

**STRATEGIES FOR SELLERS AND BUYERS
IN A DEALER TERMINATION CONTEXT
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STRATEGIES FOR SELLERS AND BUYERS IN A DEALER TERMINATION CONTEXT

By Lawrence I. Fox¹

I. **CHOREOGRAPHING THE TERMINATION**

The seller's strategy prior to the implementation of the termination decision consists primarily of due diligence efforts designed to ensure that any litigation resulting from the termination will result in a determination that the decision was based upon legitimate business reasons and that reasonable steps were taken to reduce the impact of the termination on the buyer. Such steps will help to avoid the potential for the imposition of a preliminary injunction and increase the seller's chances of a successful summary judgment motion.²

To ensure that appropriate steps are taken to implement the termination decision the seller must evaluate: the agreement with the buyer, any applicable federal or state laws, common-law, and the U.C.C. to determine whether and to what extent notice and an opportunity to cure must be offered to the buyer, and to evaluate the post termination rights and obligations of the parties.

A. The Seller's Perspective

1. Does A Franchise Relationship Exist?

Of course, a threshold issue to determine is whether a franchise relationship has actually been established.

a. In Glenn Stetzer, Grando, Inc. et al. v. Dunkin' Donuts, Inc., 2000 U.S. Dist. LEXIS 2102 (D.Conn 2000), the court considered whether defendant granted a franchise to plaintiffs, even though the parties had not signed a written franchise agreement. Plaintiffs argued that after defendant granted it an exclusive license to develop and operate Dunkin' Donuts shops in a specified territory, defendant could not withdraw its site approval unless it had good cause and gave sixty days prior written notice, as required by the Connecticut Franchise Act. Defendant argued that the Act did not apply because there was no franchise agreement. In determining whether a franchise existed, the court considered whether the parties' conduct, in addition to their words, constituted an agreement; the absence of a formal written agreement was not determinative. The court held that the parties' words and actions indicated that defendant had not yet granted a

¹ Mr. Fox extends gratitude to Kevin Matz, an associate in McDermott, Will & Emery's New York office, for his assistance in the preparation of these materials.

² Throughout this paper, the term "seller" is used to mean seller, supplier, manufacturer, and franchisor; the term "buyer" is used to mean buyer, distributor and franchisee.

franchise to plaintiffs, and that plaintiffs were merely prospective franchisees in the process of developing the franchise site.

b. In Hartford Electric Supply Co. v. Allen-Bradley Co. Inc., 250 Conn. 334; 736 A.2d 824 (Conn. S.Ct. 1999), the Supreme Court of Connecticut ruled that a manufacturer and distributor created a “franchise relationship” by their conduct, therefore, the manufacturer’s attempt to terminate the distributor without cause violated state franchise law, even though the distribution agreement provided for termination by either party, with or without cause, on 90 days notice. Hartford had been a distributor of Allen-Bradley electrical products for more than fifty years when Allen-Bradley sent it a notice of termination letter. In deciding that the relationship rose to the level of a franchise such that the termination was governed by state franchise law, the court considered the long duration of the parties’ relationship, that Allen-Bradley approved Hartford’s business plan, possessed power over Hartford’s pricing, possessed some control over its hiring and firing, required rigorous training of its personnel, exerted significant control over its inventory, regularly audited its financial records, and dictated virtually every aspect of Hartford’s operations. Furthermore, the distribution agreement accounted for more than fifty percent of Hartford’s business. The court also ruled that Allen-Bradley’s attempt to terminate Hartford violated Connecticut’s unfair trade practices statute.

2. The Distribution Agreement.

Review the agreement to identify the precise nature of the notice obligations to the buyer. If the parties have agreed to a notice provision the parties will generally be bound by the terms of the agreement. It should be noted however that in some states a termination statute will override the terms of a contract if it provides more protection to the buyer than the contract.

3. State Statutory Termination Provisions.

If a state statute precludes termination unless certain grounds exist, then a termination on other grounds whether or not permissible under the agreement, will not be enforceable. See, e.g., Arkansas (Ark. Code Ann. 4-72-201 to 4-72-210 and 4-72-301 to 4-72-310); California (Cal. Bus. & Prof. Code 20000 to 20043); Connecticut (Conn. Gen. Stat. Ann. 42-133e to 42-133n); Delaware (Del. Code Ann. tit. 6, 2551 to 2553); Hawaii (Haw. Rev. Stat. 482E-1 to 482E-12); Illinois (815 ILCS 705/19 to 705/20); Indiana (Ind. Code Ann. 23-2-2.7-1 to 23-2-2.7-7); Michigan (Mich. Comp. Laws Ann. 445.1527); Minnesota (Minn. Stat. Ann 80C.14); Virginia (Va. Code 13.1-557 to 13.1-574); Washington (Wash. Rev. Code Ann. 19.100.180); Wisconsin (Wis. Stat. Ann. 135.01 to 135.07). The First Circuit in R.W. Intern. Corp. v. Welch Food, Inc., 13 F.3d 478 (1st Cir. 1994) has held that termination of a buyer during a one-year trial period prior to finalizing a franchise agreement violates the Puerto Rico Dealers’ Contract Act which permits terminations only for just cause.

4. Uniform Commercial Code.

Absent an agreement providing for notice of termination or an applicable statute, evaluate the applicability of UCC Code Section 2-309, which provides that in certain circumstances a reasonable notice will be implied. Article 2 of the UCC concerns the purchase and sale of goods. Two provisions of the UCC relate to terminations. Section 2-306 concerns output and requirement contracts and exclusive dealing contracts. Section 2-306 requires good faith on the part of parties to such contracts. It does not however, specifically address termination of such contracts. Section 2-309 governs performance and termination of an agreement which lacks a specific duration provision. Contracts which call for a series of performances over an indefinite duration, absent an agreement otherwise, requires reasonable notice of termination (UCC 2-309). UCC Section 1-203 imposes a general obligation that parties operate in good faith.

B. Implementing the Decision to Terminate

1. Limit Employee Communications and Contacts with Dealer.

Sales personnel should be told that they under no circumstances should coerce, threaten, or pressure the buyer. Contacts with a buyer to be terminated should strictly be from management personnel and not from sales personnel where it is more likely that communications may not be accurately conveyed or use of inflammatory language may occur.

Discovery of evidence of serious non-compliance by buyer should be reported to seller's management who should take action to communicate such non-compliance to the buyer to avoid a potential waiver of buyer's non-compliance as a reason for the termination. Cf. Landry v. Oceanic Contractors, Inc., 731 F.2d 299, 304 (5th Cir. 1984) (manufacturer's right to rescind contract was voided because it accepted performance from buyer with knowledge that contract had been breached), reh'g denied, 746 F.2d 812 (1984).

2. Record All Contacts Between Seller and Buyer.

Seller and counsel should consider preparing a form upon which all contacts between the seller and the buyer can be recorded. Only facts should be memorialized: there should be no characterization of the buyer by sales personnel. The persons completing the form should be generally familiar with the legal issues that might arise in litigation; the danger of the form being useful to the buyer should be kept in mind. Also, set up a clearing person through whom all communications with the buyer will be coordinated.

3. Grounds for Termination.

a. Grounds should be in strict accordance with the parties agreement and applicable state, federal and special industry statutes. The grounds should also be reasonable and supportable from a business judgment position.

The seller should always assume it will be required to establish that it acted fairly and in pursuit of legitimate business reasons. In almost all instances the rationale offered by the seller should be non-price related.

In Delta Truck & Tractor, Inc. v. J.I. Case Co., 975 F.2d 1192, 1201 (5th Cir. 1992), involving a Dealer Agreement requiring cause for termination of buyers, the court rejected seller's termination of buyer based on a wholesale transfer of assets to a competitor. The Fifth Circuit drew a distinction between a "true business contraction or partial liquidation on the one hand and the outright sale or transfer of an active trade or business on the other." Id. at 1200. A seller cannot avoid its obligations to a buyer simply by engaging in the latter transaction. Id. at 1202. Under the circumstances of this case, the court further found that the company acquiring the seller had assumed the obligations of the Dealer Agreement and was thus liable to buyer for violating the termination-for-cause provision of the agreement. See also Louis Glunz Beer v. Martlet Importing Co., 864 F. Supp. 810 (N.D. Ill. 1994) (subdistributors had right to pursue breach of distribution agreement claims against Miller Brewing Co. as purchaser of Molson Breweries U.S.A., Inc., manufacturer of brands distributed by the plaintiffs)

Where the agreement specifies the grounds for termination, the seller should be careful to state that such grounds include the expiration of the contract by its own terms. In Classy Maids, USA v. Konitzer, No. 92-0591-FT, 1992 Wisc. App. LEXIS 642 (Wisc. Ct. App. Dec. 8, 1992), a dry-cleaning franchisee chose not to exercise his option to renew the franchise agreement which included an anti-competition clause in the event of termination. When the ex-franchisee subsequently opened up his own dry cleaning business shortly after the expiration of the franchise agreement, the franchisor sued on the covenant not to compete. The court held that the covenant was unenforceable as the ex-franchisee was not terminated and under the express language of the contract, merely allowing the agreement to lapse did not constitute termination, thus not triggering the anti-competition provision of the contract.

b. Courts recognize a seller's right to establish an efficient and profitable distribution network and that sellers are not obligated to continue doing business with buyers that do not meet their performance responsibilities, or where the supplier demonstrates a legitimate need for a change. See, e.g., Morley-Murphy Co. v. Zenith Electronics Corp., 142 F.3d 373 (7th Cir. 1998); Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, (2d Cir. Conn. 1995). Cf. Sims v. Brown-Forman Corp., 468 S.E.2d 905 (Va. Sup. Ct. 1996).

c. Termination At Will

(1) Jespersen v. Minnesota Mining and Manuf. Co., Bus. Franchise Guide, ¶ 11,180 (Ill. Ct. App. 1997) (where distribution agreement provided that it would continue in force indefinitely, but that distributor could terminate the agreement for certain designated reasons, court held distributorship

was of indefinite duration and terminable at will because only one party — the distributor — had the option to either comply with the agreement or not; the court also held that the implied covenant of good faith could not be used to override the right to terminate at will that was clearly granted by the agreement).

(2) Lane’s Floor Coverings & Shaw Industries, Inc., Bus. Franchise Guide (CCH) ¶ 11,568 (S.D.N.Y. Jan. 13, 1999) (although agreement appeared to be an indefinite contract terminable at any time and not an unenforceable perpetual agreement, substantial ambiguity concerning the parties’ intent in making the agreement existed, thus making summary judgment improper).

(3) Consumers Int’l Inc. v. SYSCO, Inc., Bus. Franchise Guide, ¶ 11,309 (Az. Ct. App. 1997) (where distribution agreement provided that it could be terminated by either party upon 60 days’ notice, the court refused to apply the implied covenant of good faith and fair dealing to require termination for cause only). See also, Infomax Office Sys. v. MBO Binder & Co. of Am., 976 F. Supp. 1247 (S.D. Iowa 1997).

d. “Good Cause” for Termination.

The requirement of cause for termination may be imposed by a state statute, it may be included in the parties written agreement, or it may be part of a state’s common law. See, e.g., BGB Pet Supply, Inc. v. Nutro Products, Inc., Bus. Franchise Guide (CCH) ¶ 11,321 (6th Cir. 1997) (holding that under Michigan law a contract that provides that it will continue so long as performance is satisfactory is terminable only for cause).

(1) Statutory Good Cause:

Several statutes specify examples of good cause for termination. A few such examples are;

- willful abandonment of the business by buyer (Arkansas, California, Connecticut, Illinois, Minnesota, Mississippi, Missouri, New Jersey, Washington);
- criminal conviction of buyer; (Arkansas, California, Connecticut, Illinois, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Washington);
- bankruptcy of buyer (Arkansas, California, Illinois, Minnesota, Mississippi, Missouri, Nebraska, Washington, Wisconsin);
- impairment of seller’s trademark by buyer (Arkansas, Illinois, Minnesota);

- buyer's failure to pay money owed to seller (Arkansas, California, Mississippi, Missouri, Nebraska);
- misrepresentation or fraud by buyer in entering the agreement (California, Mississippi, Missouri, Nebraska);
- failure by buyer to comply with laws and regulations applicable to business (California, Minnesota);
- repeated instances of default by buyer (California, Illinois, Washington);
- franchisee actions adversely and substantially affected franchisor's interests (Puerto Rico);
- death of majority stockholder of buyer (Maryland) See, e.g., Heisel v. John Deere Const. & Forestry Co., 2008 WL 53232 (E.D. Mo. 2008).

Note: Many statutes define good cause without reference to specific examples. A typical definition provides that good cause "shall include, but not be limited to, the failure of [buyer] 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."

(2) "Cause":

- a. Buyer's Failure to Pay Debts to Seller (the most common reason for termination).

See ABJO Motors, Inc. v. Shell Oil Co., 856 F. Supp. 656 (S.D.Fla. 1994) (buyer's failure to pay rent good cause for termination under the Petroleum Marketing Practices Act).

- b. Buyer's Failure to Meet Sales Quotas.

If quota is part of the agreement, courts will scrutinize the facts and circumstances to determine its reasonableness. If general market conditions cause many buyers to be in non-compliance with established quotas, the seller may not be able to selectively enforce a quota provision. For example, in Newell Puerto Rico, Ltd. v. Rubbermaid Inc., 20 F.3d 15 (1st Cir. Mar. 31, 1994), the court upheld a jury verdict awarding the buyer \$1.4 million in damages where the buyer presented evidence that seller's assigned sales objectives did not comport with realities of the Puerto Rico market, and seller failed to come forth with evidence that its requirements were reasonable.

c. Buyer's Acquisition of Interest in Other Businesses.

Refusal of buyer to participate in the seller's promotional or selling efforts can be grounds for termination. See, e.g., Day Enterprises, Inc. v. Crown Scent Petroleum Corp., 529 F. Supp. 1291 (D.C. Md. 1982) (termination approved because buyer failed to expend "substantial full time" to the business).

d. Buyer's Interest in Competitor's Franchises.

Franchisee's ownership of five Hardee's restaurants held to be violative of Burger King franchise agreement prohibition against holding any interest in any business similar to franchisor's. Clause held reasonable under Wisconsin statutory standards of "good cause" — "essential and reasonable." Deutschland Enterprises, Ltd. v. Burger King Corp., 957 F.2d 449 (7th Cir. 1992).

e. Buyer's Unauthorized and Unapproved Transfer of Part or All of its Interests in Its Own Business.

Typically a franchise agreement forbids a transfer by a buyer of any part of its business without prior approval from the Seller. See, e.g., The Stroh Brewery Co. v. Western Maryland Distributing Co., Bus. Franchise Guide ¶ 11,304 (4th Cir. 1997) (termination of franchise proper for failure to receive franchisor's approval prior to transferring the franchise). Although the seller has broad discretion to disapprove a proposed transfer, most statutes governing such transfer require that the seller act reasonably and will judge the seller's conduct on an objective standard. Consequently, the seller should demonstrate that a proposed transferee is unqualified as a result of its lack of capital, experience or other justifiable business reasons. See, e.g., Hamro v. Shell Oil Co., 674 F.2d 784 (9th Cir. 1982); c.f. In Re Stimus Chrysler-Plymouth, Inc., 134 B.R. 676 (US Bkrptcy, M.D. Fla. 1991) (objection to assignment must be "reasonable" if transfer is pursuant to franchisee's bankruptcy reorganization).

f. Buyer's Failure to Meet Standards Set Forth By Seller in the Agreement.

Buyers are usually required to maintain certain performance, operation, and service requirements the failure of which would establish good cause for termination. Typically, the courts require that a substantial breach of an important requirement exists prior to establishing good cause. Minor non-willful breaches may not satisfy the requirement of good cause. Tappan Motors, Inc. v. Volvo of America Corp., 85 A.D.2d 624, 444 N.Y.S.2d 938 (1981), appeal dismissed, 56 N.Y.2d 632, 435 N.E.2d 1098, 450 N.Y.S.2d 483 (1982) (buyer's termination was enjoined although the buyer failed to meet reasonable standards established by the buyer because termination would create undue hardship to the buyer). Sellers

faced with frequent but not egregious non-compliance should consider arranging to purchase the franchise or find a third-party replacement to buy it.

g. Buyer's Failure to Carry Insurance.

A buyer's failure to obtain liability insurance can be grounds for termination where the procurement of insurance is required by the agreement. Zeidler v. A & W Restaurants, Inc., Bus. Franchise Guide (CCH) ¶ 12,015 (N.D. Ill. 2001) (A fast food franchisor was justified in terminating a franchisee which did not procure liability insurance for its franchise as required by the license agreement.)

h. Buyer's Violation of Law.

Statutes usually permit seller to terminate a buyer convicted of criminal conduct or other actions calling into questions buyer's fitness such as misbranding and consumer fraud.

(i) Interstate Battery System of America v. Wright, 811 F. Supp. 237 (N.D. Texas 1993) (summary judgment for seller where termination was based on misbranding of seller's product); Aamco Indus. v. DeWolf, 312 Minn. 95, 250 N.W.2d 835 (1977).

(ii) Alexander v. Exxon Company, U.S.A., 949 F. Supp. 1248 (M.D.N.C. 1996) (under the Petroleum Marketing Practices Act, a franchisee who plead guilty to a felony charge of conspiracy to distribute cocaine prior to his award of the franchise, could be terminated for good cause; the franchisor determined that the franchisee was convicted of a felony involving moral turpitude and there was no need for the franchisor to make an independent finding that the conviction for the felony related in any way to the operation of the franchise).

i. Termination of Buyer For Reasons Unrelated to the Buyer's Performance.

In certain circumstances, a seller may wish to terminate a relationship with the buyer for reasons unrelated to the buyer's performance. For example, the cost of supplying that customer increases such that it becomes significantly uneconomic to continue dealing with the buyer. Generally speaking, reasons for termination that are not specifically related to the buyer's performance will not suffice to establish the good cause requirement of statutes or agreements. Notwithstanding the foregoing, some cases and statutes have recognized that a seller may establish good faith in connection with the termination of a buyer that is part of an overall change in the seller's marketing scheme and strategy. However, it is important to review the cases and statutes in each particular jurisdiction for termination for marketing purposes have resulted in verdicts against sellers and substantial damage awards to buyers. For example, in Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990), the court warned that

“the internal economic reasons of the franchisor are not, by themselves, good cause for termination or nonrenewal of a franchise.” Id., at 137. The court reiterated that a central function of the Wisconsin franchise statute was “preventing suppliers from behaving opportunistically once franchisees or other dealers have sunk substantial resources into tailoring their businesses around, and promoting, a brand.” See also, Sims v. Brown-Forman Corp., 468 S.E.2d 905 (Va. Sup. Ct. 1996) (Court held that “down-sizing” did not amount to statutory “good cause” for the termination of a franchise); Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, (2d Cir. Conn. 1995) (a legitimate business concern to increase customer service frequency by realigning overlapping distribution territories can meet the good cause requirement); Corp v. Atlantic Richfield Co., 860 P.2d 1015, 1022 (Wash. 1993) (acknowledging that even under statutory schemes protecting franchisees against significant changes in franchise agreements, “courts generally give considerable deference to franchisors’ efforts to restructure, retrench, or wind down their franchise systems.”) See also Dr. Pepper Bottling Co. v. Frantz, 842 S.W.2d 37, 42 (Ark. 1992) (termination not for good cause under Arkansas franchise statute where jury found that termination was due not to any fault of buyer but to seller’s acquisition of another bottling company); Solman Distributors, Inc. v. Brown Foreman Corp., 888 F.2d 170, 173 (1st Cir. 1989) (seller’s business justification rejected as beyond confines of Maine Act which defines “cause” according to fault or deficiency of buyer); Kealey Pharmacy and Home Care Servs v. Walgreen Co., 539 F. Supp. 1357 (W.D. Wis. 1982), aff’d in part and vacated in part, 761 F.2d 345 (7th Cir. 1985).

j. Evidence to Support Good Cause.

In Kerns, Inc. v. Wella Corp., 114 F.3d 566 (6th Cir. 1997), applying New York law, the court found that a manufacturer may use after-acquired evidence to support that it terminated the distributor for good cause.

k. Retroactive Application of Statutes Governing Dealerships are Unconstitutional.

(i) In Cloverdale Equip. Co. v. Manitowoc Engineering Co., Bus. Franchise Guide ¶ 11,468 (6th Cir. 1998), the parties’ written distribution agreement had expired, but the court found that by course and conduct they had entered into an implicit in-fact contract. The court held that the retroactive application of the Michigan Farm and Utility Equipment Act, which was promulgated after the parties entered into a one-year implied-in-fact contract, was unconstitutional.

4. Is The Seller Required To Provide Notice and If So, What Form Must the Notice Take and When Must it Be Given?

a. Generally Required

In most instances, either as a result of a specific provision contained in the agreement between the parties or the existence of a specific statute requiring it, notice of termination is required. If the parties have not provided for notice and there is no statute mandating notice, the common law as reflected in the Uniform Commercial Code Section 2-309, may impose a duty to provide reasonable notice.

b. What is a Reasonable Length of Time for Notice?

If the parties have not specified a period of time for notice in their agreement, a reasonable time will be implied. See Central States Distrib., Inc. v. Minnesota Mining & Manuf. Co., No. 97 C622, 1998 U.S. Dist. LEXIS 1404 (N.D. Ill. 1998) (where contract contains no definite term of duration, it is terminable at will upon reasonable notice); Luis Glunz Beer, Inc. v. Martlet Importing Co., Inc., 864 F. Supp. 810, (N.D. Ill. 1994) (beer importer that provided 100 days' notice prior to terminating a terminable-at-will distribution agreement did not breach the implied covenant of good faith and fair dealing).

What is a reasonable depends on the circumstances in each case and the commercial needs of the parties. However, the range is normally 30 to 90 days. Also, in those jurisdictions recognizing the doctrine of equitable recoupment, a "reasonable duration" includes "the length of time reasonably necessary for a dealer to recoup its investment." Sofa Gallery, Inc. v. Stratford Co., 872 F.2d 259, 262 (8th Cir. 1989) (applying Minnesota law). The test is whether the buyer has a reasonable opportunity to recoup his expenditures, not whether he has actually done so. Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530, 533 (4th Cir. 1989) (North Carolina law).

Immediate termination may be appropriate in certain circumstances such as bankruptcy or a buyer engaging in criminal conduct.

Extremely short notice periods can be found to be unconscionable and therefore voided if it imposes an extreme burden upon the buyer. See, e.g., Martin v. Heublin, Inc., Bus. Franchise Guide, ¶ 11,143 (E.D. La. 1996) (failure to give notice of termination was unreasonable where defendant's product constituted 30-40% of distributor's business, defendant's product opened door for other sales by distributor, and termination came just before the holiday season, which was important to the distributor's annual sales); Ashland Oil Inc. v. Donahue, 223 S.E.2d 433 (W.Va. 1976) (10 day notice period found unconscionable).

Seller's effort to impose a termination in a time shorter than permitted by statute may result in an injunction prohibiting the termination until the statutory period of notice had run; Zipper v. Sun Co., Inc., 947 F. Supp. 62 (E.D.N.Y. 1996) (notice that franchise was terminated "effective immediately" and that franchisor would enter the premises (10) ten days later was found to be unreasonable under the Petroleum Marketing Practices Act); Armstrong Bus.

Serv. V. H&R Block, 96 S.W.3d 867 (Mo. App. W.D. 2002) (Missouri 90 day notice requirement for franchise termination held so “fundamental” that courts would not apply choice of law provision which would result in shorter notice period); cf. Dedvukaj v. Equilon Enterprises, L.L.C., 301 F.Supp. 2d 664 (E.D. Mich. 2004) (Finding that termination of gasoline station franchise was reasonable under Petroleum Marketing Practices Act, although franchisor did not furnish franchisee with 90 days' notice of termination, since franchisor suffered loss and was likely to suffer further losses if it continued to supply gasoline to franchisee until end of 90 day period).

c. What Form Must Notice Take?

Unless required specifically by statute, a formal notice is not required. The Parties may choose any form of notice and be bound by the terms of their agreement. If neither a statute nor their agreement provides for a notice, the Uniform Commercial Code or Common Law may apply. The Seller “gives” notice by “taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it.” U.C.C. § 1-201(26). Buyer “receives” notice when it is duly delivered at the designated place of business or when it “comes to [buyer’s] attention.” U.C.C. 1-201(206). As a practical matter seller should send written notice by certified mail. [Seller may also send fax copy of letter to buyer on a machine that provides an electronic confirmation receipt by the receiving party.]

d. What Information Should Be Contained in the Notice?

Depending upon the agreement or the existence of a statute, the seller is usually obligated to state the reasons for the termination, and if required a statement of the buyer’s opportunity to cure or other post-notice of termination rights. Seller should provide a rationale for its termination decision and should always advance legitimate business reasons specifically identifying the conduct of the buyer which has resulted in the determination to terminate. The notice should also articulate the efforts that were undertaken by the seller to minimize the economic and competitive impact of the termination on the Buyer. In sum, the notice of termination should: (i) be in writing; (ii) set forth the pro-competitive reasons for the termination; and (iii) state that the reasons set forth in the notice are representative, and not exhaustive of the motivations requiring that the buyer be terminated. These reasons stated should track closely the provisions of the contract and any applicable statute setting forth the circumstances where “good cause” for termination could be found. Cases have held that a seller may not assert conduct as “good cause” for a termination unless it was asserted in the notice of termination to the buyer. See Keley Pharmacy v. Home Care Service, Inc. v. Walgreen Co., supra.

5. Post-Notice Dealings Between Seller and Buyer

a. Opportunity to Cure

Generally, a seller has no obligation to provide a buyer with an opportunity to cure unless a statute or agreement requires it. See, e.g., Novus du Quebec, Inc. v. Novus Franchising, Inc., Bus. Franchise Guide (CCH) ¶ 10,823 (DC Minn.) (opportunity to cure not required under Minnesota Franchise Act if opportunity to cure would be futile given widespread violations); Shell Oil Co. v. Wentworth, 822 F. Supp. 878, 886 (D. Conn. 1993) (no requirement to give buyer opportunity to cure where termination was for misbranding of gasoline); Midwest Great Dane Trailers, Inc. v. Great Dane Ltd. Partnership, 977 F. Supp. 1386, 1390 (D. Minn. 1997) (where dealership agreement did not require that dealer be given notice and an opportunity to cure before manufacturer appoint a new dealer, court refused to consider alleged statements by manufacturer throughout relationship that it would give dealer notice and an opportunity to cure); University Motors Ltd. v. General Motors Corp., Bus. Franchise Guide (CCH) ¶ 11,561 (4th Cir. 1999) (franchisor who terminated franchise, in part, because of franchisee's poor performance held to have violated the West Virginia Motor Vehicle dealer franchise statute because it did not properly deliver termination notice or provide an opportunity to cure).

If an opportunity to cure is required, it is usually required to occur within a definite time, usually thirty days. See, Dining Equip. v. QFA Royalties, 2008 WL 4186692 (E.D. Wis. 2008) (discussing Wisconsin's 60-day cure provision). See, e.g., California Franchise Relations Act, Cal. Bus. and Prof. Code § 20020, 20021 and 20025 (West 1988) (termination must be for good cause after notice and up to thirty days to cure the reason for the termination).

b. Other Post-Termination Obligations Between Seller and Buyer.

The parties may agree that certain obligations survive the termination of the relationship or other statutes may require that the seller act in a certain manner after he has decided to terminate the buyer.

(1) Non-Competition by Buyer — Covenant Not to Compete After Termination If Reasonable Time and Scope Are Enforceable.

See DAR & Associates, Inc. v. Uniforce Servs, Inc., No. 98-CV-409 (JG), 1999 U.S. Dist. LEXIS 403 (E.D.N.Y. 1999) (upholding restrictive covenant because franchisor demonstrated a legitimate business interest warranting protection, the covenant was reasonable, and any hardship to the franchisee was mitigated by the fact that the provision was knowingly agreed to and the franchisee was fairly compensated under the agreement); Domino's Pizza, Inc. v. EL TAN Inc., 1995 WL 367893 (N.D. Okla. 1995) (covenant not to compete was valid and enforceable against a terminated buyer under Oklahoma law, since the covenant was ancillary to a sale of good will). Classy Maids, USA v. Konitzer, 1992 Wisc. App. LEXIS 642 (Wisc. Ct. App. Dec. 8, 1992) (where agreement failed to specify expiration as being encompassed by termination provision, ex-franchisee

did not violate non-compete clause where he was not terminated but merely allowed agreement to lapse).

(2) Inventory and Equipment Repurchase.

Certain state statutes specifically provide that seller must repurchase the buyer's goods and equipment and identify whether the purchase price will be the fair market or the buyer's purchase price. See, e.g., Mississippi and Wisconsin, which require repurchase upon termination.

In Harry Rubin & Sons v. Clay Equipment, 591 N.Y.S.2d 596 (3d Dept. 1992), the court found the existence of an agreement to maintain inventory of defendant supplier's farm equipment. The court construed the applicable New York statute, General Business Law § 696-f, and held that defendant was obligated to repurchase its inventory upon termination of the franchise pursuant to the statute's plain terms. The fact that an oral agreement was involved in which the retailer was not required to keep any of defendant's inventory did not alter the court's decision.

In Town and Country Equipment v. Massey-Ferguson, 808 F. Supp. 779 (D. Kan. 1992), plaintiff retailer's franchise was terminated. The manufacturer allegedly refused to repurchase some of the inventory and breached an agreement to repurchase other inventory. Plaintiff then sold the equipment to third parties and sued to recover the difference between what it received from the sale and the amount due under the repurchase statute. The court construed the applicable Kansas inventory repurchase statute, K.S.A. § 16-1001, and held that a retailer whose franchise was terminated could not recover under the repurchase statute where the retailer sold the equipment to third parties.

In Corp. v. Atlantic Richfield Co., 860 P.2d 1015 (Wash. 1993), the Supreme Court of Washington addressed the issue of whether changes made in a franchise agreement constituted termination or non-renewal under the Washington Franchise Investment Protection Act (FIPA). Under FIPA, franchisees were entitled to compensation upon termination of the franchise agreement for the fair market value of the franchisee's inventory, supplies, equipment and furnishings purchased from the franchisor, and good will. The Washington Supreme Court held that the changes to the agreements did not as a matter of law constitute termination or non-renewal and thus the compensation provisions of FIPA were not triggered. The court stated that the compensation provisions do not apply where a franchisee chooses not to enter into the revised franchise agreement due to a dislike of its terms. Moreover, the court held that the compensation provisions were inapplicable where the franchisees continued to operate the franchises.

(3) Prohibitions against buyer's use of seller's intellectual property rights and trade secrets.

(4) Prohibitions against use by buyer of same location or telephone number.

(5) Some contracts provide a provision permitting the seller to use “self-help” to prevent continued violation by the buyer of its distributorship agreement. These provisions are circumscribed by state and federal constitutional provisions and are generally to be avoided as they usually result in substantial counterclaims.

(6) Payment of post-termination commissions.

In Robert Syputa d/b/a Team Associates v. Druck Inc., Bus. Franchise Guide (CCH) ¶ 11,327 (Wa. Ct. App. Feb. 9, 1998), the contract at issue which provided that commissions would be paid following customer payment and for at-will employment, did not specifically provide for the payment of post-termination commissions and the court refused to apply industry standards or parol evidence to vary the terms of the written agreement.

6. Consequences of Termination

a. Trademarks and Trade Dress

Upon termination or expiration of the agreement, the buyer must immediately cease using the seller’s trademarks and service marks. See Gorenstein Enterprises, Inc. v. Quality Care - USA, Inc., 874 F.2d 431 (7th Cir. 1989); Manpower Inc., v. Mason, 405 F. Supp. 2d 959 (E.D. Wis. 2005). The buyer must also cease using the seller’s protectable trade dress (i.e., the appearance of its business premises, including type of fixtures, color scheme, floor plan, etc.). See Fuddrucker Inc. v. Doc’s B.R. Others, Inc., 826 F.2d 837 (1987).

b. Covenants Not to Compete

(1) In Term Covenants

In most states, covenants not to compete are usually enforceable during the term of the distribution agreement.

(2) Covenants not to compete are less likely to be enforced after expiration or termination of the distribution agreement. See Cal. Bus. and Prof. Code § 16600.

(3) Miscellaneous

Distribution agreements generally require the buyer to return all manuals and other proprietary information upon termination of the franchise. If the seller leases or subleases the distribution premises to the buyer, the lease or sublease

generally terminates upon termination or expiration of the distribution agreement, requiring the buyer to turn possession of the premises over the seller.

C. Practical Considerations.

1. General

During the period after notice and before the effective date of the termination, seller will likely be obligated to fill the buyer's orders up until the time the agreement expires, but may take efforts to protect itself by requiring that the buyer pay cash and agreeing only to fill the buyer's orders to the extent of the buyer's "normal" requirements.

2. Beware of Buyer's Bankruptcy

a. Franchisor status as creditor — required to file proof of claim for franchisee's obligations if franchisee files for bankruptcy. *Malkove & Womack, Inc. v. Western Steer-Mom & Pop's Inc.*, 134 B.R. 965 (Bankr. N.D. Ala. 1991) (franchisor's claims for contractual termination and royalty fees barred; limited to debt scheduled by franchisee/debtor).

b. An action for breach of a franchise agreement (based on contract and tort theories, state and federal rights), has been considered "related" to a Chapter 11 bankruptcy case, but it is a "noncore proceeding;" withdrawal of the reference is appropriate. *Lone Star Industries, Inc. v. Liberty Mutual Ins.*, 131 B.R. 269 (Bankr. D. Del. 1991). *But see Vylene Enters., Inc. v. Naugles, Inc.*, 90 F.3d 1472, 1476 (9th Cir. 1996) (where court held that franchisee's adversary proceeding asserting claims for relief based on franchisor's alleged refusal to negotiate for an extension of the franchise agreement, and other alleged misconduct concerning the performance of the agreement and franchisor's counterclaims and motion for preliminary injunction concerning the franchisees continued use of certain property were "core" proceedings).

c. Even if notice to terminate franchise agreement was served pre-petition, franchisor must litigate propriety of termination of franchise agreement with debtor-franchisee in bankruptcy court. *In Re Toyota of Yonkers*, 135 B.R. 471, 477 (Bankr. S.D.N.Y. 1992). *But see In re Diversified Washes of Vandalia, Inc.*, 147 B.R. 23 (Bankr. S.D. Ohio 1992) (stay provision of Bankruptcy Code does not stop running of termination notice period); *City Auto, Inc. v. Exxon Co.*, 806 F. Supp. 567, 569 (E.D. Va. 1992) (bankruptcy stay held not to apply where franchise was terminated before franchisee filed bankruptcy petition).

d. Prohibition against "ipso facto clauses" that automatically terminate executory contracts in the event of bankruptcy filing (11 U.S.C. § 365 (e)(1)) do not apply to pre-petition termination, even though based on buyer's pending insolvency. *Comp. III, Inc. v. Computerland Corp.*, 136 B.R. 636 (Bankr. S.D.N.Y. 1992).

e. Auto manufacturer's contractual right to terminate franchise agreement upon franchisee's attempt to unilaterally assign or transfer agreement without manufacturer's consent rendered unenforceable by dealer filing of Chapter 11 petition; debtor-in-possession's "assumption" of franchise granted. In re Tom Stimus Chrysler-Plymouth, Inc., 134 B.R. 676 (Bankr. M.D. Fla. 1991) (only "reasonable" objection to assignment would be considered).

II.

COUNSELING A BUYER THAT RECEIVES A NOTICE OF TERMINATION OR REASONABLY SUSPECTS THAT TERMINATION MAY BE FORTHCOMING

A. Pre-Notice of Termination Advice

1. Make sure that sales and revenues are consistent with the agreement with the seller and in conformity with the seller's marketing practices and policies.
2. Make sure that payment of bills occurs timely.
3. Sell, promote, and service the seller's products in a way that maintains and enhances customer goodwill. Thus, even if the buyer engages in discounting or in price cutting, the existence of superior service will undermine the rationale advanced by the seller for the termination and increases the buyer's opportunities to overcome a summary judgment motion in an antitrust case alleging that the termination was as a result of a boycott or a resale price maintenance scheme.
4. If a buyer believes that termination or non-renewal is imminent and that such action by the seller is lawful, the buyer might affirmatively seek the seller's permission to sell the distributorship to an acceptable successor purchaser.

B. Post-Notice of Termination Advice

1. Immediately communicate with the Seller in an effort to determine what conduct must be undertaken to cure the problems which resulted in the termination.
2. Seek informal discovery through communications with sales personnel trying to obtain evidence that the termination was a result of anti-competitive objectives such as a group boycott or resale price fixing agreement.
3. Undertake efforts to make the seller's conduct appear unfair by documenting alternate means available to seller to achieve its business objectives.
4. Begin to assemble information concerning the market in which the seller conducts business in an effort to define the relevant product and geographic markets in such a way as to demonstrate that the seller possesses market power

sufficient to impose restrictions which would be found to be unreasonable under the rule of reason. Also begin assembling evidence that the seller's conduct would establish a viable cause of action under various statutory and common law causes of action.

III. **PRE-LITIGATION COUNSELING FROM THE BUYER'S** **PERSPECTIVE**

- A. Be sure that the continuing conduct of the buyer is in compliance with the seller's intellectual property rights and do not violate seller's trademarks, copyrights, or trade dress rights.
- B. Buyer should consider placing orders for additional products with an offer to pay for them either in cash or an expedited basis. If seller refuses to honor reasonable buyer requests it helps in later effort to characterize its conduct as capricious and unfair.
- C. Buyer must analyze whether to file action seeking declaratory judgment, injunction or damages or wait for the seller to sue for unpaid bills or return of goods and then assert its causes of actions in the form of counterclaims and setoffs.
- D. Counsel should always assume that the buyer will have to prove that it met its contract obligations to the seller and acted reasonably and in a manner designed to promote aggressively and properly the seller's products. In some cases this can be proven without discovery. In most cases, however, counsel may want to obtain discovery that:
 - 1. The buyer actively promoted the seller's products.
 - 2. It met its sales quotas.
 - 3. It paid its bills in a timely manner.
 - 4. No complaints were lodged against it by the seller or by its customers.
 - 5. It made substantial financial, as well as time commitments to the seller's products.
 - 6. It was dependent upon the seller's products for its business livelihood and that it could not readily use the equipment or facilities in connection with another line of work, nor could it obtain another distributorship readily. Make efforts to show buyer was dependent on the seller's products and that the relationship was a long-term one with few, if any, problems.

a. The portion of buyer's business represented by his work for seller. In Kenosha Liquor Co. v. Heublien, Inc., 895 F.2d 418, 419 (7th Cir. 1990), a buyer was found not to be a "dealer" under Wisconsin's Fair Dealership Law where seller's product accounted for only 5.8 % of sales. In Kusel Equip. Co. v. Eclipse Packaging Equip. Ltd., 647 F. Supp. 80 (E.D. Wis. 1986), buyer and seller were not deemed to share a "community of interest" where less than two percent of buyer's sales were attributable to the seller's product. See Fleet Wholesale Supply v. Remington Arms Co., 846 F.2d 1095, 1097 (7th Cir. 1988) (buyer not a dealer under Wisconsin Fair Dealership Law where purchases from seller represented only 0.5 % of buyer's business); Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 677-79 (2d Cir. 1985) (three percent of business does not justify franchise statute application); Pearson v. Ford Motor Co., 68 F.3d 1301, (11th Cir. Fla. 1995) (manager and minority stockholder not a "dealer" under federal automobile dealer laws); Lounibos v. Advanced Training Systems, Inc., (1996 U.S. Dist. Lexis 644, (N.D. Ill. Jan. 22, 1996) (Minnesota Termination Law not applicable to termination of sales representatives under agency agreements).

7. Finally, demonstrate that the reason for termination was an anti-competitive one, for example:

a. The termination was part of an overall vertical price fixing agreement.

b. The true reason for termination was that it was, in reality, a consequence of price-fixing, market allocation, or customer allocation conspiracy between and among the other buyers.

c. The termination was a result of the buyer's failure to adhere to unreasonable non-price vertical restraints imposed by the seller, such as prohibitions against carrying non-competing products.

d. The termination was a result of an unlawful tying and the buyer's unwillingness to continue to purchase the unwanted products. See, e.g., MCA Television Ltd. v. Public Interest Corp., 1999 U.S. App. LEXIS 6131 (11th Cir. 1999).

e. Always seek to demonstrate that the purported rationale of seller's conduct, although ostensibly pro-competitive, was in fact anti-competitive because it did not result in increased efficiencies or enhanced product quality. Evidence of this may exist in varying forms, such as showing that the termination would result in increased prices to consumers and decreased quality, output, and innovation, as well as ultimately decreasing distributional efficiencies. But see NYNEX Corp. v. Discon, Inc., 119 S. Ct. 493 (1998), where respondent, Discon, who sold removal services used by the New York Telephone Company, a subsidiary of NYNEX, alleged that it was terminated in violation of §1 of the Sherman Act by another subsidiary of NYNEX that purchased removal services

for New York Telephone for the purpose of benefiting one of Discon's competitors. The Supreme Court acknowledged the claim that the petitioner's behavior hurt consumers by raising telephone service rates. However, the court noted that the injury "flowed not so much from a less competitive market for removal services, as from the exercise of market power that is lawfully in the hands of the monopolist ... combined with a deception worked upon the regulatory agency that prevented the agency from controlling [the monopolist's] exercise of its monopoly power."

IV. **ALTERNATIVES TO LITIGATION**

A. Agreement to Transfer Franchise to New Buyer

1. Where buyer and seller can mutually agree to resolve their dispute by transferring the franchise to a third party acceptable to the seller, the parties can enter into an agreement which may include the following terms:

- recitation of mutual desire to transfer distribution and franchise rights to third party
- buyer's agreement to relinquish all rights to third party upon seller's assurance and warranty that third party will assume legal obligations attendant to franchise or distribution agreement upon transfer
- buyer's agreement to relinquish all rights under the franchise or distribution agreement, including trademark rights
- effective date of transfer
- continuing the current seller-buyer relationship in the event that the effective date must be extended
- arrangements for selling current inventory to either seller or third party
- provision for accounting of amounts due and payable to either buyer or seller
- buyer agrees to refrain from taking action injurious to seller, its reputation or goodwill
- buyer to cooperate in effecting transfer to third party
- no disclosure of terms of agreement without prior consent of the parties

- parties entitled to legal recourse in the event of material breach and prevailing party allowed to recover attorneys' fees
- representation by seller that termination or non-renewal not performance-related (if appropriate)
- mutual releases

2. Generally, the successor corporation will not be liable for the debts and obligations of the predecessor corporation unless

- a. there is an express or implied agreement of assumption;
- b. the transaction amounts to a consolidation or merger of two corporations;
- c. the purchasing corporation is merely a continuation or reincarnation of the selling corporation; or
- d. the transfer of assets is for the fraudulent purpose of escaping the selling corporation's debts. A.R. Teeters & Assoc. v. Eastman Kodak, 836 P.2d 1034, 1039 (Ariz. App. Div. 1 1992).

3. Usually the agreement between seller and buyer is paralleled by an agreement between the seller and the third party succeeding to the buyer. Such an agreement may contain a reference to the buyer-seller agreement to transfer franchise or distribution rights and reflect the third-party's agreement to assume any and all legal obligations accompanying the franchise or distribution agreement. The agreement may also state an intent to enter into a new distribution or franchise agreement between the seller and the third party.

B. Arbitration

1. Availability.

A termination claim may be subject to arbitration pursuant to a contractual arbitration clause.

a. In We Care Hair Development, Inc. v. Engen et al., 180 F.3d 838 (7th Cir. 1999), the Seventh Circuit upheld a district court order that compelled arbitration of a franchising dispute and that enjoined franchisees from participating in a state court class action pending the outcome of the arbitration. The court rejected plaintiff's argument that a federal court cannot compel arbitration when the damage claims for which arbitration is sought are pending in a non-removable state action. Further, the court held that the arbitration clause was not unconscionable, even though it required franchisees to arbitrate while

permitting the franchisor to litigate, because franchisees were savvy business people who were on notice of the dispute resolution provisions.

b. In Collins v. National Dairy Queen, Inc., 169 F.R.D. 690 (M.D. Ga. 1997), the court held that the franchisees whose franchise agreement provided for mandatory arbitration of disputes were not entitled to litigate claims against franchisor and thus were not entitled to notification of an anti-trust/breach of contract class action, and that franchisees whose franchise agreement contained permissive arbitration clauses were entitled to such notice. The court also found that a parent corporation was entitled to rely upon mandatory arbitration clauses contained in franchise agreement to which only the franchisor subsidiary was a signatory because the claims against the parent and the subsidiary were based on essentially the same facts and were inherently inseparable. However, neither parent nor subsidiary could invoke mandatory arbitration provision contained in sub-franchise agreements to which neither were parties.

c. In Holmes v. Coverall North America, Inc. 649 A.2d 365 (Md.Ct.App. 1994), the Maryland Court of Appeals enforced arbitration clause as severable from overall agreement since the buyer only alleged fraudulent inducement of franchise relationship as opposed to fraudulent inducement to enter into arbitration clause. See also Doctor's Associates, Inc. v. Distajo, No. 96-7321, 1997 U.S. App. LEXIS 3243 (2d Cir. Feb. 24, 1997).

d. In Doctor's Associates, Inc. v. Hollingsworth, 949 F. Supp. 77 (D. Conn. 1996), aff'd sub nom Doctor's Associates, Inc. v. Bennett, Bus. Franchise Guide (CCH) ¶ 11,331 (2d Cir. 1998), the court rejected the franchisees' many challenges and compelled 31 franchisees who had brought a state class action against the franchisor to arbitrate their claims as provided in their individual franchise agreements. First, the court rejected the claim that the requisite amount in controversy did not exist between the franchisor and each franchisee. The court found that because the lump sum damages alleged in the complaint far exceeded the jurisdictional amount and it was difficult to calculate the individual damages, it could not conclude as a matter of law that the amount in controversy was less than the jurisdictional amount. Second, although the franchisee sued the individual owners and agents of the franchisor, the court rejected the argument that the franchisor was not an aggrieved party entitled to petition to compel arbitration. Third, the court found that the franchisees' claims concerning mismanagement of an advertising fund related to and fell within the scope of the arbitration clause. Finally, the court enjoined the franchisees from proceeding with the state class action, and it enjoined other franchisees not a party to the action from proceeding in state court against the franchisor.

e. In The Barbers, Hairstyling for Men & Women Inc. v. Bishop, Bus. Franchise Guide (CCH) ¶ 11,308 (7th Cir. 1997), even though plaintiff's state court complaint contained a damage cap of \$74,950, the appellate court reversed the district court's finding that the requisite amount in controversy was not satisfied. Rather than removing, the franchisor filed an independent action to

compel arbitration. Thus, the franchisor as plaintiff, received the benefit of the doubt that the claim satisfied the jurisdictional minimum. Also, the court considered that the value of any equitable relief that might be awarded would exceed the jurisdictional minimum.

f. In Revels v. Miss America Org., 599 S.E. 2d 54 (Ct. App. N.C. 2004), a former state beauty queen, who resigned her position, sued the state parent organization for breach of contract. The organization then petitioned the court to stay the proceeding and compel arbitration pursuant to the parties' written agreement. In finding that the organization failed to sign the contract, the court ruled that the arbitration clause was not compulsive.

g. In Island Cash Register, Inc. v. Data Terminal Sys., Inc., Bus. Franchise Guide (CCH) ¶ 11,463 (N.Y. App. Div. 1998), the court dismissed plaintiff's claims for wrongful termination because the plaintiff failed to demand an arbitration within 60 days of the termination as provided by the dealership agreement.

2. Favored by Congress & Courts.

The Supreme Court mandated the enforcement of arbitration agreements in Southland Corp. v. Keating, 465 U.S. 1 (1984) (“[i]n enacting § 2 of the federal Act, [United States Arbitration Act] Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”). The Court held that the United States Arbitration Act preempted a state franchise law which made franchise issues subject to judicial resolution. The Court noted the “national policy favoring arbitration” and consequently invalidated the state law attempt to preclude compulsory arbitration. The Supreme Court recently declined to overrule Southland in a case in which the Court held that an Alabama statute which bars predispute anti-arbitration clauses was preempted by the Federal Arbitration Act. See also Doctor's Associates, Inc. v. Casarotto, 116 S. Ct. 1652 (1996) (Montana statute requiring that notice that a contract is subject to arbitration be indicated on the first page of the contract conflicted with the Federal Arbitration Act and was therefore displaced by the FAA). See also Doctor's Assoc., Inc. v. Hamilton, 150 F.3d 157 (2d Cir. 1998), cert. denied (1999); Allied-Bruce Terminix Cos., Inc. v. Dobson, 115 S.Ct 834 (1995); Perry v. Thomas, 482 U.S. 483, 489 (1987); Madison Beauty Supply Ltd. v. Helene Curtis, Inc., Antitrust & Trade Reg. Rep. (BNA), No. 1560, at 477 (April 9, 1992) (Wisconsin Court of Appeals held that the Federal Arbitration Act preempted state's law, which attempted to limit the arbitrability of commercial disputes, and stayed litigation pending arbitration of the matter pursuant to arbitration clause). Antitrust claims may be subject to arbitration. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Gemco Latino America, Inc. v. Seiko Time Corp., 671 F. Supp. 972, 978 (S.D.N.Y. 1987), adhered to in part, dismissed in part, 685 F. Supp. 400 (S.D.N.Y. 1988). But see Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, 1995 WL 86415

(7th Cir. 1995) (Seventh Circuit held “that an election [by a franchisor] to proceed before an nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate.”)

3. Broad Scope of Arbitration Clause.

a. In Harmer v. Doctor’s Associates, Inc., 781 F. Supp. 1225 (E.D. Mich. 1991), the court held that a dispute over sale of franchise was subject to arbitration pursuant to arbitration clause, even though the franchisee claimed that the franchise agreement had been rescinded.

b. In First Team, Inc. v. Lingle, No. 98 C 3922, 1999 U.S. Dist. LEXIS 1086 (N.D. Ill. Feb. 3, 1999), the court held that because the franchise agreement was silent on the issue of who determines arbitrability — the court or the arbitrator — the parties did not have the issue decided by the arbitrator. Therefore, the issue of arbitrability of the parties’ dispute was for the court to decide.

c. In Collins v. International Dairy Queen, Inc., Bus. Franchise Guide (CCH) ¶ 11,464 (M.D. Ga. 1998), the court denied plaintiff’s motion to send out additional class notices because the agreements entered into by the putative class members required that their disputes be arbitrated. Because there was ambiguity as to the intended scope of the arbitration clause, the court followed the federal presumption in favor of arbitrability.

4. Arbitration clauses may also contain forum selection and choice of law clauses that are enforceable.

See, e.g., Silka v. Surface Doctor, Inc., Bus. Franchise Guide (CCH) ¶ 11,314 (S.D. Ca. 1997) (enforcing forum selection clause contained in arbitration provision); Medika Intern., Inc. v. Scanlan Intern., Inc., 830 F. Supp. 81 (D.P.R. 1993) (valid arbitration clause sweeps in forum selection and choice of law clause in favor of Minnesota, defeating buyer’s action in Puerto Rico under Puerto Rico statute protecting franchisees).

5. Arbitration Clause may establish the scope of reasonable permissible discovery and type of relief available, i.e., discovery in accordance with Federal Rules and civil procedure will be permitted; relief will be limited to one years lost profits and no consequential damages or injunctions permitted.

6. Suppliers and distributors should attempt to negotiate the terms of the arbitration clause. For example, a distributor may attempt to exclude statutory causes of action, while the supplier will be interested in drafting the provision as broadly as possible to apply to all disputes.

7. Appealability of Motions to Deny or Compel Arbitration.

Section 16 of the FAA prohibits appellate review of orders that stay an action pending arbitration or compel arbitration if the orders are interlocutory, and permits appellate review of orders favoring arbitration if they are “final decisions.” See 9 U.S.C. § 16(b). Generally, courts hold that an order under § 16 is not final if the issue of arbitrability is “embedded,” i.e., if issues other than the arbitrability of a dispute are raised or the relief sought is other than a determination of arbitrability. An order is “final” under § 16 if the action was brought solely to determine arbitrability.

A split in the circuit courts of appeals exists as to whether a dismissal of an action without prejudice in deference to arbitration in the context of an embedded proceeding is a final, appealable decision. See Seacosts Motors of Salisbury, Inc. v. Chrysler Corp., 143 F.3d 626 (1st Cir. 1998) (collecting cases).

8. Advantages of Arbitration:

- Faster resolution
- Informal and inflexible proceedings - precludes plaintiff from a jury
- Private
- Little or no motion or discovery practice
- Less likelihood of injunction against termination
- Usually less expensive
- Greater confidentiality
- No rules of evidence
- Fact rather than law oriented
- Technical expertise of arbitrator
- No treble damages
- Collateral estoppel effect

In Bright v. Spaghetti Warehouse, Inc., 03A01-9708-CV-00377, 1998 Tenn. App. LEXIS 286 (Tenn. Ct. App. Apr. 29, 1998), the court dismissed the franchisees’ individual action as barred by the doctrine of collateral estoppel because of an earlier arbitration. Pursuant to the franchise agreement, an arbitration was conducted in which the panel ruled against the franchisees in their corporate capacity on their claims of misrepresentation, fraud, fraudulent inducement, violation of the Texas Deceptive Trade Practices - Consumer

Protection Act, violation of the FTC Disclosure Requirements Concerning Franchising, and breach of contract. The court rejected the franchisees' arguments that the claims in the lawsuit — individual claims of fraudulent inducement and violations of the Texas Deceptive Trade Practices - Consumer Protection Act — are separate and distinct from the claims in the arbitration and that they are not bound by the arbitration because they were not involved there as individuals. The court noted that simply changing the packaging of a claim did not create different issues. The court also stated that if the parties are in privity, and privity exists between a shareholder and a corporation, the individuals are bound by the arbitration.

9. Disadvantages of Arbitration:

- Can be costly for a class-wide dispute due to parties' requirement of paying the fees of the arbitration panel
- Too informal - complaint usually vague and lacks sufficient detail to frame issues; conduct of hearing lacks formal objections
- Lack of discovery without consent
- Power of arbitrator limited - arbitrator cannot impose punitive damages or sanctions for abuse
- Finding impartial arbitrators is difficult
- Case less likely to settle
- Ad hoc disregard for legal precedent
- Arbitrators are not always lawyers
- Enforcement of the award is cumbersome, since the findings may be vague
- Overturning arbitrators' awards is difficult because they find both fact and law and mere error is not enough; one needs to show misconduct or that the arbitrator exceeded authority

In Matter of Rothman v. Re/Max of New York, Inc. Index No. 24833/1997 (Sup. Ct. Suffolk Cty Nov. 29, 1999), the court strongly cautioned against using arbitration as a means to resolve complicated franchise disputes. The court stated “The use of Alternative Dispute Resolution “ADR” is very much the fashion these days. Forgetting Lord Coke’s admonition *Via trita est tutissima* [The beaten path is the safest], (10 Coke 142), those with disputes are officially

encouraged to forsake the Courts in favor of a veritable cornucopia of alternatives. Mediation, arbitration, and mini-trials seek to displace the bench and bar. A person styled as a “neutral” often acts as a judge, yet is not bound by *stare decisis* or the wisdom of two thousand years of common and civil law. It has one advantage, its adherents proclaim. An advantage that outweighs all defects. It is fast. The instant case proves the hollowness of this assertion.” The court observed that the participants in the Rothman case appeared before an arbitrator 45 times over a period of three and a half years, and that had they litigated the matter in the first place, it probably would have been resolved by a jury by now. Instead, the arbitration agreement actually spawned additional Federal and State court actions.

C. Mediation

D. Judge Pro Tem (Rent A Judge)

**V.
COMMENCING LITIGATION**

Generally speaking, if the termination is of the specific buyer only, and is not part of a system-wide distribution change involving the termination of most, if not all, buyers, one would be well advised to contact the seller to immediately discuss the reasons for the termination in an attempt to gain some informal discovery concerning the underlying basis for the decision. During these discussions, you may well discover the identity of the parties possessing other relevant information as well as any existing relevant documents. Moreover, you may elicit some other information that your client has not disclosed.

Whether a single buyer or all buyers in a system-wide change are terminated, the analysis of one’s litigation strategy can be segmented into five broad categories: A) Who should be the plaintiff and who the defendant? B) What causes of action are available and which of them should be pursued? C) Where should the action be commenced? D) What relief should be sought? E) What motions and pre-trial discovery should be considered?

A. Who are the potential plaintiffs?

1. Only the terminated buyers that are your clients?
2. Should the assistants be joined as plaintiffs and, if so, does sufficient privity of relationship exist?
3. Other sellers of products to the franchisees who were deprived of outlets because of seller’s exclusive dealing requirement? They may have had an action during the period that the franchisees were precluded from selling their products, but the termination in fact makes their case less viable because they would now have access to the terminated couriers.

4. Should you seek a group of buyers as plaintiffs?

a. Advantages:

(1) Financial - costs and burdens shared.

(2) Equities - ability to show wide impact of defendant's conduct.

b. Disadvantages:

(1) May have conflicts.

(2) Increases plaintiff's usual discovery burdens.

(3) Complicates case, which may decrease chances of settlement.

5. Class Action:

Should a class action be instituted on behalf of all terminated franchisees? Members of class action benefit from a number of economies of scale which may be crucial to maintaining an action where individual damages are relatively slight. However, the party opposed to a class may prefer to be in a position to deal with all its adversaries at once. Indeed, it is possible that the adverse party may employ the device defensively (i.e., sue the class for declaratory judgment). Such an approach may not succeed, however, if most or all of the plaintiff class members "opt out" of the class. See Fed. R. Civ. P. 23(c)(2) (providing that in certain class actions, the court shall direct to the members of the class the best notice practicable under the circumstances; this notice is intended to advise each class member that it may opt out of the action if that member so requests by a prescribed date).

a. Advantages of Class Action:

(1) Ability to jointly bear litigation expenses.

(2) Ability to pool useful information to enhance the evidentiary foundation of a claim.

(3) Availability of broader discovery powers.

(4) Tolling of statute of limitations for class members.

(5) Settlement of all claims on behalf of class, rather than individual settlements. If the claims are at all amenable to settlement, i.e., if the controversy is not a life or death matter for the class's opponent, a dauntingly

united front of class members is likely to motivate the opponent to come early to the bargaining table.

(6) Adverse publicity attendant to class actions may encourage defendant to settle.

(7) The combined resources of a class will better assure counsel of remuneration, permitting counsel's best efforts.

b. Disadvantages of Class Action:

(1) Administrative burdens.

(2) Discovery and litigation of class certification can be time-consuming and expensive.

(3) Class actions generally result in more protracted litigation.

(4) Individual class member's ability to settle is limited unless it opts out.

(5) Counsel carries administrative burden of maintaining adequate contact with class members, and must be careful to discharge a heightened set of fiduciary responsibilities in protecting the interests of each class member.

(6) Difficulty in selecting adequate class representatives.

(7) Questions of law or fact may not be common to the class. In Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998), the court vacated a \$390 million class action award against the franchisor because the class was not properly certified. The court found that the named representatives did not adequately represent the class because there was a conflict of interest regarding the appropriate relief. The court also found a lack of commonality among class members because there were different written contracts at issue, and because certain claims were based on oral representations.

(8) Claims or defense may differ.

(9) Difficulty of one litigation forum means that the court may have to apply various state laws. In cases involving the application of the statutes or common law of many different states, a court may rule that proceeding on a class action basis would create an unmanageable level of complication, and thus may deny certification to the class. See Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 95 F.R.D. 168, 177-78 (D. Del. 1982) (although proposed class members sought to enforce contracts which were identical in their material parts and derived from a common source, class certification denied

because court would have had to apply contract law from as many as thirty-two different states; bottlers thus failed to demonstrate common issues of law or fact necessary under Fed. R. Civ. P. 23(a)). Note: This problem would not arise in actions brought under state class action rules and/or based on federal, antitrust or other laws.

(10) Certain class members, while not opting out, may nonetheless be uncomfortable with maintaining an action in a distant forum and being represented by counsel whom they did not personally choose.

(11) The class opponent will have the benefit of broader discovery rights.

(12) It is possible that a class action posture will provoke an opponent to file counterclaims against absent class members who otherwise would not be pursued.

(13) Some courts have manifested antipathy to class actions, which may prejudice the position of class members.

(14) Settlement must be approved by the court. It is inherently difficult with a nation-wide class to demonstrate that common issues of law or fact predominate pursuant to Fed. R. Civ. P. 23(a) where the buyer has not terminated all buyers at one time.

(15) In the event of failure of the class's action, litigation expenses will probably far exceed those involved in an individual lawsuit.

6. Trade Association As Plaintiff:

Is an action by the trade association viable or worthwhile? See Fed. R. Civ. P. 23.2 (unincorporated association's right to bring action).

a. Trade associations usually limited to seeking declaratory judgments or injunctions and cannot seek damages. Fed. R. Civ. P. 56 allows a party, when seeking to obtain a declaratory judgment, to move for summary judgment without supporting affidavits. See also Cal. Stat. §§ 24757.5 and 25008 (California Alcoholic Beverage Control Act statutorily provides that trade associations on behalf of distilled spirits and beer manufacturers and wholesalers may bring an action for an injunction and for monetary damages).

b. Standing determination: trade association has standing to bring suit on behalf of members when:

c. members could sue in their own right;

d. the interests sought to be protected are germane to the organization's purpose; and

e. neither the claims nor the requested relief require the participation of the individual members in the suit.

See International Union, United Auto., Aerospace and Agric. Implements Workers of Am. v. Brock, 477 U.S. 274 (1986) (the above three-part standard would appear to preclude a buyer association from suing in a representative capacity for actual damages; however, an action for injunctive or declaratory relief is not so likely to be barred). See also United Union of Roofers of America v. Ins. Corp. of America, 919 F.2d 1398 (9th Cir. 1990); Peick v. Pension Ben. Guaranty Corp., 724 F.2d 1247, 1259 (7th Cir. 1983), cert. denied, 467 U.S. 1259 (1984) (associational standing is particularly appropriate when the association is seeking to represent interests central to the purpose of the organization and where the relief sought is some form of prospective remedy, such as declaratory judgment); Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979) (the prerequisites to associational standing were satisfied by a hearing before the district court concerning the organization's motion for injunctive relief), cert. denied, 445 U.S. 915 (1980).

7. Couriers' sub-buyers as plaintiffs?

Although sub-buyers of the Couriers are not in contractual privity with the seller, they may be able to sue the seller for a breach or for interference with contractual relations. Alternatively, a sub-buyer may be able to establish that a relationship existed directly between the sub-buyer and seller. See Louis Glunz Beer, Inc. v. Martlet Importing Co., Inc., 864 F. Supp. 810 (N.D. Ill. 1994) However, except where a seller/sub-buyer relationship can be established, it is not advisable that sub-buyers be joined in the action, as it would seem to unnecessarily complicate the litigation.

8. The Franchisor As Plaintiff

a. Should the seller be the plaintiff and seek declaratory judgment that the termination was lawful?

b. Should the franchisor sue for lost profits? In a case of first impression, the court in Postal Instant Press, Inc. v. Sealy, 51 Cal. Rptr. 2d 365 (Cal. Ct. App. 1996) held that where a franchisee failed to timely pay past royalty fees the franchisor was entitled to terminate the franchise agreement, however, the franchisor was not entitled to damages in the amount of the franchisor's lost or future royalties because that loss was not proximately caused by the franchisee's breach, but rather by the franchisor's termination of the franchise agreement. Cf, Radison Hotels Intern. v. Majestic Towers, 488 F. Supp. 2d 953 (C.D. Cal. 2007) (distinguishing the rule in Sealy based on the parties' inclusion of a liquidated damages clause).

9. Prospective Purchasers.

Where a franchisor is required to approve a change of ownership, a prospective purchaser or franchisee may have standing to bring a claim for unreasonably withholding consent. See Crivelli v. General Motors, C.A. 94-1453, 1999 U.S. Dist. LEXIS 489 (W.D. Pa. Jan. 20, 1999).

B. Who should be the defendant(s)?

In addition to the seller, the following individuals may also be liable to buyers for violations of franchise law. (See Cal. Corp. Code §§ 3100 et. seq.)

1. Every person who directly or indirectly controls the seller.
2. Partners of the seller.
3. Principal executive officers and directors of the seller.

Avery v. Solargizer Int'l., Inc., 427 N.W.2d 675 (Minn. Ct. App. 1988); A.J. Temple Marble and Tile, Inc. v. Union Carbide Marble Care, Inc., 87 N.Y.2d 574, 640 N.Y. Supp. 2d 849 (1996).

4. Employees of the seller who materially aided in the act or transaction constituting the violation of law.
5. Successor seller may be liable for breach of predecessor's obligations to their buyers.

In mergers and acquisitions, seller may sell business to another as an asset sale and the purchaser typically would acquire the assets disclaiming any assumption of seller's obligation to buyers. Generally, efforts to establish common law successor liability on manufacturers in asset purchase situations are unsuccessful. Wine Imports of America Ltd., v. Gerolmo's Liquors, Ltd., 563 F. Supp. 163 (E.D. Wis. 1983). But see Groseth International, Inc. v. Tenneco, Inc., 410 N.W.2d 159 (S.D. 1987) (where Tenneco exerted control over the distributorship contracts and treated them as acquired assets, assumption of the obligations to the buyer will be implied).

C. Causes of Action

1. Statutory Causes of Action

a. Applicable Federal Statutes

(1) Lanham Act, 15 U.S.C. §§ 1051-72, 1091-96, 1111-21, 1123-27 (1982 & Supp. IV 1986) (in order to ensure the integrity of a trademark, it is the duty of the licensor to supervise the use of the trademark). See Fashion Boutique of Short Hills v. Fendi USA, No. 91 Civ. 4544 (MGC), 1992 WL

170559 (S.D.N.Y. July 2, 1992) (plaintiff stated cause of action for trade disparagement under Lanham Act).

(2) Antitrust statutes, *e.g.*, 15 U.S.C. §§ 1-7 (1982) (contracts, combinations in the form of trusts or otherwise, or conspiracies in restraint of trade; or, monopolization or attempt or conspiracy to monopolize any part of trade among the several states is illegal).

- a. Terminated distributors may allege antitrust violations.

See Generac Corp. v. Caterpillar Inc., No. 97-1404, 1999 U.S. App. LEXIS 5722 (7th Cir. 1999) (holding no §1 violation where Caterpillar allowed Generac to manufacture and sell under its trademark certain generators to specified Caterpillar dealers because (i) this arrangement constituted a vertical agreement with Generac and Caterpillar playing the roles of supplier and purchaser; (ii) Generac could sell other generators in the covered territory, and (iii) Generac had considerable flexibility to act independently if the Caterpillar dealers did not meet Generac's needs); Juliano v. Sun Co., Inc., Antitrust & Trade Reg. Rep. (CCH) ¶ 72,325 (3d Cir. 1998) (dismissing plaintiffs' §1 claim for lack of standing where plaintiffs failed to offer evidence to support their claim that defendant's requirement that they sell gasoline at a price below cost resulted in the failure of their business); Sea-Roy Corp. v. Parts R Parts, Inc., No. 1:94CV00059, 1997 U.S. Dist. LEXIS 21809 (M.D.N.C 1997) (court refused to allow terminated distributor to use the Sherman Act to convert an ordinary dealer termination case into an antitrust violation); Khan v. State Oil Co., 93 F.3d 1358 (7th Cir. 1996), *rev'd on other grounds*, 522 U.S. 3 (1997) (reinstating terminated franchisee's claim of maximum price fixing because franchisee offered evidence from which one could infer that had he been allowed to raise his price above the suggested retail price he would have had a higher income and thus would have been able to pay his rent and therefore avert termination); Anthony Distributors Inc. v. Miller Brewing Co., 882 F. Supp. 1024, (M.D. Fla. 1995) (sellers' actions to protect its natural monopoly over its own product in targeting a buyer for termination cannot be challenged under Sherman Act §1); Florida Seed Co., Inc. v. Monsanto, Inc., 1995 2 Trade Cases (CCH) P71, 240, (M.D. Ala. 1995) (terminated buyer lacked standing to bring antitrust action based on manufacturer's illegal acquisition of a competitor).

- b. Suppliers may allege antitrust violations by Franchisors.

In Subsolutions, Inc. v. Doctor's Associates, Inc., 62 F.Supp 2d 616 (D.Conn 1999), the U.S. District Court for the District of Connecticut ruled that vendors who sold point-of-sale ("POS") systems to Subway franchisees could assert claims against franchisor for conspiracy and illegal tying stemming from franchisor's decision to require all franchisees to install certain point-of-sales systems and to buy them exclusively from one vendor.

- c. Suppliers may allege antitrust violations by other suppliers.

See Pepisco, Inc. v. The Coca-Cola Company, 1998 U.S. Dist. LEXIS 13440 (S.D.N.Y. Aug. 27, 1998) (court denied motion to dismiss holding that the market described by the plaintiff — which consisted of sales of fountain-dispensed soft drinks distributed through food service distributors — was an economically viable market relevant to the plaintiff’s Section 2 claims).

(3) F.T.C. Act, 15 U.S.C. §§ 41-58 (1982 & Supp. III 1985) (unfair competition and deceptive trade practices).

(4) F.T.C. Franchise Rule.

(5) Automobile Dealer Franchise Act, 15 U.S.C. §§ 1221-25 (1982) (Automobile Dealers Day in Court Act provides for automobile buyers to bring action against automobile manufacturer for failure of manufacturer to act in good faith in complying with terms of the franchise, or in terminating or failing to renew the franchise).

(6) Petroleum Marketing Practices Act, 15 U.S.C. § 2801 (1982) (general prohibition against termination or non-renewal of franchise except for cause, and then not for the purpose of converting the premises to operation by employees or agents of the franchisor). See Patel v. Sun Co., 948 F. Supp. 465 (E.D. Pa. 1996) (court held that franchisor did not violate the PMPA when it failed to renew the franchise because of the impending expiration of the underlying lease for the real estate upon which the service station premises were located); Baker v. Amoco Oil Co., 956 F.2d 639 (7th Cir. 1992) (oil company entitled to terminate service station franchise where franchisee accounted for sales inaccurately); Early v. Texaco Refining & Marketing Co., 951 F.2d 1059, 1063 (9th Cir. 1991) (when average customer complaints in region were one per year, ten sincere customer complaints against dealer were “numerous,” and provided reasonable basis for valid termination of service station franchise under PMPA); C.T. Massey v. Exxon Corp., 942 F.2d 340 (6th Cir. 1991) (where terminations predated decision to renew franchises in the market area, termination in “good faith” under PMPA). See also Ellis v. Mobil Oil, 969 F.2d 784, 787 (9th Cir. 1992) (franchisor has duty to make bona fide offer to franchisee when franchisor transfers interest in premises and court must make specific finding as to objective reasonableness of fair market value of the station); Mobil Oil Corp. v. Virginia Gasoline Marketers & Automotive Repair Ass’n, 34 F.3d 220 (4th Cir. 1994) (Virginia Petroleum Products Franchise Act preempted by PMPA because it denies grounds for nonrenewal available to franchisors under the PMPA.)

(7) RICO, 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986) Racketeer Influenced and Corrupt Organizations allows for a finding of a pattern of racketeering activity when there are at least two incidents of racketeering

conduct within ten years of each other. See Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) (upholding dismissal of RICO claim where plaintiff failed to allege any violation of 18 U.S.C. § 1962 based on purported conspiracy to steal plaintiff's confidential information and misrepresenting facts about plaintiff to franchisees); Virden v. Graphics One, Inc., 623 F. Supp. 1417 (C.D. Cal. 1985) (buyer's RICO claim held to survive summary judgment); Zaro Licensing, Inc. v. Cinmar, Inc., 779 F. Supp. 276, 280 (S.D.N.Y. 1991) (motion to dismiss counterclaims granted due to franchisee's failure "to plead the predicate acts upon which [the alleged RICO] violations are premised with sufficient particularity;" most of alleged "predicate acts" arose out of franchisor's attempt to procure repayment loans and threats to terminate license if not repaid, "a desire neither surprising nor sinister," nor "extortion"). See also Dudley Enterprises, Inc. v. Palmer Corp., 832 F. Supp. 221 (N.D. Ill. 1993) (plaintiff sufficiently pleaded person, enterprise and pattern of racketeering elements of RICO claim in amended complaint, although court thought plaintiff's case was "borderline" and could be better addressed in common law contract and business fraud claims); Miyano Machinery, USA v. Zonar, 1993-1 Trade Cas. (CCH) ¶70,145 (N.D. Ill. Jan. 29, 1993) (RICO claim dismissed where plaintiffs' allegations failed to show pattern of racketeering activity).

b. Applicable State Statutes

(1) General franchise termination and non-renewal statutes.

Generally, such statutes provide that a franchise can be terminated or not renewed only upon a showing of good cause. What constitutes good cause is usually defined by the statute.

a. Be aware of statutes of limitations.

E.g., Sound of Music v. Minn. Mining and Manu Co., 477 F.3d 910, 918-19 (7th Cir. 2007) (holding that terminated franchisee's claim was time barred under the Illinois Franchise Disclosure Act's one year statute of limitations; limitations period began to run when franchisee had knowledge of facts reasonably indicating a claim plus consultation with an attorney even though the attorney was ignorant of the Act and was unaware of potential claims thereunder); Powell v. The Coffee Beanery, Ltd., 932 F. Supp. 985 (E.D. Mich. 1996) (franchisees' claim under the California Franchise Investment Law barred by one year statute of limitations, which runs from "the discovery by the plaintiff of the fact constituting the violation," because franchisee knew on date he signed the franchise agreement and paid the franchisor the critical facts even though he was unaware at that time of the legal significance of those facts).

b. Consider whether your relationship falls within the franchise statute.

E.g., Gentis v. Safeguard Business Sys., Inc., Bus. Franchise Guide (CCH) ¶ 11,318 (Ca. Ct. App. 1998) (court held that the distributors were franchisees

within the meaning of the California Franchise Investment Law, even though they could not enter into binding sales contracts, did not transfer title to goods, and did not regularly deliver products to customers; the court considered that they contacted and recruited new business, demonstrated products, installed and maintained systems, offered and ensure the distribution and sale of defendant's goods).

(2) Disclosure statutes.

(3) Special industry statutes (i.e., alcoholic beverages, automobiles, farm machinery). These statutes usually provide for adjudication of disputes at the administrative agency level, and decisions of administrative law judges are generally accorded judicial deference as long as the administrative decisions are not arbitrary or capricious and are supported by substantial evidence. See Evans v. Saab Cars USA, 25 F.3d 1048 (6th Cir. 1994) Kawasaki Motors Corp. v. Texas Motor Vehicle Comm'n, 855 S.W.2d 792; Lookout Beverages, Inc. v. Heaven Hill Distilleries, Inc., No. 01-A-9203-CH-00119, 1992 Tenn. App. LEXIS 786 (Tenn. Ct. App. Sept. 23, 1992). Compare R&R Marketing L.L.C. v. Brown-Forman Corp., Bus. Franchise Guide (CCH) ¶ 11,325 (N.J. Super. Ct. 1998) (holding agency decision that denied two authorized liquor wholesalers who formed a limited liability company protection under New Jersey's wholesaler anti-discrimination statute was arbitrary and capricious).

(4) "Baby F.T.C. acts," e.g., N.Y. Gen. Bus. Law § 349 (McKinney Supp. 1988); Clark v. America's Favorite Chicken Co., 1994 U.S. Dist. Lexis 7430 or 9329 (E.D.La. 1994) (franchisee has standing to sue franchisor as a "business competition" within the meaning of Louisiana's baby FTC Act). Bio-Vita, Ltd. v. Rausch, 759 F. Supp. 33 (D. Mass. 1991) (rescission granted under state deceptive and unfair practices statute). But see Freundenberg Building Systems, Inc. v. Architectural Floor Systems, 1995 U.S. Dist. Lexis 14890, (D. Mass. Oct. 3, 1995) (Massachusetts "little FTC Act" did not apply to protect buyer since the conduct complained of did not occur "primarily within Massachusetts). Tex. Bus. & Com. Code Annot. §§ 17.41 et seq. (Vernon 1987 & Supp. 1991) (See Loeber, M., "A DTPA Cause of Action For the Terminated or Nonrenewed Franchisee: A Jack in the Box For the Unfair Franchisor," 43 Baylor Law Review 809 (1991)).

(5) State antitrust statutes, e.g., N.Y. Gen. Bus. Law §§ 340-47 (McKinney 1968 and Supp. 1988).

(6) State unfair competition statutes (prohibiting acts contrary to equity and good conscience). See Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1218-20 (4th Cir.), cert. denied, 464 US 894 (1983) (South Carolina statute prohibited conduct which did not violate the Sherman or F.T.C. acts, but was contrary to equity and conscience).

(7) State consumer fraud and deceptive business practices statutes. E.g., Illinois Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. Ann 505/1 et seq. Generally a plaintiff must plead (1) a deceptive act or practice, (2) intent on the part of the defendant that plaintiff rely on the deception, and (3) that the deception occurred in a course of conduct involving trade or commerce. Lynch Ford, Inc. v. Ford Motor Company, Inc., 96C 3793, 1997 U.S. Dist. LEXIS 2009 (E.D.Ill. Feb. 24, 1997). The Lynch Ford Court rejected the plaintiff's claim that the defendant's termination of its dealership for poor sales performance was a lie and thus a violation of Illinois Consumer Fraud and Deceptive Business Practices Act because the alleged deceptive act did not occur in the course of conduct involving trade or commerce, i.e., in advertisement, in offering for sale, a sale, or a distribution of services. Rather, the alleged deceptive act occurred by way of a fabricated statement made by defendant to the plaintiff pertaining to the defendant's decision to terminate the plaintiff's dealership.

c. U.C.C. Good Faith Requirement

(1) Objective good faith requirement has been adopted by Uniform Distribution Practices Act, § 203, comment 1 (covenant of good faith and fair dealing; can't waive by contract or agreement). See Corenswet, Inc. v. Amana Refrigeration, 594 F.2d 129 (5th Cir.), cert. denied, 444 U.S. 938 (1979).

(2) U.C.C. § 2-309(2). "Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party."

(3) U.C.C. § 1-203. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

(4) Contract Limitations

- a. Applies only to the sale of goods. See U.C.C. § 2-102.
- b. U.C.C. § 2-719 permits U.C.C. rights to be limited by contract. "[P]arties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect." U.C.C. § 2-719 "Purposes" comment.

(5) Adequate Assurances of Buyers Performance. U.C.C. § 2-609 authorizes a seller to seek from a buyer adequate assurances of the buyer's ability to perform its contract obligations. If such assurances are not furnished within thirty days, the seller may terminate the buyer. This is a very underutilized weapon in a seller's arsenal to ensure it has taken all reasonable steps

prior to terminating a poorly performing buyer. Sellers should clearly use this section more frequently. See, e.g., Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 92 N.Y.2d 458 (1998) (party has a right to demand assurances under § 2-609 even where the other party is solvent and the contract at issue is not governed by the UCC); Hornell Brewing Co., Inc. v. Spry, 174 Misc.2d 451, 664 N.Y.S.2d 698 (N.Y. Sup. Ct. 1997).

2. Common Law Theories

a. Equitable Estoppel; Promissory Estoppel; Waiver

(1) Party seeking to enforce the contract is precluded when its conduct is inconsistent with the rights or position of opposing party. Justice forbids a person from denying his own conduct when others relied upon him and acted based upon that reliance.

- a. Acts or statements inconsistent with claim asserted and sued upon.
- b. Action and reliance by other party.
- c. Injury to alleging party if first party allowed to repudiate act.

(2) In Clarence Beverage, Inc. v. BRL Hardy (USA), Inc., 2000 U.S. Dist. LEXIS 1665 (W.D.N.Y. 2000), plaintiff's claim for promissory estoppel survived motion to dismiss where the complaint alleged that defendant promised it an exclusive distributorship of its wines, that in reasonable reliance on this promise plaintiff secured real estate and equipment in order to handle the distribution, that plaintiff did not seek to distribute similar wines, and that defendant's failure to perform led to overstaffing and loss of monies.

(3) In Wagner Excello Foods v. Fearn Int'l, Inc., 601 N.E.2d 956 (Ill. App. 1 Dist. 1992), plaintiff was a manufacturer of fruit drink concentrates who entered into a contract with defendant to manufacture fruit drink concentrate from formulas supplied by defendant and packaged according to defendant's specifications. Plaintiff sued for breach of contract based on defendant's failure to meet minimum quantity purchase requirements. The court upheld dismissal on the basis of waiver because plaintiff failed to enforce compliance over the years when defendant continually failed to meet minimum requirements. See also Bolar Pharmaceutical Co., Inc. v. Hercon Laboratories Corp., Civ. Action No. 12,102, 1992 Del. Ch. LEXIS 164 (Del. Aug. 19, 1992) (party executing contract with knowledge that condition of termination already occurred is held to have waived that condition).

(4) Miskimen v. Kansas City Star Co., 684 S.W.2d 394 (Mo. Ct. App. 1984). Publisher estopped from terminating 250 contract carriers because publisher has, over ninety-year period, led carriers to believe they had

proprietary rights, not just contract rights. Therefore, despite contract right to cancel on four-days' notice, and despite the fact that the publisher gave sixty-days' notice, the court estopped publisher from relying on contract clause after ninety years of contrary behavior. The court noted:

a. "The forms of contracts were never the subject of negotiations." Id. at 396.

b. "To permit the company to change its delivery system without compensating the carriers for the loss of their business would be manifestly unfair." Id. at 402.

c. "No one in his right mind would purchase anything for such a large sum believing that his right to keep and work and continue to profit from the property could be terminated upon four days' notice. Nothing could be more obvious than the carriers in purchasing the routes and in devoting their lives and fortunes to build their businesses acted in reliance on the company's previous owners' and managers' explicit and implicit representations and acts giving assurance that the contractual relationship was a lasting one and not subject to unilateral termination without cause." Id. at 401.

d. "The unfairness of the situation is further emphasized by the fact that the termination provision was never the subject of bargaining or negotiation. The Star's conduct created a reasonable expectation in the carriers that the relationship was not merely one of a contract terminable at will. It created a reasonable expectation that each carrier owned a business that could be conveyed and sold in the knowledge based upon over ninety years of history that the carrier's business would continue so long as the company's business continued and so long as the individual carrier performed his part of the bargain." Id. at 402.

(5) However, in Sutter Home Winery v. Vintage Selections, 971 F.2d 401, 409 (9th Cir. 1992) (applying Arizona law), buyer's allegations regarding (1) special efforts it took to sell seller's wines, to the detriment of buyer's relationship with other suppliers; (2) reliance on seller's historical conduct and industry custom; and (3) seller's expression of good faith were "not the type of specific promises which can support an action for promissory estoppel." Cunningham Implement Co. v. Deere and Co., No. CT-95-1148, 1995 WL 697555 (Minn. App. Nov. 28, 1995) (reliance on manufacturer's purported past conduct insufficient to establish reliance where plaintiff failed to allege specific promise); see also Reed Paper Co. v. Procter & Gamble Distributing Co., 807 F. Supp. 840, 847 (D. Me. 1992) (summary judgment in favor of manufacturer on promissory estoppel claim where plaintiff had no evidence beyond pleadings to support alleged promise that franchise relationship would continue to operate from year to year unless terminated for good cause); Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1515 (D. Colo. 1992), aff'd, 13 F.3d 366 (10th Cir. 1993) (no promissory estoppel claim where

plaintiff buyer did not implement any changes detrimental to plaintiff following meeting in which buyer and seller discussed how buyer could improve future sales). But see Martin v. Heubelin, Inc., Bus. Franchise Guide, ¶ 11,143 (E.D. La. 1996) (even though distributor did not expand warehouse space or hire additional personnel, court found detrimental reliance in distributor's continued promotion of defendant's products).

(6) According to Wagner Excello Foods v. Fearn Int'l, Inc., 601 N.E.2d 956, 965-66 (Ill. App. 1 Dist. 1992), plaintiffs cannot sue on a breach of contract and promissory estoppel claim arising out of the same breach. Where performance required to satisfy the detrimental reliance requirement of promissory estoppel would constitute consideration for a contract, promissory estoppel theory becomes inapplicable. "Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract." Id. at 965 (citations omitted).

b. Fraud

To state a cause of action, plaintiffs must allege the precise misconduct, the general time frame of the misconduct, the individuals who committed the alleged fraudulent conduct, plaintiffs' reliance on the fraudulent conduct and damages suffered as a result. See Bennett Enterprises, Inc. v. Domino's Pizza, Inc., 794 F. Supp. 434, 436-37 (D.D.C. 1992); Fluid Powers, Inc. v. Vickers, Inc., No. 92-0302, 1993 U.S. Dist. LEXIS 2012 (E.D. Pa. Jan. 27, 1993).

(1) Clarence Beverage, Inc. v. BRL Hardy (USA), Inc., 2000 U.S. Dist. LEXIS 1665 (W.D.N.Y. 2000) (claim for promissory fraud survived motion to dismiss where the complaint alleged that plaintiff was promised an exclusive distributorship by defendant, that such promise was accepted but that the representations were made, inter alia, without any intention of performing and with designs to disclose prospective retail accounts so that those retailers could be directly solicited by defendant).

(2) Meyers v. Cornwell Quality Tools, Inc., 674 A.2d 444 (Conn. Ct. App. 1996) (upholding jury's verdict for franchisee who claimed that franchisor committed fraud by representing to franchisee that he had sufficient financial resources to operate a franchise, that he would provide franchisee with adequate training, that franchisee could expect a certain amount of annual income, and that franchisor would repurchase any inventory if the franchise was terminated).

(3) Kanco Distributing, Inc. v. Snapper, Inc., No. 96-1397-JTM, 1998 U.S. Dist. LEXIS 1177 (D. Kan. 1998) (court granted summary judgment in favor of manufacturer on distributor's fraud claim because the distributor could not demonstrate justifiable reliance on manufacturer's alleged assurances that if distributor increased its market share and remained current on

its payments to manufacturer it would remain a distributor, since manufacturer continually reminded distributor of its contractual right to terminate distributor at any time).

c. Breach of Fiduciary Duty

Most courts have refused to apply fiduciary duty construction in franchise relationships.

(1) D&K Foods, Inc. v. Brugger's Corp., Bus. Franchise Guide (CCH) ¶ 11,506 (D. Md. 1998) (dismissing claims for breach of fiduciary duty with respect to a franchisor's administration of a franchisee advertising fund); Broussard v. Meineke Discount Muffler Shops, Inc., Bus. Franchise Guide (CCH) ¶ 11,459 (4th Cir. 1998) (same); Crim Truck & Tractor Co. v. Navistar Int'l Transport. Corp., 823 S.W.2d 591, 595 n.5, 597 (S. Ct. Tex. 1992) (“[t]he majority of other jurisdictions have rejected the imposition of general fiduciary duties on the franchise relationship;” “no good reason to add to the existing regulatory scheme by implication of a common law fiduciary duty.”); Red Roof Inns v. Murat Holdings, 223 S.W.3d 676 (Ct. App. Tex. 2007) (finding that Louisiana does not recognize fiduciary relationship between franchisor and franchisee). See O’Neal v. Burger Chef Sys., Inc., 860 F.2d 1341, 1349 n.4 (6th Cir. 1988) (citing nineteen cases from various jurisdictions holding that franchise agreement does not give rise to fiduciary duty).

(2) Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979) cert. denied, 446 U.S. 918 (where franchisor Amoco Oil made material misrepresentations to franchisee Arnott, and franchisee relied on such misrepresentations to his detriment, the court held that franchisor had “breached its ‘fiduciary’ duty of good faith and fair dealing . . . in terminating its . . . agreement with [franchisee] without good cause.”). Id. at 884. Seller’s duty of good faith and fair dealing was limited later in Bain v. Champlin Petroleum, 692 F.2d 43 (8th Cir. 1982), in which the court held that:

In every contract there is an implied covenant of good faith and fair dealing on the part of both parties However, although the existence of trust and confidence in another is inherent in all fiduciary relationships, its mere presence does not suffice to automatically make either party to a business relationship such as here present a fiduciary in every aspect of that relationship.

Id. at 47 (emphasis in original).

The court further held that “Arnott does not stand for the proposition that the grant of a franchise of itself in all instances imposes on the franchisor all of the duties and responsibilities which traditionally pertain to a true fiduciary.” Id. at 48.

(3) Federal district court in Wisconsin rejected the notion that a fiduciary duty automatically arises from a franchise relationship. Amoco Oil Co. v. Cardinal Oil, 535 F. Supp. 661 (E.D. Wis. 1982).

[The court rejects] the contention that [a franchisor/franchisee] relationship, in itself, gives rise to fiduciary obligations. It is the law of this state that every contract imposes upon the parties thereto duties of good faith and fair dealing That this duty also inheres as a matter of statutory law in a franchisor/franchisee relationship does not . . . make that relationship a fiduciary one.

Id. at 666.

(4) Similarly, the Seventh Circuit stated:

Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper. That philosophy may animate the law of fiduciary obligations but parties to a contract are not each other's fiduciaries — even if the contract is a franchise.

Orig. Gr. Am. Choc. Chip Cookie v. River Valley, 970 F.2d 273, 280 (7th Cir. 1992) (citations omitted). See also Oil Express Nat'l Inc. v. Burgstone, Bus. Franchise Guide, ¶ 11,148 (N.D. Ill. 1997) (although franchise agreement required franchisor to administer an advertising fund for franchisee to which franchisor was to contribute, that obligation did not create a fiduciary relationship and the alleged failure of franchisor to maintain such a fund did not constitute a breach of fiduciary duty); Siemer v. Quizno's Franchise Co., 2008 WL 904874 (N.D. Ill. 2008) (“it is well established under Illinois law that parties to a contract, including franchise contracts, do not owe a fiduciary duty to one another.”) (internal citations omitted).

(5) Walker v. U-Haul Co. of Miss., 747 F.2d 1011 (5th Cir. 1984), upheld grant of summary judgment dismissing plaintiff's antitrust and franchise claims, but remanded for trial on fraud and breach of fiduciary duty claims. Fiduciary duty between a franchisor and franchisee is a question of fact for the jury, and Walker had “offered ample evidence to warrant submitting the question to a jury.” The franchise was located on company-owned property; franchisee understood that rental would increase only commensurate with increase in his sales. U-Haul increased rent six-fold; plaintiff refused to pay and U-Haul ordered him to vacate. The antitrust case was dismissed for lack of market impact.

a. Elimination of agent is not an antitrust violation; no anticompetitive effect on marketing.

b. Franchise statute applicable; proper termination notice given.

(6) A New York trial court recognized the existence of a fiduciary relationship in In re Sbarro Holding, Inc., 445 N.Y.S.2D 911 (Sup. Ct. Kings Co. 1981), aff'd, 456 N.Y.S.2d 416 (2d Dept. 1982). In that case, franchisees were Taiwanese immigrants with no business background or experience who entered into a proposed restaurant franchise in Virginia. Franchisees were not represented by legal counsel in connection with the negotiations. Their substantial investment in the franchise was lost when the landlord of the proposed premises terminated the lease for failure to timely commence construction. The court found a fiduciary relationship because the franchisor was the franchisees' "developer, architect, builder, lawyer, supplier and guidance counselor." However, this case was later held in Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 1992 WL 170559 (S.D.N.Y. July 2, 1992), to represent an exceptional circumstance and contrary to all other New York cases which did not find a fiduciary duty to exist in franchise relationships.

3. Breach of Contract/Contract Causes of Action

a. Breach of Express or Implied Terms

In Amerisys, Inc. v. Panasonic Communs. & Sys. Co., 1993 U.S. App. LEXIS 30430 (4th Cir. Nov. 23, 1993), the circuit court affirmed the district court's dismissal on Fed. R. Civ. P. 12(b)(6) of buyer's suit against seller, alleging breach of agreement based on seller receiving and filling out orders from buyer's competitor. The dismissal was upheld since buyer's claim was premised on its reliance on seller's oral promise of exclusivity which conflicted with the express terms of the agreement signed by the buyer.

b. Implied Covenant of Good Faith & Fair Dealing

(1) Courts have adopted the notion of implied covenant of good faith. See Juliano v. Sun Co., Inc., 166 F.3d 1205 (3d Cir. 1998) (reversing grant of summary judgment on claim for breach of implied covenant where plaintiffs alleged that defendant's pricing practices, which plaintiffs contended required them to sell gas at below market prices, violated the spirit of franchise agreement by making it almost impossible for plaintiffs to operate their gas station at a profit; Dunkin' Donuts of America, Inc. v. Minerva Inc. 956 F.2d 1566 (11th Cir. 1992) (franchisor breached implied obligation of good faith, which "exists by operation of law in every contract," by conducting audits motivated by profitable franchisee's refusal to sign renewal, and utilizing "yield and usage" auditing tests not disclosed in franchise agreement.) See also Uniform Franchise and Business Opportunities Act, § 201, 7A U.L.A. 101 (1987) (duty of good faith accompanies every franchise relationship).

(2) The implied covenant of good faith also applies to contracts terminable at will. Lindale Auto Supply, Inc. v. Ford Motor Co., No. 14-96-00536-CV, 1998 Tex. App. LEXIS 1564 (Tex. Ct. App. Mar. 12, 1998) (even if manufacturer knew at the time it approved of transfer of ownership of

distributor that it would terminate the distributorship agreement, that does not constitute bad faith because the distributorship agreement provided that it could be terminated at will); Hentze v. Unverfehrt, 604 N.E.2d 536, 539 (Ill. App. 5 Dist. 1992). See also Louis Glunz Beer, Inc. v. Martlet Importing Co., Inc., 864 F. Supp. 810 (N.D. Ill. 1994) (beer importer that provided 100 days' notice prior to terminating a terminable-at-will distribution agreement did not breach the implied covenant of good faith and fair dealing). But see Cherick Distribs., Inc. v. Polar Corp., 41 Mass. App. Ct. 125, 669 N.E. 2d 218 (1996) (upholding jury's finding that four days' notice of termination was unreasonable and a breach of the covenant of good faith and fair dealing); Martin v. Heublin, Inc., Bus. Franchise Guide, ¶ 11,143 (E.D. La. 1996) (court found it was reasonable for jury to conclude that defendant acted in bad faith by terminating distributor immediately even though the decision to terminate had been made several months prior).

(3) The implied covenant of good faith has been defined by one court as follows:

The covenant of good faith and fair dealing . . . is implied by California law in every contract and imposes a duty on each party to do nothing to destroy the right of the other party to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose.

Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 728 (7th Cir. 1979) cert. denied, 445 U.S. 917 (1980). At the same time,

There is no blanket duty of good faith; nor is reasonableness the test of good faith. . . . Contract law imposes a duty, not to "be reasonable," but to avoid taking advantage of gaps in a contract in order to exploit the vulnerabilities that arise when contractual performance is sequential rather than simultaneous.

Orig. Gr. Am. Choc. Chip Cookie v. River Valley, 970 F.2d 273, 280 (7th Cir. 1992). See also Burger King Corp. v. Austin, 805 F. Supp. 1007, 1013-14 (S.D. Fla. 1992) (collecting quotations from various jurisdictions regarding the implied covenant of good faith and fair dealing).

(4) However, the courts, by recognizing a good faith requirement, are not willing to override explicit contractual terms.

a. In Zeidler et al. v. A&W Restaurants, Inc., et al., 2000 U.S. Dist. LEXIS 764 (N.D. Ill. 2000), the court held that the implied covenant of good faith cannot be read as imposing additional limitations on the

franchisor's ability to terminate beyond those stated in the franchise agreement. The court reasoned that “the covenant of good faith is not an independent source of contractual duties, rather it is a tool for interpreting express contractual terms.” Id. at *2.

b. In Lazar's Auto Sales, Inc. et al. v. Chrysler Financial Corp., et al., 2000 U.S. Dist. LEXIS 1167 (S.D.N.Y. 2000), the district court held that defendant Chrysler Financial Corp. did not breach any duty of good faith and fair dealing when it exercised its contractual right to terminate the dealership's financing. See also Burger King Corp. v. C.R. Weaver, 169 F.3d 1310 (11th Cir. 1999) (no independent cause of action exists under Florida law for breach of implied covenant of good faith).

c. In Elliott & Frantz, Inc. v. Svedala Industries, Inc., C.A. No. 97-3804, 1997 U.S. Dist. LEXIS 20769 (D.C. Pa. Dec. 30, 1997), the distribution agreement provided that the parties could by mutual agreement extend the term of the agreement, and the court refused to apply the covenant of good faith and fair dealing to require that they negotiate a new agreement. See also Choice Hotels Int'l, Inc. v. Madison Three, Inc., et al., 2000 U.S. Dist. LEXIS 2605 (D.C. Md. 2000).

d. In Grand Light & Supply Inc. v. Honeywell, 771 F.2d 672 (2d Cir. 1985), the Second Circuit refused to permit good faith provisions of U.C.C. § 1-203 to override a 30-day termination provision. “Where the contract expressly provides for termination on thirty days notice, no good faith requirement should be implied to override the contractual provisions. Therefore, the termination was proper within the terms of the contract.” Id. at 679.

e. In Pennington's Inc. v. Brown-Forman Corp., 785 F. Supp. 1412 (Mont. 1991), the District Court held that, absent proof of unconscionability, it would enforce the 30 day notice of termination provision contained in the franchise agreement, in spite of the parties' obligation of good faith and fair dealing. But See, Oil Express Nat'l, Inc. v. Burgstone, Bus. Franchise Guide, ¶ 11,148 (N.D. Ill. 1997) (the franchise agreement gave the franchisor wide discretion to perform its obligations, e.g., it would revise the operations manual as needed, use best efforts to enter into national purchasing contracts that would benefit its franchisees, and would conduct training programs as needed; the court held that franchisee's claim that the franchisor failed to do these things out of bad faith stated a claim for abuse of contractual discretion).

f. Where the parties' agreement expressly sets forth terms of assignment and did not limit franchisor's discretion in granting or withholding approval, no implied obligation of good faith would be read into agreement. James v. Whirlpool Corp., 806 F. Supp. 835, 843 (E.D. Mo. 1992). But see Burger King Corp. v. Austin, 805 F. Supp. 1007, 1017 (S.D. Fla. 1992) (claim for breach of implied covenant of good faith and fair dealing not dismissed where claim involved clause in franchise agreement which vested complete

discretion over equipment approvals in franchisor); Elliot & Franz, Inc. v. Svedala Industries, Inc., Bus. Franchise Guide, ¶ 11,310 (E.D. Pa. 1997), the distribution agreement expressly provided for a term of 2 years and that the parties may negotiate for an additional one year term. The court refused to apply the implied duty of good faith to create a duty to negotiate in good faith for a renewal of the agreement. See also Consumers Int'l Inc. v. SYSCO, Inc., Bus. Franchise Guide, ¶ 11,309 (Az. Ct. App. 1997) and Infomax Office Sys. v. MBO Binder & Co. of Am., 976 F.Supp. 1247 (S.D. Iowa 1997), where courts refused to apply the implied covenant of good faith to read into the distribution contracts a requirement for good cause termination.

(5) In Bailey's, Inc. v. Windsor America, Inc., 948 F.2d 1018, 1020 (6th Cir. 1991), the Court held that franchisor did not breach the covenant of good faith, in spite of “evidence from which a jury could have inferred that the termination of [the dealer's] sales to [the terminated distributor] represented a quid pro quo for one or more distributors that either offered to increase their own purchases [if demands met] or threatened to stop buying [if continued to sell to plaintiff].” See also Burger King Corp. v. Austin, 805 F. Supp. 1007, 1016, 1025 (S.D. Fla. 1992) (claims for breach of implied covenant of good faith and fair dealing dismissed where they are more properly set forth in claim for breach of express contractual obligations).

(6) In Piccoli A/S v. Calvin Klein Jeanswear Co., Bus. Franchise Guide (CCH) ¶ 11,530 (S.D.N.Y. Sept. 9, 1998), the court refused to hold that New York law imposes duties running between non-contracting parties on the grounds that the parties share similar roles in a series of contracts constituting a distribution network. Thus, the court dismissed plaintiff's claim for breach of the duty of good faith and fair dealing.

(7) In Sutter Home Winery, 971 F.2d at 408 (9th Cir. 1992), the Ninth Circuit held that, under Arizona law, no tort existed for breach of implied covenant of good faith and fair dealing. The court stated that tort liability applies for breach of the implied covenant if a “special relationship” exists between the parties based on “elements of public interest, adhesion and fiduciary responsibility.” The court found that a franchise and distributor agreement was based on profit-making and thus did not raise the type of “special relationship” required by the law. The court apparently adopted the position of the “vast majority of courts” holding that a franchisor-franchisee relationship is not the kind of “special relationship” which gives rise to tort liability for contractual breaches. See id. at 408 n.6, citing O'Neal v. Burger Chef Systems, Inc., 860 F.2d 1341, 1349 n.6 (6th Cir. 1988).

(8) In Cassan Enterprises, Inc. v. CMC Investments, Inc., Bus. Franchise Guide (CCH) ¶ 11,343 (9th Cir. 1997), the court held that, under California law, it could not use the implied duty of good faith and fair dealing to create an entirely new contractual duty not contemplated by the parties.

c. Implied prohibition against terminations without reasonable cause if contract is silent: Where the contract is silent on whether cause is required, courts will imply a duty to terminate only upon good cause, relying on public policy which favors voiding grossly unfair contractual provision especially where there is disproportionate bargaining power. See Shell Oil v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973) (oil company couldn't unilaterally terminate except for good cause), cert. denied, 415 U.S. 920 (1974). This holding was superseded by the Petroleum Marketing Practices Act. See Ricco v. Shell, Inc., 434 A.2d 1151, 1154 (N.J. Super. Ct. 1981). But note: most courts have refused to imply good cause if contract specifies that termination can occur without cause. (See supra §V.B.3.b.iii).

d. Unconscionability of Contract of Adhesion. In James v. Whirlpool Corp., 806 F. Supp. 835, 841 (E.D. Mo. 1992), buyer sought to avoid the agreement's assignment clause claiming that it was an unconscionable contract of adhesion and thus unenforceable. The court held that while the relative bargaining power of the parties may have been unequal, the terms were substantively reasonable and not oppressive.

e. Breach of Duty of Good Faith. In Delta Truck & Tractor v. J.I. Case Co., 975 F.2d 1192, 1204 (5th Cir. 1992), the Fifth Circuit found that seller breached its duty of good faith where seller sold its farm equipment business knowing that the transaction would result in termination of its dealers without cause. The court further found that seller structured its acquisition by a competitor in such a way as to leave terminated dealers with little or no recourse against either seller or the acquiring entity.

f. Restrictive Covenants. In Generac Cor. v. Caterpillar Inc., No. 97-1404, 1999 U.S. App. LEXIS 5722 (7th Cir. 1999), the court held that the limit on the plaintiff's ability to appoint new dealers was not an unenforceable restrictive covenant. The agreement between the parties permitted the plaintiff to take action if the defendant appointed distributors were not performing satisfactorily by trying to resolve the problems with defendant, and then appointing new distributors if the problems could not be resolved.

g. Misrepresentation

(1) Fraud or Misrepresentation. Under common law principles, damages may be recoverable for fraud or misrepresentation. Fraud is present when:

a. a party falsely represents a past or present material fact or actively conceals such a fact;

b. the misrepresenting party either knew the statement was false or disregarded its truth or falsity;

- c. the misrepresenting party intended that the misrepresentation be relied upon;
- d. that misrepresentation caused the party relying on it to act;
- e. such reliance was justified;
- f. the party relying was damaged as a result of that reliance.

(2) In Latham Seed v. Nickerson American Plant Breeders, 978 F.2d 1493, 1498 (8th Cir. 1992), cert. denied 113 S. Ct. 3037 (1993), the court upheld a jury finding of fraud by seller where the evidence showed that seller signed a new contract with a buyer while knowing that the distribution program was being terminated. Despite this knowledge, seller continued to encourage buyer to stock up on seller's product.

(3) The court in Anderson v. Chevron Corp., 933 F. Supp. 52 (D.C.D.C. 1996), granted summary judgment for defendant because plaintiffs failed to offer evidence demonstrating that defendant had decided, at the time plaintiffs entered into or renewed their franchise agreements, to withdraw from the relevant market. The court also stated that even if plaintiffs had presented evidence that defendant did misrepresent its marketing strategy in the relevant area, the plaintiffs' reliance on those representations would not have been reasonable under the circumstances. At the time the plaintiffs entered into or renewed their franchise agreements with defendant, each plaintiff received and acknowledged in certain documents that the defendant could withdraw from the relevant market provided it gave plaintiffs required notice, that in light of the constantly changing market conditions there was no guarantee that defendant would remain in the relevant market, and that no employee of defendant had authority to give any assurances to franchisees concerning defendant's intention to remain in the relevant market.

(4) The court in Burger King Corp. v. Austin, 805 F. Supp. 1007, 1019-21 (S.D. Fla. 1992), dismissed a claim for alleging that franchisor fraudulently concealed facts regarding the suitability of a site for a franchise. Applying Florida and Georgia law, the court held that, in the absence of a fiduciary or confidential relationship, failure to disclose material facts in an arm's length transaction did not give rise to an action for fraud. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1185 (3d Cir. 1993) (same result under New Jersey law). The court pointed to language in the franchise agreement stating that the parties are not in a fiduciary relationship and that the parties are operating at arm's length. See also Mechanical Rubber & Supply Co. v. American Saw & Manufacturing Co., 1992 WL 389014 (C.D. Ill. Sept. 30, 1992) (elements of fraudulent misrepresentation not met where plaintiff buyer admitted that no fraudulent inducement was involved and where no damage was shown).

(5) Although fraud is typically claimed as an inducement to execute the agreement fraudulent claims may arise during the course of the performance of the agreement, such as representations that the seller will buy back the franchisee's inventory if the franchisee is terminated or that it will refund the franchisee's investment when in fact it has no intention of doing either.

(6) Fraud may also be present in promissory statements relating to future events if the conditions listed above are present, and

a. the party making the statement had an actual fraudulent intent to deceive the other party, and

b. there was reasonable reliance on the promise.

See McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 563 N.E.2d 188, 9 ALR5th 1007 (1990).

(7) Negligent Misrepresentation. A cause of action for negligent misrepresentation exists if the elements of general negligence are established, i.e., that the franchisor grossly breached his duty of care to the franchisee in making the statement and reasonably could assume that these statements would be relied upon. See Burger King Corp. v. Austin, 805 F. Supp. 1007, 1023-24 (S.D. Fla. 1992) (sustaining claim for negligent misrepresentation for statements regarding franchise's chances of success, required total investment for franchise and total number of other franchises to be open in area). But see Bryant Corp. v. Outboard Marine Corp., 1994 U.S. Dist. Lexis 18371 (W.D.Wash. 1994) (summary judgment in favor of seller granted because court found no evidence that seller intended to terminate buyer at time when buyer inquired as to whether seller intended to change its method of distribution)

h. Third-party Beneficiary

(1) In Delta Truck & Tractor, Inc., 975 F.2d at 1203-04 (5th Cir. 1992), the court found defendant, the entity which acquired seller's business, liable to plaintiff buyer based on language in the agreement between defendant and seller which provided that seller's dealers would be offered a new dealership agreement or, in the alternative, an arrangement for consolidation, relocation, purchase or termination of dealer's operations on terms that the dealer would have received from the seller under the original dealership agreement.

(2) In Piccoli A/S v. Calvin Klein Jeanswear Co., Bus. Franchise Guide (CCH) ¶ 11,530 (S.D.N.Y. Sept. 9, 1998), the court held that as exclusive Scandinavian distributor of Calvin Klein Jeans was not an intended third-party beneficiary of the contract between Calvin Klein, Inc., the beneficial owner of the trademark, as not a party to the action, and one of its North American distributors. First, the agreement provided that others could recover damages under the agreement. Second, the agreements inurement clause coupled

with its non-assignability clause suggest that the parties did not intend to benefit third parties. Thus, plaintiff could not enforce a provision in the North American distributor's agreement with Calvin Klein, Inc. that prohibited its exportation of Calvin Klein Jeans.

i. Equitable Theories, e.g., Reformation, Rescission, Return of Investment, Recoupment. See, Total Coverage Inc., v. Cendant settlement Serv. Gp. Inc., 252 Fed. Appx. 123 (9th Cir. 2007) ("under California law, an action in quasi-contract does not lie 'when an enforceable, binding agreement exists defining the rights of the parties.'"); Sutter Home Winer, 971 F.2d at 408-09 (9th Cir. 1992) (under Arizona law, buyer cannot recover on equitable claims of unjust enrichment and breach of implied contract where express written agreement governing relationship of parties exists).

4. Tort Claims

a. Negligent Misrepresentation as a Result of a Gross Breach of Duty of Care

- duty of care
- breach
- causation
- damage

b. Tortious Interference with Contractual Relationships

(1) This cause of action falls into two categories: tortious interference with contractual rights and tortious interference with prospective economic advantage.

The elements of tortious interference with contractual rights are:

- existence of valid contract
- knowledge of the contract
- intentional interference with performance of the contract without justification
- damages

The elements of a tortious interference with prospective economic advantage are:

- plaintiff has a reasonable expectation of entering into a valid business relationship
- defendant maliciously and purposefully interferes with and defeats this legitimate expectancy
- defendant's actions cause harm to plaintiff

(2) In Collins Entertainment Corp. v. Drews Distributing Inc., No. 98-1083, 1999 U.S. App. LEXIS 3712 (4th Cir. Jan. 26, 1999), the court held that the plaintiff's claim that the new distributor caused the supplier to change the plaintiff's status from an exclusive to a non-exclusive distributor did not amount to an intentional tortious breach of contract because the change of status was not a breach.

(3) In Gossard v. Adia Services, Inc., Bus. Franchise Guide (CCH) § 11,517 (Fla. Sup. Ct. 1998), the court held that a party who knowingly purchased a franchise with a pre-existing obligation not to compete with the franchise and who then acquired a competing franchise, tortiously interfered with a franchisee's business relationships.

(4) In Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993), the court upheld the jury's finding that statements made by defendant's salespersons caused potential and existing franchisees to stop dealing with plaintiff. Id. at 1168. The court further held that the intent required to establish a tortious interference claim was intent to harm a particular plaintiff, not an intent to cause the extent of harm suffered by plaintiff. Id. at 1170.

(5) In Fluid Power, Inc. v. Vickers, Inc., No. 92-0302, 1993 U.S. Dist. LEXIS 2012 (E.D. Pa. Jan. 27, 1993), plaintiff buyer stated claim for tortious interference with present and prospective contractual relationships where plaintiff alleged defendant's interference with present and potential contractual relationships with third party. Plaintiff further alleged intentional interference from which plaintiff sustained damages. While plaintiff did not allege other contracts or potential contracts which were subject to tortious interference, plaintiff alleged that it gave defendant customer lists of current and potential customers. This information was sufficient to give defendant notice of plaintiff's claims.

(6) Absent showing of fiduciary or contractual relationship, no cause of action arises for tortious interference with contractual relations in an at-will agreement. WFB Telecommunications v. NYNEX Corp., 590 N.Y.S.2d 460, 461-62 (1st Dept. 1992). Also, where a defendant acted for a legitimate business reason or under an unqualified right pursuant to an agreement, as a matter of law, it did not tortiously interfere with plaintiff's contractual or business relationship. James v. Whirlpool Corp., 806 F. Supp. 835, 844 (E.D. Mo. 1992).

(7) In Cherick Distribs., Inc. v. Palar Corp., 41 Mass. App. Ct. 125, 669 N.E. 2d 218 (1996), the court refused to overturn a jury's finding that the franchisor's termination of the franchise on four days' notice constituted tortious interference with advantageous relationships. Since the jury held that the abrupt termination constituted a breach of the implied covenant of good faith and fair dealing, the court reasoned that the jury could also have found that the means used to effect the termination were wrongful. Also, the court noted that jury could infer that the fact that the termination was to take effect on the eve of a distributors' meeting organized by the plaintiff was more than coincidence.

(8) In Lynch Ford, Inc. v. Ford Motor Company, Inc., 96C 3793, 1997 U.S. Dist. LEXIS 2009 (E.D.Ill. Feb. 24, 1997), the Court rejected the plaintiff's claim that defendant's attempt to terminate the plaintiff's dealership constituted interference with the plaintiff/defendant contract because one cannot tortiously induce oneself to breach a contract. The Court also rejected the plaintiff's claim that defendant's attempts to terminate its dealership constituted an interference with the plaintiff's prospective business advantage with its potential customers because the plaintiff did not specifically identify any third party with which it had potential business relationship.

(9) Midwest Great Dane Trailers, Inc. v. Great Dane Ltd. Partnership, 977 F. Supp. 1386, 1395 (D. Minn. 1997) (while expressing serious reservations about the likelihood of success on the claim, court held plaintiff stated a claim for tortious interference with prospective business relationship because plaintiff effectively claimed that defendant violated the Minn. Heavy and Utility Equip. Manuf. Dealers Act by appointing a new dealer in plaintiffs' territory.)

(10) Cunningham Implement Co. v. Deere and Co., No. C7-95-1148, 1995 WL 697555 (Minn. App. Nov. 28, 1995) (because dealership agreement gave manufacturer right to approve or deny transfers of its dealerships, court found there was no cause of action for tortious breach of contract or interference with prospective economic advantage; the manufacturer's approval was a condition precedent to formation of the contract to transfer the dealership; because such approval was not given, a contract was not formed and therefore not breached).

(11) Sea-Roy Corp. v. Parts R Parts, Inc., No. 1:94CV00059, 1997 U.S. Dist. LEXIS 21809 (M.D.N.C. 1997) (where distributor was experiencing financial problems and was indebted to manufacturer, court held that third party's knowledge of this and use of that knowledge to encourage manufacturer to terminate exclusive and non-exclusive distribution agreements with distributor did not constitute a tortious breach of contract, but rather such conduct was protected by the competitive privilege).

(12) Minnesota Mining and Manuf. Co. v. Graham-Field, Inc., No. 96 Civ. 3839 (MBM), 1997 U.S. Dist. LEXIS 4457 (S.D.N.Y.

1997) (distributor failed to state a claim for tortious interference with prospective economic advantage because distributor failed to allege a particular customer relationship with which the manufacturer interfered; distributor's general allegation that manufacturer's conduct interfered with its relationships with its customers was insufficient).

(13) The cases indicate lack of uniformity in the applicable standards for tortious interference claims, which may affect the drafting of choice of law provisions. See Big Apple BMW, Inc. v. BMW North America, Inc., 974 F.2d 1358, 1381 n. 17 (3d Cir. 1992), cert. denied, 113 S. Ct. 1262 (1993) (different elements might apply based on whether New York or Pennsylvania law governed); Trimed, Inc v. Sherwood Medical Co., 977 F.2d 885, 889-90 (4th Cir. 1992) (under Maryland law, no need to show breach of contract to make out cause of action for tortious interference with business relationships); Popeyes, Inc. v. Tokita, 1993 U.S. Dist. LEXIS 13295 (E.D. La. Sept. 21, 1993) (Louisiana recognizes claim for interference with contract only against corporate officer individually who interfered with the business contract); Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc., No. 02A01-9205-CV-00138, 1992 Tenn. App. LEXIS 1010 (Tenn. Ct. App. Dec. 21, 1992) (Tennessee does not recognize tort of interference with prospective business relations).

(14) In Big Apple BMW, Inc. v. BMW North America, Inc., 974 F.2d 1358, 1382 (3d Cir. 1992), cert. denied, 113 S. Ct. 1262 (1993) the court reversed summary judgment in favor of defendant on plaintiff's claims for tortious interference with contract and prospective contractual relationships. The court found issues of fact based on allegations of economic pressure on the part of defendant. See also Commodore Business Machines, Inc. v. Montgomery Grant, Inc., 1993-1 Trade Cas. (CCH) ¶70,120 (S.D.N.Y. Jan. 13, 1993) (well-pled antitrust claims support unlawful purpose and unjustifiable cause elements of tortious interference claim).

(15) In Photovest Corp., 606 F.2d at 729 (7th Cir. 1979), the Seventh Circuit upheld the district court's award of punitive damages for multiple breaches of contract by seller which under Indiana law constituted "an oppressive, intentional, tortious wrong." However, the conduct cannot be merely tortious to recover punitive damages. Where the action is for breach of contract, a party may recover punitive damages only where an independent tort has been committed for which punitive damages would be awarded under Indiana law. Tobin v. Ruman, 819 N.E.2d 78, 86 (Ind. 2004).

c. Defamation. See, e.g., Isaksen v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987), cert. denied, 486 U.S. 1005 (1988). Be aware, most states provide for a one year statute of limitations.

5. Federal and State Securities Laws

a. Franchise agreements may be regarded as investment contracts and consequently be subject to securities laws. An investment contract is an agreement which one invests money in a common enterprise with the profits to come solely from the efforts of others. See SEC v. W.J. Howey Co., 328 U.S. 293, 298 (1946). Some courts have expanded “solely” to include those enterprises whose profits come predominantly, but not exclusively from the efforts of others. See SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974). Contra Sampson v. Invest America, Inc., 754 F. Supp. 928 (D. Mass. 1990); Kaplan v. Shapiro, 655 F. Supp. 336 (S.D.N.Y. 1987).

(1) Securities Act of 1933, 15 U.S.C. §§ 77A-77AA
(1982).

(2) Section 2(1) of the 1933 Act, 15 U.S.C. § 77b(1)
(1982).

(3) Securities Exchange Act of 1934, 15 U.S.C. § 78a-78kk
(1982).

(4) Section 3(a)(10) of the 1934 Acts, 15 U.S.C. §
78c(a)(10) (1982).

(5) State Securities Acts

a. N.Y. Gen. Bus. Law §§ 352-359h
(McKinney 1968).

b. Two theories involving security regulations.

(i) Passive Investment Theory.

Seller exercises a substantial degree of control over buyers, whereby the buyers are mere passive investors expecting profits to be derived solely from the efforts of the sellers. Thus, the relationship may be deemed an “investment contract” or “security.” Contra Mr. Steak, Inc. v. River City Steak, Inc., 324 F. Supp. 640, 644-45 (D. Colo. 1970), (franchisee is an informed investor whose skill and ingenuity will play a significant role in the success or failure of the venture, the contracts by which the relationship was created will not be deemed a security) modified, 460 F.2d 666 (10th Cir. 1972); Williamson v. Tucker, 645 F.2d 404, 419 (5th Cir. 1981), cert. denied, 454 U.S. 897 (1981) (recognizing the existence of the passive investment theory but noting the uniform rejection of this theory by a number of courts).

(ii) Risk Capital Theory.

If a franchise is undercapitalized, “exceptionally high risk,” and speculative, it may be deemed a “security” under the securities laws. See id. at 646-47.

6. Trade Laws

a. Section 1 of the Sherman Act, 15 U.S.C. 1 (1982).

(1) a franchise agreement that unreasonably restrains trade may give rise to liability under this section. See, e.g., Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

In NYNEX Corp. v. Discon, Inc., 119 S. Ct. 493 (1998), the Supreme Court held that a single buyer’s decision to deal with one supplier rather than another is not a per se illegal group boycott violative of §1 because it involves only a vertical agreement and does not involve a horizontal agreement between competitors, such as on price or price levels.

b. Section 3 of the Clayton Act, 15 U.S.C. § 14 (1982).

(1) Tying, exclusive dealing arrangements, total-requirement obligation, all may be violative of this section. See, e.g., MCA Television Ltd. v. Public Interest Corp., 1999 U.S. App. LEXIS 6131 (11th Cir. 1999) (where court held that defendant’s conditioning of its licensing to plaintiff for barter of several first-run television shows that plaintiff wanted on the plaintiff’s willingness to license for cash and barter a first-run television show that plaintiff did not want constituted a per se illegal tying arrangement, but refused to award damages because defendant could not establish antitrust injury).

(2) The essential characteristics of an illegal tying agreement is the tying of two distinct products for purpose of foreclosure of competition on the merits in the tied product. In order to state a claim under the Sherman Act, the Plaintiff must demonstrate that the Defendant had "market power" in the tying product market sufficient to force the Plaintiff to purchase the tied product. Rick-Mik Enterprises v. Equilon Enterprises, 532 F.3d 963, 971 (9th Cir. 2008) (citing Jefferson Parish Hosp. Dist. No. 2 v Hyde, 466 U.S. 2, 13-14 (1984)).

(3) There has been an upsurge in tying claims in the franchise area since the decision in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992). In that case, Kodak conditioned the sale of replacement parts for its copiers on the purchase of repair services exclusively from Kodak. The Court found that aftermarket parts and services were separate and distinct products and that Kodak had market power in the derivative market for parts even though it did not have power in the copier market. According to Kodak, market power can be defined in terms of one single product (i.e., Kodak

replacement parts) based on the parts' uniqueness together with information and switching costs. Kodak customers were "locked in" and forced to accept its terms, given the fact that the copier equipment was a large purchase involving a long term commitment, and customers were not given information necessary to make competitive choice at the time of the original purchase, and there was no other source for unique Kodak parts.

(4) Franchise Tying Cases Prior to Kodak

a. distribution v. business format

(i) Business format -- franchisor provides trademark but exercises little control.

(ii) Distribution format -- franchisor provides trademark, product sourcing, etc.

b. Principe v. McDonald's Corporation, 631 F.2d 303 (4th Cir. 1980). Franchisee sued McDonald's alleging that the obligation to lease McDonald's-owned property and purchase a \$15,000 non-negotiable, non-interest bearing, security deposit note in order to receive a franchise was an illegal tying arrangement. In affirming summary judgment for McDonald's on the security deposit issue and a directed verdict for McDonald's on the lease issue, the Fourth Circuit held that the lease, note, and license were not separate products, but rather component parts of an overall franchise package.

Franchising has come a long way since the decision in Chicken Delight. Without disagreeing with the result in Chicken Delight, we conclude that the court's emphasis in that case upon the trademark as the essence of a franchise is too restrictive. Far from merely licensing franchisees to sell products under its trade name, a modern franchisor such as McDonald's offers its franchisees a complete method of doing business . . . McDonald's practice of developing a system of company owned restaurants operated by franchisees has substantial advantages, both for the company and for franchisees. It is part of what makes a McDonald's franchise uniquely attractive to franchisees.

Id. at 309-10.

(5) Krehl v. Baskin-Robbins Ice Cream Company, 664 F.2d 1348 (9th Cir. 1982) Baskin-Robbins conditions the grant of a franchise on the agreement to purchase ice cream products from Baskin-Robbins or its licensees. Certain franchisees brought an antitrust class action alleging, among other things, that Baskin-Robbins was illegally tying the sale of its ice cream to the Baskin-Robbins trademark. In affirming the dismissal of the franchisees' case, the Ninth Circuit held that under a "distribution" type of franchise, the franchisees merely serve as conduits through which the trademarked goods of the franchisor

flow to the ultimate consumer. "Because the prohibition of tying arrangements is designed to strike solely at the use of a dominant desired product to compel the purchase of a second undesired commodity, the tie-in doctrine can have no application where the trademark serves only to identify the alleged tied product." Id. at 1354.

(6) Smith v. Mobil Oil Corporation, 667 F.Supp. 1314 (W.D. Mo. 1987). Class of gasoline dealers sued their franchisor claiming that it unlawfully required dealers to purchase franchisor-supplied gasoline, tires, batteries, and motor oil in order to obtain dealerships and use franchisor's trademarks. In granting the franchisor's motion for summary judgment, the district court held that the franchisees' service stations were "distribution" type franchises in which the trademark was not a separate product. Relying on Krehl, the court held that when a trademarked product is sold in a distributor-type franchise system, the trademark and the product are not separate products for purposes of an antitrust tying claim.

(7) Franchise Tying Cases Since the decision in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992).

Several cases have been brought by franchisees under a theory that the franchise agreement itself constitutes "market power" under a Kodak analysis. The franchisees typically assert that they are "locked in" due to switching and information costs (sunk investments in the franchise) and thus forced to buy products or services tied to the operation of the franchise and trademark as dictated by the franchisor. While the theory has been met with some degree of success, it has recently also been rejected in several significant cases.

In Queen City Pizza v. Domino's Pizza, Inc., 922 F. Supp. 1055 (E.D. Pa. 1996), aff'd, 124 F. 3d 430 (3rd Cir. 1997), cert. denied, 523 U.S. 1059 (1998), the district court dismissed claims that the Domino's Pizza franchisees had market power in the market for "Domino's-approved ingredients and supplies", explaining that any "power" that the defendant had in that market stemmed from the fact that the existing agreement prohibited the plaintiffs from purchasing the ingredients elsewhere.

Domino's . . . power to force plaintiffs to purchase ingredients and supplies from [Domino's] stemmed 'not from the unique nature of the product or from its market share in the fast food franchise business, but from the franchise agreement.'... [P]laintiffs do not and cannot purchase ingredients and supplies from alternative suppliers not because Domino's dominates the ingredient and supply market or because Defendant is the market's only supplier, but because the franchisee-plaintiffs are contractually bound to purchase only from suppliers approved by

Defendant. It is economic power resulting from the franchise agreement, therefore, and not market power that is at work here.

Id. at 435 (quoting from district court decision, emphasis added).

See Chawla v. Shell Oil Co., 75 F. Supp. 2d 626 (S.D. Tex. 1999) (dealers who had a long-term contract with Shell restricting them to Shell gasoline and trademark were not locked in to using "island card reader" chosen by Shell for its "pay-at-the-pump" program due to Shell's market power in a unique product or trademark but by the franchise agreement); United Farmers Agents Assn. v. Farmer's Insurance Exchange, 89 F.3d 233, 236-237 (economic power derived from contractual agreements such as franchises . . . has nothing to do with market power); Wilson v. Mobil Oil, 940 F. Supp. 944 (E.D. La. 1996) ("Wilson I") (sustaining tying complaint on motion to dismiss) later listing 984 F. Supp. 450 (E.D. La. 1997) ("Wilson II") (granting summary judgment dismissing tying clause), aff'd mem., 1999 U.S. App. LEXIS 1903 (5th Cir. Jan. 28, 1999); Little Caesar Enterprises, Inc. v. Smith, 34 F. Supp. 2d 459 (E.D. Mich. 1998) (report of Magistrate Judge recommending dismissal of tie-in claim); 1998 WL 892675 (E.D. Mich. Sept. 30, 1998) (approving report and dismissing); Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW, (1999 supp.) ¶¶ 510'e, at 146-148, wherein Professors Areeda and Hovenkamp take issue with the analysis in these cases based on the fact that Kodak had "power" over its customers because of "general market circumstances," "because its parts were unique and not interchangeable with parts sold by others, [and] not because customers were "locked in" to Kodak copiers "by a contract to which the... plaintiff and defendant were a party."

But see Collins v. International Dairy Queen, 939 F. Supp. 875 (M.D. Ga. 1996). In this case illegal tying was alleged based on requirement that the right to buy a franchise was conditioned on buying products in which franchisor had financial interest. Prior approval could be obtained to buy from another source but was allegedly illegally withheld. The court held that the franchisees were "locked-in" based on the high cost of switching and information as Kodak. Later, the defendants won dismissal of many of the tying claims on the theory that the franchisees were "indirect purchasers." 59 F. Supp. 2d 1305 (M.D. Ga. Aug. 5, 1999).

In Subsolutions, Inc. v. Doctor's Associates, Inc., 62 F. Supp. 2d 616 (D. Conn. 1999), the district court, relying on Kodak, held that a franchisee could state a tying claim against its franchisor for requiring, as a condition of the franchise, that the franchisee utilize a specific supplier's point-of-sale ("POS") computer system. The district court held that a tying claim would not be dismissed even though Subway had no market power among sandwich shops, or even as compared with "comparable franchisor opportunities," because "at the time many of the franchisees entered into their franchise agreement ... the POS system was merely optional . . ." Nor were franchisees limited to a specific

vendor. That changed in 1998, to become mandatory and unitary " . . . [I]t is arguable that the franchisees could not reasonably foresee that [the franchisor] would implement such a restriction." And the restriction would be anticompetitive.

In a not-for-publication decision, the United States District Court for the District of New Hampshire sustained yet another tying claim against a motion to dismiss.

In George Lussier Enterprises, Inc. v. Subaru of New England, Inc., 1999 WL 1327396 (D.N.H. Dec. 13, 1999), the dealers contended that "although a distinct market exists for the sale and installation of automobile accessories, SNE is able to force the dealers to pay higher than market rates for accessories by exploiting the demand among dealers for discretionary vehicles." The dealers also asserted that they had been unaware of these higher costs until they had signed their dealership agreements and were "locked in" and "sunk" large investment in their dealerships.

While acknowledging that SNE and Subaru did not have conventional "market power" as to automobiles generally, the district court read Kodak to authorize a tying claim in these circumstances, because "the dealers' claim arises in the context of derivative after markets in complex durable goods, e.g., automobile and automobile accessories." 1999 WL 1327396 at *4.

The district court paused long enough to note that "SNE implicitly challenges the applicability of Kodak . . . to most franchise tying claims where the tying product is not unique." But, because SNE, "confine[d] its argument on this point to a single footnote in a 25-page memorandum," the district court stated it would "decline to address this difficult argument at this time."

In Dauro Advertising, Inc. v. General Motors Corporation, 75 F. Supp. 2d 1165 (D. Colo. Nov. 24, 1999), the district court allowed an advertising agency to assert a tying claim against GM after GM changed its cooperative advertising program.

c. Section 4 of the Clayton Act, 15 U.S.C. § 15

(1) This section provides for a private right of action for damages for "[a]ny person . . . injured in business or property by reason of anything forbidden in the antitrust laws." In Sepra Corp. v. McWane, Inc., Bus. Franchise Guide (CCH) ¶ 11,465 (D.C. Mass. 1998), the court held that a "downsized" distributor who was terminated after a consolidation did not have standing to bring a Section 4 claim.

d. The Robinson-Patman Act, 15 U.S.C. § 13.

(1) The First Circuit held in Caribe BMW, Inc. v. Bayerische Motoren Werke A.G., 19 F.3d 745 (1st. Cir. 1994), that a corporation

and its wholly-owned subsidiary constitute a “single seller” under the Robinson-Patman Act. The court extended the analysis of Copperweld Corp. v. Independence Tube Corp. to a price discrimination claim and reversed the district court’s dismissal of plaintiff’s complaint.

(2) In Cool Insulation, Inc. v. Owens-Corning Fiberglass Corp., Bus. Franchise Guide (CCH) ¶ 72,486 (W.D. Tex. 1998), the court refused to find a violation of the Robinson-Patman Act because the purchasers were only bidding on projects when the alleged price discrimination occurred and the Act only protects purchasers in competition with each other at the time of the purchases.

7. Federal Sexual Harassment Discrimination Claims.

a. Sexual Harassment. A franchisor may be held liable for harassment claims brought by an employee of a franchisee if the employee establishes that the franchisor is an “employer” within the meaning of 42 U.S.C. § 2000e-(2)(a). To make this determination, courts generally apply one of the following approaches:

(1) The common law agency theory, which focuses on whether the putative employer “controls the means and manner by which work is accomplished.” See Lambersten v. Utah Dep’t of Corrections, 79 F.3d 1024, 1028 (10th Cir. 1996);

(2) The “hybrid” common law/economic realities method, which also considers the factors that relate to the degree of economic dependence of the employee on the putative employer. See Lambersten v. Utah Dep’t of Corrections, 79 F.3d 1024, 1028 (10th Cir. 1996);

(3) The single employer or true economic realities test, which focuses on interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control. See McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir. 1987).

The third approach was promulgated by the National Labor Relations Board.

In Lockard v. Pizza Hut, Inc., Bus. Franchise Guide, ¶ 11,553 (10th Cir. 1998), the court applied the single employer test and held that there was insufficient evidence to establish that Pizza Hut, the franchisor, was plaintiff’s employer. The court identified the essence of this test as “whether the putative employer has centralized control of labor relations.” Id. at 31,434. The court found the record devoid of evidence establishing that Pizza Hut controlled the day-to-day employment decisions and made final decisions concerning employment matters, or that Pizza Hut and its franchisee were interrelated. Id. at

31, 435. Thus, the court reversed the denial of Pizza Hut's motion for summary judgment.

b. Discrimination.

To determine whether a franchisor can be held liable for the conduct of the employees of a franchisee, the court must determine whether there exists an agency relationship between the franchisor and franchisee so that the acts of the franchisee can be considered the acts of the franchisor. Because the central element of an agency relationship depends upon control, courts look to whether the franchisor had the right to control the details and the means by which the franchisee conducts its business. In Arguello v. Conco, Inc., Bus. Franchise Guide (CCH) ¶ 11,547 (N.D. Tex. 1998), a group of plaintiffs charged the defendant with violating the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title II-Public Accommodations, 42 U.S.C. § 2000a. Each plaintiff alleged that they were discriminated against and harassed at different Conco-branded stores because of their race. In concluding that there was no agency relationship between Conco and the franchisee, the court considered the following: (i) the franchise agreements specifically stated that there was no agency relationship between Conco and the franchisee, (ii) there was no evidence demonstrating that in practice Conco had any control over the day-to-day operations of the franchisees, and (iii) the evidence showed that issues such as hiring and firing employees were left to the franchisees' complete discretion.

D. Procedural Issues

1. Federal Jurisdiction.

Although a party may conclude, for reasons discussed below, in section 2(c) to bring its claims in federal court, the party must satisfy the requirements of subject matter jurisdiction. In Dunkin' Donuts Inc. v. Rayput, Bus. Franchise Guide ¶ 11,564 (N.D. Ill. 1998), the court found that the franchisor's claims against the franchisee for improper deviations from its standards did not satisfy the requisite amount in controversy to support diversity jurisdiction. The court reasoned that since the allegations were against two shops, the franchisor operated over 4,400 shops worldwide, and spent approximately \$75 million annually in advertising, it was untenable to conclude that the alleged deviations threatened value to the good will inherent in the franchisor's trademarks. The court did, however, find subject matter jurisdiction based on the franchisor's properly pled Lanham Act claims.

2. Choice of Forum.

The question of forum encompasses not only where the litigation can occur but also where you want it to occur. Sellers should always include a forum designation clause in agreements with buyers. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), on remand, 934 F.2d 1091 (9th Cir. 1991), dismissed,

804 F. Supp. 1525 (S.D. Fla. 1992). The Supreme Court reversed the Ninth Circuit and enforced cruise line's forum selection clause, contained in the commercial cruise lines ticket, designating Florida courts as forum. The Court found that, so long as the parties had notice of the forum-selection clause and it met the test of fundamental fairness, i.e., it was neither imposed to discourage passengers from pursuing legitimate claims nor acquired by fraud or overreaching, it would be enforced. See General Electric Co. v. G. Siempelkamp GmbH & Co., 809 F. Supp. 1306 (S.D. Ohio 1993) (forum selection clause in order confirmation form enforced); DFO, Inc. v. Northeast Inn of Meridian, Inc., Bus. Franchise Guide (CCH) ¶ 11,552 (C.D. Ca. 1998) (enforcing forum selection clause designating California as appropriate forum even though successor in interest to franchisor who entered into the franchise agreement at issue was located in South Carolina not California and the franchisee was located in Mississippi). Note: Certain courts may still refuse to enforce forum selection provisions. Best Buy Co., Inc. v. Smith & Alster, Inc., C5-98-1400, 1998 Minn. App. LEXIS 1424 (Minn. Ct. App. Dec. 29, 1998) (upholding trial court's refusal to enforce forum selection clause requiring any suit arising from a distribution agreement be brought in New York as unreasonable and against public policy because there were two contracts at issue, 6 parties and 13 claims alleged, and judicial economy favored the unified resolution of the disputes); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 500 (S. Ct. Mo. 1992) (en banc) (Missouri's important state interest in protecting its licensed liquor distributors from unjustified franchise termination compelled court to reject forum selection clause); New England Technical Sales Corp. v. SEEQ Technology, Inc., No. 9181, 1992 WL 384381 (Mass. App. Div. Dec. 18, 1992) (trial court's enforcement of forum selection clause reversed where highest court of state has not yet decided issue of contractual forum selection clauses). But see Lu v. Dryclean-USA of California, 14 Cal. Rptr. 2d 906 (1992) (forum selection clause in favor of litigation in Florida enforced, citing United States and California Supreme Court precedent).

When pre-selecting a forum, consider:

- a. Convenience of parties, witnesses, and documents.
- b. Rules of Discovery.
- c. Applicable statutory and case law.

(1) Federal Court:

- a. In federal court, it is easier to take non-party discovery of out-of-state witnesses;
- b. Fed. R. Civ. P. 37 makes sanctions for discovery abuses more readily available. See Fed. R. Civ. P. 37(a)(4) (making the

sanctioned party made pay reasonable expenses incurred in obtaining the order compelling discovery, including attorney's fees);

(2) State Court:

- a. In state court, discovery demands must be much more specific but may
- b. permit interlocutory appeal of discovery rulings which will cause delay and
- c. motions to dismiss and for summary judgment stays all discovery.
- d. Evidence Rules.
 - (i) Federal court is more apt to actually follow the federal rules.
 - (ii) State court anomalies - Brooklyn rule.
- e. Judges' expertise, experience, and independence.
 - (i) Local partiality, home court advantage,
 - (ii) potential for favorable or unfavorable bias toward certain claims or parties should also be considered.
- f. Speed of adjudication (factors)
 - (i) case docket,
 - (ii) individual assignment versus master calendar system and
 - (iii) pretrial conferences, scheduling and management must be taken into account. See Fed. R. Civ. P. 16, which states:

In any action, the court may in its discretion direct the attorneys . . . to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial

through more thorough preparation; and, (5) facilitating the settlement of the case.

g. Availability of a desired remedy

(i) In many state courts, parties can obtain an ex parte injunction more easily than in federal court where a temporary restraining order or a preliminary injunction requires notice and a hearing.

(ii) In federal court, federal antitrust claims have exclusive jurisdiction.

h. Cost of adjudication is not a strategic consideration but should be determined.

(i) Court v. arbitration

i. Whether the trial will be heard by a jury is a strategic consideration.

(i) Composition of the jury

(ii) Size of the jury

(iii) Unanimity rules

j. Trial Procedure

(i) Voir Dire

a) State court - usually counsel conducts

b) Federal court - usually judge conducts

(ii) Closing Arguments

a) State court - usually defendant, then plaintiff

b) Federal court - usually plaintiff, then defendant, then plaintiff

(iii) See Fed. R. Civ. P. 52: “In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . .”

(iv) iv. Special verdicts in federal court. See Fed. R. Civ. P. 49(a): “The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.”

(v) General verdict and written interrogatories.

k. Availability of Fed. R. Civ. P. 11 which allows sanctions to help prevent frivolous pleadings and defenses: The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

l. Search for the forum with the most favorable interpretation of substantive law.

m. Forum selections clauses are more likely to be enforced in federal court. In Stewart Organization, Inc. v. Ricoh Corp., 108 S. Ct. 2239 (1988), the Court held that federal law governs a motion for transfer pursuant to 28 U.S.C. § 1404 (a), and contrary state law which disfavored forum-selection clause was ineffective to prevent transfer.

(i) In federal court, if the forum clause is communicated to the resisting party, has mandatory force, and covers the claims and parties involved in the dispute, it is presumptively enforceable. Accordingly, forum selection clauses are given effect unless the opposing party can make a “sufficiently strong showing” that (i) its incorporation was the result of fraud or overreaching; (2) the law to be applied in the selected forum is fundamentally unfair; (3) enforcement contravenes a strong public policy of the forum state; or (4) trial in the selected forum will be so difficult and inconvenient that the plaintiff effectively will be deprived of his day in court. Cfirstclass Corp. v. Silverjet PLC, 560 F. Supp. 2d 324, 330 (S.D.N.Y. 2008). See also, James v. Whirlpool Corp., 806 F. Supp. 835, 840 (E.D. Mo. 1992); Ortho-Med, Inc. v. Micro-Aire Surgical Instruments, 1993 U.S. Dist. LEXIS 19048 (M.D. Fla. Nov. 9, 1993). See Triangle Trading Co., Inc. v. Robroy Indus., Inc., Bus. Franchise Guide (CCH) ¶ 11,563 (D.P.R. 1998) (enforcing forum selection clause in parties’ agreement because (i) plaintiff was not a “dealer” within the meaning of the Puerto Rico Dealers’ Contracts Acts therefore, the Acts’ prohibition on forum selection clauses did not apply, and (ii) the Sales Representatives Act of 1990 does not prohibit enforcement of forum selection clauses and the clause at issue did not contravene a strong public policy); Hoffmann v. Minuteman Press Int’l, Inc., 747 F. Supp. 552 (W.D. Mo. 1990) (franchisee sued franchisor in Missouri and franchisor moved to change venue to New York in reliance on the forum

selection and choice of law clauses in the franchise agreement; however, the Court refused to transfer the action noting that the franchisee alleged it was fraudulently induced to enter into the franchise agreement that contained the forum-selection clause and if that allegation proved to be true, the forum-selection clause would be rendered “not worth the paper on which it is written”); Cutter v. Scott & Fetzer Co., 510 F. Supp. 905 (E.D. Wis. 1981) (court declined to enforce a forum-selection clause holding that Wisconsin’s Fair Dealership law, which is intended to provide remedies to dealers beyond those available at common law, would be best served by denying the franchisor’s motion to transfer venue to Ohio based on a forum-selection clause).

(ii) However, where plaintiff’s choice has little relation to the forum or goes against the choice of forum clause of the parties, no weight is given to plaintiff’s choice of forum. See Roller Bearing Co. of America, Inc. v. American Software, Inc., 570 F. Supp. 2d 376 (D. Conn. 2008); Cheney v. IPD Analytics, LLC, 583 F.Supp.2d 108 (D.C. 2008).

(iii) Also, if a court finds the forum selection clause to be permissive rather than mandatory, plaintiff’s choice of forum is accorded deference and defendant’s motion to transfer venue would be denied. Compare Utah Pizza Service, Inc. v. Heigel, 784 F. Supp. 835 (D. Utah 1992) (forum selection clause stating that “courts of the State of Michigan shall have personal jurisdiction . . . and that venue is proper in Michigan” construed as permissive) with Water Energizers Ltd., 788 F. Supp. 208 (S.D.N.Y 1992) (forum selection clause stating that “[t]he law and jurisdiction of Indiana shall govern in any action . . . “ construed as mandatory).

n. State courts are reluctant to enforce forum-selection clause and place a heavy burden on franchisors to demonstrate their validity. E.g., Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc., 146 N.J. 176, 680 A.2d 618 (“forum-selection clauses in franchise agreements are presumptively invalid, and should not be enforced unless the franchisor can satisfy the burden of proving that such a clause was not imposed on the franchisee unfairly on the basis of its superior bargaining position.”); Wimsatt v. Beverly Hills Weight Loss Clinic Int’l, Inc., 32 Cal. App. Ct. 1511, 38 Cal. Rptr. 2d 612 (Cal. Ct. App. 1995) (court refused to enforce Virginia forum-selection clause in a California action against a Virginia franchisor unless the franchisor proved that the enforcement of the forum-selection clause would not diminish any substantive rights of the plaintiff that were guaranteed by California law). But see Howard Johnson Int’l, Inc. v. Dorminey, Bus. Franchise Guide (CCH) ¶ 11,570 (D.N.J. Sept. 16, 1998) (refusing to extend Kubis, which holds that forum selection clauses in agreements subject to the New Jersey Franchise Practices Act (the “Act”), did not extend to an agreement involving an out-of-state franchisee which specifically provided that the act did not apply).

o. Issues to consider when seeking federal diversity jurisdiction include:

(i) The frequency of dual citizenship or corporate parties as citizens of their state of incorporation and of the state of their “principal place of business.” See 28 U.S.C. § 1332(c) (1982) (emphasis added).

(ii) In diversity class actions the court looks only to the citizenship of the named representative parties in determining the citizenship of the class.

(iii) In a class action, class members cannot aggregate their claims to satisfy the jurisdictional amount requirements; rather, each and every class member must be able to satisfy the requirement independently.

(3) Choice of Law:

a. Applicability of Chosen Law.

In seeking to enforce a choice of law clause in a franchise agreement, counsel should determine whether the franchise statute of the chosen jurisdiction will apply to buyers outside that jurisdiction.

(i) The Court of Appeals for the First Circuit narrowed the scope of the Puerto Rico Dealers' Act in A.M. Capen's Co., Inc. v. American Trading and Prod. Corp. et al., 202 F.3d 469 (1st Cir. P.R. 2000), as it pertains to buyers who operate predominantly outside the jurisdiction. Plaintiff was a New Jersey corporation with its principal place of business in New Jersey, and served as seller's exclusive distributor of office products in Puerto Rico. When the seller terminated the exclusivity provision of the agreement, plaintiff attempted to sue under the Puerto Rico Dealers' Act ("PRDA"). The First Circuit ruled that the PRDA did not govern the case because plaintiff did not qualify as a "dealer" as defined by the PRDA. Since plaintiff was not authorized to do business in Puerto Rico, it had no employees, offices, warehouses, or assets in the Commonwealth, since it received and processed all orders from Puerto Rico via telephone or fax to its New Jersey offices, and since it shipped all orders to Puerto Rico from New Jersey, the court determined that plaintiff's presence in Puerto Rico was "almost nonexistent." The court so held despite the fact that PRDA does not explicitly require a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to have a place of business in Puerto Rico. The court reasoned that the legislative history of the PRDA, however, incorporates such requirements.

(ii) In Generac Corp. v. Caterpillar Inc., 172 F.3d 971 (7th Cir. 1999), the Seventh Circuit changed the test used to determine when the choice of law provision of the Wisconsin Fair Dealership Law applies. Under the old rule as set by Diesel Service Co. v. AMBAC International Corp., 961 F.2d 635 (7th Cir. 1992), the court used to first analyze several factors to determine whether Wisconsin law should govern a dispute, and

if so, would then apply the WFDL criteria. Under the new rule articulated in Generac, a court need only determine whether the party is a “Wisconsin dealer” under the WFDL for the WFDL to apply. The WFDL defines a “dealer” to mean “a person who is a grantee of a dealership situated in this state.” Wis. Stat. § 135.02(2). In Generac, the court held that the distributor did not qualify as a “dealer” because it was not authorized to sell products in Wisconsin, and therefore, could not sue under the WFDL.

(iii) In Paging Source of NY, Inc. v. Sprint Spectrum, LP, E.D.N.Y., No. CV 99-7241, November 19, 1999, the District Court for the Eastern District of New York enforced a Missouri choice of law provision even though it served to exclude terminated franchisee from the benefits of either the New York or Missouri franchise laws. In applying the Missouri rule, the court noted that New York's judiciary refuses to enforce a choice of law provision only if “(1) the law of the state selected does not have a reasonable relationship to the activity . . . (2) or the state law chosen violates a fundamental public policy of New York.” Since neither of these criteria were met, franchisee could not obtain a temporary restraining order to prevent franchisor from terminating the franchise agreement without cause upon 30 days written notice as provided for in the franchise agreement.

(iv) The Supreme Court of New Jersey considered the extra-territorial reach of the New Jersey Franchise Practices Act in Instructional Systems v. CCC, 614 A.2d 124 (N.J. 1992). Plaintiff was a New Jersey corporation with its principal place of business in New Jersey and served as seller's exclusive distributor in the Northeast. Some of plaintiff's franchising activities were conducted outside of New Jersey. The court held that the extraterritorial application of the statute was appropriately limited by the Commerce Clause and constitutional due process concerns. With respect to interstate commerce, as long as enforcement of the New Jersey statute is in furtherance of a legitimate local interest and the effects on interstate commerce are only incidental, the statute can be applied to out-of-state franchising activity. As for the state choice-of-law due process limits, the New Jersey statute is constitutional if there are “contacts” with the forum, “interests” arising out of the contacts, and “fairness to defendants” in the statute.

(v) However, in a related federal court action involving the same parties, the district court dismissed plaintiff's cause of action for failure to renew under the New Jersey Franchise Practices Act on the basis that the Act was an undue burden on interstate commerce in violation of the Constitution's Commerce Clause. Instructional Systems, Inc. v. Computer Curriculum Corp., 826 F. Supp. 831 (D.N.J. 1993), aff'd in part and rev'd in part, Instructional Sys. v. Computer Curriculum Corp., 35 F.3d 813 (3rd Cir. 1994). The court declined to follow the New Jersey Supreme Court's holding to the extent that it found the extraterritorial effects of the Act to be “incidental.” Id. at 845 n.20. The court held that the New Jersey Franchise Protection Act had a direct effect of regulating interstate commerce by prohibiting defendant, a non-

New Jersey corporation, from engaging in transactions with entities wholly outside of New Jersey. For this reason, the court deemed the Act to be per se unconstitutional, insofar as it was applied to entities having no connection to the state. Id. at 848. The Third Circuit subsequently held that the district court erred in finding that the New Jersey Franchise Practices Act was unconstitutional per se because the decision of the New Jersey Supreme Court compelled a finding that there was no conflict between the NJFPA and the Commerce Clause. Institutional Systems, Inc. v. Computer Curriculum Corp., 35 F.3d 813 (3rd Cir. 1994). The Court focused on the fact that the parties themselves agreed to extend New Jersey law outside of New Jersey's borders. In addition, the Court held that even when applying a balancing test the NJFPA does not create a burden on interstate commerce.

(vi) In Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840 (6th Cir. 1986), the plaintiff sued under the Wisconsin Fair Distributorship Law (WFDL) which mandated a ninety-day notice of termination as opposed to the ten-day notice provision present in the franchise agreement. The Court held the law of Wisconsin, the chosen jurisdiction, applied in general to the litigation, but that WFDL only applied to buyers geographically situated in Wisconsin, and thus, the ninety-day notice provision did not extend to out-of-state buyers.

(vii) In Burger King Corp. v. Austin, 805 F. Supp. 1007, 1021-23 (S.D. Fla. 1992), the court held in favor of applying the Florida Franchise Act to franchisor's dispute with a non-Florida franchisee. The court noted that the franchise agreement specified Florida choice of law which made the Florida statute applicable and plaintiff-franchisor's argument that the statute applied only to persons "doing business in Florida" did not limit the statute's reach. The court found that the Florida legislature did not expressly limit the statute only to Florida residents or domiciliaries.

(viii) In Winer Motors, Inc. v. Jaguar, Rover, Triumph, Inc., 208 N.J. Super. 666, 506 A.2d 817 (App. Div. 1986), the parties' contractual choice of New Jersey law was applied generally, but the court held the New Jersey Franchise Practices Act did not govern the transaction, since plaintiff's business was in Connecticut. This was necessary "to preserve the fundamental public policy of the franchisee's home state where its statutes afford greater protection." Id. at 672, 506 A.2d at 821. See also Cottman Transmission Systems, Inc. v. Melody, 869 F. Supp. 1180 (E.D.Pa. 1994) (where protections and remedies for fraud and negligent misrepresentation under two states laws are the same, court applied law of state designated in choice-of-law clause).

(ix) In Ernst v. Ford Motor Co., 813 S.W.2d 910 (Mo. App. 1991) (en banc), the court applied procedural, noncontractual choice of law analysis to implicate state law which would permit enforcement of termination clause sought to be enforced.

(x) In Solman Distributors, Inc. v. Brown-Forman Corporation, 888 F.2d 170, 171-72 (1st Cir. 1989), the court applied Maine’s alcoholic industry franchise statute to a California seller despite a choice of law provision in favor of California law. The court found that this clause violated the Maine statute’s non-waiver provision and was thus unenforceable.

(xi) Enforcement of state franchise statutes may also bind parties to choice of law decisions made by administrative bodies with jurisdiction over the specific industry governed by the statute. In Guild Wineries and Distilleries v. Whitehall Co., 853 F.2d 755 (9th Cir. 1988), the Ninth Circuit affirmed declaratory judgment against a seller to declare California seller’s right to terminate its Massachusetts distributor. The Massachusetts Alcoholic Beverages Control Commission, after a hearing, held that Massachusetts law governed the termination. The Ninth Circuit affirmed the lower court’s declaratory judgment in favor of the buyer on principles of res judicata, avoiding the conflict of law issues.

(xii) In Sutter Home Winery, 971 F.2d at 407 (9th Cir. 1992), the Ninth Circuit interpreted a choice of law provision which stated: “Except as otherwise required by applicable law, this Agreement shall be governed by the law of the State of California.” Holding in favor of Arizona law, the court found that the only other “applicable law” was Arizona law, including Arizona’s Spiritous Liquor Franchise law, and construed the “ambiguity” in the choice of law clause against the seller, who drafted the provision.

(xiii) In Infomax Office Sys., Inc. v. MBO Binder & Co., Bus. Franchise Guide (CCH) ¶ 11,533 (D. Iowa Sept. 8, 1998), the court applied the choice of law provision in the parties’ agreement that directed Illinois law governed the agreement. First, the court held that an express contractual provision providing for termination with or without cause was valid and enforceable and that the implied covenant of good faith, which Illinois courts held prevent termination without good cause, could not be used to rewrite the agreement. Second, the court held that plaintiff failed to state a claim under the Illinois Franchise Disclosure Act (the “Act”), which permits termination only for cause, because it conflicted with the parties’ agreement. The court also noted that it could refuse to apply the Act because the franchisee was not an Illinois franchisee and choice-of-law clauses are ordinarily not applied where they would invalidate a contract or one of its express provisions.

b. Nature of Action Determinative

Counsel should bear in mind that choice of law determinations may vary depending on the nature of the legal action. Thus in Glaesner v. Beck/Arnley Corp., 790 F.2d 384, 386 & n.1 (4th Cir. 1986), a contractual choice of law provision specifying New York law was held inapplicable to the terminated buyer’s tort claim for wrongful termination. The federal court, in following the

law of the forum state of South Carolina, decided that since the plaintiff alleged liability in tort rather than contract for injuries sustained in South Carolina, that state's law applied because a tort action arises where the injury or wrongdoing occurs. See also Sutter Home Winery, 971 F.2d at 407 (9th Cir. 1992) (applying “most significant relationship” test, court held California law applicable to tort claims for unfair competition and tortious breach of implied covenant of good faith and fair dealing).

c. Courts' Refusal to Enforce Choice of Law

(i) The Supreme Court of New Jersey in Instructional Systems v. CCC, 614 A.2d 124, 133-35 (N.J. 1992) upheld application of New Jersey law to seller's termination of buyer despite the parties' agreement containing a choice of law clause calling for application of California law. The court noted the strong policy of the New Jersey Franchise Act in protecting New Jersey franchisees and New Jersey's significant “contacts” with the transaction such as franchise-specific investments relating primarily to assets in New Jersey. However, the court in citing Instructional Systems, held that the New Jersey Franchise Act did not take precedence over the parties' choice of Michigan law where the court found that the act was not intended to regulate a franchisor's exercise of its right of first refusal in the context of an agreement to assign the franchise contract.

(ii) In Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990), the court rejected the choice of law provision contained in the franchise agreement, on the grounds that “enforcement of the choice of law provision . . . would be contrary to Indiana's express policy.” Id. at 132. The dispute centered around a franchisor's decision not to renew a franchise, and the public policy at issue was that “a franchisor, through its superior bargaining power, should not be permitted to force the franchisee to waive the legislatively provided protections, whether directly through waiver provisions or indirectly through choice of law.” Id. at 132. The agreement designated New York law as governing all disputes. The court instead applied Indiana franchise law, since Indiana, the franchisee's state, had a “materially greater interest in the litigation” than New York.

(iii) In Solman Distributors, Inc., 888 F.2d at 172 (1st Cir. 1989), the First Circuit rejected a California choice of law provision in favor of Maine law based on the conflict of law principle that choice of foreign law may fall where such choice conflicts with local public policy in which the local state has a materially greater interest.

(iv) The Sutter Home Winery case counsels against drafting equivocal choice of law clauses that begin “except as otherwise required by applicable law,” since this type of ambiguity was the basis for the Ninth Circuit to reject the California choice of law in the parties' agreement, entirely apart from any “public policy” interest Arizona may have had

in its Spiritous Liquor Franchise law. See also Solman Distributors, Inc., 888 F.2d at 171 (interpreting “except as otherwise provided by law” language in termination provision to be reference to Maine statute).

(4) Motion to Sever Claims.

When a terminated distributor files an “everything but the kitchen sink” complaint, the distributor should consider moving to sever the key claims in the case to have them adjudicated first. See, e.g., Maris Distributing Co. v. Anheuser-Busch, Inc., Bus. Franchise Guide (CCH) ¶ 11,303 (Fla. Cir. Ct. 1997).

(5) Statutes of Limitation.

In addition to statutorily prescribed limitations periods, the parties may have included a limitations period in their franchise or distribution agreement that is enforceable. See, e.g., Protter v. Nathan’s Famous Sys., Inc., Bus. Franchise Guide (CCH) ¶ 11,346 (N.Y. App. Div. 1997); Techcon Contracting Inc. v. Incorp. Village of Lynbrook, 836 N.Y.S.2d 503 (N.Y. Sup. Ct. 2007) (stating that “New York permits parties to shorten the statute of limitations established by statute provided the shorter time is reasonable.”).

(6) Where the agreement does not specify a particular limitations period, the limitations period set by statute will govern, even if the limitations period under state contract law would be longer. See Basic Controlex Corporation Inc. et al. v. Klockner Moeller Corp., 202 F.3d 450 (PR 1st Cir. 2000) (three-year statute of limitations period set by Puerto Rico Dealers’ Act trumps otherwise applicable six-year state statute of limitations for contract actions).

(7) An issue may arise as to when the limitations period begins to run. In Basic Controlex, the First Circuit held that the three-year statute of limitations began to run as soon as manufacturer put dealer on definitive notice of its intent to breach their exclusive distribution agreement, not when the manufacturer officially dissolved thereby causing the agreement to officially expire. Id.

E. What Relief Should Be Sought?

1. Injunctive relief

Considerations from buyer’s perspective involve the necessity of continued supplies and likelihood that if successful, seller will negotiate a continuation agreement with the buyer. Although expensive and labor intensive, access to quick discovery and hearing are advantageous to the buyer. The downside is that if he loses, the chances of settlement are greatly diminished. The seller may seek an injunction if its necessary to protect against the erosion of its trademark rights, trade secrets, or goodwill.

a. TRO Requirements:

Fed. R. Civ. P. 65(b) establishes the requirements for granting of temporary restraining order (TRO). Notice is not required if there is a stringent affidavit showing why notice could not be given, and an affidavit showing why irreparable harm will occur if the TRO is not issued. The order lasts ten days. Furthermore, a security bond in amount set by the court must be posted.

b. Preliminary Injunction Requirements:

Fed. R. Civ. P. 65(a) governs the issuance of a preliminary injunction. Three requirements:

(1) Notice must be given.

(2) Consolidation of hearing with trial. Note: Evidence at preliminary injunction, even if not consolidated, treated as if at trial and will not be repeated.

(3) Probability of success on the merits. Standard - irreparable harm and either (a) likelihood of success of merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and balance of hardships tips decidedly in plaintiff's favor. See Pacific Equip. & Irrigation, Inc. v. Toro Co., 519 N.W.2d 911 1994 Minn. Lexis 739 (injunction against termination not compelled because parties legitimately had dispute as to whether the distributor was a franchise under the Minnesota Franchise Act).

(4) Scope of Courts' Power to Grant Injunctions. In Doctor's Associates, Inc. v. Reinert & Duree P.C., 191 F.3d 297 (2d Cir. 1999), the Second Circuit held that the district court exceeded its power when it enjoined 57 non-party franchisees from prosecuting state court actions against franchisor. The franchisor had filed three consolidated suits in the Connecticut District Court to compel other franchisees in Illinois, Maryland, and California to arbitrate, and to enjoin their state court actions against franchisor. However, two additional class actions by 57 franchisees against franchisor were also proceeding in Illinois state court. The Connecticut district court entered a preliminary injunction to bar these 57 franchisees from prosecuting their state court claims, even though they were not parties to the federal action. The Second Circuit reversed, holding that "a court's in personam order can bind only persons who have placed themselves or been brought within the court's power," therefore, the district court erred when it entered an injunction against the non-party franchisees.

(5) For the most part, courts deny buyers' injunction motions, finding that money damages are adequate and because they are reluctant to compel parties who are in conflict to continue a relationship requiring cooperation and good faith.

(6) However, injunctions have been granted in the following cases: Blackwelder Furniture Co., Inc. v. Sellig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977) (court held that if balance of hardships substantially favors plaintiff, it is enough for plaintiff to have raised substantial questions going to the merits); Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197, 1205 (2d Cir. 1970) (although court recognized that termination of business could have been remedied through a damage award, “the right to continue a business in which [plaintiff] had engaged for twenty years . . . is not measurable entirely in monetary terms; the [plaintiffs] want to sell automobiles, not to live on the income from a damages award”); Milsen Company v. The Southland Corporation, 454 F.2d 363, 366-67 (7th Cir. 1971) (“The public interest in encouraging antitrust prosecutions by private parties . . . and the need for such parties to continue in their businesses while the legal claims are tried have persuaded courts to restrain termination pendente lite”); Mitsubishi Caterpillar Forklift America, Inc. v. CTK, Inc., Bus. Franchise Guide (CCH) ¶ 12,016 (Tenn. Cir. Ct. 2001) (Forklift dealer was granted a preliminary injunction which prevented the manufacturer from terminating its dealership because it had raised substantial issues which could result in a judgment in its favor, it had no adequate remedy at law, and the balance of hardships weighed in its favor and in favor of maintaining the status quo. The injunction also prohibited the manufacturer from failing to continue to adequately supply it with trucks and parts, treating the dealer differently from any similarly situated dealer, or from appointing any additional dealer within the same territory.); U.S. Ice Cream Corp. v. Carvel Corp., 136 A.D.2d 626, 523 N.Y.S.2d 869 (N.Y. App. Div. 1988) (ice cream franchisor was preliminarily enjoined from terminating an exclusive franchise agreement since, absent an injunction, there was no assurance the franchisee could stay in business pending trial. Interference with an ongoing business, particularly one involving a unique product and an exclusive franchise, is enjoinable as risking irreparable injury); Falcon, Ltd. v. Coor’s Natural Beverages, Inc., Bus. Franchise Guide (CCH) ¶ 9079 (Ill. App. Ct. 1980) (a soft drink buyer was entitled to a preliminary injunction against termination. Termination would cause injury to reputation and goodwill resulting in loss of existing and future business which could not be calculated. Damages not an adequate remedy); Burger King Corp. v. Lee, 766 F. Supp. 1149 (S.D. Fla. 1991) (preliminary injunction granted against franchisee’s continued use of trademarks where franchisor had terminated franchise due to franchisee’s failure to pay royalty and advertising charges); Burger King Corp. v. Majeed, 805 F. Supp. 994 (S.D. Fla. 1992) (preliminary injunction granted to franchisor where franchisees continued to use franchisor’s trademarks despite being terminated for failing to pay royalties and other charges; defendants alleged that they sued franchisor for various civil rights and antitrust violations but such allegations of wrongdoing did not justify defendants’ infringement of franchisor’s trademarks); Image Technical Serv., Inc. v. Eastman Kodak Co. 87-1686 AWT, 1996 U.S. Dist. LEXIS 2386 (N.D. Cal. Feb. 28, 1996) (court awarded 10 year permanent injunction requiring Kodak to sell parts to all independent service organizations (“ISO”) after jury returned verdict in favor of only 10 ISO’s who sued for antitrust violations; in applying the injunction to all ISO’s rather than just the 10

named ISO's, the court relied on case law holding that even though a class had not been certified, the violation and relief would be the same for every class member thus it was with the court's power to extend the injunction to all ISO's), modified, 125 F.3d 1195 (9th Cir. 1997) (modifying injunction to eliminate requirements that Kodak sell parts that it does not manufacture and that Kodak set prices that are reasonable; and directing specific changes to the language of the injunction); Bronx Auto Mall, Inc. v. American Honda Motor Co., Inc., 934 F. Supp. 596 (S.D.N.Y. 1996) (automobile franchisor, who was found to have violated the New York Franchise Motor Vehicle Dealer Act, was enjoined from declining to renew or terminating the plaintiff's franchise based on the reasons it had given to plaintiff at that time; an injunction was awarded because the Court found that the quantification of damages that would be suffered by plaintiff if defendant were permitted to end the dealership relationship would be extremely difficult); Heck Implement, Inc. v. Deere & Co., 926 F. Supp. 138 (W.D. Mo. 1996) (court preliminarily enjoined franchisor from terminating franchisee even though it found franchisee's likelihood of success on the merits questionable, since the court found that the franchisee would suffer great harm from loss of the franchise and that harm outweighed any harm that the franchisor would suffer by continuing the franchise until a trial on the merits was held); Kim v. Mobil Oil Corp., Bus. Franchise Guide (CCH) ¶ 11,145 (D. Md. 1997) (court held franchisee entitled to preliminary injunction to enjoin the termination of the franchise, finding that § 2805(e) of the PMPA, which prohibits courts from ordering renewal where the basis for nonrenewal is a good faith decision to sell the franchise, applied only to permanent injunctions); Atlantic City Coin & Slot Svc. Co., Inc. v. IGT, 14 F. Supp. 2d 644 (D. N.J. 1998) (court granted preliminary injunction to terminate family-owned franchisee seeking relief under the New Jersey Franchise Practices Act; using state rather than federal case law interpretations of the Act, the court found the franchisee had (i) a reasonable probability of success in showing the three elements of a claim under the Act, (ii) made a threshold showing of irreparable harm because the franchisee successfully lobbied casinos to abandon a rule of having no more than 50% of their slot machines from one supplier, and (iii) shown the public interest was in its favor because it was through the franchisees' efforts that the franchisor was made a success in the relevant market).

(7) Security Bond:

Buyers will often seek to enjoin a termination. The equities relevant to issuance of a preliminary injunction often favor the buyer. See Lano Equip., Inc. v. Clark Equip. Co., Inc., 399 N.W.2d 694 (Minn. Ct. App. 1987) (preliminary injunction pending trial on the merits upheld; proper for manufacturer to be temporarily enjoined from interfering with, altering, or terminating distributorship after buyer refused to sign annual buyer sales agreement that imposed, for the first time, restrictions on buyer's sales territory. The court cited the long satisfactory duration of the distributorship prior to the seller's attempted termination; the imbalance of potential harm to the parties; and a likelihood of buyer's success on the merits). Where a buyer who wins a preliminary injunction against termination

fails to post a bond in accordance with the court's order, the injunction does not take effect and the buyer may be terminated even though it filed for bankruptcy after receiving notice of termination. City Auto, Inc. v. Exxon Co., 806 F. Supp. 567 (E.D. Va. 1992).

c. Available for Antitrust Violations: Injunctions also available to enjoin antitrust violations under Section 16 of the Clayton Act, 15 U.S.C. 526. See Collins v. Int'l Dairy Queen, 59 F.Supp.2d 1312 (M.D. Ga. 1999) (Court clarified that the indirect purchaser rule does not prevent franchisees from pursuing monopolization and attempted monopolization claims for injunctive relief).

2. Declaratory Judgment:

Fed. R. Civ. P. 57 (procedure for obtaining a declaratory judgment pursuant to 28 U.S.C. § 2201). Uniform Declaratory Judgment Act, 28 U.S.C. § 2291m states that in case of actual controversy within its jurisdiction, except in specified situations, any U.S. court may render a declaratory judgment, regardless of whether further relief will be sought.

a. Appropriate under Uniform Declaratory Judgment Act when proceeding will "terminate the controversy." Cannot be an advisory opinion - must be a real justifiable controversy. While the court will broadly construe the availability of declaratory relief, a pre-termination action may be considered too hypothetical to be justifiable. The seller may request a determination of the rights and duties of the parties on termination. Matter usually involves discrete issue of law or undisputed facts. Summary proceeding of justifiable controversy. Expedited trial and jury available.

(1) In Verosol B.V. v. Hunter Douglas, Inc., 806 F. Supp. 582 (E.D. Va. 1992), plaintiffs brought an action to declare that a License Agreement with defendant was terminated for defendant's failure to pay royalties pursuant to the agreement. A non-signatory to the agreement was joined on plaintiffs' allegation that the non-signatory engaged in conduct that violated patent rights which were given to defendant under the License Agreement. The court dismissed the non-signatory because there was no justifiable controversy. The action was brought as a contract action, not as a patent infringement action, and the court decided the case according to principles of contract law. The court also found that plaintiffs joined the non-signatory to defeat transfer of the action to another forum.

(2) In Aida Eng'g, Inc. v. Red Stag, Inc., 629 F. Supp. 1121 (E.D. Wisc. 1986), the seller requested a declaratory ruling to determine whether the defendant buyer was a "buyer" within the meaning of the Wisconsin Fair Distributorship Law, a franchise statute, and whether the seller could terminate the relationship without first complying with the law. The court ruled

in favor of the seller on both requests without discussing any possible issues of prematurity.

(3) In McDonald's Corp. v. Robert A. Makin, Inc., 653 F. Supp. 401 (W.D.N.Y. 1986), the court awarded summary declaratory judgment to a seller, ruling that the buyer's section 1 counterclaims were not relevant to the buyer's liability for termination on grounds of non-payment of fees. Absent an affirmative defense excusing a franchisee's failure to pay, a franchisor had a contractual right to terminate the franchise agreement and recover damages if franchisee refused to meet its contractual obligations while enjoying all of the agreement's benefits.

(4) In Guild Wineries and Distilleries v. Whitehall Co., 853 F.2d 755 (9th Cir. 1988), the Ninth Circuit affirmed declaratory judgment against a seller to declare California seller's right to terminate its Massachusetts distributor. The Massachusetts Alcoholic Beverages Control Commission, after a hearing, held that Massachusetts law governed the termination. The Ninth Circuit affirmed the lower court's declaratory judgment in favor of the buyer on principles of *res judicata*, avoiding the conflict of law issues.

(5) In Solman Distributors, Inc. v. Brown-Forman Corp., 888 F.2d 170 (1st Cir. 1989), summary declaratory judgment was affirmed in favor of plaintiff buyer where buyer sought declaration that he was terminated without cause contrary to Maine statute requiring termination for cause. The court rejected seller's choice of California law in the agreement and further held that seller's reorganization of its distribution system, while a sound business reason, did not constitute cause under the Maine statute.

(6) In Zipper v. Sun Co., Inc., 947 F. Supp. 62 (E.D.N.Y. 1996), the court denied franchisor's motion for partial summary judgment seeking a declaration that its termination of a franchise agreement was valid under the Petroleum Marketing Practices Act because the court concluded that the franchisor's notice to terminate the franchise immediately was not reasonable under the circumstances).

(7) In Hornell Brewing Co., Inc. v. Spry, 174 Misc.2d 451, 664 N.Y.S.2d 698 (N.Y. Sup. Ct. 1997), the court granted manufacturer's motion for a declaratory judgment that the distributor was properly terminated because it failed, pursuant to U.C.C. § 2-609, to provide manufacturer with adequate assurances of its continued ability to perform its obligations under the distribution agreement.

b. Benefits of Declaratory Judgment Action: - For Either Buyers or Sellers

(i) Excellent vehicle for summary proceeding on expedited basis to get quick declaration of rights

(ii) No bond need be posted
(iii) Avoid lengthy litigation with time consuming and expensive discovery

c. For Buyers

(i) Association can bring on behalf of members

d. For Sellers

(i) Assists terminating seller to take the initiative to characterize itself as reasonable business seeking to ascertain its legal rights and not an oppressive and arbitrary bully taking advantage of faithful but weaker buyer.

(ii) Enables seller to select most advantageous forum with most hospitable judicial decisions re whether buyer is actually franchisee and what its rights are.

(iii) Expedited hearing commits buyer before it has had chance to develop market data and facts to support legal claims against the seller.

3. Damages

a. Compensatory damages are based on numerous factors, including:

(1) Lost profits.

a. A wrongfully terminated distributor is commonly awarded the profits it lost as a result of the wrongful conduct. See Lapinee Trade, Inc. v. Boon Rawd Brewery Co., Ltd., 91 F.3d 909 (9th Cir. 1996); Van Riper v. Ford New Holland, Inc., 261 Mont. 206, 862 P.2d 47 (1992); Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Ltd, U.S.A., Inc., 256 Iowa 899, 129 N.W.2d 731 (1964).

b. A wrongfully terminated franchisee may also claim lost profit damages for the period between the attempted termination and the actual termination. In Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc., 180 F.3d 542 (3d Cir. 1999), the Third Circuit held that the district court erred when it excluded franchisee's claims for lost profits incurred due to the franchisee's uncertain status after franchisor attempted to terminate the franchise relationship, but before the relationship actually terminated. The franchisee argued that retailers were aware of its ongoing litigation with the franchisor over the franchisor's attempt to terminate the franchise agreement, and

consequently, retailers were unsure of franchisee's ability to service the products in the future. As a result, many retailers limited or eliminated their purchases from the franchisee, thereby causing it to lose profits. The Third Circuit ruled that the franchisee should have been allowed to present evidence of lost profits due to its uncertain status as a franchisee at trial.

But see L&M Beverage Company, Inc. v. Guinness Import Company, C.A. No. 94-4492, 1996 U.S. Dist. LEXIS 9025 (E.D. Pa. June 24, 1996), where the Court refused to award lost profits to franchisee, who sold its distribution rights to a third party after receiving a notice of termination from franchisor rather than bringing an action to enjoin the franchisor's allegedly wrongful termination. The franchisee could not show that franchisor's conduct was the proximate cause of franchisee relinquishing its future profits on the product lines it sold to the third party. Rather, the Court held franchisee's compensatory damages would be measured in terms of any diminution in value of the distribution rights which resulted from the franchisor's allegedly wrongful conduct).

c. A franchisor is also entitled to recover lost profits as the result of a franchisee's breach of the franchise agreement. In Burger King Corp. v. C.R. Weaver, 169 F.3d 1310 (11th Cir. 1999), the Eleventh Circuit upheld an award of lost profits to a Burger King franchisor when a franchisee breached the franchise agreement by refusing to pay rent and royalty fees, and infringed Burger King's trademark. The court rejected franchisee's argument that awarding lost profits would provide a windfall to Burger King, citing the congressional intent to deter similar activity in the future and to make infringement unprofitable.

d. The amount of lost profits is typically measured in one of two ways.

(i) A "before and after" comparison is utilized if the business is established. This method compares the distributor's profit record prior to the termination with its performance subsequent thereto. See C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1053 (5th Cir. 1981). See also Peirce v. Ramsey Winch Co., 753 F.2d 416, 439 (5th Cir. 1985); Michael Todd & Co., Inc. v. The Lacal Co., Inc., 583 F.2d 1056, 1059 (8th Cir. 1978); Builders Windows, Inc. v. Ceco Steel Prods. Corp., 209 F. Supp. 376, 379 (N.D. Ill. 1962); Record Club of America v. United Artists Records, 696 F. Supp. 940, 950 (S.D.N.Y. 1988).

(ii) The "yardstick theory" is applicable for a new business that ceases to exist before it is able to compile an earnings record. Under this method, the lost profits are estimated by comparing the profits of a similarly comparable business. See C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1053 (5th Cir. 1981). See also Peirce v. Ramsey Winch Co., 753 F.2d 416, 439 (5th Cir. 1985).

But see Bausch & Lomb v. Sonomed Tech., 780 F. Supp. 943, 971 (E.D.N.Y. 1992), aff'd in part and rev'd in part, 977 F.2d 270 (2d Cir. 1992) (in determining whether damages for lost profits are capable of proof with reasonable certainty, courts distinguish between established businesses and new or “fledgling” enterprises; fledgling enterprises are subject to a stricter standard for the obvious reason that there does not exist a reasonable bases of experience upon which to estimate lost profits with the requisite degree of reasonable certainty). Cf. Clarence Beverage, Inc. v. BRL Hardy (USA), Inc., 2000 U.S. Dist. LEXIS 1665 (W.D.N.Y. 2000) (plaintiff may assert damages for lost profits even though it was a new business because defendant was to have granted to plaintiff an exclusive distributorship with established customers, therefore, this was not a case where no market existed upon which to base damages); Coastal Aviation v. Commander Aircraft Co., 937 F. Supp. 1051 (S.D.N.Y. 1996) (distributor could not base lost profits on “expected” retail price of aircrafts less dealer discount price; use of such damages formula presupposed existence of “market price” for such product, which in turn assumed market damage, and product in question was new).

e. Some cases have held that in order to recover lost profits a distributor need not have necessarily been operating at a profit. See Lapinee Trade, Inc. v. Boon Rawd Brewery Co., Ltd., 91 F.3d 909 (9th Cir. 1996) (damages for lost profits permissible even though plaintiff losing money if an expert can predict, and a jury can conclude, that the business can be turned around); Graphic Prods. Distributors. v. Itek Corp., 717 F.2d 1561, 1579 (11 Cir. 1983) (although young business sustained net losses during its existence, there was evidence from which the jury could find that it would earn profits in the future); Chinck Distribs., Inc. v. Polar Corp., 41 Mass. Ct. App. 125, 669 N.E.2d 218 (1996) (upholding a jury’s award of lost profits even though the franchisee had lost money each year from its inception because the jury heard evidence that the profits of the franchisee, as a closed corporation, may be subsumed in salaries and benefits to its shareholder employees, that the franchisee made pretax profits, and that the value of a beverage distribution business as a going concern would be one dollar per number of cases delivered annually); Terrell v. Household Goods Carriers’ Bureau, 494 F.2d 16, 23 n.12 (5th Cir.), cert. denied, 419 U.S. 987 (1974);

But see Proteus Books Ltd. v. Cherry Lane Music Co., 873 F.2d 502, 510 (2d Cir. 1989) (lost profit damages found speculative where plaintiff’s sales performance had been consistently poor).

f. The appropriate measure of damages is net profits, not gross profits. See, Try Hours, Inc. v. Swartz, 2007 WL 867106 (Ohio App. 2007); Zell-Aire of New England, Inc. v. Zell-Aire Corp., 684 F.2d 174, 176 (1st Cir. 1982); Don Burton, Inc. v. Aetna Life & Casualty Co., 575 F.2d 702, 708 (9th Cir. 1978); Alesayo Bev. Corp. v. Canada Dry Corp., 947 F. Supp. 658, 671-72 (S.D.N.Y. 1996).

But see Digital & Analog Design Corp. v. North Supply Co., 44 Ohio St.3d 36, 41, 540 N.E.2d 1358, 1363 (1989) (plaintiff may be entitled to gross profits if it could be shown that it would not have incurred additional costs to generate those profits that were lost, or where the costs that constituted the plaintiff's ongoing and fixed overhead were not eliminated as a result of the lost profits); Bronken's Good Time Co. v. J.W. Brown & Assocs., 203 Mont. 427, 433, 661 P.2d 861, 865 (1983) ("The general rule in breach of contract actions is that where overhead or operating expenses are saved as a result of the breach, the proper measure of recovery is net, not gross profit, and where such expenses are constant, and no savings occurs, the rule is otherwise.").

- (2) Loss of goodwill;
- (3) Reduction in business receipts;
- (4) Loss of nationally advertised franchise;
- (5) Destruction of business.

Another type of damage awarded to a wrongfully terminated distributor is the going concern value of its business. This type of damage is usually, but not always, sought where the entire business has been destroyed as a result of the loss of the right to distribute the defendant's product. See Peirce v. Ramsey Winch Co., 753 F.2d 416, 439 n.15 (5th Cir. 1985); Dr. Pepper Bottling Co. v. Frantz, 311 Ark. 136, 143-44, 842 S.W.2d 37, 41 (1992); Westfield Centre Service, Inc. v. Cities Service Oil Co., 432 A.2d 48, 55 (N.J. Sup. Ct. 1981).

a. The value of a business can be determined by considering: (1) the profit the business made over and above the amount fairly attributable to the return on the capital investment and the labor of the owner; and (2) the reasonable prospect that profits will continue into the future. See Knutson v. The Dailey Review, Inc., 383 F. Supp. 1346, 1387 (N.D. Cal. 1974), mod. on other grounds, 401 F. Supp. 1374 (N.D. Ca. 1975). See also Industrial Craft v. Bank of Baroda, 47 F.3d 490, 496 (2d Cir. 1995); 24/7 Records, Inc. v. Sony Music Ent., 566 F. Supp. 2d 305, 317 (S.D.N.Y. 2008).

b. Other ways to value a business include: evidence of what a reasonable buyer and seller would agree is a reasonable price; testimony from business brokers knowledgeable in sales of comparable businesses and the criteria they utilize in arriving at a price; methods used by the Internal Revenue Service for tax purposes. Westfield Centre Service, Inc. v. Cities Service Oil Co., 432 A.2d 48, 55 (N.J. Sup. Ct. 1981).

c. Alternatively, one could apply an earnings multiplier to the business' past earnings. See Indu Craft v. Bank of Baroda, 47 F.3d 490, 496 (2d Cir. 1995).

(6) Where a terminable at will contract has been terminated upon insufficient notice, a distributor cannot seek damages for the going concern value of the business. Rather, the only permissible damages are recoupment of any investment made during the notice period and other damages flowing from the insufficient notice. See Central States Distributing, Inc. v. Minnesota Mining & Manufacturing Co., No. 97 C 622, 1998 U.S. Dist. LEXIS 1404 (N.D. Ill. Feb. 6, 1998).

(7) Ability to recover both lost profits and the going concern value of the business.

a. The cases make it abundantly clear that a plaintiff cannot recover *lost future profits* and the going concern value of the business because the future profits of a business are necessarily a component of the worth of a business. See Malley-Duff & Associate v. Crown Life Ins. Co., 734 F.2d 133, 148 (3d Cir. 1984) (going concern value of business and lost future profits are alternative measures of damages); American Anodco, Inc. v. Reynolds Metals Co., 743 F.2d 417, 424 (6th Cir. 1984) (“[if] the loss of value is based on loss of future profits, to allow both would be to permit a double recovery.”); Graphic Prods. Distribs. v. Itek Corp., 717 F.2d 1561, 1579 (11 Cir. 1983) (same); Farmington Dowel Prods. Co. v. Forster Mfg. Co., Inc., 421 F.2d 61, 82 (1st Cir. 1970) (plaintiff not entitled to present value of business as a going concern and lost future profits because “the latter figure would be a major element in determining the former figure.”); Bush v. National School Studios, Inc., 131 Wis.2d 435, 444, 389 N.W.2d 49, (Ct. App. 1986) (since lost future profits and lost good will are computed into loss business value, a damage award that includes both lost profit and lost value of the business is impermissibly duplicitous).

b. A plaintiff may, however, recover *lost past profits* and the going concern value of the business. See Walle Corp. v. Rockwell Graphics Sys., Inc., No. 90-2163, 1992 U.S. Dist. LEXIS 14433 (E.D. La. Sept. 18, 1992) (on motion for JNOV and new trial court allowed award of damages for lost future and past profits to stand, but held plaintiff could not recover damages for loss of good will and for lost future profits because they are duplicative); McDonald v. Johnson & Johnson, 537 F. Supp. 1282, 1357 (D. Minn. 1982) (“There exists no double recovery where the award represents damages for lost past profits and lost going concern value.”), mod., 722 F.2d 1370 (8th Cir.), cert. denied, 469 U.S. 870 (1984); Bonjorno v. Kaiser Aluminum & Chem. Corp., 518 F. Supp. 102, 110-113 (E.D. Pa. 1981) (plaintiff entitled to lost past profits and going concern value of business even though past profit history used to calculate the going concern value); mod. 559 F. Supp. 922 (E.D. Pa. 1983) (because new evidence established that business was in existence at plaintiff’s declared end of the damages period, court granted defendants motion for JNOV with respect to this damage award); San Antonio v. Guidry, 801 S.W.2d 142, 150 (Tex. Ct. App. 1990) (for the period after plaintiff’s business was destroyed, he could not recover both lost profits and the value of his business; however, he could recover lost profits for the period prior to the closing of his business).

- (8) Impairment or loss of capital investment;
- (9) Loss of advertising or circulation revenues; and
- (10) Decline in sales volume and market share.

a. Counsel should consider what effect the loss of the seller's line may have on other aspects of the buyer's business. The buyer's ability to obtain substitute product lines after termination is an important consideration. Finally, counsel should determine the buyer's investment in assets which cannot be used in the marketing of other products.

b. The court in Hampton Audio Electronics v. Contel Cellular, 23 F.3d 401 (4th Cir. 1994) (upheld summary judgment against franchise because franchise failed to segregate damages allegedly suffered as a result of franchisor's breach from those suffered by preexisting segment of franchisee's business).

b. Liquidated Damages

(1) Parties may determine that the damages attributable to the early or wrongful termination of a franchise agreement are difficult to calculate. Therefore, they insert liquidated damages provisions into their contracts, which courts have held are enforceable. See Ramada Franchise Sys., Inc. v. Bhatt, Bus. Franchise Guide (CCH) ¶ 11,559 (D. Conn. 1999) (liquidated damage provision for franchisee's wrongful early termination of franchise agreement should not be unconscionable or penal in nature). Accord DAR & Associates, Inc. v. Uniforce Servs., Inc., 98-CV-409 (JG), 1999 U.S. Dist. LEXIS 403 (E.D.N.Y. Jan. 13, 1999) (upholding liquidated damages clause because damages were not readily ascertainable at the time of contract and the method for calculating damages was reasonable).

(2) A liquidated damages provision in a franchise agreement that seeks to limit a franchisee's right to recover damages under a state franchise act is void. In Zeidler et al. v. A&W Restaurants, Inc. et al., 2000 U.S. Dist. LEXIS 764 (N.D. Ill. 2000), the court ruled that a liquidated damages clause that prohibited either party from recovering "loss of prospective profits, anticipated sales or other losses or damages of any kind" caused by termination, was unenforceable as to franchisee's claim under the Illinois Franchise Disclosure Act.

c. Mitigation

(1) A terminated distributor is under a duty to mitigate its damages by obtaining a replacement product or line, and is not entitled to recover damages to the extent that its profits for the sale of the other line or products increased or would have increased as a result of its diverted efforts. Cooney Industrial Trucks, Inc. v. Toyota Motor Sales, U.S.A., 168 F.3d 545 (1st Cir.

1999) (upholding ruling that terminated distributor suffered no damages because the profits it earned on the replacement distributorship would not have been possible absent defendant's breach); Advanced Medical, Inc. v. Arden Medical Sys., Inc., 955 F.2d 188, 200-01 (3d Cir. 1992); Cincinnati Power, Inc. v. Rexnord, Inc., 773 F.2d 92, 97 (6th Cir. 1985); Borger v. Yamaha Int'l Corp., 625 F.2d 390, 399 (2d Cir. 1980); Sportsmart, Inc. v. No Fear, Inc., No. 94 C 4890, 1996 U.S. Dist. LEXIS 7606, at * 33 (N. D. Ill. May 28, 1996); Bausch & Lomb v. Sonomed Tech., 780 F. Supp. 943, 971 (E.D.N.Y. 1992), aff'd in part and rev'd in part, 977 F.2d 270 (2d Cir. 1992). But see BGB Pet Supply, Inc. v. Nutro Products, Inc., Bus. Franchise Guide (CCH), ¶ 11,321 (6th Cir. 1997) (distributor's alleged failure to mitigate was not a reason to reduce the damage award because there was sufficient evidence to support a finding by the jury that the distributor would not have turned a profit if it had distributed products on a non-exclusive basis).

(2) The terminated distributor is required only to act reasonably and is not required to incur extraordinary or substantial costs. See Fen Hin Chon Enters., Ltd. v. Porelon, 874 F.2d 1107, 1115 (6th Cir. 1989); Esch v. Yazoo Manuf. Co., Inc., 510 F. Supp. 53, 56 (E.D. Wisc. 1981); AB & C, Inc. v. Banfi Prods., Inc., 71 Ohio App. 3d 650, 657, 594 N.E.2d 1151, 1155 (1991).

(3) Where the product lost by the distributor is unique in the marketplace, the distributor may be relieved of the duty to mitigate because it would be virtually impossible to locate a replacement product. See Fen Hin Chon Enters., Ltd. v. Porelon, 874 F.2d 1107, 1115 (6th Cir. 1989) (awarding damages for destruction of business property and plaintiff not required to mitigate because evidence showed that substitute goods of same quality from another supplier were not available and using inferior goods would cause plaintiff technical difficulties); Sportsmart, Inc. v. No Fear, Inc., No. 94 C 4890, 1996 U.S. Dist. LEXIS 7606, at * 33 (N. D. Ill. May 28, 1996) (question of fact existed as to whether defendant's products were unique such that plaintiff was unable to substitute goods); AB & C, Inc. v. Banfi Prods., Inc., 71 Ohio App. 3d 650, 657, 594 N.E.2d 1151, 1155 (1991) (evidence showed that the brand of wine that had been distributed by plaintiff commanded 80 to 90 percent of the market share in its class and thus plaintiff could not obtain an adequate or comparable replacement).

(4) The burden of demonstrating that mitigation was possible lies with the defendant. See Esch v. Yazoo Manuf. Co., Inc., 510 F. Supp. 53, 56 (E.D. Wisc. 1981); Jack Jacobs, Inc. v. Allied Sys. Co., 68 Ore. 554, 559, 683 P.2d 1011, 1014 (Ct. App. 1984).

d. Proving Damages.

There are two components to a claim of damages. First, there is the fact of damages, *i.e.*, establishing a causal relationship between the defendant's conduct and the plaintiff's injury. After the plaintiff has shown injury, it must then prove the amount of damages it suffered.

(1) The fact of damages

a. The damages sought must be demonstrated with reasonable certainty, but not with absolute accuracy. See Lapinee Trade, Inc. v. Boon Rawd Brewery Co., Ltd., 91 F.3d 909 (9th Cir. 1996) (recovery of “reasonably calculated damages” are permissible even if the amount “is only an approximation.”); Michael Todd & Co., Inc. v. The Lacal Co., Inc., 583 F.2d 1056, 1060 (8th Cir. 1978) (“damages actually incurred need not be computed with precision”); Builders Windows, Inc. v. Ceco Steel Prods. Corp., 209 F. Supp. 376, 379 (N.D. Ill. 1962).

b. Damages that are merely speculative are impermissible. See Bausch & Lomb v. Sonomed Tech., 780 F. Supp. 943, 971 (E.D.N.Y. 1992) (lost profits damages too speculative where court would have “to hypothesize” that distributor would meet the threshold number of orders and sales required, particularly because the distributor had experienced difficulty selling products), aff’d in part and rev’d in part, 977 F.2d 270 (2d Cir. 1992); Record Club of America v. United Artists Records, 696 F. Supp. 940, 950 (S.D.N.Y. 1988) (refusing to award value of business as a going concern because defendant’s records were only one of many labels carried by plaintiff and it was far “too speculative to attribute the failure of the business to UAR’s breach.”).

c. It must be shown that the damages sought were foreseeable, *i.e.*, within the contemplation of the parties when they entered into the distribution relationship. See C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1053 (5th Cir. 1981) (court found that jury properly rejected going concern value of business as measure of damages because it was not foreseeable that the entire business would collapse as a result of the loss of a single product line); RMLS Metals v. International Business Machines Corp., 874 F. Supp. 74 (S.D.N.Y. 1995) (when contract contains no clause indicating that lost profits may be recovered as damages for breach, the court must consider what the parties would have concluded had they considered the subject); Hentze v. Unverfehrt, 237 Ill. App.3d 606, 612, 604 N.E.2d 536, 540 (Ct. App. 1992) (where contract provided for termination of dealership upon 60 day’s notice, damage award of lost profits for a 5 year period was not within contemplation of the parties).

d. The defendant’s conduct must be the proximate cause of the plaintiff’s damages. See L&M Bev. Co., Inc. v. Guinness Import Co., No. 94-4492, 1996 U.S. Dist. LEXIS 9025 (E.D. Pa. 1996) (lost profits sought by distributor not allowed because distributor failed to present evidence of a causal link between defendant’s conduct and its loss); Builders Windows, Inc. v. Ceco Steel Prods. Corp., 209 F. Supp. 376, 379 (N.D. Ill. 1962).

(2) The amount of damages

a. The following kinds of evidence/proof can be used to determine the amount of damages sustained: (a) business records of the plaintiff prior to defendant's breach, (b) business records of a similarly situated company at the time of and subsequent to the defendant's breach, and (c) expert opinion testimony based on either (a) or (b). Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir. 1957); Esch v. Yazoo Manut Co., Inc., 510 F. Supp. 53 (E.D. Wis. 1981).

b. Where the defendant's wrongful conduct amounts only to the failure to give reasonable notice of the distributorship's termination, the plaintiff should be put in the position it would have occupied but for the defendant's failure to give the notice. Thus, the distributor's damage award may be limited to its lost profits during the reasonable notice period. See Sierra Wine & Liquor Co. v. Heublein, Inc., 626 F.2d 129, 132 (9th Cir. 1980) (distributor terminable at will should have been given 6 months notice of the termination, and thus was entitled to 6 month's lost profits); Smalley Trans. Co., Inc. v. Bay Dray, Inc., 612 So.2d 1182, 1190-91 (Ala. 1992) (damages available for the failure to give the notice of termination as required by the parties' agreement does not include the loss of any profits or other damages suffered beyond the notice period); Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Ltd, U.S.A., Inc., 256 Iowa 899, 908, 129 N.W.2d 731, 738 (1964) (distributor entitled to recover the prospective margin on sales it would have made during the period ending in a reasonable time after receipt of notice of termination of the contract).

But see Mercury Marine Div. of Brunswick Corp. v. Boar Town U.S.A., Inc., 444 So.2d 88 (Fla. Ct. App. 1984), where the court refused to restrict damages to the notice period. The parties' agreement allowed the defendant to terminate for good cause, but required the defendant to provide the plaintiff with notice and an opportunity to cure. The defendant, however, did neither. Without explaining its reasoning, the court stated that it considered the evidence and the case law addressing similar questions, and rejected the defendant's argument.

e. Punitive damages

(1) Where a defendant merely breaches a distribution or franchise agreement, punitive damages are typically not awarded. Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975, 982-84 (Ind. 1993) (Refusing to award punitive damages for a breach of contract without evidence of a tort independent from the breach).

(2) Punitive damages may be available where conduct is fraudulent or unconscionable. See Midwest Home Distributor, Inc. v. Domco Industries, Ltd., Bus. Franchise Guide (CCH) ¶ 11,495 (Iowa Sup. Ct. 1998) (upholding award of punitive damages for a terminated distributor where evidence showed manufacturer's intentional misrepresentations to the distributor demonstrated a willful and wanton disregard for the distributor's rights);

Contractor Util. Sales Co. v. Certain-Teed Corp., 748 F.2d 1151, Bus. Franchise Guide (CCH) ¶ 8302 (7th Cir. 1984), cert. denied, 470 U.S. 1029 (1985) (agent was entitled to \$3,000,000 in punitive damages where evidence sustained finding of fraud in the execution of contract between the parties). See also Unijax v. Champion Int'l, Inc., 683 F.2d 678, 687 (2d Cir. 1982) (proof of malice or intent to harm is “indispensable” to support award of punitive damages in action for tortious interference with prospective business advantage); Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 739-741 (3d Cir. 1991), cert. denied, 112 S. Ct. 3034 (1992) (level of outrageous or malicious conduct required for sustaining award of punitive damages under Pennsylvania law and the Second Restatement of Torts not met where franchisor fully considered decision to terminate, despite independent proof of fraudulent misrepresentation by franchisor to induce franchisor’s resignation).

(3) In Patton v. Mid-Continent Systems, Inc., 841 F.2d 742 (7th Cir. 1988), punitive damages for breach of contract were allowable under Indiana law due to fraud, malice and gross negligence which were “mingled” with contract breach. While the franchisor’s failure year after year to cure a contract breach converted an innocent breach into a deliberate one, a breach must still be shown to be malicious, fraudulent or grossly negligent for punitive damages to apply. See also Miller Brewing Co. v. Best Beer of Bloomington, Inc., 608 N.E.2d 975, (Ind. 1993) (in Indiana, punitive damages for breach of contract are proper only where plaintiff can plead and prove existence of independent tort for which award of punitive damages would be allowed).

(4) Similarly, in Photovest Corp., 606 F.2d at 729 (7th Cir. 1979), the Seventh Circuit upheld the district court’s award of punitive damages for multiple breaches of contract by seller which under Indiana law constituted “an oppressive, intentional, tortious wrong.” However, the conduct cannot be merely tortious to recover punitive damages. Where the action is for breach of contract, a party may recover punitive damages only where an independent tort has been committed for which punitive damages would be awarded under Indiana law.

(5) In Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993), the jury returned a verdict in favor of plaintiff which included an award of \$50 million in punitive damages. Defendant moved for judgment as a matter of law on the punitive damage claims and the district court granted judgment in defendant’s favor. Plaintiff cross-appealed, and the circuit court upheld the district court. Under New Jersey law, recovery of punitive damages requires a showing that defendant committed an intentional wrong that is an “evil-minded act” or an act accompanied by wanton and willful disregard for the rights of another. Id. at 1192. The circuit found nothing in the record to support any “evil-minded” motive or willful disregard of plaintiff’s rights, and its attempt to establish a broad corporate scheme to destroy plaintiff’s business was based only on speculation. Id. at 1200.

f. Rescission.

If rescission is granted, the franchisee may be entitled to:

- (1) value of initial fees
- (2) royalties paid
- (3) cost of removing signs displaying franchisor's name
- (4) return of money paid to franchisor for goods and services returned
- (5) disbursements
- (6) attorney's fees
- (7) pre-judgment interest

g. Recoupment.

Essentially, recoupment implies a minimum term in an at-will agreement defined as the length of time in which the buyer can reasonably be expected to recoup its investment, and holds that it is a breach of contract if the agreement is terminated before that. See Sofa Gallery, Inc. v. Stratford Co., 872 F.2d 259 (8th Cir. 1989); Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530 (4th Cir. 1989); Ag-Chem Equipment Co., Inc. v. Hahn, Inc., 480 F.2d 482 (8th Cir. 1983); McGinnis Piano and Organ Co. v. Yamaha International Corp., 480 F.2d 474 (8th Cir. 1973); Clausen & Sons, Inc. v. Theo Hamm Brewing Co., 395 F.2d 388 (8th Cir. 1968).

(1) Recoupment applies only where there is an agreement which is terminable at will and “has traditionally been confined to the recovery of preliminary expenses incurred in setting up a distribution system, such as sums expended for initial promotion and renting a facility.” Ag-Chem, supra at 487. See also Berryfast, Inc. v. Zeinfeld, 714 F.2d 826 (8th Cir. 1983) (even though distributorship terminable at will, a distributor who in good faith invested in the distributorship but was terminated without having a sufficient opportunity to recoup his investments was entitled to compensation for the time, labor and expense expended).

(2) This remedy is not available where the buyer has actually recouped his expenses. Bartolomeo v. S.B. Thomas, Inc., 889 F.2d at 533.

(3) In calculating unrecouped expenditures recoverable in recoupment, the court must “tak[e] into account, of course, the value of any benefits it may have derived from the arrangement during its existence or may

derive thereafter.” Ag-Chem, *supra* at 489; see also Schultz v. Onan Corp., 737 F.2d 339, 348 (3rd Cir. 1984) (defining “unrecouped expenditures” as “the initial or continuing investment required of the franchisee, reduced to the extent that profits were earned by the distributorship as a fruit of the investment”). Sofa Gallery Inc. v. Stratford Co., 827 F.2d 259, 263 (8th Cir. 1989) (distributor bears burden of proving the extent to which its investments had gone unrecouped, and distributor could not recover recoupment damages for any investment upon which it had realized a profit over and above operating expenses).

(4) The test for equitable recoupment is not whether a buyer has recouped his expenditures but whether he has had a fair opportunity to do so. Bartolomeo, 889 F.2d at 533.

h. Trademark Infringement.

The seller may sue for damages for trademark infringement. In Gorenstein Enterprises, Inc. v. Quality Care - USA, Inc., 874 F.2d 431 (7th Cir. 1989), shortly after entering into a franchise agreement, the Gorensteins, franchisees, defaulted on their obligation to pay royalties. Quality Care terminated the franchise agreement and demanded that the franchisee cease using their marks. The Gorensteins responded by suing for rescission. Before trial, the district court granted partial summary judgment in favor of Quality Care, ruling that the franchisee had infringed the Quality Care mark. The jury found in favor of Quality Care and trebled the award of damages under Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a). The Seventh Circuit upheld the lower court’s finding that the Gorensteins were not entitled to use the Quality Care mark pending the outcome of the rescission claim - the franchisee could not repudiate the franchise yet retain continued use of the trademark. The Seventh Circuit trebled a damage award of \$900,000, awarded pre-judgment interest of 9%, and awarded Quality Care its attorneys’ fees incurred on appeal. See Burger King Corp. v. Weaver, No. 96-5438, 1999 U.S. App. LEXIS 3635, at *31-33 (11th Cir. Mar. 9, 1999) (upholding lost profits award to franchisor under the Lanham Act because the award was a justifiable deterrent and the franchisee willfully and deliberately continued to use the franchisor’s marks after receiving notice of termination).

VI.

LITIGATION AND PRE-TRIAL TACTICAL CONSIDERATIONS

A. Complaint:

Avoid the tendency to throw in every conceivable claim--as a plaintiff, be more surgical and target defendant’s weakest point.

1. Is there an antitrust claim? If there is no real basis for alleging antitrust conspiracy or if defendant has insignificant market share in a competitive industry, do not plead the antitrust claim--it opens you up to a motion to dismiss,

potential discovery problems and expensive economic analysis. If there is serious question concerning the anticompetitive nature of defendant's conduct,

a. your complaint should allege the specific geographic and product markets adversely affected by the seller's conduct;

b. that the seller's conduct has no efficiency-enhancing characteristics and in fact results in:

- increased price
- decreased quality
- decreased output
- decreased innovation
- decreased production efficiency
- increased transaction costs
- decreased buyer efficiency
- a negative impact on both intrabrand and interbrand competition.

2. Allege that the buyer is covered by statute and cannot be terminated without cause--burden of proof on franchisor to show cause.

3. Allege the full range of common law rights:

- estoppel
- fraud
- breach of fiduciary duty
- implied covenant of good faith

This will give a court the hooks on which to hand a judgment for plaintiff on the equities.

B. Jury Trial v. Bench Trial

1. Availability of Jury Trial.

While common law and statutory causes of action for damages grant the right to a jury trial, actions that seek solely equitable relief must be tried by a

judge. In Abad Corp. v. Sun Company, Inc., 2000 U.S. Dist. LEXIS 521 (E.D. Pa. 2000), the court struck the plaintiff's demand for a jury trial because the remedies it sought were purely equitable. Plaintiff Abad operated a Sunoco service station as a franchisee of the defendant Sunoco, Inc. When Sunoco provided Abad with notice of non-renewal of the franchise agreement and notice of default, Abad brought suit against Sunoco under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §2801, seeking a declaratory judgment and a preliminary and permanent injunction enjoining Sunoco from nonrenewal of the franchise relationship. Abad requested a jury trial but the court ruled that it was not entitled to trial by jury it because it sought only remedies in equity, not in damages.

2. Jury:

- more compassionate and likely to award punitive damages
- judge will preclude defendant from introducing extraneous material about plaintiff
- has interim effect on franchisor and may stimulate settlement

3. Bench:

- client may not be a good witness and/or has engaged in questionable conduct
- if plaintiff's evidence will have problem getting admitted may have better chance if no jury

C. Pre-trial Motions:

1. Improper Venue — Move to Dismiss or Transfer (FRCP 12(b)(3) and 28 USC § 1406(a)) Waived if:

a. not raised in responsive pleading, pre-answer motion or answer,

b. participated in injunction,

c. moved for summary judgment, or

d. engaged in pretrial discovery

2. Forum Non Conveniens — Move to Dismiss

This principle applies where jurisdictions and venue are proper and defendant is subject to process in several forums and seeks dismissal of case

because plaintiff's choice of forum is completely inappropriate and inconvenient. Doctrine applies only in cases not covered by statutory provision for transfer for convenience (28 USC § 1404(a)). Dismissal warranted if all other forums are non-federal, more convenient and appropriate. See Carnival Cruise Lines, Inc. v. Shute, et al., 111 S. Ct. 1522 (1991), on remand, 934 F.2d 1091 (9th Cir. 1991) (discussed supra).

3. Motion for Summary Judgment (FRCP 56)

a. General:

A party may move for summary judgment on the ground that there is no genuine issue as to any material fact and that judgment is proper as a matter of law. A party against whom the claim is asserted can make the motion at any time; motion is typically made at the conclusion of discovery and prior to the commencement of trial.

b. History of Judicial Reluctance:

Previously, courts were reluctant to grant summary judgment motions in antitrust cases. See Poller v. CBS, 368 U.S. 464, 467 (1962).

c. Current View:

In recent years the Supreme Court has become much more receptive to disposing of antitrust cases on motions for summary judgment.

(1) In Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) the Court limited the range of permissible inferences from ambiguous evidence in a Section 1 case. The Court held that, in a horizontal conspiracy case, plaintiff must present evidence "that tends to exclude the possibility that the alleged conspirators acted independently." (quoting Monsanto, 465 U.S. at 764). If claim is based on conduct that makes no economic sense (there, a horizontal predatory pricing claim), plaintiff must come forward with more persuasive evidence to support its claim. 106 S. Ct. at 1356.

(2) In Monsanto Co. v. Spray-Rite Service Corp. 465 U.S. 752 (1984) the Court clarified the standard a plaintiff must meet to establish a conspiracy under the Sherman Act. The Court held that, in a buyer termination (vertical conspiracy) case, the plaintiff must "present direct or circumstantial evidence that reasonably tends to prove 'defendants' had a conscious commitment to a common scheme designed to achieve an unlawful objective." This requires evidence that "tends to exclude the possibility of independent action by the manufacturer and buyer." Id. at 764. The Supreme Court sustained a jury verdict for the plaintiff holding that Monsanto had terminated Spray-Rite, a buyer of Monsanto's herbicides, pursuant to a conspiracy to maintain resale prices.

- But the Court required more than complaints of plaintiff's prices by other defendants followed by termination of plaintiff.
 - Direct testimony of coercion to maintain prices was in evidence. See also Celotex Corp. v. Catrett 477 U.S. 317 (1986); Andersen v. Liberty Lobby Inc., 477 U.S. 242 (1986). (supporting use of summary judgment motions.
- d. Wake of Monsanto & Matsushita: -

(1) Grant of Summary Judgment

Relying on these Supreme Court cases, lower courts have granted judgment to defendants where plaintiffs have failed to counter plausible, rational, and legitimate explanations of defendant's behavior or when the plaintiff relied upon legally insufficient inferential proof.

a. Center Video Indus. Co. v. United Media, 995 F.2d 735 (7th Cir. 1993). Summary judgment granted in favor of defendant in suit charging seller with violation of Sherman Act § 1 based on seller's termination of buyer after buyer's competitor complained to seller about buyer's pricing. The court found that no per se violation was established since plaintiff could not allege facts to show an agreement to set price levels or specific prices.

b. A-Abart Electric Supply, Inc. v. Emerson Electric Co., 956 F.2d 1399 (7th Cir.), cert. denied, 113 S. Ct. 194 (1992). Defendant seller allegedly agreed with defendant buyer, plaintiff's competitor, to sell new line of ceiling fans only to defendant buyer. The agreement did not fix price levels. The court found that the restraint was vertical and, as it did not fix prices, defendants' conduct was subject to a rule of reason analysis. Summary judgment was granted to defendants because plaintiff failed to come forth with showing of adverse effect on competition required under the rule of reason analysis.

c. Purity Products, Inc. v. Tropicana Products, Inc., 702 F. Supp. 564 (D. Md. 1988), aff'd sub nom., Purity Products, Inc. v. Kohlberg, Kravis, Roberts & Co., 887 F.2d 1081 (4th Cir. 1989). Seller received and responded to complaints about plaintiff's extraterritorial sales, which was consistent with seller's policy of limiting sales to exclusive territories. Participation of competitors in detecting and reporting violations did not constitute a "common scheme" and played no active part in the termination decision. Termination was based on the terminated buyer's intention to continue to violate the distribution policy. Summary judgment was granted for the seller.

d. Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. 753 (D.S.C. 1988). Summary judgment was granted to the franchisor on a franchisee's claim that the franchisor unlawfully refused to grant a

new franchise. The court ruled that conspiracy could not be inferred from the mere fact that the franchisor acted in response to a complaint from another franchisee that the plaintiff had “cannibalized” its market area since the facts indicated that the franchisor acted independently.

e. Lomar Wholesale Grocery v. Dieter’s Gourmet Foods, 824 F.2d 582 (8th Cir. 1987), cert. denied, 484 U.S. 1010 (1988). Food buyer alleged competitor buyer and sellers conspired to engage in group boycott to deny Lomar access to products and conspired to fix prices. The district court granted defendants’ summary judgment motions. The Court of Appeals affirmed, stating that “Lomar . . . may not rest merely on the conclusory allegations contained in its pleading and legal memoranda. Rather, by affidavits or otherwise, it must point to specific evidence showing that there are genuine disputes of material fact that must be resolved before its claims can be decided.” Id. at 585 (emphasis in original).

f. Garment District, Inc. v. Bells Stores Services, Inc., 799 F.2d 905 (4th Cir. 1986), cert. denied, 486 U.S. 1005 (1988) Janzen’s capitulation to large customers’ urging to terminate discount competitor not illegal because there was no proof that an agreement on price existed.

g. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1155 (9th Cir. 1988) “More must be shown than simply an agreement between the manufacturer and a complaining buyer to terminate a price-cutter.”

h. Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919, 923-25 (2d Cir. 1985) Termination of plaintiff by manufacturer following complaints about plaintiff’s discounting policy not sufficient evidence of illegal agreement.

i. National Marine Elec. Distribs. v. Raytheon Co., 778 F.2d 190, 192-93 (4th Cir. 1985) Evidence not sufficient to show plaintiff was terminated for purposes of restraining price competition.

j. Toys “R” Us, Inc. v. R.H. Macy & Co., Inc., 728 F. Supp. 230 (S.D.N.Y. 1990). Court dismissed plaintiffs vertical pricing fixing claim under Monsanto and Sharp finding no evidence of any agreement by manufacturers who refused to sell swimwear to Kids ‘R’ Us pursuant to urgings by Macy, because no two actors, either a manufacturer and Macy or manufacturers alone agreed upon a set price or price level.

k. Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567-1570, 1573-1574 (11th Cir. 1991). Under “rule of reason,” distributor granted summary judgment, in spite of allowable “exclusive dealing,” since no proof of “injury” or “concerted refusal to deal.”

l. Bailey’s Inc. v. Windsor America, Inc., 948 F.2d 1018 (6th Cir. 1991). Absent evidence that supplier participated in group

boycott, termination of sales to retailer to retain or increase business with complaining distributor did not establish § 1 violation of Sherman Act.

m. Williams v. I.B. Fischer, 794 F. Supp. 1026 (D. Nev. 1992), aff'd, 999 F.2d 445 (9th Cir. 1993). Plaintiff was a manager for franchisee who sued franchisor and franchisee alleging violations of the Sherman Act arising out of their enforcement of the anti-raiding clause in the franchise agreement which prevented plaintiff from being hired as manager for another franchisee of the same franchisor. The court held that the franchisee and franchisor had common economic goals which made them a single enterprise incapable of intra-enterprise competition. Thus, by definition they could not engage in an unlawful combination in violation of the Sherman Act.

n. Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503 (D. Colo. 1992), aff'd, 13 F.3d 366 (10th Cir. 1993). Plaintiff's characterization of defendant's dual distribution scheme whereby defendant sells directly to customers while at the same time acting as distributor is properly analyzed as a vertical, not horizontal, restraint. Plaintiff could not prove per se violation since there was no evidence of an agreement to set prices. Plaintiff also fails under rule of reason analysis because there was no evidence of an agreement to allocate markets nor of any adverse effect on competition.

o. "Lack of Market Power" Defense:

Some courts have found that a manufacturer whose conduct would not constitute a per se violation (of Section 1) is entitled to summary judgment if it lacks market power, i.e., if it lacks the power to raise prices significantly above the competitive level without losing all its business. See Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982); JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 698 F.2d 1011 (9th Cir.), cert. denied, 464 U.S. 829 (1983); MHB Distributors, Inc. v. Parker Hannifin Corp., 800 F. Supp. 1265 (E.D. Pa. 1992); Exxon Corp. v. Superior Court of Santa Clara Co., (CCH) 1997-1 Trade Cases ¶ 71, 677 (Cal. Ct. App. Jan. 14, 1997).

(2) Denial of Summary Judgment

Courts have denied summary judgment motions in circumstances when evidence sufficiently demonstrates the existence of a termination in furtherance of a price fixing conspiracy with non-terminated buyers.

a. Business Electronics v. Sharp Electronics Corp., 485 U.S. 717 (1988).

(i) An agreement between a complaining buyer and seller to terminate a price-cutting buyer is not per se illegal unless the complaining buyer also agreed, tacitly or expressly, to sell the product at a certain price or price level.

(ii) The Court refused to apply the per se rule merely because a discounter was terminated since it would be difficult for manufacturer to “convince a jury that its motivation was to ensure adequate service since price-cutting and some measure of service cutting go hand-in-hand.” Id. at 1521.

(iii) Court reaffirmed per se nature of resale maintenance agreements and remanded to the case for a jury determination of whether sufficient evidence of an agreement on price existed.

b. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358 (3d Cir. 1992) cert. denied, 113 S. Ct. 1262 (1993). Plaintiffs claimed antitrust violations arising from denial of applications for additional franchises. Summary judgment in favor of defendants was vacated because plaintiffs offered evidence of concerted action between the distributor and other dealers spanning several years to engage in group boycott to prevent competition by plaintiffs’ dealerships.

c. Helicopter Support Systems, Inc. v. Hughes Helicopter Inc., 818 F.2d 1530 (11th Cir. 1987). The Eleventh Circuit reversed the district court’s grant of summary judgment for the defendant. The complaints by competing buyer to the defendant regarding plaintiffs price-cutting activities coupled with express resale price maintenance language in buyer agreements and communications between the defendant and the complaining buyers regarding termination of plaintiff was sufficient evidence to preclude summary judgment.

d. Arnold Pontiac-GMC v. General Motors Corp., 700 F. Supp. 838 (W.D. Pa. 1988). Summary judgment was inappropriate where the manufacturer’s refusal to grant an additional franchise could have been the result of the manufacturer’s caving into pressure from other complaining buyers who resented impending competition and threatened not to participate in the manufacturer’s promotional programs.

D. Pre-Trial Discovery

In general, FRCP 26 permits parties to discover any matter that is not privileged which is relevant to any claim or defense, in the pending action, including the existence of documents and the identity of and location of persons with knowledge of relevant information. The focus of the terminated buyer’s discovery effort is to establish that the termination was not based upon legitimate “good cause,” but rather was a result of either the buyer’s refusal to accede to the seller’s resale price maintenance conspiracy or was a consequence of a group boycott instigated by its competitors who induced the seller to terminate the buyer. The seller’s discovery efforts will be designed to establish the deficiencies in the buyer’s performance, the lack of any competitive harm to the market flowing from the termination, and the efficiency-enhancing reasons supporting the termination.

1. Depositions

a. Buyer Should Depose:

Sellers, officers, sales personnel, former employees, consulting and trial experts (accountants, economists) competitive buyers who were not terminated (communications with sellers; pricing activity). Documents and statements by sales personnel who have dealt with the plaintiff often play a major role in establishing this factual aspect of the terminations. H.L. Moore Drug Exchange v. Eli Lilly & Co., 662 F.2d 935, 938 (2d Cir. 1981), cert. denied, 459 U.S. 880 (1982); Trabert & Hoeffler, Inc. v. Piaget Watch Corp., 633 F.2d 477 (7th Cir. 1980).

b. Seller Should Depose:

Buyers, officers, accountants, sales personnel, former employees, experts, customers (re dissatisfaction).

2. Document Demands

See Fed. R. Civ. P. 34. Buyer should seek documents relevant to establishing it satisfied its obligations to service and promote the seller's products, i.e., sellers' sales and service reports, correspondence files (lack of consumer complaints), invoice and documents showing treatment of non-terminated buyers. The seller will seek documents showing deficiencies in performance and service. Note: limited to parties only.

3. Interrogatories

See Fed. R. Civ. P. 33. Generally considered ineffective because they are in writing, drafted by counsel, and thus do not permit spontaneous answer from witnesses whose demeanor can be asserted. Limited to parties only. Should be used only to learn the identity of potential witnesses and individuals who are knowledgeable about the events and decision to terminate the buyer.

a. Requests to Admit

See Fed. R. Civ. P. 36. Limited to parties. Designed to clarify and sharpen the issues for trial. Defines contours of litigation by determining what is and is not in dispute. Used to determine whether other party will concede accuracy of facts already known by discovering party. Helps to avoid costs of investigating facts not in contention, eliminates trial exhibits and witnesses not needed, facilitates summary judgment motions, and makes settlement negotiations more realistic. Rule 36(b) provides that an admission pursuant to a request is conclusively established.

4. Protective Orders

See Fed. R. Civ. P. 26(c) protects confidentiality of documents and avoids protracted discovery disputes regarding access to material considered confidential or proprietary, e.g., pricing, customer lists, discussions with non-terminated buyers.

VII.

SUMMARY OF GUIDANCE FOR SELLERS AND BUYERS IN A TERMINATION CONTEXT

Counsel should, whenever possible, provide the client with detailed guidance concerning the appropriate manner in which to conduct itself in the buyer relationship and in its termination so as to minimize potential legal exposure. The points outlined below should be addressed.

A. Seller's Perspective

1. Seller should formulate and adhere to standards for inspecting buyers, completing inspection reports, communicating (in writing) deficiencies to a buyer, giving assistance to the buyer, and conducting follow-up inspections.
2. All events of default by a buyer should be properly documented.
3. Even if not required by the distribution agreement, sufficient prior notice of termination is advisable to comply with implied good faith standards.
4. Ensure that termination policy is uniformly enforced. This will help negate buyer's argument that termination was a consequence of its failure to adhere to seller's pricing demands or was a result of conspiracy between the seller and the terminated buyers' competitors.
5. Where a buyer has made a substantial investment in the franchise, it may be advisable to afford a reasonable opportunity to sell the business to an acceptable successor purchaser, thereby allowing the new buyer to realize the unamortized value (and any appreciation) of the assets and any residual goodwill of the business.
6. Do not make a policy of soliciting buyer's views regarding the performance of other buyers.
7. Consider seeking a declaratory judgment in a friendly forum regarding the lawfulness of a proposed course of action, e.g., forward integration.

8. Always give at least 60-days' notice of termination.
9. Offer to purchase buyer's current inventory.
10. The seller should not solicit views of other buyers concerning the propriety of appointing new buyers or of terminating an existing buyer.
11. Specify in the distribution agreement that it is not a franchise and not covered by state statues.
12. Specify that all money paid is for goods and services rendered and not for a franchise fee.

See Wright-Moore Corp. v. Ricoh Corp., 980 F.2d 432, 436 (7th Cir. 1992), on remand from 908 F.2d 128 (7th Cir. 1990) (neither excessive inventory nor training expenses incurred by buyer were indirect franchise fees sufficient to subject buyer to protection of Indiana Franchise Act). But see To-Am Equipment Co., Inc. v. Mitsubishi Caterpillar Forklift Am., Inc., No. 95 C 0836, 1997 U.S. Dist. LEXIS 641 (N.D. Ill. Jan. 24, 1997) (court refused to overturn jury's finding that a buyer was a franchisee within the meaning of the Illinois Franchise Disclosure Act because the threshold franchisee fee of \$500 was met by considering payments accumulating over a decade).

13. Always state that termination may occur without cause.
14. Include in the agreement:
 - a. an arbitration clause;
 - b. forum selection clause;
 - c. choice of law;
 - d. reservation of right to appoint other buyers in territory or to establish company stores;
 - e. integration clause;
 - f. payment of attorneys' fees by losing party;
 - g. termination provision including change in marketing plan; and
 - h. limitation on those with authority to execute or amend the agreement or its terms on behalf of the company.
15. Negotiate over the inclusion of forum selection and choice of law clauses.

Retain all documents (i.e., drafts, notes, correspondence) sufficient to establish that the inclusion of these clauses was not unfairly imposed upon the franchisee on the basis of the franchisor's superior bargaining position, but rather were included in exchange for specific concessions to the franchisee. See Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc., 146 N.J. 176, 680 A.2d 618 (1996).

16. Strictly enforce contracts.
17. Terminate if grounds exist.

If you choose to continue the relationship, preserve, in writing, that grounds for termination exist, but that continuation of buyer is pursuant to a settlement agreement.

18. Do not expressly or impliedly permit buyer to create property interest in distributorship.
19. Always prepare memo outlining efficiency-enhancing effects of proposed change in distribution system (have independent economic experts involved), i.e. lower prices, greater efficiency, innovation, and more responsive service.
20. In any litigation get a protective order precluding use of discovery for any purposes or disclosure to anyone not a party to the litigation.
21. If attempting to settle a dispute, make sure to put a legend on any written settlement documents to help ensure that they are not considered as evidence in litigation or arbitration.

See, e.g., Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd., Bus. Franchise Guide (CCH) ¶ 11,311 (4th Cir. 1998) (arbitration panel justified use of settlement negotiations because of their relevance to the franchisee's claims that entering into settlement negotiations constituted mitigation of damages).

B. Buyer's Perspective

1. The buyer should maintain thorough documentation to demonstrate compliance with agreement and to show its damages in the event of termination. Retention of documents should include:
 - a. copies of inspection reports
 - b. notes of discussion with seller's representatives
 - c. evidence of corrective action taken

d. all other documentation relevant to asserted defaults and other possible motives for termination.

The importance of creating a record is shown by Wesley v. Mobil Oil Corp., 513 F. Supp. 227 (E.D.P.A. 1981). In violation of an express provision of his distributorship agreement, a gasoline buyer closed his station for a period of more than seven days to take a vacation. Both sides admitted that the conduct had occurred, that it was material to the agreement, and that the agreement specifically prohibited closing the station for more than sixty consecutive hours. Good cause, however, was found lacking because upon hearing of the buyer's plan to close the station, the oil company representative said, "Do what you want. What can I say?" Id. at 229. Also, just before the closing, the representative said, "Have a good vacation," Id. at 229. Thus, the oil company was said to have affirmatively misled the buyer into believing it would waive its rights to terminate and the buyer was entitled to a preliminary injunction to temporarily preserve the status quo.

2. If a buyer believes that termination or non-renewal is imminent and that such action by the seller is lawful, the buyer might affirmatively seek the seller's permission to sell the distributorship to an acceptable successor purchaser.

3. Create estoppel or waiver arguments.

a. During initial startup when relationship is good and mutual need exists, ask to secure loan from bank with franchise as collateral and other things to create proprietary and not just contractual right.

4. Do without written agreement if possible.

5. Get side letter setting forth how termination clause will be implemented by the seller.

6. If termination is imminent, try to negotiate performance criteria as an alternative.

7. Create Franchisees Definition Arguments, i.e. dependence and control.

8. Pay \$500 to claim franchise fee. Pay in form of a check, specifically identified, or increase payment above bona fide wholesale price.

VIII. **SPECIAL E-COMMERCE CONCERNS RELATING TO INTERNET** **ENCROACHMENT**

A. The Drug Emporium Arbitration

1. In Emporium Drug Mart, Inc. of Shreveport v. Drug Emporium, Inc., American Arbitration Association, No. 71 114 0126 00 (Sept. 2, 2000), reprinted in 79 BNA Antitrust and Trade Regulation Report, No. 1976, at 279 (Sept. 22, 2000), a three-member panel of the American Arbitration Association, by a 2 to 1 decision, ruled that a franchisor must stop accepting drug orders on-line over the Internet for shipment to customers in the exclusive territories assigned to its franchisees by franchise agreement.
2. The claimants were franchisees who operate high-volume low-margin drug stores bearing the service mark "Drug Emporium" in exclusive territories assigned by franchise agreement. The exclusive territories were the states of Arkansas, Kansas, Louisiana and Texas. The franchisees claimed that the activities of the franchisor's subsidiary, Drug Emporium.com ("DE.com"), a "virtual drug store" on the Internet, breached the license granted to them by the franchisor, Drug Emporium, Inc. ("DEI"), to sell drugs and related items under DEI's service mark in their respective territories.
3. In addition to asserting a claim for breach of contract, the franchisees alleged that DEI breached the implied covenant of good faith and fair dealing by selling product through DE.com into the franchisees' protected territories, contrary to the franchisees' expectations, at the time that the franchise agreements were executed, that DEI would not sell directly into their territories. When DEI announced the proposed sale of DE.com to an online drug retailer, Health Central.com, the franchisees filed a motion for preliminary injunctive relief claiming that DE.com's encroachment into their territories was causing them irreparable harm.
4. DEI, in turn, argued that its franchisees were granted only the right to use DEI's service mark in brick and mortar operations. According to DEI, the franchise agreements included clauses describing the stores as susceptible to theft by customers and store employees -- a description that could only apply to brick and mortar stores. DEI also argued that the on-line operations should not be viewed as a store at all, but rather as an alternate means of distribution, the right to which DEI retained under the franchise agreements.
5. In ruling for the franchisees, the AAA Panel held that the franchisees "demonstrated a likelihood of success in proving that DEI has violated their franchise agreements, in demonstrating dilution of the license granted in the mark and consequent harm,

and in showing a likelihood of future confusion in the absence of injunctive relief."

6. In reaching this determination, the Panel looked at extrinsic evidence (i.e., evidence other than the license agreement) and observed:

"The DE.com site touts itself as 'Your neighborhood pharmacy for 20 years' and has attempted to build market share with sales prices 'that vastly undercut prices' available in the claimants' stores. DEI's sale of the on-line assets and the refusal of the buyer to be subject to this panel's ruling support an 'inference that the intention is to exploit the DEI mark in claimants' territories with even greater zeal. Indeed, the \$17 million purchase price, which includes the acquisition of DE.com's assets, creates a big motive to do so."

7. The Panel moreover observed that DEI "has marketed DE.com as '[t]he full service online drugstore' and have certified DE.com to be a 'drugstore' in their filings to the SEC."

8. The Panel also drew an inference concerning the parties' expectations at the time of contracting from the fact that DEI's alleged internet encroachment had occurred only recently:

"We also infer from the Respondents' conduct that honored the Claimants' territories until now -- including the offer of compensation during the test period for DE.com -- that the parties' reasonable expectation was that the [franchisees] would not be forced to compete with direct drugstore sales by [DE.com]. This inference is bolstered by the failure of the franchise agreement to permit the Respondents to operate drugstores within the territory absent a breach by the franchisees."

9. In addition to ruling that the franchisor must stop accepting drug orders on-line for shipment to customers in the exclusive territories assigned to its franchisees, the AAA Panel also directed DEI "to place a clear notice to prospective customers within claimants' territories on the DE.com web site that states that DE.com is unable to ship orders to the above-identified territories, and to direct such customers to the nearest Drug Emporium franchised outlet in the enjoined territory."

B. The Significance of Drug Emporium

1. The AAA Panel's decision in Drug Emporium is a landmark in that it recognizes (in what is generally regarded as the first decision of its kind) that a franchisor may encroach upon an exclusive territory licensed to a franchisee as a result of sales activity conducted over the Internet by the franchisor, or its affiliates.
2. Drug Emporium also underscores the importance of addressing and resolving the legal issues related to Internet marketing under franchise agreements that often have been drafted before the marketing potential of the Internet had been realized by the parties. As a result, many franchisors may find themselves in the position of having to litigate whether their existing franchise agreements permit them to engage in e-commerce.
3. The Drug Emporium decision further signals a new route that some franchisees may attempt to pursue to restrict or limit Internet sales by franchisors to customers located in exclusive territories.
4. What happened in Drug Emporium is a consequence of the fact that the franchise agreements in question were drafted before the Internet's marketing capabilities had been realized. Because this may be the case with many franchise agreements, these agreements should be carefully reviewed to determine whether they may present potential problems along the lines of the Drug Emporium model.
5. In addition, both franchisors and franchisees should give careful consideration to the issue of Internet sales in drafting and negotiating their franchise agreements. For example, the franchisor may wish to retain the right to sell goods over the Internet to customers located in a territory to which a franchisee has been granted exclusive rights. Conversely, the franchisee, in negotiating the franchise agreement, may wish to clarify that Internet sales will not be permitted to be made to customers located within a territory to which the franchisee is granted exclusive rights. The franchisee may further seek to add provisions to the Agreement that establishes a protocol to direct traffic from the franchisor's web site to brick and mortar stores located in the franchisee's exclusive territory.
6. It bears repeating that the decision in Drug Emporium was not issued by a court, but rather is a ruling of an AAA Panel.

C. Other Cases

The New York long-arm statute allows for the exercise of jurisdiction over an out-of-state defendant who operates a website serving a national market, even

though the website has not produced any New York customers. Exercise of jurisdiction in this case also comports with federal due process, because the defendant was aware that its domain name was substantially similar to the name of a New York corporation, and therefore should have expected that the potential infringement of the company's trademark would have consequences in New York. Starmedia Network, Inc. v. Star Media, Inc., No. 00 Civ. 4647 (S.D.N.Y. Apr. 23, 2001).

HYPOTHETICAL PROBLEM -- THE VENUS CASE

Venus Beauty Products (“Venus”) is a company with a forty-year history of door to door selling by designated “Venus Beauty Couriers.” Each “Courier” signed a form contract with Venus which stated that during a given period, the Courier had to purchase a minimum number of beauty products from a specified number of lines for resale within each Courier’s exclusive distribution area. The contracts were terminable by either party upon thirty days notice.

Standard Venus contracts included the following provisions: (a) upon termination of the contract, the Courier was precluded from competing with Venus for a period of one year; (b) that as a new line was introduced, the Courier incorporate such products to constitute a minimum of one-fifth of each order for the first nine months after the introduction of the product(s) so that Venus could capitalize on national advertising; (c) the Courier had to devote substantially full time and best efforts to the promotion and sale of Venus products; (d) contemporaneous with execution of the contract, the Courier had to purchase a three months’ supply of Venus products commensurate with the size of the Courier’s distribution area, at five percent above the wholesale price sheet; (e) the Courier had to attend two training sessions per year at his/her own expense; and (f) the Courier could not assign, sell, transfer or devise the contract without Venus’ approval.

Venus trained the Couriers in beauty and make-up techniques. The Couriers were regularly notified of recurring training courses, the selection of which was left to the individual Courier as long as each met the twice a year minimum. The Couriers paid Venus for the cost of materials and supplies used in the training courses. A Courier typically paid approximately two hundred dollars for such materials in his/her first year of operation and one hundred dollars annually thereafter. As part of the total marketing program for Venus Beauty Products, the Couriers were required to drive vans painted vermilion and emblazoned with “Venus Beauty Vans”.

Each individual “Courier could develop his/her own particular marketing program tailored for his/her distribution area, subject to review by Venus. This review was primarily for the purpose of ensuring that the individual advertising campaigns were consistent with Venus’ general advertising thrust. In order to assist new Couriers in purchasing the necessary vehicles, Venus Beauty Products sponsored a financing program through the same bank which Venus used for its corporate purposes. As part of the financing arrangement, the Couriers were required to maintain no-interest checking accounts with a minimum balance of five hundred dollars. Venus’ bank found this financing to be profitable, and accordingly Venus was able to negotiate an unusually low fee structure for its corporate banking services.

An agreement between Venus and a major credit card company enabled Venus to offer the Couriers the option of permitting customers to charge purchases. Venus performed the collection services and the Courier was reimbursed the gross amount minus a five percent administration charge.

In addition to being required to drive a van, the Couriers were requested to be groomed according to the "Venus Image," and Venus intermittently sent the Courier internal publications which depicted variations of the "Image." The Couriers were also strongly encouraged to wear vermillion when out on their routes.

Although not stated in the contract, as the Courier developed his/her route he/she was allowed to take on and select assistants subject to Venus' approval, which was rarely withheld. The Courier also helped develop the assistant and was allowed to bring the assistant to the ongoing training programs provided by Venus. The Courier who selected his/her assistant determined the nature of his/her relationship with the assistant. Some Couriers paid assistants; some Couriers sold or leased a subset of their exclusive area; some Couriers created an agreement by which the assistants purchased the Venus Beauty Products from the Couriers at Venus' prices and paid the Couriers a percentage of their earnings.

Some distribution areas became very valuable. A few Couriers merged and others expanded by purchasing distribution areas. As a result, several Couriers had very large operations and two had multi-state businesses.

For a period of several years there had been a general decline in the overall revenue, partly because there were fewer women at home during the day to purchase such products. In response to this drop in revenues, Venus cut back its manufacturing operations. All Couriers came under pressure from Venus to improve their performances, especially those whose sales volumes were below average.

On January 1, 2000, Venus opened a website, which it calls "Venus Rules the Web.com" This website was designed both to provide additional information to consumers regarding the full line of Venus beauty products, and to permit consumers to purchase Venus products directly from the website. Upon factoring in the cost of shipping products to consumers (which cost the consumer bears), the prices paid by consumers for products purchased directly from the website are generally higher than the prices that consumers were charged for products purchased from Venus Beauty Couriers. However, upon consideration of sales taxes, the prices of products sold by Venus Beauty Couriers were generally higher than the prices charged to consumers who purchased directly from the website (which purchases were not subject to sales tax).

In its marketing literature and advertisements, Venus does *not* refer to its website as a store and simply implores consumers to visit the Venus website so that they can see for themselves the full line of fine beauty products that Venus

has to offer. In addition, Venus does not specifically refer to its website as a store in its filings with regulatory authorities. Venus's filings with the Securities and Exchange Commission do, however, report the amount of revenues attributable to sales from the website. For the year ended December 31, 2000, sales from Venus's website accounted for approximately 15% of Venus's total sales revenues. Venus's total sales revenues from all sources were approximately the same for 1999 and 2000.

For several years, the Couriers had been individually developing alternative methods of marketing to offset the loss of at-home purchasers. The Couriers would arrange special "socials," evening functions and demonstrations at county fairs and flea markets. The Couriers also formed an independent association which was in the process of realigning and redeveloping marketing strategies for the products from Venus. This association offered group insurance coverage and held annual sales meetings, as well as issued regular periodicals on sales and cosmetics trends.

In an effort to sustain and possibly enhance their own revenues, several Couriers made significant investments in mobile vans adding special lighting and special equipment to take advantage of public areas where people gathered, such as churches, parks, and shopping areas. Also, many Couriers combined the sale of Venus' products with other products of interest, including home cleaning products, plastic storage products, and magazines.

Although Venus products had previously been distributed exclusively by Couriers, Venus began selling products to department stores and other retail outlets, many of which were at or near the same shopping areas where Couriers were developing alternate marketing arrangements. The volume of such sales steadily increased. The previous manufacturing cutbacks, however, hampered Venus' ability to handle orders promptly and, on occasions, Couriers began to experience serious supply problems, particularly those who needed larger orders for socials involved in alternate marketing methods.

Some Couriers began to substitute Venus products with products from other manufacturers. Some of these Couriers rewrapped the substitutes in Venus packaging material. Other Couriers used unmarked packaging and still others used packaging which displayed the true manufacturer's name. Some Couriers sold Venus products for low prices to discount houses which offered them for resale as loss leaders. When Venus learned of these practices, it announced that any Courier caught selling products other than Venus products or selling Venus products to discount houses would be terminated. No Courier was terminated, however, a number of Couriers were repeatedly threatened with termination. Some Couriers ignored these threats, while other Couriers stopped selling non-Venus products and stopped selling to discount houses. Some signed agreements promising never to sell non-Venus products again.

Venus Beauty Products then announced its decision to create a more upscale image and to switch to a direct sales agency functioning out of prestige stores located in shopping centers and neighborhood malls. Venus notified all of its Couriers that it was terminating the contracts upon four weeks notice in order to realign the business focus and image of Venus Beauty Products. The Couriers were offered the opportunity to apply for sales positions with Venus, although based on the new style of selling and the reduced number of positions, none of the Couriers were guaranteed a job. Moreover, up until a week before the notice of termination, Venus continued to accept applications for the financing of vans and to approve new assistants for the training programs which were still being offered by Venus.

CONTRACT TERMS

1. Duration specified
2. Min. Order requirements from number of product lines
3. Exclusive geographic territory
4. Terminable-at-will upon 30 days notice
5. Non-compete 1 yr.
6. Min. Order requirement on new product introductions
7. Devotion of full time and best efforts
8. Initial order of 3 months supplies at wholesale price + 5%
9. Attendance at two training sessions at Couriers' own expense + \$200 in expenses for training materials
10. No assignment or transfer without approval from Venus
11. Couriers required to drive "Venus Beauty Van"

EVENTS

- A - some couriers expanded by acquiring other territories and some become multistate.
- B - Economic climate changed and sales fell off and Venus cut back on manufacturing operation
- C - Development of alternatives to at-home sales i.e., socials, demonstrations at fairs and flea markets; new improved vans for nighttime sales in parking lots; added non-beauty product lines - cleaning products, plastic storage products, magazines
- D - Venus goes direct to department stores and retail outlets near shopping areas where couriers were selling from vans
- E - Couriers needing large orders experienced allocation problems and delayed shipment
- F - Couriers begin to : (i) substitute Venus products with other manufacturers products. (some rewrapped in Venus wrapping; some sold in unmarked wrapping and some disclosed other manufacturers name)
- G - Venus announces it will terminate anyone selling non-Venus products or selling to discount houses [subsequent threats of termination were made by Venus to couriers]
- H - Some couriers sign agreements not to sell non-Venus products
- I - Venus provides 30 day notice to all couriers that it is changing distribution system to direct sales agency selling out prestige stores
- J - All couriers offered opportunity to apply for sales position
- K - Venus continued to accept new courier applications, approve assets, and accept requests for van financing until a week before Notice of Termination issued.

TRANSACTIONS

- A - Bank financing of vans for interest free checking
- B - Venus offer of credit card use for 5% discount fee
- C - Venus encouraged couriers to dress in vermilion and consistent with Venus image
- D - Use by couriers of assistants (Venus approval required) and various relationships i.e., sale and resale, employees; lease territory and receive % of assistant's earnings

E-COMMERCE CONSIDERATIONS

- A - The contract does not address whether Venus may sell goods from its website to consumers located in a Courier's exclusive distribution area.
- B - Venus's website both provides detailed information to consumers regarding the full line of Venus beauty products, and permits consumers to purchase Venus products directly from the website.
- C - Upon factoring in the cost of shipping products to consumers (which costs the consumer bears), the prices paid by consumers for products purchased directly from the website are generally higher than the prices that consumers are charged for products purchased from Venus Beauty Couriers.
- D - However, upon considering sales taxes, the prices of products sold by Venus Beauty Couriers are generally higher than the prices charged to consumers who purchased directly from the website (which purchases are not subject to sales taxes).
- E - In its marketing literature and advertisements, Venus does *not* refer to its website as a store and simply implores consumers to visit the Venus website so that they can see for themselves the full line of fine beauty products that Venus has to offer.
- F - Venus does not specifically refer to its website as a store in its filings with regulatory authorities. Venus's filings with the Securities and Exchange Commission do, however, report the amount of revenues attributable to sales from the website.
- G - For the year ended December 31, 2000, sales from Venus's website accounted for approximately 15% of Venus's total sales revenues.
- H - Venus's total sales revenues from all sources were approximately the same for 1999 and 2000.

Appendix

STATE FRANCHISE LAWS

Ark Code Ann Tit. 4, Chap. 72, Sections 4-72-201 to 4-72-210
Cal. Bus. & Prof. Code Div. 8, Chap. 5.5, Sections 20000 to 20043
Ct Gen Stat Tit. 42, Chap. 739, Sections 42-133c to 42-133h
Del Code Ann Tit. 6, Chap. 25, Sections 2551 to 2556
Haw Rev Stat Tit. 26, Chap. 482E, Section 482E-6
815 Ill. Comp. Stat. Ann 705/1 to 705/44
Ind Code Tit. 23, Art. 2, Chap. 2.7, Sections 1 to 7
Iowa Code Tit. XX, Chap. 523H, Sections 523H.1 to 523H.17
Md Code Ann Tit. 11, Sections 11-1301 to 11-1307
Mich Comp. Laws Chap. 445, Section 445.1527
Minn Stat Chap 80C, Section 80C.14
Miss Code Ann Tit. 75, Chap. 24, Sections 75-24-51 to 75-24-61
Missouri Rev Stat Chap. 407, Sections 407.400 to 407.410,
407.420
Neb Rev Stat Chap 87, Art. 4, Sections 87-401 to 87-410
NJ Stat Ann Sections 56:10-1 to 56:10-15
SD Codified Laws Chap. Tit. 37, Chap 37-5A, Section 37-5A-51
WA Rev Code Tit. 19, Chap. 19.100, Sections 19.100.180 to
19.100.190
Wis Stat Chap 135, Sections 135.01 to 135.07
DC Code Tit. 29, Chap 12. Sections 29-1201 to 29-1208
PR Laws Ann Tit. 10, Chap. 14, Sections 278 to 278d
VI Code Ann Tit. 12A, Chap. 2, Sections 130 to 139

The reader should note that in addition to the statutory provisions listed above, some states have industry-specific franchise laws which deal with termination.