “[n]o franchisor may unjustly terminate a franchise.” 6 Del. C. § 2552(g). A termination is considered unjust if it is “without good cause or in bad faith.” 6 Del. C. § 2552(a). Though this standard for lawful termination has been challenged before, the Delaware Supreme Court held that the standard is not unconstitutional for vagueness. *Globe Liquor Co. v. Four Roses Distillers Co.*, 281 A.2d 19, 21 (Del. 1971). The Court explained that the term “bad faith” may be defined by referring to other laws, such as the Uniform Commercial Code (“UCC”), which contain the same term. *Id.* More specifically, the UCC defines good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” UCC 2-103.

There are few cases that shed light on what the Delaware courts may consider to be bad faith under the statute. However, in one case, the Delaware Chancery Court found that abandoning a distributor with little notice while continuing to supply other nearby distributors may constitute bad faith. See

*Paradee Oil Co. v. Phillips Petroleum Co.*, 320 A.2d 776 (Del. Ch. Ct. 1971) (granting preliminary injunction after finding plaintiff “demonstrated a probability of success in proving that Phillips is attempting ‘unjustly’ to terminate and refuse to renew the relationship within the meaning of the Franchise Security Law”).

## STATES WHERE COURTS MAY IMPLY A STATUTORY GOOD FAITH REQUIREMENT

Several states, including Hawaii and Washington, have a general requirement of good faith that is not specific to termination in their relationship statutes. These general good faith provisions require the parties to deal with each other in good faith. Though there is little case law interpreting them, courts may find that they govern all aspects of a franchise relationship and use them to imply a good faith requirement to termination. Sometimes, even, courts have discussed whether to imply a good faith requirement where a state relationship state does not have a specific or general good faith provision, as in the case of the New Jersey Franchise Practices Act.

## Hawaii

Hawaii’s Franchise Investment Law (“HFIL”) requires that “[t]he parties shall deal with each other in good faith.” HRS § 482E-6(1). The statute also states that it will be considered an unfair or deceptive act or practice or unfair method of competition if a franchisor “terminate[s] . . . except for good cause.” HRS § 482E-6(2)(H). “[G]ood cause in a 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.” HRS § 482E-6(2)(H). Hawaii state or federal courts have not analyzed the HFIL’s good faith or good cause requirement as it pertains to terminations.

## Washington

Under the Washington Franchise Investment Protection Act (“FIPA”), “[t]he parties shall deal with each other in good faith.” Rev. Code Wash. (ARCW) § 19.100.180(1). The statute also makes it unlawful for a franchisor

to terminate a franchise agreement prior to its expiration except for good cause which is defined to mean a failure by the franchisee to comply with a material provision of the franchise after receiving written notice of the breach and an opportunity to cure. *Id.* § 19.100.180(2)(J).

One federal court analyzing the legality of a franchise termination under FIPA seemed to impose an additional obligation of good faith with respect to terminations describing § 19.100.180(1) as the second allegation of a FIPA violation. See *Fleetwood v. Stanley Steemer Int'l, Inc.*, 725 F. Supp. 2d 1258, 1276 (E.D. Wash. 2010). In *Fleetwood*, the franchise agreements at issue could be terminated if the franchisees failed to pay any sum due to the franchisor. *Id.* at 1262. After the franchisees defaulted several times, the franchisor notified them of their defaults and provided them with the opportunity to cure. *Id.* However, the franchisees argued that assurances made by the franchisor that the franchisor would protect them from termination meant that the franchisor breached its statutory good faith obligations when it terminated the agreement even with cause. The court did not reject such a claim as a matter of law. Rather, it found that any assurances made by the franchisor were “akin to supportive commentary and opinion rather than words rising to the level of extra-contractual promises” and did not evidence violations of the franchisor’s statutory good faith obligations. *Id.*

### New Jersey

Some courts have engaged in a similar analysis even where a state relationship statute does not contain an explicit good faith requirement. For example, the NJFPA does not require a franchisor to show that its termination decision was made in good faith. This did not stop some federal courts from considering whether such an element should be implied. Former Third Circuit Chief Judge Becker previously addressed an appellant’s argument that, under New Jersey law, an examination of whether a franchisor’s termination was supported by good cause required an inquiry into whether the franchisor also acted in good faith. *GMC v. New A.C. Chevrolet*, 263 F.3d 296, 320 (3d Cir. 2001). Judge Becker observed “[a]lthough this argument is an interesting one, and, as

we explain briefly in the margin, New Jersey law offers no clear answer on this point, resolution of this issue is not necessary to our disposition.” *Id.*; see also *Maple Shade Motor Corp. v. Kia Motors of Am., Inc.*, 384 F. Supp. 2d 770, 774, n. 4 (D.N.J. 2005) (“No court has resolved the issue of whether good faith by the franchisor is also required.”).

The Third Circuit found that it did not need to address the “good faith” issue because the appellant failed to produce evidence to create a genuine issue regarding whether the appellee acted in good faith or without pretextual motive when it terminated the franchise. *Id.* In a footnote, however, the court noted that, although the plain language of the NJFPA does not include a good faith requirement, New Jersey courts have imposed one in certain circumstances when construing other franchise-related statutes that similarly omit an explicit good faith requirement. *Id.* at n.11 (citing *Monmouth Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 509 A.2d 161 (N.J. 1986)).

In *Chrysler*, the New Jersey Supreme Court analyzed a related but different statutory scheme, the New Jersey Motor Vehicle Franchise Act (“NJMVFA”). The NJMVFA allows an automobile dealer to challenge a franchisor’s decision to relocate a new dealer into the same market area if the dealer can demonstrate that it will be “injurious.” N.J. Stat. Ann. § 56:10-18. The statute also lists several factors that may be considered to determine whether the relocation would be injurious. N.J. Stat. Ann. § 56:10-23. Though the provision does not state that the franchisor’s motivation or good faith are factors, the New Jersey Supreme Court considered the purpose of the statute and implied a good faith requirement. See *Chrysler Corp.*, 509 A.2d at 170 (“Accordingly, we conclude that an additional criterion to be considered in determining injury under the Motor Vehicle Franchise Act is the motivation of the franchisor in designating the new dealer. If the protesting dealer is able to prove that the manufacturer’s decision to franchise a new dealer in the relevant market area was not made in good faith, but to coerce, intimidate, or retaliate against an existing dealer, then that proof, combined with some evidence of economic injury, would satisfy the statutory test of injury to the franchisee.”).



Since the GMC decision, neither the district courts nor the Third Circuit have clarified whether a franchisor’s termination decision under the NJFPA must be analyzed through the prism of good faith. But a recent decision from the Third Circuit involving a claim that a franchisor’s termination decision was motivated by racial animus suggests these courts are not inclined to recognize such a good faith requirement under the NJFPA. See *7-Eleven, Inc. v. Sodhi*, 2017 U.S. App. LEXIS 16177, at \*7-8 (3d Cir. Aug. 24, 2017). In *Sodhi*, franchisor 7-Eleven discovered several accounting and employment issues after performing an audit and sent notices of material breach of the franchise agreement, which required the franchisee to pay all sales, payroll and income taxes related to the operation of the stores. *7-Eleven, Inc. v. Sodhi*, 2016 U.S. Dist. LEXIS 70794, \*10 (D.N.J. May 31, 2016). 7-Eleven sued the franchisee and sought declaratory relief finding that it properly terminated the franchise agreements based on the franchisee’s breaches. In response, the franchisee asserted several counterclaims, including claims for violation of the NJFPA and breach of the implied covenant of good faith and fair dealing.

The district court granted 7-Eleven’s motion for summary judgment on the counterclaims and 7-Eleven’s claim for declaratory judgment that the franchise agreements were properly terminated. The district court observed that the franchisee “admitted that he failed to pay payroll taxes, provide workers’ compensation insurance, or withhold and pay Social Security taxes for employees of his Stores.” *Id.* at

13. Importantly, the court found that the defendants did not dispute that these failures were a material breach of the franchise agreements. *Id.* at \*14. The court held that these material breaches constituted good cause for 7-Eleven’s termination of the agreements. The court went a step further and opined that “any purported ulterior motive of 7-Eleven, even if shown, is irrelevant to finding that 7-Eleven had good cause to terminate the Franchise Agreements.” *Id.* at \*15.

In its analysis of the franchisee’s claim for breach of the implied duty of good faith and fair dealing, the court rejected several statements allegedly made by 7-Eleven as inadmissible hearsay. *Id.* at \*17. The court did, however, consider documents listing Sodhi and other franchise owners who appeared to be of Indian descent as “Second Wave Target[s].” Though the court acknowledged that this evidence “suggest[ed] that 7-Eleven may have had an ulterior motive in terminating the Franchise Agreements,” the implied duty of good faith and fair dealing does not preclude a party from exercising its express rights under such an agreement. Because “an ulterior motive does not preclude termination for good cause” under the NJFPA, the court found that 7-Eleven was entitled to judgment as a matter of law on the implied duty claim. *Id.* at \*17-18.

The Third Circuit affirmed the district court’s ruling that 7-Eleven properly terminated its franchise agreements for cause based on the franchisee’s failure to pay taxes. *Id.* Though the Third Circuit’s opinion was somewhat limited because the franchisee did not explicitly appeal

STATE	STATUTE	SECTION
Connecticut	Connecticut Franchise Act	Conn. Gen. Stat. § 42-133v(a).
Delaware	Delaware Franchise Security Law	6 Del. C. § 2552(a), (g)
Hawaii	Hawaii Franchise Investment Law	HRS § 482E-6(1)
New Jersey	New Jersey Franchise Practices Act	Implied by courts
Washington	Washington Franchise Investment Protection Act	Rev. Code Wash. § 19.100.180(1)

whether “good cause” existed for termination under the NJFPA, the Third Circuit reinforced the principle that the implied covenant of good faith and fair dealing cannot override an express term in a contract. Whether intended or not, in *Sodhi*, the district court and the Third Circuit missed an opportunity to clarify whether a franchisor’s termination decision must be analyzed through the prism of good faith. But based on their express rejection of the franchisee’s “motivation” defense in spite of allegations of the franchisor’s bad faith, the New Jersey district court and the Third Circuit do not seem inclined to recognize such a good faith requirement.

## Conclusion

Franchisors and franchisees alike, as well as practitioners who advise them, should be aware of the varying approaches to good faith requirements and remain conscious of them as they consider particular factual scenarios. In addition to consulting state relationship statutes and the cases interpreting them, it is advisable to analyze similar statutes outside the franchise context for guidance on how a state court might interpret a state relationship statute without an express good faith provision. ■



## MEMBER SPOTLIGHT

### John Haraldson

The ServiceMaster  
Company, LLC

**LOCATION:** Peabody Place in the heart of downtown Memphis, TN, overlooking Beale street and the Mississippi. One cool benefit is that I can go watch the world-famous ducks walk in to the Peabody Hotel every day at 11.

**PRACTICE SPECIALTY:** Franchise. I get to work with the awesome franchisees and brand leaders on issues ranging from franchise disclosure and transactions, contracts, insurance coverage, as well as dispute resolution.

**HOBBIES:** I love to read both business books and thrillers. I also have an organic garden. I think tomatoes are my favorite because there is nothing better than a caprese salad with freshly picked tomato and basil. I also enjoy a relaxing hike in the woods.

**BEST LOVED SONG:** Definitely, Eye of the Tiger. Who isn’t motivated by Rocky Balboa?

**FAVORITE THING ABOUT THE FORUM ON FRANCHISING:** The people. Everyone is friendly and makes you feel like family, instead of work colleagues. When you live in our world, having people you trust by your side is important!

**SURPRISED TO KNOW ABOUT ME:** My wife and I adopted two incredible children from Russia. Ask me about the returned child, plane crash, and volcano – international adoption is a fascinating adventure!

# Message from the Editor in Chief

Heather Carson Perkins, Faegre Baker Daniels LLP

Welcome to the Spring issue of *The Franchise Lawyer*.

In this issue, we introduce *A Litigator's Perspective*, a new feature written by members of the Litigation and Dispute Resolution Division ("LADR") of the Forum on Franchising. *A Litigator's Perspective* will be a recurring column, with insights on language used in franchise agreements and how precision—or lack of precision—can lead to sometimes unexpected results in litigation between parties to franchise agreements. In the first installment, Ben Reed of Plave Koch discusses some recent cases that explore the difference between the "expiration" and "termination" of a franchise agreement—terms which practitioners sometimes use interchangeably. I look forward to this continuing regular feature from LADR.

Endings are a recurring theme in this issue. John J. McNutt and Frank J. Sciremammano of Gray Plant Mooty write on incurable defaults as the basis for termination. And Christopher Young and Erica Dressler of Pepper Hamilton discuss state relationship statutes that impose a requirement of good faith in the franchise termination process. Finally, from across the pond, Gordon Drakes of FieldFisher discusses the top five things that franchisors should be thinking about as the end of Great Britain's membership in the European Union approaches.

In our last issue, we wrote about the reversal of the *Browning-Ferris* decision by a panel of the NLRB in *Hy-Brand Industrial Contractors, Ltd., et al.*, 365 NLRB 156, at 5 (Dec. 14, 2017) ("*Hy-Brand*"). The *Hy-Brand* decision caused quite a stir with franchisors concerned about joint liability for franchisee employees. But on February 26, 2018, the NLRB vacated the decision, rendering it of no force and effect. The decision to vacate *Hy-Brand* was based on a determination by the Office of the Inspector General ("OIG") earlier in February that one of the NLRB

members who decided *Hy-Brand* should have been disqualified from participating in the *Hy-Brand* decision. Specifically, the OIG determined that NLRB Member William Emmanuel should have recused himself from *Hy-Brand* because his former firm represented a litigant in the *Browning-Ferris* case that *Hy-Brand* reversed—a decision that the OIG described as a "do-over" of *Browning-Ferris*. The OIG reasoned that Emmanuel's participation in the *Hy-Brand* case when he could not have participated in *Browning-Ferris* exposed a problem in the NLRB's processes. Based on the recommendation from the OIG, the NLRB issued the order vacating the *Hy-Brand* decision pending further proceedings before the board.

Meanwhile, shortly before this issue went to press, McDonald's USA LLC and the NLRB arrived at a proposed settlement of long-running and closely-watched proceedings over whether the employees of McDonald's franchisees are jointly employed by McDonald's. The settlement is subject to approval by an administrative law judge who, as of this writing, set a hearing regarding the approval of the proposed settlement for early April 2018. If the matter is fully resolved by then, you will see an update in the Summer issue.

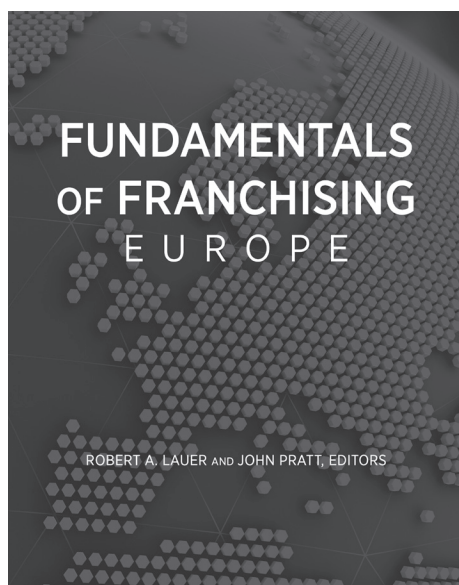
I realized the other day that I am roughly halfway through my tenure as the Editor in Chief of *The Franchise Lawyer*. As I sit here at the midpoint, I am grateful for the support, ideas and feedback that I have received from my predecessors, my associate editors, and fellow Governing Committee members—not to mention from all of the members of the Forum who so generously donate their time and expertise to write for this publication. I have learned a great deal, but always strive to do better and learn more. And so I solicit you, readers, for feedback on the publication and ideas for—or better yet, submissions to—*The Franchise Lawyer*. Thank you.



**Heather Carson Perkins**

Faegre Baker Daniels LLP

# FUNDAMENTALS OF FRANCHISING EUROPE



This is the first U.S.-published, comprehensive, and definitive review of franchise laws in Europe and the European Union. Written by a team of distinguished European franchise law practitioners, it begins by addressing the issues related to franchising that are dealt with at the EU level and are applied within each of the member states and members of the European Economic Area (EEA) in broadly the same way.

**Edited by** Robert A. Lauer and John Pratt

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