

The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship

WILLIAM L. KILLION

The great enemy of the truth is very often not the lie—deliberate, contrived and dishonest—but the myth—persistent, persuasive and unrealistic.¹

This article is about two franchising myths, myths that often impact the development of franchising case law in ways that do a disservice to franchisors, franchisees, and even the public welfare. The first myth is that franchisees are generally naïve and unsophisticated in comparison to franchisors and, therefore, need special protection from opportunistic conduct by comparably large franchisors. The second, and related, myth is that there is a “gross bargaining disparity” between the franchisor and franchisee resulting in one-sided franchise agreements that allow franchisors to control unfairly the fortunes of their franchisees. This article refers to these collectively as the modern myth of the vulnerable franchisee.

Nowhere does the modern myth of the vulnerable franchisee play out more than in California. The poster child of the mischief this myth can cause is the California Court of Appeal decision in *Postal Instant Press, Inc. v. Sealy (PIP)*.² The court held in *PIP* that a franchisor could not recover estimated future lost profits after terminating the franchisee for failure to pay royalties and advertising fees because awarding such damages “would violate the statutory and common law prohibition of damages which are ‘unreasonable, unconscionable or grossly oppressive.’”³ In support of its conclusion, the court delivered these harsh words about the franchisor-franchisee relationship:

To sanction such an award in this case would so unbalance the relationship between franchisors and franchisees as to threaten to convert every franchise agreement allowing such damages into an unconscionable and oppressive contract. Imagine the position of a small-business person operating a franchise involved in some minor contract dispute with the franchisor during the 20-year term of the agreement. Don’t do exactly everything the way the franchisor demands and the franchisee risks declaration of a “material breach” backed up by the whip of a giant “lost future profits” award. Such an award would leave the franchisee enslaved for five or ten or twenty years working primarily for the franchisor’s benefit but without its trademark or other services. Franchisors would seldom have to apply that whip, of course. It would be enough to crack it now and then to keep their franchisees in line. This is nearly the definition of oppression.⁴

The *PIP* court said that “franchising involves the unequal bargaining power of franchisors and franchisees and therefore carries

within itself the seeds of abuse. Before the relationship is established, abuse is threatened by the franchisor’s use of contracts of adhesion presented on a take-it-or-leave-it basis.”⁵ The Ninth Circuit ten years later, in 2006, relied in part on *PIP* to conclude in *Nagrampa v. MailCoups, Inc.*⁶ that the franchisee there “was in a substantially weaker bargaining position than” the franchisor and thus declared a commitment to arbitrate unenforceable.⁷

The problem with the modern myth of the vulnerable franchisee is that it turns on a myopic view of the franchise relationship as implicating the interests of only two parties, one franchisor and one franchisee. It disregards the interests of other stakeholders, including citizens who aspire one day to own their own businesses, consumers who turn to franchising to deliver goods and services, employees and suppliers who earn their living from franchising, and the other franchisees in a particular franchise system that are dependent on the continued success of the system. As Judge Kozinski observed in his dissent in *Nagrampa*,

as with most paternalistic endeavors, the majority’s opinion carries the seeds of great irony. By invoking the unconscionability doctrine to protect “the little guy” in this case [from an agreement to arbitrate] the majority has construed California franchise law in a way that will result in fewer opportunities for the “little guys” in the future because “the ever-growing cost of litigation is one of the most serious and uncontrollable risks faced by modern businesses.”⁸

The modern myth of the vulnerable franchisee is sometimes perpetuated by a belief that a state is particularly protective of its resident franchisees and that court decisions should reflect this populist attitude. California is the classic example of this, but Washington State with its supposed “franchisee bill of rights” is not dissimilar. In fact, there is a perception among franchise lawyers that the courts in states that adopted franchise legislation in the early 1970s are predisposed to favor the franchisee over the franchisor.

The myth is also perpetuated by application of the remedial purposes canon of statutory construction to franchise legislation. This canon teaches that the courts should construe legislation to effectuate the beneficial purpose for which it was enacted. Relying on this canon, courts liberally and broadly construe franchise legislation because it “is a remedial statute designed to favor franchisees over franchisors.”⁹

Whether it appears in the form of a general attitude toward franchising or application of the remedial purposes canon of construction, the myth ultimately has as its source legislation from the early 1970s—legislation that courts sometimes

William L. Killion is a partner in the Minneapolis office of Faegre & Benson LLP.

mistake for a declaration of public policy that franchisees are collectively naïve and franchisors are collectively abusive. The myth fails to appreciate that franchise legislation was a product of its time. It was the product of state legislatures trying to address a relatively new phenomenon: the widespread use of business format franchising. And it was the product of wildly divergent views of franchising. At one extreme was the view propounded by the likes of franchisee-advocate attorney Harold Brown that franchisees were so vulnerable and franchisors so oppressive that the courts should declare franchisors fiduciaries. At the other extreme were franchisor advocates who feared that any significant franchise regulation (particularly relationship laws) presented a real risk of destroying franchising. In between these extremes, there was a consensus that at least some “bad” people had infiltrated franchising. As the Wisconsin Department of Financial Institutions describes it, “the oft-repeated stories of franchisees who ‘struck it rich’ through franchising were accompanied by the abuse of that system by a few fly-by-night, unethical and, often, criminal operators.”¹⁰ There were “horror stories of tens of millions of dollars of peoples’ life savings invested in what they thought were businesses which provide income, but which instead turned out to be schemes to defraud.”¹¹

It was in the midst of these divergent views that legislators grappled with how best to protect their constituents while still protecting franchising as an economic concept. In the process, they produced franchise legislation that was the product of a careful balancing of the interests of the franchisor, the franchisee, the consumer, and other franchising stakeholders. It was not a directive to the courts to favor one side of the franchise relationship over the other.

In many ways, this article is a history lesson. It seeks to unravel the modern myth of the vulnerable franchisee by putting into historic perspective the events that led to franchise legislation in the 1970s and the effect this legislation has now had on leveling the playing field between franchisor and franchisee. It contends that after nearly forty years of franchise presale disclosure and relationship regulations, ever-increasing competition among franchisors for franchisees, and a marked change in the sophistication of franchisees, franchising should not continue to suffer a hangover in the twenty-first century from abuses that may or may not have been rampant decades earlier. The wrong that the legislators set out to correct beginning in 1970 has now been righted. Franchisees today have a wealth of information available to them before they sign the franchise agreement. Franchise agreements reflect the protections that the law deemed necessary to temper the supposed adverse consequences of presumed gross bargaining disparity; although still generally take-it-or-leave-it agreements, they reflect competition among franchisors for the most sophisticated franchisees.

Because franchise legislation reflects a careful balancing of the interests of a number of franchising stakeholders and because franchise legislation has served its objective, courts should not liberally construe franchise statutes or otherwise assume responsibility for protecting the interests of franchisees at the expense of those of other stakeholders. They should instead view franchising today for what it truly is—a business

relationship with franchisor and franchisee alike entitled to application of the laws in an even-handed way.

THE HISTORY OF MODERN BUSINESS FORMAT FRANCHISING

1945–1955: The Experimental Years

Franchising was not unheard of as WWII formally ended for the United States on V-J Day, August 14, 1945. Product distribution franchising and even modest forms of business format franchising had existed in the United States for decades.

Product distribution franchising was the most common form prior to WWII. Under this model, the franchisor manufactures and sells finished or semifinished products to its dealers or franchisees. The franchisee, in turn, resells the product to consumers or others in the chain of distribution. Classic examples of product distribution franchises prior to WWII were automobile, service station, and soft drink franchises.

Much less common before WWII was the business format franchise. The business format franchise “includes not only the product, service, and trademark, but the entire business format itself—a marketing strategy and plan, operating manuals and standards, quality control, and continuing two-way communication.”¹² One of the earliest examples of business format franchising was the Howard Johnson chain of restaurants. Howard Johnson began franchising restaurants in 1935, and by 1939 more than 100 restaurants carried that name.¹³ Years earlier, in 1924, two businessmen by the name of Allen and White founded a franchised food service chain that carried their initials, A&W, and offered distinctive root beer syrup. It was the close of WWII, however, that set the stage for the ultimate introduction of business format franchising in a big way.

Thomas Dicke describes the forces that came together after WWII and culminated in the franchising boom.¹⁴ The end of the war marked the return to civilian life of millions of servicemen and women looking for jobs, ready to start a family, and ready to spend money. “The great expansion of the service and retail sectors in particular aided the growth of business-format franchising by increasing the size of its natural habitat, while growth in personal income increased people’s ability to buy both franchised goods and franchised businesses.”¹⁵ But the contributors to the growth of franchising were also more subtle. They included, according to Dicke, a combination of the American Dream of owning your own business and a persistent belief in big business as a key to success. Franchisors sold franchising “as a method that combined the economic efficiency of big business with the personal satisfaction and social advantages of small business ownership.”¹⁶

Although conditions were ripe for the expansion of franchising after the war, for the first fifteen years it “grew rapidly but quietly.”¹⁷ The initial surge occurred in the soft-serve ice cream business. Harry Axene, a farm implement salesman from Missouri, obtained the right to sell in large parts of the United States a license to use a special patented machine for making Dairy Queen soft-serve ice cream.¹⁸ Axene sold off large territories to territory operators, who in turn sold subfranchises to individuals to operate individual Dairy Queen stores.

Because Axene retained few controls over territory operators in the territory agreements he sold, the original Dairy Queen franchises barely qualified as business format franchises.¹⁹ By 1955, the Dairy Queen system had 2,600 stores throughout the United States. Axene eventually formed Tastee-Freez with another partner and continued selling large territories.²⁰ By the mid-1950s, Tastee-Freez had 1,500 stores throughout the United States.

1955–1970: The Boom Years

In some ways, business format franchising as we know it today began on April 15, 1955, when Ray Kroc opened his first McDonald's restaurant in Des Plaines, Illinois. The spark that ignited the franchise boom occurred, however, three years earlier when the *American Restaurant Magazine* published an article about a carry-out drive-in in downtown San Bernardino, California.²¹ The magazine reported how the McDonald brothers had created a self-service system capable of serving a sandwich, beverage, French fries, and a dish of ice cream in twenty seconds. The brothers, according to the article, were also developing a nationwide franchise system that would "soon be made available to the industry."²²

The article led to a pilgrimage of entrepreneurs to San Bernardino hoping to duplicate the success of the McDonald's system. One pilgrim was Ray Kroc, a milk shake machine salesman from Illinois. Kroc was fifty-two years old in 1954 when he was in Los Angeles making routine calls and decided to drive sixty miles east to San Bernardino to see the McDonald's drive-in. He considered himself a "battle-scarred veteran of the business wars," with diabetes, incipient arthritis, and the loss of a gallbladder and most of his thyroid gland.²³

Kroc was impressed with the operation and had dinner with the McDonald brothers that evening. He discovered that the McDonald brothers had already issued franchises for ten other sites in California and Arizona and were looking for someone to franchise their concept in the remainder of the United States.²⁴ When Kroc flew back to Chicago after his meeting with the McDonald brothers, he had a "freshly signed contract with the McDonald brothers in [his] briefcase."²⁵

Kroc was not the first to apply business format franchising to fast food. In fact, he walked into an already crowded field.²⁶ The year 1954 was the "magical year in fast food" franchising.²⁷ Not only did Kroc strike his deal with the McDonald brothers that year, Dave Edgerton became the first franchisee of InstaBurger King in Miami and eventually started the Burger King franchise chain with Jim McLamore.

Although Kroc certainly did not invent the business format franchise concept, he did revolutionize it. As John Love explains it, "what Kroc was inventing was a unique franchising system, one that set McDonald's apart from all the other early fast-food franchises."²⁸ Kroc and his lieutenants at McDonald's would eventually perfect business format franchising, establishing the model that guides all successful franchise systems today. McDonald's built a central organization to develop standards of operation, train licensees, and enforce compliance with standards through supplier relationships and through field inspections. Although quality assurance is now

the mantra of every fast-food franchisor, McDonald's invented the concept through its QSV&C (Quality, Service, Value, and Cleanliness) program.

The McDonald's numbers tell the story. By 1960, there were more than 200 McDonald's restaurants across the country.²⁹ By the time the company went public on April 15, 1965 (ten years to the day after Kroc had opened his first restaurant), there were 710 McDonald's restaurants in forty-four states producing \$171 million in annual sales. In 1972, with more than 2,200 McDonald's restaurants and system sales of \$1 billion, Kroc received the Horatio Alger award. *Time Magazine* ultimately named him one of the 100 most influential Americans in the twentieth century.

The McDonald's system was not the only franchise success story. Brands like Kentucky Fried Chicken, International House of Pancakes, Radio Shack, Ramada Inns, Perkins Pancake House, and Midas dotted the streets and highways of America. These systems and many others enjoyed significant growth in the late 1950s, but "what changed this rapid but steady expansion to a boom was the publicity generated in the late 1950s when both the popular and business press discovered franchising."³⁰

Franchising eventually hit Wall Street. The stock of Kentucky Fried Chicken hit the market in March 1966 and ignited what *Newsweek* described as "one of the decade's daffiest booms—the great franchise explosion."³¹ By 1969, the stock prices of franchise companies had created a number of new multimillionaires, at least on paper. Al Lapin, the founder of International House of Pancakes, was worth \$40 million on paper; Ray Kroc, \$100 million; and John Brown and Jack Massey, the two partners behind the growth of Kentucky Fried Chicken, well over \$50 million apiece.

As 1969 drew to a close, franchising was at its zenith, although cracks had already appeared in franchising's veneer. The estimated number of franchisors had grown from 789 to 900 during 1969 alone. Franchise industry revenues had grown 3,600 percent over the fifteen-year period from 1955 to 1970.³² From 50,000 franchisees in 1955 grossing \$2.5 billion annually, franchising had grown by 1970 to 670,000 franchisees "selling everything from potato pancakes to pedigreed poodles and piling up volume of \$90 billion a year."³³ Franchising had become, according to *Newsweek*, "a game that everyone can play—from the biggest names in show business and the craftiest financiers of Wall Street to the man on the street."³⁴ "The latter," the magazine reported, "has gotten in on the action either by buying a franchise or by buying one of the scores of stocks in franchise companies that have rushed to the market in the last year."³⁵

1970: The Bubble Bursts

The headline in the *Wall Street Journal* for Friday, May 29, 1970, said it all: "Many Franchise Firms Fall on Hard Times After a 15-Year Boom."³⁶ According to the article, "once considered the darling of Wall Street and the savior of the small businessman, franchising today is spurned on Wall Street and cursed on Main Street."³⁷

Several things coalesced in 1970 to burst the franchising

bubble. Most visible was the collapse of a huge bull stock market “in which the franchisers flew high among the glamour stocks, soaring in the unaccustomed company of computer and electronics makers.”³⁸

Compounding the problem, some franchisors, under then-common accounting methods, recorded their entire initial franchise fee as income the day the franchise agreement was signed. The Minnie Pearl’s Chicken System, owned by PSI, was the headline grabber of the problems attendant to this practice. One of its founders, John Jay Hooker, reportedly “sold franchises by the carload, knocking off whole territories in a single stroke to entrepreneurs who were to subfranchise (some were sold to companies organized and owned in part by Hooker himself).”³⁹ Each time Hooker sold a franchise, PSI booked the franchise fee as income. By the time it went public in May 1968, PSI had sold and recorded income from the sale of 405 franchises, although only four restaurants were actually open.⁴⁰ Its stock reached a peak of \$68 per share before the franchise bubble burst. By the end of 1969, only 263 Minnie Pearl stores were in operation, although by then 1,600 had been sold.⁴¹ Ultimately, PSI stock fell to less than \$1 per share.⁴²

Adding to the discontent with franchising was the emergence of the celebrity franchise system in the late 1960s, systems for which the celebrities had done little more than lend their name. Johnny Carson, Edie Adams, and Mickey Mantle testified in January 1970 before the highly publicized Senate hearings on franchising chaired by Harrison Williams. They were not, however, the only celebrities to join the franchising game. Others included Tony Bennett, Eva Gabor, Ed McMahon, Jerry Lewis, Mahalia Jackson, Arthur Treacher, Fats Domino, Dizzy Dean, Eddie Arcaro, Rocky Graziano, Roy Rogers, Tennessee Ernie Ford, Eddy Arnold, Al Hirt, Pat Boone, and Willie Mays. The rise and fall of Broadway Joe’s was emblematic of the celebrity franchise scandal. Named after quarterback Joe Namath, Broadway Joe’s had opened just one restaurant when it sold 200,000 shares to the public in the spring of 1969. After reaching a high of \$17 per share, by the summer of 1969 the shares traded at \$5 each.⁴³

The decline of franchising manifested itself and was hastened by lawsuits, particularly class actions, against franchisors. No system experienced the negative impact of litigation more than Chicken Delight.⁴⁴ In January 1967, a group of franchisees filed a class action against Consolidated Foods Corp., the owner of the Chicken Delight system, claiming that the franchisor had unlawfully tied the purchase of products to the purchase of the franchise.⁴⁵ Chicken Delight did not charge its franchisees an up-front fee or royalty but instead earned its revenues from the sale of cookers, fryers, packaging, and mixes. The case went to trial in early 1970 and resulted in a jury verdict against the franchisor. The Ninth Circuit, in the now infamous *Siegel v. Chicken Delight*,⁴⁶ affirmed the trial court’s finding of an unlawful tie under the Sherman Act § 1 but reversed the damages award. The legal victory marked the end of the Chicken Delight franchise system. The franchisor ceased selling products in the wake of the jury verdict, and within a few months, half of the franchised locations were closed. By the time of the Ninth Circuit opinion, most of the franchisees and the franchisor had gone out of business.⁴⁷ Consolidated ultimately settled the class action for \$2.5 million,

which, after payment of fees, put about \$2,600 in the pockets of each of the approximately 800 class action members.⁴⁸

Perhaps the ultimate irony is that a court under the prevailing law today would throw out the case on summary judgment given Chicken Delight’s lack of economic power in the tying product market.⁴⁹ By the time of the *Siegel* decision, there were many franchisors competing in the chicken franchisor market, not the least of which was Kentucky Fried Chicken. The Ninth Circuit nevertheless concluded that “Chicken Delight’s unique registered trade-mark, in combination with its demonstrated power to impose a tie-in, established as a matter of law” market power.⁵⁰

Beyond the headline-catching problems of systems like Minnie Pearl’s, horror stories of individual, mom-and-pop franchisees losing their life savings to fly-by-night franchisors became commonplace. The empirical data supporting the claims of widespread abuse might have been inconclusive, but the rhetoric was not. One source of inflammatory statements was the office of then New York Attorney General Louis Lefkowitz. Based on 1,000 questionnaires sent to franchisors in 1969, Lefkowitz’s office concluded that “franchising companies are in many instances fly-by-night operations often with nothing more substantial than fancy multi-color brochures”; “citizens of this state are surrendering their life savings to buy worthless franchises”; and “criminal elements and high pressure salesmen have infiltrated into the franchise business.”⁵¹

Chief among the critics was Boston lawyer Harold Brown. Describing the franchise relationship as “characterized by such pervasive power of [franchisor] control,” Brown called upon the courts to make the franchisor a fiduciary.⁵² Brown described the typical franchisee as follows: “Generally franchisees are in their middle years, come from a sheltered existence, and appear to be totally unprepared for a violent change in their life pattern—numerous franchisors have stated that their franchisees are like children, demanding constant discipline and control. Franchising may well warrant analysis by psychologists.”⁵³

Franchising’s reputation by 1970 was at its nadir. A May 29, 1970, *Wall Street Journal* article carried the subheading, “Investigations, Dealer Revolt, Market Saturation Plague Fast Food Firms, Others.”⁵⁴ It captured succinctly the apparent sentiments of the times.

The spectacular early success of franchisers and the ease of entry into the field prompted many entrepreneurs with neither experience nor capital to become either franchisers or dealers. The franchise holder today is often no businessman at all but perhaps a plumber or electrician who has been told he needs no experience to profit handsomely and that the franchiser will teach him all he needs to know. Some business greenhorns have sunk all their savings into franchises only to see everything evaporate.⁵⁵

Although franchising clearly had a black eye in 1970, there was ultimately little doubt that franchising was a critical part of the American business landscape. Moreover, the empirical data did not support the rhetoric coming from franchising’s most vocal critics. John Buffington, then general counsel to the Federal Trade Commission (FTC), appeared before the Williams

subcommittee on January 27, 1970. He testified that “frankly, the Commission does not know the extent of the use of exploitative practices in franchising. We receive relatively few complaints on such matters.”⁵⁶ He was quick to add that this did not mean that deceptive practices were a “minor problem” but may only mean that “a fleeced franchisee realizes that the Commission cannot restore him to his former position.”⁵⁷

Following the conclusion of the Williams hearings, the Senate Small Business Committee published in 1970 a report entitled “The Impact of Franchising on Small Business.”⁵⁸ It concluded that statistical and empirical information about franchising was deficient in both quality and quantity.⁵⁹ The Small Business Administration sought to fill the gap by commissioning a study by the University of Wisconsin. In 1971, Wisconsin Professors Ozanne and Hunt issued their report entitled “The Economic Effects of Franchising.”⁶⁰ In their recommendations, the authors said thus:

We conclude that the net economic effects of franchising as a system of distribution are positive. Without franchising, thousands of small businessmen would never have had the opportunity of owning their own businesses. Similarly, franchising has enabled many entrepreneurs with little capital to take an idea and from it build a large multi-unit organization. Without franchising, these entrepreneurs would have had to give up their idea or attempt to sell it to some large corporation. Any system which opens up economic opportunities for the “little guy” should be carefully nourished and protected. Franchising represents a viable alternative to large, completely integrated corporate chains. Since the net economic effects of franchising are positive, any legislation which would crippled this very important segment of our economy should be avoided.⁶¹

The authors called for federal regulations requiring “full disclosure,” a “cooling off” period after execution of the franchise agreement, and termination for cause.⁶²

FRANCHISE REGULATION

Federal Government

Congress was the first venue for proposed franchise regulation. The principal proponent for federal legislation on franchising was Senator Philip Hart of Michigan. As chair of the Subcommittee on Antitrust and Monopoly, Hart held hearings in 1965 and 1966 and introduced in August 1967 a bill entitled the Franchise Competitive Act, which sought to regulate termination of franchise relationships.⁶³ Senator James Eastland of Mississippi introduced the Franchise Distribution Act of 1967, a bill designed to reduce “the great disparity in economic power now heavily in favor of the franchisor.”⁶⁴ Senator Hart introduced, in 1969, a modified version of his earlier bill establishing additional regulation of the franchise relationship.⁶⁵ Finally, Senator Williams introduced in May 1970 a bill that paralleled many of the concepts of the presale disclosure bill then pending in California.⁶⁶ None of these bills ever became law, and the battleground of franchise regulation shifted to the states, particularly California and Washington at the outset.

State Laws and Regulations

The states filled the legislation gap left by Congress. Not surprisingly, California became a hot spot for the franchising boom and eventually franchise regulation. By 1969, California had the largest number of franchisees of any state, with approximately 5,600 franchisees—nearly 10 percent of the more than 600,000 franchisees in the entire United States.⁶⁷ Alongside its high number of franchisees, the state had a high number of franchisee complaints. California’s deputy attorney general reported during a hearing in Sacramento on November 7, 1969, that “the number of complaints received by the Attorney General’s office indicates that in the investment field franchise problems have now replaced promotional subdivision problems as the number one area of concern of California investors.”⁶⁸

California was one of the first states to regulate franchising when, on January 1, 1971, the California Franchise Investment Law (CFIL) became law.⁶⁹ The California legislature stated its intent in § 31001 as follows:

The Legislature hereby finds and declares that the widespread sale of franchises is a relatively new form of business which has created numerous problems both from an investment and a business point of view in the State of California. Prior to the enactment of this division, the sale of franchises was regulated only to the limited extent to which the Corporate Securities Law of 1968 applied to those transactions. California franchisees have suffered substantial losses where the franchisor or his or her representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between franchisor and franchisee, and the prior business experience of the franchisor.⁷⁰

The CFIL was primarily a presale disclosure statute. It sought to require franchisors to provide franchisees with the “full and complete information” that they needed to make an informed investment decision. The law required franchisors to furnish a disclosure document to each prospective franchisee within a certain period of time prior to execution of a binding agreement. The law also required that the disclosure document contain information regarding the franchise business and the experience of the franchisor; a statement of the terms and conditions of termination or refusal to renew the franchise relationship; any requirement that the franchisee purchase goods or services from the franchisor’s designee; an explanation of the basis and data underlying a statement of estimated or projected earnings; and the identification of any exclusive territory. The law established a procedure for the franchisor to file with the California Commissioner of Corporations an application for registration along with the proposed offering prospectus and copies of the proposed franchise and related agreements, financial statements of the franchisor, and copies of advertisements offering the franchise opportunity. Although concerned primarily with adequate disclosure to the prospective franchisee prior to sale, the act also declared unlawful the offer or sale of a franchise by means of any communication that contains an untrue statement of a material fact or that omits a

material fact necessary in order to make the statements made not misleading.⁷¹

The CFIL did not pass without input from franchisors. The interests of franchisors in the California legislation were represented primarily by the International Franchise Association (IFA), an association formed by a group of franchisors in 1960. By 1970, the IFA had some 200 members, including the franchisors of the McDonald's, Holiday Inn, and Kentucky Fried Chicken systems.⁷² The IFA hired Harry Rudnick, a Chicago attorney, as its legal counsel. Franchisor representatives (principally the IFA and Rudnick) supported California's adoption of franchise regulations patterned after the California Corporate Securities Law but resisted the "fair, just, and equitable" standard of the securities law.⁷³ The act as finally adopted did not include this standard.

California was not the first state to regulate franchising. Delaware passed its Franchise Security Law, effective July 8, 1970, a relationship statute that prohibited the termination or nonrenewal of "franchised distributors" without "good cause" or "in bad faith."⁷⁴ New Jersey followed suit in 1971 with passage of its New Jersey Franchise Practices Act⁷⁵ prohibiting "the arbitrary and capricious cancellation of franchises while preserving the right of franchisors to safeguard their interests through the application of clear and nondiscriminatory standards."⁷⁶

Washington State entered the fray on February 19, 1971, with the introduction into both houses of its Franchise Investment Protection Act (FIPA).⁷⁷ The bill, as introduced, contained disclosure provisions patterned after the California Franchise Investment Law and "fair practice" provisions based on a bill introduced into the Massachusetts legislature.⁷⁸ The FIPA passed in the House and Senate in the 1971 session and was signed by then Governor Evans, but its effective date was delayed until May 1972 to allow franchisor interests an opportunity to seek amendments during the 1972 session.⁷⁹

Like California's CFIL, Washington's FIPA did not pass without franchisor input. Washington's assistant attorney general, William Clark, said in October 1971 that "the International Franchise Association is gearing up for a major attack on the bill."⁸⁰ As it turned out, Clark and the Washington attorney general met privately with franchisor representatives between legislative sessions and reached an agreement on a set of amendments, "which in several respects diluted the protection offered to franchisees by the Act."⁸¹ The amendments were attached to a "title-only" bill that passed in the 1972 session.

Several states adopted disclosure and registration laws in the 1970s,⁸² and a number of states also adopted franchise fair practices acts, also called franchise relationship regulations, during the same period.⁸³ Today, fifteen states have legislation requiring presale disclosure of specified information by a franchisor to a potential franchisee.⁸⁴ Eighteen states have legislation governing the franchise relationship.⁸⁵

Federal Trade Commission

In 1979, the FTC adopted its FTC Rule (Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures).⁸⁶ Like California, the FTC concluded that the best way to protect prospective franchisees is through disclosure.

According to the FTC's Statement of Basis and Purpose supporting its adoption in 2007 of its Amended Franchise Rule:

[t]o prevent deceptive and unfair practices in the sale of franchises and business opportunities and to correct consumers' misimpressions about franchise and business opportunity offerings, the Commission adopted the original Franchise Rule, which is primarily a pre-sale disclosure rule. The original Rule did not purport to regulate the substantive terms of the franchise or business opportunity relationship. Rather, it required franchisors and business opportunity sellers to disclose material information to prospective purchasers on the theory that informed investors can determine for themselves whether a particular deal is in their best interest.⁸⁷

FRANCHISING TODAY

Franchising today is in some ways the same as it was in 1970, yet in other ways quite different. Franchising was in 1970, and still is today, a critical component of the U.S. economy. It was then, and remains today, one of the best hopes for the small entrepreneur to become an independent businessperson and still compete with big business.

What is different today is the sophistication of franchisees. Franchisees today are more savvy than their counterparts forty years ago, most notably because of the presale information available to them and the widespread emergence of the multi-unit franchisee. As to the former, franchisees now have through the typical franchise disclosure document detailed information about the franchise opportunity, the very information a number of states and the FTC have determined will allow the franchisee to make an informed buying decision. As to the latter, franchising is still dominated by the single-unit operator, but multiunit operators are a large and significant component of the franchising landscape today. Indeed, the multiunit operator has become the target franchisee for many franchisors. As a consequence, the uniform franchise agreement present in the marketplace today is frequently written to attract sophisticated franchisees that are candidates to become multiunit operators.

Franchising and the Economy

Franchising was big business in 1970, and it remains big business today. Senator Williams, in his opening statement before his subcommittee on January 20, 1970, said that "franchising now accounts for approximately \$90 billion in annual sales, or about 10 percent of our country's gross national product."⁸⁸

The U.S. Department of Commerce reported on franchising in the U.S. economy over a fifteen-year period. Its first report covered the years 1973 to 1975, and its final report covered 1986 to 1988. In its report for 1973–75, the department said that "franchise sales of goods and services should reach a record level of \$176.9 billion in 1975."⁸⁹ In its final report for 1988, the department observed that "franchising sales of goods and services in more than 509,000 outlets are expected to reach almost \$640 billion in 1988, about 7 percent higher than a year earlier and about 91 percent over the level of sales at the start of the 1980s."⁹⁰

The IFA has picked up where the Department of Commerce

left off. It has funded two major studies of franchising by Price-waterhouseCoopers, the first based on data from 2001 and the second on data from 2005. The most recent study sought to measure the “direct impact” on the U.S. economy of franchise businesses, the “total impact” of franchise businesses on the economy, and the employment generated by franchising according to various economic sectors. The report concluded that franchise businesses generate an annual economic output of \$2.3 trillion, or 11.4 percent of the total private U.S. sector output.⁹¹

The story this data tells is that the continued health of franchising is important to the franchisor, franchisee, potential business owner, supplier, franchise employee, investor, individual consumer, and the economy as a whole. The observations of the Department of Commerce in its final report are as valid today as they were in 1988:

Franchising, a major force in the U.S. economy, continues its steady growth in sales, employment, units, and international expansion, offering tremendous opportunities to individuals seeking their own businesses and companies looking for wider distribution for their products, systems, and services. Franchising has become so powerful partly because economic factors have made growth through company-owned units difficult for many businesses. In addition, franchisees are enjoying a competitive edge over other small business entrepreneurs by the use of trade names, marketing expertise, acquisition of a distinctive business appearance, standardization of products and services, training, and advertising support from the parent organization.

Franchising represents the small entrepreneur’s best chance to compete with giant companies that dominate the marketplace. Without franchising, thousands of businesspersons would never have had the opportunity of owning their own businesses and never have felt the immense satisfaction of being a part of the free enterprise system.⁹²

The public record leaves little doubt that legislators, when adopting various state laws, have been aware of the critical role franchising has played in the United States economy since WWII. There is no evidence that the chief concern of the state legislators was to safeguard generally the individual franchisee at the expense of the many other stakeholders in the franchise relationship. To the contrary, these laws reflect a careful balancing of these respective interests. The FTC recently identified the importance of balance in explaining why it declined to “impose industry-wide provisions mandating substantive terms of private franchise contracts that would impact on the entire franchise industry”:⁹³

In our law enforcement experience investigating relationship issues in individual franchise systems, it has been the case that the franchisor actions allegedly causing harm to individual franchisees also frequently generate countervailing benefits to the system as a whole or to consumer welfare overall that may or may not be outweighed by the alleged harm to franchisees.⁹⁴

Debunking the Myth of the Vulnerable Franchisee

Franchise legislation and regulations have achieved their goal. The presale disclosure requirements at the state and federal level in particular have given franchisees considerable information regarding the franchise opportunity. Based on the theory that “informed investors can determine for themselves whether a particular deal is in their best interest,” these laws guarantee to the franchisee the basic information legislators and administrators deem necessary to make an informed decision. Franchisees today have information that franchisees in 1970 could not reasonably have obtained on their own. Franchisees now have laid before them, in plain English, a franchise disclosure document containing such things as the litigation history of the franchisor and even the names, addresses, and telephone numbers of current franchisees. Armed with this information, franchisees today can easily shop alternative franchise opportunities. The FTC has summarized the situation as follows:

With regard to avoidability of injury, the unfairness analysis falls short. A franchise purchase is entirely voluntary. The Franchise Rule ensures that each prospective franchisee receives disclosures—expanded in key respects by the current amendments—that explain the terms and conditions under which the franchise will operate. Prospective franchisees can avoid harm by comparison shopping for a franchise system that offers more favorable terms and conditions, or by considering alternatives to franchising as a means of operating a business. Prospective franchisees are also free to discuss the nature of the franchise system with existing and former franchisees, as well as trademark-specific franchisee associations, and the amended Rule facilitates such discussion by providing prospects with contact information. Under these circumstances, the Commission cannot categorically conclude that prospective franchisees who voluntarily enter into franchise agreements, after receiving full disclosure, nonetheless cannot reasonably avoid harm resulting from a franchisor enforcing the terms of its franchise agreement.⁹⁵

Not only do franchisees today have much more presale information than they did forty years ago, collectively they are also more sophisticated and have more bargaining power. Professors Blair and Lafontaine in their recent treatise identify “four popular misconceptions about franchising,” one of which is that “franchisees all operate small mom-and-pop ventures, and are inexperienced and unsophisticated in business matters,” a misconception that the authors say leads to a “perception of imbalance of power between franchisors and franchisees.”⁹⁶ According to Blair and Lafontaine,

The main conclusions to draw from the data are that a very large number of franchisees, most likely the majority of them, to this day are single-unit owners, but multi-unit ownership is present at least to some degree in almost all franchised chains, and a large proportion of franchised units belong to multi-unit franchisees. Moreover, many multi-unit franchisees are large and sophisticated companies. In fact, the data imply that the largest 200 franchisees are larger on average than the typical (median) franchisor.⁹⁷

Professors Brickley, Misra, and Van Horn in their study published in 2006 in the University of Chicago's *Journal of Law and Economics*⁹⁸ also debunk the naïve franchisee view. They first explain the difference between the "economic view" of franchising and the "naïve-franchisee view."⁹⁹ According to the authors, the economic view "casts the marginal franchisee [the franchisee that is "relatively well informed"] as a rational individual who adjusts his reservation price for a franchise on the basis of the terms in the contract."¹⁰⁰ "The naïve-franchisee view, by contrast, implies that the contracts of larger, better-known companies will not reflect the concerns of the franchisee (the contracts are one-sided)."¹⁰¹ Studying the contracts of over 1,000 franchisors, the authors concluded that the naïve view is inconsistent with reality. They find that large franchisors do cater to the interests of franchisees by issuing franchise agreements of long duration, one of the most critical elements of any agreement for any franchisee.

Drawing on a database of 180,000 franchisees and 255,000 unit addresses from 1,300 brands, FRANData found in 2007 that 24 percent of franchised units in the United States were owned by franchisees with two to five total units. Twenty-five percent were owned by franchisees with more than five units. Fifty-one percent were owned by single-unit operators. According to FRANData, 82 percent of franchisees are single-unit operators that control 51 percent of the units, 15 percent own two to five units and control 24 percent of the units, and 3 percent own more than five units and control 25 percent of the unit locations.¹⁰²

Although franchisees collectively have more bargaining power than their counterparts did in 1970, franchisors have no more economic power today than they did forty years ago. In fact, franchisees have a wide variety of alternative franchise opportunities in which they can invest. FRANData estimates that there are more than 2,900 active franchise systems today.¹⁰³ There are multiple franchise concepts competing with each other for franchisees in almost every segment of the retail and business-to-business industry. *Entrepreneur Magazine* has a website devoted to franchising that identifies the many alternatives a franchisee has in choosing a franchisor, and *Bond's Franchise Guide* identifies over 1,000 separate franchise investment opportunities. With such a broad variety of franchisors competing with each other for franchise opportunities, it is difficult to imagine that individual franchisors have anything approaching economic power and that franchisees have little alternative but to give in to the contractual dictates of an overpowering franchisor.

Perhaps the most insidious assumption by some courts today is that franchise agreements are procedurally unconscionable simply because they are usually take-it-or-leave-it documents. This view is again the product of courts considering the interests and input of only the two direct parties to the franchise agreement. When viewed from the larger perspective of franchisors competing for sophisticated franchisees and franchisees having numerous alternative investment opportunities, the typical franchise agreement is anything but unconscionable. The willingness of franchisors to commit to a thirty-year franchise relationship is alone evidence that franchise agreements are

not altogether one-sided. And the existence of a uniform franchise agreement means that less powerful franchisees get the benefits of the same contractual protections as more powerful franchisees. In fact, California franchise regulations state that where a franchisor offers or sells a franchise on terms other than those contained in its standard form of agreement, it must file a "negotiated sales notice" with the state and must attach to its disclosure document all such notices that it has filed within the prior twelve-month period.¹⁰⁴ In addition to this, there are other reasons that franchisors are slow to negotiate their standard agreement, including ease of contract administration and the desire for equal treatment of similarly situated franchisees.

An End to Applying the Remedial Purpose Canon

Where compelled by statute to apply the remedial purposes canon, courts have little alternative but to follow the directive. The Wisconsin Fair Dealership Act,¹⁰⁵ for example, specifically says that the statute should be "liberally construed" to promote fair business relations between dealers and grantors and to protect dealers from unfair practices by grantors.

Absent this directive (or other equally compelling evidence), however, courts should not view franchise legislation and regulations as "designed to favor franchisees over franchisors."¹⁰⁶ The Alabama Supreme Court recently said thus in *Edwards v. Kia Motors of America, Inc.*:

The implication in the dissent is that the Franchise Act should be read to operate against the manufacturer and in favor of the dealer and that it is the duty of this Court to enforce such an application in favor of the one and against the other class of parties. It is instead the duty of this Court to apply the law as it is written, regardless of the identity of the parties, "dispassionately approach[ing] the issues on their merits, as we are required by oath to do."¹⁰⁷

There are legal theories available that courts can use to reject (or at least temper) application of the remedial purpose canon to franchise legislation. First, courts may not use the remedial purpose canon to contradict the plain meaning of a statute.¹⁰⁸ A second situation where courts have recognized the limits of the remedial purpose canon is when a liberal construction would either upset a legislatively crafted compromise or cause conflict with other goals of the statute.¹⁰⁹ Franchise legislation reflects just such a compromise.

Conclusion

The purchase of a franchise is not significantly different from the purchase of any business opportunity. There are no guarantees. Two hundred new franchise systems entered the marketplace in 2007 alone during an economic downturn when it seemed the franchise market was already saturated.¹¹⁰ A number of these systems will never get off the ground, a number will ultimately fail, a number will be successful, and one or more may be the next McDonald's franchise system. There is undoubtedly a risk-reward component to joining one of these new franchise systems as opposed to a more established one. But this is the reality of the marketplace.

Franchisees today have all of the information that legislators and regulators have found they need to make an informed

decision. Franchise agreements include protections deemed appropriate by state legislators and reflect competition among franchisors for franchisees. If franchisors break their contracts or violate the specific prohibitions of state franchise laws, the courts must call them to account. There is simply no place in today's environment, however, for courts to bail franchisees out of bad business decisions under an assumption that franchisees are collectively naïve or franchisors are collectively overpowering or that they are under a directive to liberally construe franchise legislation.

Endnotes

1. John F. Kennedy, Commencement Address at Yale University (June 11, 1962).
2. 51 Cal. Rptr. 2d 365 (Ct. App. 1996).
3. *Id.* at 372.
4. *Id.* at 375.
5. *Id.* at 374.
6. 469 F.3d 1257 (9th Cir. 2006).
7. *Id.* at 1282; *see also* AT&T Mobility II, LLC v. Pestano, 2008 WL 682523, at *4 (N.D. Cal. Mar. 7, 2008) (relying on *Nagrampa* and *PIP* as support for application of consumer contract adhesion cases to a franchise agreement even though a franchise does not involve the "necessities of life").
8. *Nagrampa*, 469 F.3d at 1313.
9. Randall v. Lady of Am., 532 F. Supp. 2d 1071, 1087 (D. Minn. 2007).
10. STATE OF WIS. DEP'T OF FIN. INSTS., SECURITIES & FRANCHISING, FRANCHISING REGULATION OVERVIEW, available at www.wdfi.org/fi/securities/franchise/regulatn.htm.
11. *Id.*
12. U.S. DEP'T OF COMMERCE, FRANCHISING IN THE ECONOMY 1986–1988 (Feb. 1988).
13. Howard Johnson's began in 1925 when Howard Johnson turned a failing drugstore in Massachusetts into a soda fountain and sundries store. Johnson opened his first highway restaurant in 1935. He thereafter pioneered franchising as an avenue for rapid growth of a chain of restaurants. Johnson owned a one-half interest in each restaurant. The franchisee, in turn, provided half the capital investment and managed day-to-day operations. Johnson controlled the menu and operation system. Each store had to purchase from Johnson the ice cream that made up the famous twenty-eight flavors, as well as purchase selected other food ingredients. Each building had a "roadside cathedral" look. By the end of 1939, there were 107 Howard Johnson restaurants; 1941, 150; 1951, 255. The restaurant chain peaked in 1979 with 870 units. *See generally* JOHN A. JAKLE & KEITH A. SCULLE, FAST FOOD: ROADSIDE RESTAURANTS IN THE AUTOMOBILE AGE 21 (1999).
14. THOMAS S. DICKE, FRANCHISING IN AMERICA: THE DEVELOPMENT OF A BUSINESS METHOD, 1840–1980 (1992).
15. *Id.* at 124.
16. *Id.* at 126.
17. *Id.*
18. NATHAN AASENG, BUSINESS BUILDERS IN FAST FOOD (2001).
19. Harry Axene was a sales manager for Allis-Chalmers when he encountered his first Dairy Queen store in East Moline, Illinois. Axene discovered that H.A. McCullough and his son, Alex, owners of an ice cream manufacturing facility in the Moline area, had developed the Dairy Queen concept. H.A. McCullough had already entered an agreement in 1939 with Harry Oltz, the inventor and holder of a patent on the soft-serve machine used in Dairy Queen stores. Under the agreement, Oltz received approximately two cents per gallon of soft-serve mix run through the freezer. McCullough and Oltz also agreed that McCullough had the right to license use of the patent in the western United States; Oltz had the eastern United States. The license agreement issued by McCullough and Oltz to third parties covered only the patent and had few quality controls. From 1943 through 1948, McCullough and Oltz sold some territories, but the major growth of the system came from Axene. Axene, over time, acquired from McCullough and Oltz the right to sell a number of exclusive territories to "territory operators." By 1948, Axene had sold all of his territories, often an entire state at a time. The territory operators purchasing territories from McCullough, Oltz, and Axene were generally permitted to do whatever they wanted in their territories. In 1948, Axene and others formed the Dairy Queen National Trade Association to bring uniformity into the Dairy Queen system by developing standard sources of supply and advertising programs. The first meeting of the association was on December 6–8, 1948. One of the Dairy Queen suppliers attending the first meeting was Ray Kroc, a supplier of the Multimixer brand shake mixer.
20. Leo Maranz introduced Axene to a new freezer, half the size of the Dairy Queen freezer, that Maranz had developed while Axene was still active in the Dairy Queen system. When the idea of a new freezer was rejected at the 1949 Dairy Queen convention, Axene severed his ties with Dairy Queen and formed a partnership with Maranz to develop Tastee-Freez as a market for its new freezer. CAROLINE H. OTIS et al., THE CONE WITH THE CURL ON TOP: THE "DAIRY QUEEN" STORY 39 (IDQI 1990).
21. *One Million Hamburgers and 160 Tons of French Fries a Year*, AM. RESTAURANT MAG., July 1952, at 44.
22. *Id.* at 45.
23. RAY KROC, GRINDING IT OUT (1977).
24. *Id.* at 79.
25. *Id.* at 13.
26. *See generally* JOHN F. LOVE, McDONALD'S BEHIND THE GOLDEN ARCHES 48–55 (1986).
27. *Id.* at 56.
28. *Id.*
29. *See generally* DANIEL GROSS, FORBES GREATEST BUSINESS STORIES OF ALL TIME (1996).
30. DICKE, *supra* note 14, at 126.
31. *The Great U.S. Franchising Boom*, NEWSWK. 3, 88 (Nov. 10, 1969).
32. *Many Franchise Firms Fall on Hard Times After a 15-Year Boom*, WALL ST. J., May 29, 1970, at 1.
33. *Id.*
34. *The Great U.S. Franchising Boom*, *supra* note 31, at 88.
35. *Id.*
36. *Many Franchise Firms Fall on Hard Times*, *supra* note 32, at 1.
37. *Id.*
38. *Franchising: Too Much Too Soon*, BUS. WK., June 27, 1970, at 54.
39. CHARLES S. BURCK, *Franchising's Troubled Dream World*, FORTUNE MAG., Mar. 1970, at 120.
40. Julie Bennett, *What Really Happened to Minnie Pearl Fried Chicken?*, FRANCHISE TIMES (June–July 2007), available at www.franchisetimes.com/content/story.php?article=00401.
41. Burck, *supra* note 39, at 120.
42. Bennett, *supra* note 40.

43. *The Great U.S. Franchising Boom*, *supra* note 31, at 88.

44. A.L. Tunick started his own company in 1950 wrecking and dismantling plant machinery. In 1951, his company was about to dismantle a factory producing the Deacon cooker, a unique method of quick-cooking chicken under high heat, but the inventor of the cooker talked him into keeping the business open. Tunick opened a store in 1952 to encourage sales of his cooker, demonstrating the product it produced. The chicken and the store were a big hit, and Tunick started the Chicken Delight franchise. By 1960, there were 160 Chicken Delight locations in forty states. By 1964, there were hundreds of Chicken Delight stores in nearly every state, and Tunick had his own office building, warehouse, and training school. Consolidated Foods Industries purchased Chicken Delight from Tunick and increased the system by 1970 to 800 stores.

45. For the history of the Chicken Delight system, *see* HARRY KURSH, THE FRANCHISE BOOM, 261–64 (1968).

46. 448 F.2d 43 (9th Cir. 1971).

47. Ernest A. Braun, *Policy Issues in Franchising*, 14 SW. U. L. REV. 155, 180 n.106 (1984).

48. *Id.*

49. See William L. Killion, *Franchisor Price: What Does Leegin Really Mean for Franchising*, 13:2 FRANCHISING BUS. & L. ALERT 2 (Sept. 2007).

50. Siegel, 448 F.2d at 49.

51. Memorandum from David Clurman to Attorney General Lefkowitz (Jan. 7, 1970) (reproduced in *Hearings Before the S. Subcomm. on Urban and Rural Economic Development of the Select Comm. on Small Business*, 91st Cong. 526–38 (1970)).

52. Harold Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650, 664 (1971).

53. *Id.* It is tempting to dismiss today these early statements by Brown as the hyperbole of a franchisee advocate. In the confusion that surrounded franchising in 1970, however, Brown's statements found a receptive ear. *BusinessWeek* reported that Senator Williams "hopes to 'unwrap the entire franchising package,'" including "the franchise agreement as a fiduciary relationship between the franchisor and franchisee." Bus. Wk., Jan. 3, 1970, at 16. Brown appeared as a witness before the Williams subcommittee. The Eighth Circuit in *Arnott v. American Oil Co.*, 609 F.2d 873, 884 (8th Cir. 1979), sustained a trial court finding that a fiduciary relationship existed between an oil company and a service station. The court later reversed itself in *Bain v. Champlin Petroleum Co.*, 692 F.2d 43 (8th Cir. 1982).

54. *Many Franchise Firms Fall on Hard Times*, *supra* note 32, at 1.

55. *Id.*

56. *The Impact of Franchising on Small Business: Hearing Before the S. Subcomm. on Urban and Rural Economic Development of the Select Comm. on Small Business*, 91st Cong. 311 (Jan. 27, 1970) (statement of John V. Buffington, General Counsel of Federal Trade Commission).

57. *Id.*

58. THE IMPACT OF FRANCHISING ON SMALL BUSINESS, S. REP. NO. 91-1344 (1970).

59. *Id.*

60. URBAN B. OZANNE & SHELBY D. HUNT, THE ECONOMIC EFFECTS OF FRANCHISING (1971). The report identified four preexisting major empirical studies on franchising: LEWIS & HANCOCK, THE FRANCHISE SYSTEM OF DISTRIBUTION (1963); CURRY ET AL., PARTNERS FOR PROFIT (1966); ATKINSON, FRANCHISING: THE ODDS-ON FAVORITE (1968); CHARLES L. VAUGHN, THE VAUGHN REPORT ON FRANCHISING OF FAST FOOD RESTAURANTS (1970).

61. OZANNE & HUNT, *supra* note 60, at 63.

62. *Id.* at 63–67.

63. S. 2321, 90th Cong., 1st Sess. (1967).

64. S. 2507, 90th Cong., 1st Sess. (1967).

65. S. 1967, 91st Cong., 1st Sess. (1969).

66. S. 3844, 91st Cong., 2d Sess. (1970).

67. Comment, *A Tempest in a Chicken Bucket: Some Reflections on Franchise Regulation in California*, 17 UCLA L. REV. 1101 n.4 (1970).

68. *Id.* at 1103.

69. The CFIL was introduced into the state legislature on May 18, 1970, and was drafted by the staff of the California attorney general in conjunction with the Department of Corporations. *Id.* at 1123 n.134. It was based in large part on the California Corporate Securities Law, *id.* at 1123, and built on the definitions of the 1969 version of Senator Hart's U.S. Senate bill. Braun, *supra* note 47, at 209.

70. California Franchise Investment Law, CAL. CORP. CODE § 31000 (1971).

71. *Id.* § 31201.

72. Wong, *In the Absence of Federal Risks, More States Begin Regulating the Franchise Industry*, WALL ST. J., Oct. 11, 1971.

73. TOM MURPHY, FROM BOARDROOM TO BEETLE BOARDS: MEMORY OF A CONSULTANT 65–66 (2002).

74. DEL. CODE ANN. tit. 6, §§ 2551–2556.

75. N.J. STAT. ANN. § 56:10-1 et seq.

76. Statement accompanying Franchise Practices Act, Assembly Bill No. 2063 (Mar. 29, 1971).

77. Donald Chisum, *State Regulation of Franchising: The Washington Experience*, 48 WASH. L. REV. 291 (1973).

78. *Id.* at 335. Harold Brown takes credit for preparing the initial draft of the Massachusetts Franchise Fair Dealing Act. Harold Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. at n.6 (1971).

79. *Id.*

80. Wong, *supra* note 72.

81. "Weakening amendments added in 1972 include several exemptions from registration. . . ; a provision apparently restricting the contents of the franchise offering circular. . . ; a provision restricting disclosures on prior franchise failures. . . ; a provision allowing earnings projections in franchise sales. . . ; and a provision diluting the prior prohibition of 'kick-backs.'" Chisum, *supra* note 77, at 336 n.223 (citations omitted).

82. See Braun, *supra* note 47, at 206 n.201.

83. Delaware (1970); New Jersey (1971); Washington (1972); Michigan (1974); Minnesota (1974); Wisconsin (1974); Hawaii (1974); Connecticut (1972); and Indiana (1976).

84. David A. Beyer & Scott P. Weber, *Perilous Prospects —Part I: Lawsuits to Get Into the System*, 22 FRANCHISE L.J. 224, 231 n.65 (2003).

85. *Id.* at 232 n.80. Rhode Island became the eighteenth state with enactment of its Rhode Island Fair Dealership Act, effective June 14, 2007.

86. 16 C.F.R. pt. 436.1.

87. 72 Fed. Reg. 15,445.

88. *Hearings Before the S. Subcomm. on Urban and Rural Economic Development of the Select Comm. on Small Business*, 91st Cong. 1 (1970).

89. U.S. DEP'T OF COMMERCE, FRANCHISING IN THE ECONOMY 1973–1975, at 1 (1975).

90. U.S. DEP'T OF COMMERCE, FRANCHISING IN THE ECONOMY 1986–1988, at 1 (Feb. 1988).

91. See INTERNATIONAL FRANCHISE ASSOCIATION, available at www.franchise.org/Franchise-News-Detail.aspx?id=38358.

92. U.S. DEP'T OF COMMERCE, *supra* note 86, at 1 (Feb. 1988).

93. DAVID J. KAUFMAN & DAVID W. OPPENHEIM, FTC DISCLOSURE RULES FOR FRANCHISING & BUSINESS OPPORTUNITIES 135 (2007).

94. *Id.* at 139.

95. *Id.* at 138.

96. ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING 49 (2005).

97. *Id.* at 50.

98. James A. Brickley, Sanjog Misra & R. Lawrence Van Horn, *Contract Duration: Evidence from Franchising*, 49 J. L. & ECON. 173 (2006).

99. *Id.* at 174.

100. *Id.*

101. *Id.*

102. Darrell Johnson, President, FRANData, Address at the Developer 2008 Multi-Unit Franchising Conference: The State of Multi-Unit Franchising—Mastering Growth (Apr. 2008).

103. See § 310.100.2 of the CALIFORNIA ADMINISTRATIVE CODE.

104. *Lady of Am.*, 532 F. Supp. at 1087.

105. Wis. STAT. § 135.025(a).

106. *Id.*

107. 2008 WL 2068088, at n.7 (May 16, 2008) (citing *Kaylor v. State*, 782 So. 2d 206, 211 (Ala. 2000)).

108. Blake A. Wilson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?* 20 HARV. ENVTL. L. REV. 199, 243 (1996).

109. *Id.* at 246.

110. Richard Gibson, *On Franchising*, WALL ST. J. (Mar. 2008), available at http://online.wsj.com/article/SB121004434452770011.html?mod=dist_smartbrief.