# Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel

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**Abstract**

A survey conducted for this article indicates that potential franchisees often fail to consult an attorney. This failure, in turn, certainly affects the "bargained for" franchise contracts and thus should impact franchising relationship law. Indeed, legislators and judges can employ various legal standards to protect some franchisees from their own folly, particularly when these franchisees are unsophisticated parties, with little or no business experience. If this protection is to remain merely a disclosure regime and not a mandatory contractual regime , and if the *pro se* franchisee is to have no concomitant right to rely more so on a franchisor's representations than would, say, the franchisee who wisely obtained counsel, then what measures should a franchisor undertake to try to ensure that all its franchisees do, in fact, have lawyers?

Case law establishes that franchisors are not fiduciaries for their franchisees, and so we cannot expect a franchisor's lawyer to double as counsel for an interested nonclient, the franchisee. Still, the common law duty to avoid fraud, the public policy encouraging adherence to good faith bargaining, and legislative and regulatory concerns over an unequal playing field indicate that franchisors must do much more to encourage, without equivocation, franchisees' early retention of competent counsel.

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## INTRODUCTION

The franchisor-franchisee relationship has often been referred to as the "little guy" against the "big guy."[i] Franchising has been defined as:

> [A] system for the selective distribution of goods and/or services under a brand name through outlets by independent businessmen, called 'franchisees.' Although the franchisor supplies the franchisee with know-how and brand identification on a continuing basis, the franchisee enjoys the right to profit and runs the risk of loss. The franchisor controls the distribution of his goods and/or services through a contract which regulates activities of the franchisee, in order to achieve standardization.[ii]

If parties enter into a franchise or licensing agreement, rather than some other business agreement,[iii] this does not necessarily insulate the parties from liability. For example, simply because the parties have formed a franchisee-franchisor relationship does not mean that that the parties did not also form an agent-principal relationship. The latter may be formed, intentionally or unintentionally, in addition to the franchise relationship if the franchise contract "so regulates the activities of the franchisee as to vest the franchisor with control within the definition of agency."[iv] In that case, the agency relationship arises even though the parties expressly deny it."[v]

However, assuming that an agent-principal relationship is not formed, then the franchisor-franchisee relationship is governed largely by case law interpreting the contractual relationship.[vi] Under contract law, courts have generally been reluctant to find that franchise agreements establish a fiduciary duty between the parties.[vii] Nonetheless, a small minority of courts have found, as a matter of law, a fiduciary relationship exists between a franchisor and franchisee.[viii] Defining what duties and responsibilities a franchisor potentially owes to a franchisee is essential to understanding the dynamics of the franchisor-franchisee relationship, especially if the franchisee is "David" facing the "Goliath" franchisor.

A more perplexing question regarding the franchisor's duties and responsibilities to the franchisee is: does the franchisor, or even the franchisor's attorney, owe an unrepresented franchisee an additional duty of care during the negotiation process? This difficult proposition is a focus of this article.

### *A. A Need to Protect Franchisees?*

Consider the history of franchising. After World War II, the American Dream of owning your own business turned the franchise business into a booming success.[ix] Yet, by the 1970s, the need for legislation to regulate franchises became apparent.[x] As the value of and growth in heavily franchised sectors tapered off or even plummeted, franchisees often sought redress from franchisors.[xi] A common theme emerged: that "fly-by-night franchisors" caused "mom-and-pop franchisees" to lose their life savings by investing in worthless franchises.[xii] In the 1970s, the typical franchisee was seen as an inexperienced businessperson who was attempting to achieve the American Dream.[xiii] Some of these business babes-in-the-woods invested their life savings with a crooked franchisor, "only to see everything [their dream and their money] evaporate."[xiv]

As a result of the decline in franchising markets as well as the mounting reputation of franchisors as dishonest businesspersons looking to swindle investors, regulations were implemented to attempt to police the franchising business.[xv] Today, these federal and state regulations continue to govern franchises because franchisors are still seen as high-pressured salespersons. Yet, some commentators have noted that today's franchisee is not the unsophisticated investor of the 1970s.[xvi] Moreover, today's franchisee has access to much more information regarding the franchise and business opportunities than franchisees did forty years ago.[xvii]

Thus, many have argued that there is no longer a need for paternalistic legislation to protect the unwary franchisee.[xviii] These critics say the legislation implemented in the 1970s was a product of its time and was only required to protect inexperienced franchisees from the evils of the fly-by-night franchisors of that era.[xix] They go on to claim that today "[f]ranchise legislation and regulations have achieved their goal,"[xx] and in light of the sophistication of today's franchisee[xxi] and the amount of information he is provided regarding the franchise before signing the agreement, contemporary franchisees are no longer vulnerable investors.[xxii]

While once there was an assumption that the franchisor possessed the upper hand and the bargaining power during negotiations of a franchise agreement, today's sophisticated franchisee may now in fact be the dominant party. Because the franchisee holds so much information regarding franchisors, he has the ability to essentially go "franchise shopping" to see where he can get the best opportunities for the best price.[xxiii] Along these lines, commentators dispute the presumption that franchise agreements are presented to franchisees on a take-it-or-leave-it basis.[xxiv] These commentators go on to contend that "the typical franchise agreement is anything but unconscionable."[xxv] This, they argue, is evidenced by the fact that franchisors are willing to enter franchise agreements spanning up to thirty years, which establishes that the franchisee has a say in the agreement's terms.[xxvi]

Thus, the debate continues as to whether the modern franchisee is as naïve as his counterpart forty years ago and, therefore, still in need of any additional protections the courts have granted franchisees in the past. Many wonder whether today's franchisee is savvier, better informed, and armed with more bargaining power than a franchisee was in the 1970s. If such is the case, should the courts intrude less into franchise agreements? Specifically, should courts stop the practice of "bail[ing] franchisees out of bad business decisions under an assumption that franchisees are collectively naïve or franchisors are collectively overpowering[?]"[xxvii] While this may have been true forty years ago, "[t]he Modern Myth of the Vulnerable Franchisee," is, according to this school of thought, exactly that—a myth.[xxviii]

### *B. How the Article Proceeds*

Part I of this article explores the franchisee's decision about whether to hire an attorney to represent him or her throughout the franchise bargaining process. First, the article deals with why some franchisees never consult an attorney before proceeding to the bargaining process; specifically, it considers this omission's consequences at law and on the parties' franchise agreement. A survey conducted for this article demonstrates that many franchisees who need representation simply go without it or otherwise remain without *effective* counsel. The article considers the psychological reasons behind why franchisees fail to consult an attorney before proceeding to the bargaining process. Many franchisees believe that they do not need to consult an attorney before they decide to invest. Others believe that they are capable of self-representation. Next, the role of a franchisee attorney during the bargaining process is explored. Finally, if a franchisee believes that he has the capability to represent himself, should additional protections be implemented to protect him against his own inexperience? Or should the law accept that those who need representation will seek it out before proceeding beyond their *pro se* capabilities? Whether franchisees are truly unskilled and unaware and whether additional protections need to be employed for the investors' own safety is examined.

Part II examines whether franchisees are truly unsophisticated parties who require additional protections. Some courts have held that when the franchisee has no business experience and reasonably relies on the franchisor's representations, the franchise agreement may be held as void if the franchisor intended to take advantage of the franchisee's inexperience. Conversely, some courts have held that franchisees are sophisticated investors who knowingly enter into a franchisee agreement and, therefore, should be bound by the agreement.

Next, Part III of this article studies the franchisor-franchisee relationship as it is governed under contract law, including the covenant of good faith and fair dealing. The common law has established numerous reasons why a contract may be voided, such as incapacity to bargain,[xxix] preexisting duty,[xxx] duress in the bargaining process,[xxxi] misrepresentation,[xxxii] undue influence,[xxxiii] and unconscionability.[xxxiv] This last justification– unconscionability–is grounded upon a finding that franchise agreements established between represented franchisors and uncounseled franchisees are sometimes grossly unfair, procedurally and substantively, because of the unequal bargaining power between the parties. The question of whether the franchisor obtains a windfall when negotiating with unrepresented franchisees is considered. This part looks at: (1) whether franchise agreements are merely adhesion contracts, which solely benefit the franchisor, and (2) whether an attorney should owe a duty to the unrepresented franchisee to ensure that procedural rights are not unknowingly contracted away through unconscionable contracts or provisions.

In the remaining two parts, Part IV focuses on how the Federal Trade Commission (FTC) and state disclosure laws have handled the issues raised in this Article, Part V proposes two disclosure based solutions to the nonclient franchisee problem. There are, this author submits, strong policy arguments for why better disclosure laws should be enacted.

## I. Franchisees and the Decision Whether to Hire an Attorney

The franchisor-franchisee relationship has often been referred to as a "David and Goliath" relationship in light of the unequal bargaining power between the parties.[xxxv] The courts have generally been concerned about the capability of the franchisor and the franchisor's attorney to overpower a franchisee's ability to bargain effectively.[xxxvi] For purposes of this article, that concern is only relevant when the franchisee is—as seems to be increasingly common—*not* represented by counsel. There are numerous rationales why a franchisee may not seek counsel when negotiating the franchise agreement, including such factors as time, cost, complexity, or that the franchisee simply does not feel it is necessary. Yet, the franchisee's choice not to retain an attorney when bargaining may have extreme implications on the process. For example, the franchisee may not obtain as good of a deal as he could have if he had been represented, or potentially the agreement could be held void if the court finds that the franchisor or his attorney grossly took advantage of the unrepresented franchisee—that is, to the point where there was not an arm's length transaction. The following section discusses the various reasons why the franchisee may decide not to hire an attorney.

### *A. Franchisees Often Fail to Hire an Attorney*

Franchisors often resist negotiating with potential franchisees over the terms of the franchise.[xxxvii] If indeed a would-be franchisee's attempt to negotiate is—or at least is thought to be—futile, a consequence may be reluctance to hire someone to dispense "pointless advice."[xxxviii] Therefore, it is common for a franchisee to enter into a franchise agreement without representation. Numerous sources support this conclusion.[xxxix] An e-mail and telephone survey of franchise counsel (conducted September to November 2008), who represent more than half of all franchised businesses in the United States, revealed that many franchisees do not commonly use counsel at negotiations.[xl] In fact, only 21.1% of franchisees were represented by counsel at closings attended by surveyed franchisor attorneys between 2006 and 2008.[xli] Interestingly, the franchisees most likely to obtain legal representation were those with mid-level investments,[xlii] those negotiating with franchisors with a business life of ten years or more before becoming franchisors,[xliii] and those dealing with franchisors having fewer than 500 units in the franchise system.[xliv] In response to the author's survey of the franchisor attorneys, the following comments were among those offered:

"It is unusual for any of [our] franchisees to actually have attorneys and/or accountants represent them in the purchase process."[xlv]

"The franchisees are very rarely represented by counsel."[xlvi]

"[For] existing franchised businesses, franchisees are underrepresented, and their counsel often ignore the franchise and focus on the assets. I am often amazed at how resolution of the franchise transaction is an afterthought."[xlvii]

Even if the franchisee seeks legal counsel, it may not actually help much. Surveyed franchisor lawyers also stated:

"[On the rare occasion when franchisees hire lawyers,] they are typically represented by a generalist attorney."[xlviii]

"Franchisees who have consulted with counsel generally retain a general practitioner [usually their family attorney] who is not familiar with franchising."[xlix]

"Franchisees go to the family lawyer or [their] friend[s] for counsel. Franchising law is a specialty, and general practitioners usually aren't familiar with the laws and [regulations]."[l]

### *B. Evidence from a Survey of Franchising Counsel: The Uncounseled Franchisee*

The author's survey of franchising lawyers supports what observers of franchising had long concluded: regardless of the unequal bargaining power, lack of knowledge of the franchisor's business, or the process for obtaining a franchise, many franchisees still decide to "go it alone."[li] In other words, despite the many reasons why a franchisee should obtain counsel, including boiling down legalese inherent in contracts or simply advocating for a better deal, franchisees are still reluctant to obtain an attorney, particularly one that is experienced in franchise law. Franchise lawyers who responded to the survey reported that, out of 1,459 franchise closings[lii] they had attended, only 308 closings[liii] included franchisees represented by counsel. Moreover, while the business sophistication of franchisees has generally increased over the past ten years,[liv] 68.2% of surveyed franchisor attorneys believed that the percentage of franchisees represented by lawyers in franchise closings[lv] remained the same (i.e., neither increased nor decreased).[lvi] This decision by franchisees to enter negotiations without counsel is largely based on the "the prevailing public perception that franchise agreements are non-negotiable"[lvii] and the fact that franchisees "believe, or are told, that a lawyer will be costly and will only slow down the process or kill the deal."[lviii]

When franchisees do have legal representation during the negotiation and closing process, some franchisors comment that it is unhelpful.[lix] Although the franchise law sophistication of franchisee attorneys has generally increased,[lx] 70.5% of franchisee lawyers "were not franchise attorneys but general practice attorneys, who tend[ed] to ask for changes that franchisors would never agree to (e.g., deletion of covenants against competition, change in royalties)."[lxi] The ineffectiveness of the legal representation may be further aggravated by the lack of a relationship between the lawyer and the franchisee, with some franchisees having counsel for less than six months before the closing.[lxii] Having unsophisticated and unfamiliar counsel, therefore, may result in a lack of protection for the franchisee. Additionally, survey results reveal that the effectiveness of legal counsel at closings often hinges on the characteristics of the franchisee and franchisor.[lxiii] In fact, only 12% of counsel for those franchisees with investments between $150,000 and $350,000 sought to obtain more favorable terms for their clients.[lxiv] On the other hand, other categories of franchisees fared much better: 74.9% of franchisee lawyers sought more favorable terms for the franchisee when the franchisor had been in business for ten or more years before it started to franchise,[lxv] and 81.2% of franchisee lawyers sought to negotiate more favorable terms for their clients when dealing with franchise networks with under 500 units.[lxvi] Therefore, it is fair to say that not all franchisees are represented equally, even when they have counsel at closings.

Some franchisors remark that a franchisee often is protected by a franchise association.[lxvii] These associations "may be an independent organization recognized as such by the franchisor company or an advisory board, the membership of which is either selected or approved by the franchisor company."[lxviii] Generally, the purpose of these franchise associations is to "negotiate the standard form of franchise agreements on behalf of their members, and those franchise associations generally are represented by expert counsel."[lxix] Consequently, franchisees that are part of a franchise association may not need independent counsel for each individual franchise negotiation, because they have the benefit of the standard form agreement.[lxx]

Yet, others argue that because the franchise applicant frequently is unfamiliar with franchising, many wrongfully believe that the norm is *not* to consult an attorney before investing.[lxxi] Moreover, if the franchisee is told by the franchisor that there is no need to consult an attorney before continuing with the transaction, the franchisee is likely not to seek legal advice before investing.[lxxii] If the franchisee believes that an attorney will only cost her more money and time, and that she can successfully negotiate the agreement herself, she is less likely to obtain counsel.[lxxiii]

Unfortunately for the franchisee, "[f]ranchise agreements are lengthy, complex, and subtle."[lxxiv] An attorney can advise the franchisee in numerous areas,[lxxv] and he can also be a strong advocate. In fact, according to the author's survey, only 27.9% of franchisee attorneys merely advised the franchisee without also engaging in the franchise negotiations.[lxxvi] By not hiring an attorney, the franchisee is either implicitly asserting that she is qualified to perform the requisite duties in all of these areas or that she does not know all of these areas that will need to be considered in contracting for her franchise.[lxxvii]

The franchisee that believes she does not require legal assistance is likely to realize later that she must have an attorney as the agreement becomes increasingly complicated. Further, the franchisee may later recognize that she needs representation in the event that a dispute arises between franchisor and franchisee. Such a dispute calls for either diplomatic skills to settle the matter or for representation in court or in arbitration when the settlement fails. However, by the time the franchisee comes to this realization, a significant amount of her investment may already have been lost.

### *C. The Psychological Basis for the Franchisee's Self Representation*

The findings from the survey of lawyers who have participated in franchise closings run in tandem with basic psychology. While many franchisees no doubt decide not to hire a lawyer before investing in a franchise because they believe it will cost them time or money, there are other psychological reasons why a franchisee may opt to represent himself in a transaction. Interestingly, those franchisees that are the least capable of self-representation are often the ones who insist upon representing themselves.[lxxviii] This Part evaluates the psychological basis for self-representation and whether those franchisees that decide to represent themselves need additional protections to guard them from their own inexperience.

First, some franchisees decide not to hire an attorney because they believe they do not need assistance. David Dunning, a Professor of Psychology at Cornell University, proposes that "[o]n average, people tend to hold overly favorable views of themselves. They overestimate their skill, knowledge, their moral character, and their place on the social ladder."[lxxix] For example, when asked "if their skill level is 'average,' 'above average,' or 'below average,' too many people endorse the above average option, a belief that cannot be objectively possible."[lxxx]

Dunning also proposes that people's overconfidence is at its peak when they are "*sure* of what they are saying."[lxxxi] Yet, even "[w]hen people express 100% certainly in their predictions, they still tend to be wrong roughly one time out of every five, an error rate of 20%."[lxxxii] Thus, the surer the franchisee is that he can negotiate on his own, the more likely it is that he will be mistaken.

Similarly, overconfidence can lead to over-optimism about outcomes in various legal situations. Professor Sean Hannon Williams has reported that an overly rosy view about everything from marriage, employment contracts, and credit card use can lead to an underestimation of potential negative effects and a belief that the law will protect people regardless of their position.[lxxxiii] Furthermore, the overly optimistic person will tend to form a bias in favor of one viewpoint and not seriously consider contrary information.[lxxxiv] In practice, a franchisee may be so optimistic about a new business venture that the franchisee becomes biased in thinking that the franchise agreement is sound and that nothing in the future could go wrong.

Additionally, many inexperienced franchisees who choose to represent themselves believe that they possess the skills to negotiate the contract on their own. Thus, many inexperienced franchisees are unaware they need professional representation during the transaction. In the case of many franchisees, "[n]ot only do they reach erroneous conclusions and make unfortunate choices, but their incompetence robs them of the ability to realize it."[lxxxv] They do not actively decide against seeking help, but passively fail to even consider pursuing legal or other assistance.

A research experiment conducted by Justin Kruger and David Dunning at Cornell University revealed that "people who lack the knowledge or wisdom to perform well are often unaware of this fact."[lxxxvi] This lack of wisdom results in a double edged sword: "the same incompetence that leads them to make wrong choices also deprives them of the savvy necessary to recognize competence, be it their own or anyone else's."[lxxxvii] Thus, these franchisees suffer a double burden.[lxxxviii] First, these franchisees lack the knowledge that would enable them to represent themselves in the transaction. Their lack of knowledge also plagues them by giving them a false sense of competence and blinding them to the fact that they are in no position to represent themselves.[lxxxix] These franchisees who represent themselves not only believe that they are capable of effectively doing so, but they tend to believe that their performance is "above average."[xc]

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*D. The Role of the Counselor*

There are essentially four stages of counseling in the franchising process.[xci] The first stage is the purchase of the franchise.[xcii] It is important for the franchisee to have representation at this stage because "the franchisee needs a professional advisor who is familiar with investments in business but who also has some knowledge of the idiosyncrasies of franchising."[xciii] Legal advice at the time of purchasing is also important; an attorney who commonly engages in franchise negotiations may be in a better position to determine whether it is a quality investment. An attorney can prevent an unwary franchisee from making an unwise business decision.[xciv]

The second stage of counseling is ownership.[xcv] At this point, representation is important because "business-related counseling is often required."[xcvi] An attorney's negotiating skills are essential at this stage in the event of franchisor-franchisee disputes.[xcvii] An attorney can effectively protect the "franchisee's legal rights" or "business interests" in the event of conflicts.[xcviii]

In the third stage, the attorney may be required to take more of a diplomatic stance to mitigate the conflict between franchisor and franchisee. The franchisee's attorney "must be familiar with the business arrangements" and "understand what the bargaining positions of the franchisees may be."[xcix] The goal of the attorney at this point is to keep the franchisor cooperating while still satisfying the demands of his client, the franchisee. The franchisee's attorney may "play a role in negotiating a collective agreement with the franchisor" to ensure that his client's interests are fulfilled.[c]

The last stage begins when disputes arise and "diplomacy has failed . . . ."[ci] Here, the attorney assumes a more traditional role as an advocate for his client, potentially at trial. The attorney should also be proficient in alternative dispute resolution because, alternatively, he may be required to settle the issue in front of an arbitration or dispute resolution panel.[cii]

Thus, there are various roles the attorney is required to assume when representing a franchisee. These roles require someone with knowledge of how the franchising process works. Many franchisees are not sophisticated in their business experiences and, therefore, could easily be taken advantage of by the franchisor, or his attorney, in the negotiating process.[ciii] Nevertheless, many franchisees choose not to retain counsel before investing, regardless of the possible ramifications. The next section explores why many franchisees decide to undertake the transaction without an attorney's advice and assistance.

*E. The Hard Lesson Many Franchisees Later Learn*

Many franchisees learn after the fact that starting a franchise is an extremely complicated process and that there are things they can do to make it easier. According to a Wells Fargo/Gallup Small Business Index poll, many small business owners reported various things they would do differently if they could go through the startup process again.[civ] For example, many reported that they would have had more capital backing, asked more advice from experienced business owners, or obtained a better understanding of financial management rights before getting started.[cv]

Additionally, one in three of those surveyed[cvi] reported that obtaining more legal advice would have been helpful.[cvii] The author's survey revealed that 34.1% of franchisee attorneys have much prior experience in their clients' respective franchise industries, while only 6.8% have none at all.[cviii] Thus, legal advice can be especially beneficial to franchisees who lack business experience.[cix] Yet, it is still important for those who do have business familiarity. While “experience and knowing the competition is extremely helpful in any business,”[cx] the attorney’s role encompasses much more than merely detailing the particular business. It also requires negotiating and advocacy skills, which a lawyer is more likely to possess than a franchisee.

## II. Franchisee: Sophisticated Businessperson or Inexperienced Investor?

As established above, some courts may be more sympathetic to franchisees who are inexperienced and negotiating with more sophisticated franchisors represented by counsel.[cxi] However, a franchisee will not be able to rely on judicially favorable predispositions if that franchisee is deemed “a sophisticated investor.”[cxii] The next two sections discuss the distinctions between these two types of franchisees and the additional protections courts are willing or unwilling to grant them.

### *A. The Sophisticated Businessperson*

In *North American Financial Group, Ltd. v. S.M.R. Enterprises, Inc.*,[cxiii] plaintiff North American was “in the business of raising venture capital and investing or loaning venture capital”[cxiv] and defendant Fantastic[cxv] franchised hair care centers to franchisees that operated the business under the mark, "Fantastic Sam's."[cxvi] Among other claims that North American made,[cxvii] North American contended that Fantastic committed common law fraud.[cxviii] The court noted that under Illinois law, common law fraud is defined as "anything calculated to deceive, whether positive acts, omissions or concealments, where a legal or equitable duty is breached causing damages to plaintiff."[cxix]

Thus, for North American to prevail on a claim of common law fraud it must establish:

> (1) that the defendants made a false representation of a material past or existing fact; (2) which was known to be false when made; (3) the misrepresentation must have been made intentionally to induce the plaintiff to act; (4) the plaintiff must rely on the misrepresentation and have the right to rely; and (5) the plaintiff must be injured as a result of such reliance.[cxx]

In considering these elements, the *North American* Court noted that the "background, special expertise or education" of the claimant may be examined to determine whether reliance on the alleged misrepresentation was reasonable.[cxxi]

Here, the court held that North American had no claim in law against Fantastic for common law fraud.[cxxii] First, the court noted that the alleged misrepresentations[cxxiii] cited by North American were clearly discoverable by the franchisee before it entered into a franchise agreement with Fantastic.[cxxiv] Further, the court found that it is "certainly reasonable to assume that an entity planning to commit as much as one million dollars in an unknown enterprise would check out the president of that enterprise," and that North American's failing to do so was unreasonable.[cxxv] It appears that the court deemed North American a sophisticated investor, most likely because it was in the business of raising and investing or loaning venture capital.

Similarly, in *Payne v. McDonald's Corp.,*[cxxvi] the plaintiff franchisee claimed, among other things,[cxxvii] that it reasonably relied on statements made by the franchisor to its detriment.[cxxviii] The franchisee asserted that, in light of the fact that the franchisor possessed "'exclusive or superior knowledge and should have been aware that [the] other party would rely heavily on its assertions,'" it should be entitled to relief for reliance on such statements.[cxxix] The court disagreed.[cxxx]

The *Payne* court cited the decision of the United States Court of Appeals for the Fourth Circuit in *Miller v. Premier Corp.,*[cxxxi] holding "that the questions of 'superior knowledge' and of 'reasonable reliance' are intertwined."[cxxxii] In applying this principle, the court determined that the issue was "[w]hether reliance on future projections of profit [wa]s reasonable" and that this depended "both upon the manner in which the projections [we]re represented and what in fact was known by the person claiming inferior knowledge."[cxxxiii]

In applying these principles, the *Payne* court determined that the franchisee was not in a position to claim inferior knowledge. In fact, the court noted that the franchisee possessed "extensive knowledge concerning the cost of constructing franchised McDonald's restaurants and the profits which might be expected to accrue from the operations of such restaurants, as well as an understanding of the impact which new restaurants in the area might have on his [other] facility."[cxxxiv] Thus, the court held that it was not reasonable for the franchisee to rely on the future predictions of the franchisor when the franchisee was such a sophisticated investor.[cxxxv]

These cases suggest that the issue of whether a franchisee may rely on statements made by the franchisor depends on the sophistication of the franchisee. If the franchisee has previously negotiated franchise agreements or knows the intricacies of the business, courts may be less likely to find that his reliance on a franchisor's statement is reasonable. However, this situation may be different if the franchisee is deemed inexperienced.

### *B. The Inexperienced Investor*

Although courts may be unwilling to give more protections to sophisticated franchisees, some courts have granted these additional protections when a franchisee has no prior business experience and relies on statements made by an experienced franchisor.[cxxxvi] In the latter situation, the inexperienced franchisee's reliance on statements made by an experienced franchisor may be deemed reasonable, thus making the franchisor liable for any breach of those statements.[cxxxvii] Facts are crucial, so thorough examination of a factually rich, but—on legal grounds, at least—typical case for franchising fraud, *Fisher v. Mr. Harold's Hair Lab, Inc.*,[cxxxviii] illustrates how the inexperienced franchisee may be shielded from the machinations of an unscrupulous franchisor.

In *Fisher*,[cxxxix] the Supreme Court of Kansas found that the plaintiff franchisee did reasonably rely on the statements made by the defendant franchisor, inducing him to purchase the franchise to his detriment.[cxl] Here, the franchisors, Harold and Carolyn Wilborn, were sole stockholders of the corporation, "Mr. Harold's East—Your Toupee Establishment" (Mr. Harold's), which sold men's hairpieces, toupees, and other services and supplies connected therein.[cxli] The franchisee, Charles F. Fisher, was "a senior test pilot with Boeing Company," whose "only experience in business management had been executive training furnished by Boeing."[cxlii] After discussions with the Wilborns, Fisher decided to purchase a Mr. Harold's franchise as well as the right to sell franchises to others.[cxliii] However, Fisher soon encountered difficulties selling franchises, and he "discontinued his efforts to sell franchises."[cxliv]

Subsequently, Fisher sued Mr. Harold's, Inc., and each Wilborn individually, claiming "eighteen specific fraudulent representations allegedly made by the Wilborns and relied on by Fisher in entering into the agreements."[cxlv] The Wilborns argued that the alleged representations constituted opinion or puffing, and—besides—Fisher did not rely upon them.[cxlvi] The court disagreed.

While the general rule is that for a "fraudulent concealment to be actionable [it must] be material to the transaction," and a "matter is material if it is one to which a reasonable man would attach importance in determining his choice of action in the transaction in question," there are exceptions to this rule.[cxlvii] A misrepresentation of a material fact need not be made if "'a party to a bargain has made misrepresentations for the purpose of inducing action by the other, and the other party has acted, relying upon the misrepresentations.'"[cxlviii]

Ostensibly, this exception is intended to protect less sophisticated parties who are bargaining with more sophisticated businesspersons.[cxlix] According to the *Fisher* court, if the parties have equal bargaining power, then the franchisee "'has no right to rely, since he is assumed to be equally able to form his own opinion.'"[cl] However, "where the terms of dealing are not equal, and the representor has superior knowledge of the subject, a statement which would otherwise be one of opinion will be regarded as one of fact."[cli] Applying these principles, the Kansas Supreme Court found that while the statements made by the Wilborns to Fisher "regarding Mr.

Harold's fame might properly be regarded as puffing," the statements they made about having "thirty years experience with men's hair pieces and did not manufacture their own hair pieces" were not.[clii] Neither were the representations the Wilborns made regarding the "number of stores in operation" regarded as puffing.[cliii]

The Wilborns also argued that Fisher's claim was not actionable because "where goods are open to inspection of the buyer, he is presumed to be as competent a judge of their value as the seller."[cliv] Yet, the court also noted an exception to this general rule. The court indicated that the general rule cited by the Wilborns "'applies *only* where the parties stand on an equal footing and have equal means of knowledge, with no relation of trust or confidence existing between them.'"[clv] Moreover, in the instance that "'one of the parties to a bargain represents himself as having special knowledge or his position is such that business expectations suggest that he is better informed than members of the general public or if one of the parties is obviously in a disadvantageous bargaining position,'" the weaker party would likely be protected by allowing him to rely on the statements made by the representor, which under normal circumstances would not be actionable.[clvi]

Again, the court found that Fisher was an unsophisticated investor because he had no background in business, certainly not in hairpieces, but was instead affiliated with the aerospace industry.[clvii] While Fisher did examine some of the hairpieces during the negotiations, the court determined that "he lacked the knowledge to assess the quality of the merchandise he saw."[clviii] The court found that the law would not "'deprive a defrauded party of relief because he had opportunity to investigate, when his lack of knowledge was such that the investigation would disclose nothing to him.'"[clix] Thus, while Fisher did inspect some of the merchandise, he was not truly sure what he was inspecting, and therefore, he relied upon the Wilborns' statements to his detriment.[clx]

Lastly, the Wilborns argued that their statements were not actionable because they were mere opinions or predictions relating to future profit in the business.[clxi] The general rule regarding opinions or predictions is that these do not constitute fraudulent misrepresentations, which requires that the misrepresentation "relate to some material past or existing fact."[clxii] Nonetheless, the court noted that there was an exception applicable to this general rule, too, which establishes:

> [f]alse representations of future profits of a business may be so gross as to constitute fraud, especially where the representor is experienced and has superior knowledge of the business and the representee is inexperienced and ignorant of the facts and prospects respecting such business. Thus, in some cases wherein the defendant was held liable for false predictions concerning future profits or income, considerable emphasis was placed on the fact that the defendant had or professed to have superior knowledge, whereas the plaintiff did not have such knowledge and relied on the defendant's

> statements. In this connection it is held that a positive statement concerning future rents, profits, or income implies that the speaker has knowledge of facts which justify the prediction. . . .[clxiii]

Further, the court found that if the weaker, or less sophisticated party, does rely on the opinions or predictions given by the stronger, or sophisticated party, then "courts will ordinarily give [the opinions or prediction] the legal effect of a statement of existing fact," which means that these statements could then be actionable in fraud as a past or existing material fact.[clxiv] Thus, statements that are deemed opinions or predictions, which generally are not actionable, may become actionable,[clxv] if an unsophisticated party relied upon the statements of a sophisticated party.[clxvi]

The Kansas Supreme Court held that the Wilborns' statements were actionable in fraud. Fisher relied upon what normally would be considered future predictions, regarding the annual return of the business.[clxvii] The fact that Fisher was not sophisticated in the hair business, and that the Wilborns held themselves out as possessing superior knowledge of the business, transformed the Wilborns' assurance that Fisher would have an annual return of $25,000 from prediction to existing material fact; and, because this fraudulent statement induced Fisher to enter the transaction, it was actionable.[clxviii]

As set forth above, the reasonableness of a franchisee's reliance on the representations of the franchisor often depends on the franchisee's sophistication and experience. In determining when prospective franchisees are sophisticated and, thus, less likely to be misled by the franchisor, courts consider a number of factors, including: (1) the general business experience of the franchisee;[clxix] (2) the franchisee's knowledge and experience in the same line of business as the franchise;[clxx] (3) the franchisee's prior dealings with a particular franchise;[clxxi] and (4) the franchisee's ability to protect himself from false or misleading statements.[clxxii] If the franchisee has previously negotiated franchise agreements or has experience in the franchise's industry, a court is likely to find his reliance on the franchisor unreasonable. However, if the franchisee has little business experience, particularly in the area of the franchise, a court will probably determine that he is an inexperienced investor and worthy of judicial protection.[clxxiii] As franchisees become more sophisticated[clxxiv] and continue to enter negotiations without legal representation,[clxxv] this analysis will be critical in determining if there is a need to protect individual franchisees in their dealings with franchisors.

## III. WAYS THAT CONTRACT LAW CAN PROTECT FRANCHISEES

### *A. Contract Law's Covenant of Good Faith and Fair Dealing*

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[clxxvi] Good faith is broadly defined, but generally it requires the parties to act "honestly in fact in the conduct or transaction concerned."[clxxvii] Under the Uniform Franchise and Business Opportunities Act of 1987, "[a] franchise or business opportunity imposes on the parties a duty of good faith in its performance and enforcement,"[clxxviii] and good faith is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[clxxix]

The duty of good faith and fair dealing is imposed upon the parties from the formation of the franchise agreement[clxxx] and is intended "to prevent arbitrary, malicious, or abusive conduct, or conduct that deprives the other contracting party of the benefit of the bargain, and to preserve the justifiable expectation of the parties to a franchise or business opportunity relationship."[clxxxi] However, the imposition of this duty is not the equivalent of a fiduciary duty.[clxxxii] Many courts have held that there is no fiduciary duty established by the creation of a franchise agreement,[clxxxiii] while only a few courts, whose reasoning has since been repudiated, have found that a fiduciary relationship is established between the franchisor and franchisee in certain circumstances.[clxxxiv] Comment 1 of Section 201 of the Uniform Franchise and Business Opportunities Act explains the more limited nature of the duty of good faith and fair dealing:

> The duty is imposed to modify and limit the exercise of discretion or power reserved in a contract, rather than add to

> or override substantive provisions of a contract, especially in longer term relational contracts which must, by their nature, reserve significant discretionary authority to provide marketing flexibility over the term of the arrangement.[clxxxv]

While establishing a fiduciary relationship between the franchisor's lawyer and the franchisee can be a difficult burden to overcome, it can be more difficult to establish that a franchisor owes a fiduciary duty to a franchisee.[clxxxvi]

The fact that the franchisor potentially owes the franchisee a duty of fair dealing does not necessarily create a fiduciary duty between the franchisor's attorney and the franchisee. The relationship of the franchisor and its lawyer is one based on agency law, where essentially the lawyer is the agent of the principal, the franchisor.[clxxxvii] Accordingly, the lawyer owes a fiduciary duty to her client.[clxxxviii] However, this agency relationship between the lawyer and franchisor does not necessarily create a fiduciary relationship between the lawyer and the franchisee. Stated differently, even if a fiduciary relationship is established between franchisee and franchisor and between franchisor and attorney, the presence of these relationships does not automatically create a fiduciary relationship between the franchisee and the franchisor's lawyer.

In the event that a fiduciary duty is created between the franchisor and the franchisee and the franchisor subsequently violates its duty to the franchisee, liability is not automatically imposed on the franchisor's agent (i.e., its lawyer).[clxxxix] Under agency law, the agent is not responsible for the negligent acts of its principal.[cxc] If the agent were to incur damages as a result of the principal's negligence, then the agent would be entitled to indemnification from the principal for the damages the agent incurred.[cxci]

Unfortunately for the principal-franchisor, if the agent-lawyer violated his duty to the franchisee, assuming the establishment of a duty through the third-party beneficiary principle or otherwise under the Restatement of Laws Governing Lawyers,[cxcii] then the franchisor could also be held liable in addition to the lawyer.[cxciii] However, if the lawyer owed the franchisee no duty of care, then the franchisor alone would bear the negligence claim.[cxciv] Yet, the franchisor may then have a claim against the lawyer for legal malpractice if the lawyer breached his duties owed to the franchisor.[cxcv] Nevertheless, even if the lawyer is in breach of his duties to the franchisor, this is not an independent basis for the lawyer's tort liability to the franchisee.[cxcvi]

Therefore, for purposes of this discussion, although the franchisor and franchisee owe a fiduciary duty to each other, the franchisor's lawyer does not automatically assume a fiduciary relationship with the franchisee as well. Rather, the lawyer only owes the nonclient a fiduciary duty in some limited circumstances, such as if the lawyer were to explicitly create an attorney-client relationship with the franchisee or, more realistically, if the franchisee is a third-party beneficiary for the attorney's legal advice. Only in these limited circumstances is the franchisor's lawyer liable to the franchisee in a legal malpractice claim. If franchisees were generally able to hold franchisors' attorneys liable, this would undermine the most fundamental purposes underlying the attorney-client relationship: ensuring that lawyers are zealous advocates for their clients, and enabling lawyers to keep confidential the communications between themselves and their clients. If lawyers owed a duty of care to their opposing party (e.g., the franchisee), this likely would prevent them from effectively representing their actual clients, and it could force lawyers to disclose confidential information in order to defend themselves in negligence claims brought by these nonclients.

In the event that a franchisor, or its lawyer, takes advantage of an unrepresented franchisee, the franchisor would likely do so during the contract negotiation process.[cxcvii] Neither Section 201 of the Uniform Franchise and Business Opportunities Act nor Section 205 of the Restatement (Second) of Contracts specifies that the franchisor owes the franchisee a duty of good faith and fair dealing during the process of forming the contract.[cxcviii] Nonetheless, the comments accompanying this section note "[b]ad faith in negotiation, although not within the scope of this

Section, may be subject to sanctions."[cxcix] Violations of good faith and fair dealing during the negotiation of a contract could result from the presence of such factors as incapacity to bargain,[cc] duress,[cci] misrepresentation,[ccii] undue influence,[cciii] or unconscionability during the negotiation process.[cciv]

In *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies*,[ccv] the plaintiff franchisor sued the franchisee for trademark infringement.[ccvi] Defendant franchisee counterclaimed asserting that the franchisor had terminated the franchise in violation of the franchise agreement.[ccvii] In reaching its decision, the court recognized that parties to a contract owe each other a duty of good faith and fair dealing.[ccviii] Illinois case law precedent defined this duty as "a determination of commercial reasonability," which ultimately gave judges "carte blanche to declare contractual provisions negotiated by competent adults unreasonable and to refuse to enforce them."[ccix] The *Cookie Company* court refused to apply this principle. Rather, the court held, "[t]here is no blanket duty of good faith; nor is reasonableness the test of good faith."[ccx]

While parties to a contract have a duty of good faith, that duty "does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper."[ccxi] The court found that if parties to a contract were their brother's keeper, then this would ultimately impose a fiduciary duty upon the parties, yet "parties to a contract are not each other's fiduciaries—even if the contract is a franchise."[ccxii] The court ultimately defined the good faith duty imposed upon the parties of the contract not as one that is "reasonable," but rather one that does not take "advantage of gaps in a contract in order to exploit the vulnerabilities that arise when contractual performance is sequential rather than simultaneous."[ccxiii] Only a violation of the latter would be "bad faith" and thus hold the contract, or a provision within, unenforceable.[ccxiv]

Here, the court held that had the franchisor attempted to take advantage of the vulnerability of an unsophisticated franchisee[ccxv] then this would have been considered unconscionable. However, the court found that such was not the case and ruled that the franchise agreement was not unconscionable.[ccxvi] The court further noted that, while contract law prohibits parties to act unconscionably, the law "does not provide remedies for spiteful conduct or refuse enforcement of contractual provisions invoked out of personal nastiness."[ccxvii] This principle does not replace the duty of good faith, which protects parties to a contract against opportunistic behavior by the other party.[ccxviii]

The court established a connection between the terms "commercial reasonableness" and "unconscionability."[ccxix] While the former is intended to "prevent overreaching in the contract formation stage," the latter infers "that no one in his right mind would have agreed to" the terms of the contract as presented.[ccxx] The court noted that, while considering whether a contract is commercially reasonable is valuable in determining whether a contract is unconscionable, to find that a contract is commercially unreasonable does not conclude that it is also unconscionable.[ccxxi]

Clearly, sustaining an action for a breach of the covenant of good faith and fair dealing is not an easy task. For example, in *Barnes v. Burger King Corp*.,[ccxxii] the franchisee, Zuri Barnes signed a franchise agreement with the franchisor, Burger King Corp. (BKC), to operate a Burger King franchised restaurant.[ccxxiii] However, after Barnes allegedly was compelled to close his restaurant,[ccxxiv] he brought an action against BKC, claiming, among other things,[ccxxv] a breach of the implied covenant of good faith and fair dealing.[ccxxvi] Barnes argued that BKC breached the covenant of good faith and fair dealing by allowing another Burger King franchise to open in close proximity to his franchise.[ccxxvii] The court disagreed.

The *Barnes* court acknowledged "that Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract."[ccxxviii] However, the court also noted that there are limits to the application of the covenant, "and there are many circumstances under which courts will not allow a party to pursue a cause of action for breach of the implied covenant."[ccxxix] The *Barnes* court identified two such circumstances to include "where the application of the covenant would contravene the express terms of the agreement [and] where there is no accompanying action for breach of an express term of the agreement."[ccxxx]

As for the first factor, the court held that the "implied covenant of good faith should not be invoked to override the express terms of the agreement between the parties."[ccxxxi] Here, the court found that application of the covenant would supersede the express terms to which the parties had agreed because the franchise contract between Barnes and BKC expressly permitted BKC to open additional franchise restaurants in the vicinity of Barnes' franchise.[ccxxxii] Thus, the court would "not enforce Barnes' claim for breach of the implied covenant of good faith based on [BKC's] opening of an additional franchise in derogation of those express terms."[ccxxxiii]

As for the second factor, the court cited precedential case law that established "that a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached."[ccxxxiv] Thus, Barnes would only be permitted to maintain a claim for breach of the implied covenant of good faith and fair dealing if he could sustain a claim for breach of at least one of the expressed terms in the franchise agreement.[ccxxxv] The court found that "the unambiguous terms of the Franchise Agreement adequately establish[ed] that [BKC was permitted to] open additional franchises in the vicinity of Barnes' franchise."[ccxxxvi]

Accordingly, Barnes' claim for breach of the implied covenant of good faith and fair dealing failed as a matter of law.

As *Barnes* demonstrates, the two-pronged test to sustain an action for breach of the implied covenant of good faith and fair dealing is a high standard. Potentially, the easiest way for a franchisee to meet the burden is to claim that the franchise agreement is an adhesion contract or is essentially unconscionable. Thus, if the franchisee can sustain this claim, then the franchisee would be able to bootstrap a claim for a breach of the implied covenant of good faith and fair dealing. Moreover, courts are more likely to find that a franchise agreement is an adhesion contract or is unconscionable than to sustain a breach of the covenant.

### *B. Unconscionable Franchise Agreements and Adhesion Contracts*

Franchise agreements present inherent dangers to franchisees,[ccxxxvii] namely that franchisors can offer to unsophisticated franchisees an uneven agreement.[ccxxxviii] However, an uneven agreement does not go without repercussions. Courts will examine the fairness of the agreement at the time it was negotiated rather than solely focusing on the relationship between the parties after the agreement has been signed.[ccxxxix] In addition, after the agreement has been signed, the franchisor will then owe an implied duty of good faith and fair dealing.[ccxl] Furthermore, if the franchisor attempts to uphold a clause of the agreement and the franchisee disapproves, then there could be a court battle to determine whether the agreement is unconscionable.[ccxli]

Frequently, courts will presume franchise agreements to be adhesion contracts because “parties are in unequal bargaining positions, and the provisions are highly favorable to the franchisor while offering the franchisees little protection.”[ccxlii] For example, in *American Nursing Care of Toledo, Inc. v. Leisure*, the court was presented with the issue whether a franchise agreement between a franchisor and a franchisee was terminated and replaced by an oral agreement between the parties as the franchisee contended.[ccxliii] In reaching its decision, the court noted that it “will exercise great caution in construing and applying the provisions of the license agreements in question” because of the disproportionate bargaining power of the parties inherent to franchise agreements.[ccxliv]

However, some courts are more reluctant to find that franchisee agreements are inherently adhesion contracts. Unlike other consumer contracts where both parties are not usually sophisticated businesspersons, franchise negotiations are more likely to bring, at least, marginally sophisticated businesspersons to the bargaining table. Thus, while courts may be willing to find that regular consumer contracts are unconscionable or adhesion contracts because of the disparate bargaining power between the parties, courts may be less inclined to find such unequal bargaining power between franchisors and franchisees. This result may be because franchisees receive federally mandated disclosures from the franchisor or other protections provided through state franchising laws.[ccxlv] However, the receipt of disclosures and the existence of state laws may somewhat supplement, but certainly does not replace, the effect and benefit of a franchisee having an attorney at the negotiating table.

Yet, courts still seem reluctant to provide franchisees with more protection. For example, similar to *Original Great American Chocolate Chip Cookie Co.*, where the court concluded that the franchisees were sophisticated businesspersons, the Seventh Circuit found a franchise agreement's arbitration clause to be enforceable, as claimed by the franchisor, because it did not create an unfair surprise to the franchisee.[ccxlvi] In fact, in *We Care Hair Development, Inc. v. Engen*,[ccxlvii] the court cited *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies* and found that the franchisees were "not vulnerable consumers or helpless workers," but rather "business people who bought a franchise" and were not "forced to swallow unpalatable terms."[ccxlviii]

Further, in *Choice Hotels International, Inc. v. Chewl's Hospitality, Inc.*,[ccxlix] the United States Court of Appeals for the Fourth Circuit defined a contract of adhesion as, "one that is drafted unilaterally by the dominant party and then presented on a take-it-or-leave it basis to the weaker party who has no real opportunity to bargain about its terms."[ccl] Here, the court made an explicit distinction between consumer contracts and commercial contracts and found that franchise agreements fall into this latter category.[ccli] The court cited the trial court's findings that the defendant franchisee was "not an unsophisticated consumer," but rather "an experienced hotel franchise owner, having purchased at least one other franchise in the past," and held that the franchisee could not demonstrate that these findings were clearly erroneous.[cclii] Thus, the court here held, as the *We Care Hair* court did, that the arbitration clause included within the franchise agreement was not unconscionable.[ccliii]

Nonetheless, courts may be more willing to find that a franchise agreement is an adhesion contract when the franchisor is represented by counsel while the franchisee is not. In such an instance, the franchisor's attorney drafts the franchise agreement, and it will commonly favor his client over the franchisee. However, unbeknownst to many attorneys, "[l]awyers writing standard form contracts for clients to use in recording transactions with parties not represented by counsel have a professional duty to restrain their zeal."[ccliv] Rather, what many attorneys do while drafting contracts on behalf of their clients is limit their client's liability and the adverse parties' procedural rights, such as:

> (1) a convenient forum, (2) trial by jury, (3) a public hearing, (4) an impartial judge, (5) one who is accountable to a higher court for his or her adherence to the governing law, (6) exemplary or treble damages if provided by controlling law, (7) provisional remedies such as preliminary injunctions or attachments, (8) the traditional American rule with respect to the taxation of attorneys' fees, (9) the right to conduct a private investigation of possible wrongdoing and gain access to the information of an adversary through the use of modern discovery rules, and (10) the right to participate in a class action.[cclv]

While all of these procedural rights can be waived by contracting parties, the concern of some is that franchisees are waiving these rights without truly understanding what such a waiver means. Franchisees may give up rights "before they are engaged in a dispute [and thus before they could] reasonably be expected to contemplate future disagreement."[cclvi] Without the franchisee being represented by counsel during negotiations, the franchisee is even less likely to consider the issue of future disagreements, and even more likely to "have little or no bargaining power with the firm that is imposing its business form on [him] as a record of unnegotiated transaction."[cclvii]

Further, negotiations between a franchisor and franchisee place the franchisee in a delicate situation. Much like a person seeking employment, a franchisee could not easily ask what rights he would have if sued by the franchisor.[cclviii] Rather, if a prospective employee or franchisee were to pose such a question it would not likely be received positively.[cclix]

Prospective franchisees and employees do not ask such questions because they lack bargaining power and fear that they will not become employees or franchisees if they step on the employer's or franchisor's toes.[cclx] If "small franchisees had the power to secure fair terms, there would be no need for legislation to protect them."[cclxi]

This argument proposed by some scholars would likely not be persuasive in those courts that routinely find that franchisees are sophisticated businesspersons who are not forced to swallow the terms of a franchise agreement on a take-it-or-leave-it basis. Rather, these courts are more likely to find that franchise agreements are fair and enforceable, "since they are made between business people who are familiar with bargaining and the process of allocating risk."[cclxii] This principle would likely even be true where the franchisee is not represented by counsel during the negotiation process with the franchisor and his counsel. Because courts rarely find commercial contracts unconscionable, an unrepresented franchisee who agrees to an adhesion contract is unlikely to receive protection from these courts.[cclxiii]

Thus, jurisdictions vary widely in finding that a franchise agreement is unconscionable. Some jurisdictions see franchise agreements as inherent adhesion contracts, finding that franchisees do not have the same bargaining powers as franchisors. Yet, other jurisdictions will often find that franchisees are sophisticated parties who are capable of bargaining for terms of a franchise agreement with franchisors, even if the franchisee was unrepresented and the franchisor was represented during contract negotiations. These latter courts have also found that the terms of franchise agreements are generally not drafted on a take-it-or-leave it basis. Accordingly, they do not see that franchisees are being forced to accept unconscionable terms in order to acquire the franchise. Whether a franchise agreement is viewed as an adhesion contract or a contract negotiated by parties of equal bargaining powers will vary largely by jurisdiction and applicable state case law. Even so, how sophisticated must a franchisee be before courts are likely to find equal bargaining power between him and the franchisor?

## IV. HOW REQUIRED DISCLOSURES CAN PROTECT FRANCHISEES

In 2007, the Federal Trade Commission (FTC) announced revisions to the Franchise Rules ("Amended Rules").[cclxiv] A year later, the FTC made compliance with the Amended Rules mandatory.[cclxv] Of particular interest are the Amended Rules on disclosures. The previous rule of disclosure required claims about a franchise's financial performance to include costs, expenses, profits, earnings, and other methods of calculating the financial soundness of a company.[cclxvi] However, the Amended Rule does away with the requirement to reveal costs and expenses in making claims about financial performance.[cclxvii] Furthermore, the Amended Rule extends the time of the disclosure deadline.[cclxviii] The franchisor must submit disclosure documents either no less than two weeks before the payment or execution of the document, or at the reasonable request of the franchisee.[cclxix] Additionally, the Amended Rule no longer makes it a requirement to submit the final franchise agreement five days before signing.[cclxx] However, if the franchisor makes material changes to the document, then the final agreement must be submitted to the franchisee seven days before signing.[cclxxi] Furthermore, the Amended Rule changes the method of submitting the disclosure to include email or website, followed by any instructions needed to guide the franchisee in viewing the document.[cclxxii] The disclosure documents must be stored for review as well.[cclxxiii]

The Amended Rule also includes substantial changes to the disclosure document itself. The cover page of the disclosure document must "reference sources of additional background information that prospective franchisees can use in investigating the franchise"; "include the e-mail and website for the franchisor"; "contain various warnings about document holding periods and other matters"; and disclose the investment needed to begin franchise operations, as well as the amount that must be paid to the franchisor.[cclxxiv] Within the document, the Amended Rule requires franchisors to reveal the name of their parent company and the principal business address.[cclxxv] Similarly, the franchisor is also required to reveal the names of a "broad range of people" that have "management responsibility" over the company, any actions involving affiliates, any action material when considering the number of franchises, and any settlements or litigation finding the company liable after the Amended Rule was enacted.[cclxxvi] The franchisor additionally has the responsibility of updating the franchisee on any actions involving the franchisor as a plaintiff in the last fiscal year. [cclxxvii] The Amended Rule requires the franchisor to inform the franchisee about the ways in which the franchisor will provide assistance in the process of maintaining the franchise, "including advertising assistance, training, operations manuals, and required computer systems."[cclxxviii] However, the Amended rule does not require the franchisor to submit financial performance information.[cclxxix] The franchisor, on the other hand, must inform the franchisee in the preamble of the disclosure document that the franchisor chose not to disclose the financial performance information.[cclxxx] The Amended Rule updates the use of charts to summarize the number of outlets and transfers, as well as other information regarding the franchise system.[cclxxxi] The franchisor also has the responsibility of informing the prospective franchisee of the existence of confidentiality agreements with current franchisees.[cclxxxii] Franchise associations "created, sponsored, or endorsed" by the franchisor must also be revealed to the franchisee.[cclxxxiii] In regards to outlets, franchisors must reveal:

> information for each previous owner of the outlet in the last five years, the ownership period for each previous owner required to be disclosed, the reason for each previous ownership change during the last five years, and the periods when the franchisor retained control of the outlet in the last five years.[cclxxxiv]

Additionally, the franchisor must include more information into the audited financial statements, including the financial statements of the parent company in limited circumstances.[cclxxxv] Meanwhile, the Amended Rule gives the franchisor more time for the audited financial statements to be updated.[cclxxxvi] After the document has been submitted, the Amended Rule requires the franchisee to acknowledge receipt of the disclosure document.[cclxxxvii] Lastly, the Amended Rule prohibits waivers of franchisor liability for misrepresentations in the submitted disclosure document.[cclxxxviii]

While the Amended Rules include new requirements for disclosure, the Amended Rules do not affect a state's right to include additional requirements for disclosure.[cclxxxix] For example, Maryland, New York, and Rhode Island kept an old FTC requirement: the deadline for disclosure is at the date of the first meeting.[ccxc] Many states also have a franchise regulatory agency, which a franchisor must register with and obtain approval from before marketing a franchise business.[ccxci] Furthermore, most states have enacted consumer fraud or deceptive trade practices acts, which allow for a private cause of action for violations of the FTC franchise rules.[ccxcii]

Nevertheless, some commentators still argue that more protection for franchisees may be needed. For example, some argue that franchisees should be given more disclosure (or, put more bluntly, "straight talk") about the realities of what could happen when the franchisor-franchisee relationship terminates.[ccxciii] In contrast, others argue that state consumer protection legislation should expressly include the purchase of a franchise.[ccxciv] Additionally, these commentators propose that a private cause of action for a franchisee against a franchisor for misrepresentations or failing to comply with disclosure requirements should be adopted at the state or federal level.[ccxcv] This private cause of action should include recovery of attorney's fees—in addition to damages—to lessen the economic burden of litigation on franchisees.[ccxcvi]

Overall, the goal of the FTC's Amended Rule and other state law requirements for disclosure statements is to address the issue of unsophisticated franchisees. The myriad of disclosures serves to inform the franchisee of the franchise situation he is about to sign in to.[ccxcvii] As the existence of rules to govern parties in the negotiations of franchises suggests, unrepresented franchisees are a problem. However, franchisees are not only a problem to themselves, but they are problems for the system itself, as seen from the fact that even franchisors recognize the need for regulation.[ccxcviii] By requiring franchisors to submit more information about the franchise, thereby making research into the franchise that much easier for the franchisee,[ccxcix] the FTC and state legislators have attempted to protect franchisees from the pitfalls of signing a franchise agreement and franchisors from the economic impact of an unsuccessful franchise.

Public policies supporting franchise disclosure rules ultimately aim to protect the interests of both parties to the contract, but particularly that of the franchisee. However, the policies are not specific to franchise law. Consumer, real estate, and marriage laws all favor or mandate disclosures, perhaps going so far as to require a party to seek counsel.[ccc] As mentioned earlier, many states have consumer fraud and deceptive trade practice laws that require those who are selling a service or a product to disclose pertinent information to the consumer and not to misrepresent the information.

State consumer protection laws may have implications in other areas of law as well. For example, one type of consumer fraud law can be seen in the Federal-Truth-in-Lending Act, which tries to shield consumers from misrepresentations by lenders and require certain information to be disclosed to consumers before taking out a credit card or receiving a loan.[ccci] Furthermore, various states, such as Illinois, have consumer and commercial protection acts that require disclosure of information regarding the buying or selling of real estate and rentals.[cccii] Perhaps the strictest of all the protection laws is one that does not concern consumers: marital law. States, such as New Jersey[ccciii] and California,[ccciv] require that a party not only have pertinent information disclosed to him or her, but also that he or she be represented by independent legal counsel or waive the right to independent legal counsel before signing various types of marital agreements. If a party is not represented by independent legal counsel, then there may be a presumption that the contract was not signed "voluntarily" and is therefore considered unconscionable or void.[cccv] This same result can be found in the fiduciary context where a transaction between a trustee and a beneficiary may be presumed voidable if the beneficiary does not obtain independent legal counsel.[cccvi] Under these circumstances, merely urging the beneficiary to obtain independent legal counsel will not be sufficient to avoid the presumption.[cccvii]

Whether the Amended Rules have led to their intended effect remains to be seen. In the survey of franchise counsel, 68.2% of respondents claimed that the percentage of franchisees represented by lawyers at closing had stayed about the same in the past ten years.[cccviii] Meanwhile, only 31.8% of respondents claimed the percentage has increased.[cccix] The change in the number of franchisees seeking knowledgeable counsel may not be enough to meet the needs of the public policy underlying disclosure laws. If the current disclosure laws are not enough to change the course of uncounseled franchisees, then changes to the amount, substance, and enforcement of disclosure laws may need to be considered.

## V. SOLUTIONS TO THE NONCLIENT FRANCHISE PROBLEM

### *A. Why Lawyers Should Not be Liable to Nonclient Franchisees*

One solution to the issue of nonclient franchisees is to place liability on the franchisor's lawyer to inform the franchisee of the importance of seeking independent counsel. There are arguments on both sides as to whether a lawyer should be liable to nonclient franchisees. One such argument for franchisor lawyer liability is that it will encourage full disclosure to franchisees.[cccx] By requiring lawyers to fully disclose all material information to potential franchisees, it will equalize the discrepant bargaining power between franchisors and franchisees.[cccxi] If lawyers were facing the possibility of violating state or federal disclosure laws,[cccxii] then lawyers would likely be much more forthcoming with information to potential investors.[cccxiii] Additionally, those who support this policy decision argue that such disclosure will not threaten attorney-client confidentiality because the "lawyer-client privilege should not shield information that the franchisor is legally required to disclose. Nor should it have any application to misleading information contained in a document designed to be read and relied on by third parties."[cccxiv]

A second policy reason behind franchisor lawyer liability arises from the lawyer's role in the transaction, as someone with "greater access to the franchisor and its records,"[cccxv] and the amount of reliance placed on him by the franchisee.[cccxvi] Throughout the transaction, a franchisee relies not only on information communicated to him by the franchisor's lawyer, but he also assumes that what the lawyer communicates is legally accurate[cccxvii] because the lawyer is better situated to know the relevant and applicable laws regarding the transaction.[cccxviii] However, if information provided by the franchisor's attorney is not legally accurate and the franchisee reasonably relies on it, the franchisee could subsequently be liable for actions he takes based upon that information unless the lawyer is held liable.[cccxix]

Similarly, because counsel is closely connected to the franchisor, he is in a better position to advise the franchisor as to what information should be disclosed to the prospective franchisee, which will in turn result in more appropriate disclosure to the franchisee.[cccxx] Those who support this position argue that "encouraging collaboration between lawyers and franchisors" will position the lawyer to better "fulfill his professional obligations to the franchisor."[cccxxi]

On the other hand, many argue that lawyers should not be liable to nonclient franchisees. One such argument is that liability will lead to defensive drafting, which would result in meaningless negative information regarding the franchise system being disclosed to potential investors.[cccxxii] Thus, the more the lawyer has to disclose, the more likely potential investors will shy away from investing, a phenomena seen in other fields of law, potentially to their detriment as well as the franchisor's and the franchise system in general.[cccxxiii]

While advocates for liability argue that it will result in more adequate disclosure, those on the other side argue that "liability for negligence will not necessarily produce more accurate and comprehensive disclosures."[cccxxiv] Instead, many lawyers argue "the result may be simply [that the franchisor's lawyer] will devote substantial amounts of time to documenting their own efforts to ensure accuracy and comprehensiveness,"[cccxxv] rather than spending time attending to duties to his actual client, the franchisor. Indeed, lawyers who prepare disclosure statements in other areas of law, such as for securities disclosure requirements, are able "to reduce their exposure by delegating portions of the work to other professionals."[cccxxvi] However, this is not always the case for franchise attorneys.

Additionally, those who argue against liability claim that "[l]iability cannot be justified by reliance on the lawyer's role."[cccxxvii] While it is true that the franchisor's lawyer prepares the offering circulars distributed to potential franchisees and these circulars must be in compliance with applicable investing laws, "the notion that [franchisees] somehow rely on counsel is simply unrealistic if the circular reveals no evidence of the lawyer's participation in the drafting process."[cccxxviii] Without the franchisee knowing that the lawyer participated in the drafting of the circular,[cccxxix] there is no way to establish that the franchisee relied on the information the attorney supplied to be factually correct or legally accurate.[cccxxx]

Further, it is the duty of a franchisor's lawyer, like any lawyer, to represent the interests of her client, not the interests of another party, including a prospective franchisee.[cccxxxi] The franchisor's lawyer, therefore, will create agreements that are favorable to the interests and objectives of the franchisor.[cccxxxii] To the extent that such agreements are one-sided, a court will find them to be unenforceable.[cccxxxiii] Although the franchisor's lawyer should advise her client of the risk of such agreements and perhaps offer suggestions for reducing those risks, these matters are still not concerned with protecting the prospective franchisee. Indeed, there may also be some business reasons for avoiding a one-sided agreement, such as the inability to sell franchise opportunities because the franchise agreement is unduly oppressive[cccxxxiv] or simply fostering a good franchisor-franchisee relationship[cccxxxv]—a relationship that the franchisor lawyer must respect. Nevertheless, these matters are still designed to protect the interests of the franchisor, not the franchisee.

Rather than holding lawyers liable, the courts should encourage potential franchisees "to conduct their own investigations and assessments of franchise systems; to compare systems with one another and with other investments; and to seek expert advice from professionals, including accountants and lawyers with expertise in franchising."[cccxxxvi] If franchisees were able to fall back on holding the franchisor's attorney liable, they might become less diligent and fail to properly research potential investments for themselves. Also, such liability would be difficult for courts to determine. Ultimately, courts would be positioned to determine "whether or to what extent negligent drafting has caused a particular loss," and these "[a]fter-the-fact claims of reliance on particular items in a disclosure document will be easy to make and hard to refute, even if untrue."[cccxxxvii]

Another argument against liability is that it would be unfair to hold lawyers liable when the essential information that must be disclosed comes from their clients.[cccxxxviii] If the franchisor fails to disclose information to his attorney and, therefore, the lawyer fails to disclose the information to the potential investor, the lawyer could be held liable for his client's nondisclosure.[cccxxxix] Further, the lawyer "may well lack the resources to ferret out information that the client fails to provide" or "other kinds of expertise necessary to recognize red flags in information that the franchisor provides, such as discrepancies in financial statements."[cccxl]

Many opponents argue that "[l]iability will lead to disproportionately large damage awards."[cccxli] At most, if the franchisor's attorney is liable, it is for negligence. However, the damages the potential investor may be awarded are of a more punitive than negligent nature. The awards that the potential investor may be awarded are measured by "the difference between the value of a franchise as it was represented and the actual value."[cccxlii] Accordingly, if the franchisor does not properly disclose the requisite information to his attorney, or if the attorney fails to ferret out this information or spot the red flags, he may be facing substantial damages fees.[cccxliii] These damages can accrue not only during the period that the franchisor actively distributes the circular, but also anytime the franchisor uses the circular.[cccxliv] Thus, the attorney is required "to continually monitor the timeliness and accuracy of the disclosure document's contents, changes in the franchisor's business condition, and the entire franchise program."[cccxlv] Failure to do so may result in the attorney's liability for massive damage awards to investors.

Those who oppose the franchisor's lawyer's liability to the nonclient franchisee also argue that lawyer liability will result in detrimental results to the practice of law in general. For example, holding lawyers liable will detract from loyalties owed to their clients because lawyers will be more likely to "consider their own interests in the disclosure process rather than providing completely disinterested advice to the franchisor."[cccxlvi] It will likely threaten a client's confidentiality in light of the attorney's "self-protective concerns."[cccxlvii] Attorneys will be increasingly likely to disclose more information to potential investors for fear of liability[cccxlviii] in contradiction to the duties owed their clients. Making lawyers potentially liable to nonclients therefore essentially places them in a position at conflict with the duties owed to their clients.

Lawyer liability to nonclients may also result in an increase in the cost of attorney's fees and the unavailability of legal services.[cccxlix] Lawyers facing potential liability may be unwilling to take on the representation of franchisors in general, or if they are willing to represent franchisors, they may increase the cost of their services to offset the potential risk the representation poses.[cccl] Moreover, an increase in the standards of franchising may result in the decrease in the availability of franchise lawyers. In order to avoid liability for nondisclosure, larger companies may increasingly engage these attorneys to produce disclosure documents[cccli] which, in return, may decrease smaller franchisors' ability to obtain representation.[ccclii] Further, risk-averse attorneys "may also decline to represent start-up franchisors whose businesses are truly innovative and potentially highly successful but lack records of success to assure that they will not fail, leaving the lawyers to face angry franchisees."[cccliii] As a result, some would-be franchisees may be deprived of a potential opportunity due to this lack of support for franchisor innovation.[cccliv]

### *B. Why Better Disclosure Requirements Should Be Adopted*

Another possibility in addressing the nonclient franchisee problem would be to create more robust disclosure requirements in franchise law. Rather than place liability on a franchisor's lawyer to inform the franchisee, a solution would be to include more explicit warnings in disclosure documents to impress upon the franchisee the importance of seeking counsel before signing a franchise agreement.[ccclv] Currently, the FTC does not require the franchisor, in disclosure documents, to suggest to the nonclient franchisee to obtain counsel.[ccclvi] As in other fields of law, however, this type of disclosure could be the key to addressing and combating the various psychological reasons (overconfidence, over-optimism, and general incompetence) why franchisees do not obtain counsel and thus limit the harmful effects of uncounseled franchisees.[ccclvii]

While these personality traits, especially optimism and confidence, can be a positive aspect of business, Dunning cautions "there is a dark side to our chronic optimism. It can lead to actual harm."[ccclviii] This caution is equally true in the area of franchise law and a major argument for why better disclosures are needed to impress upon franchisees to seek counsel.

On the other hand, better disclosures for franchise agreements may not be helpful in convincing franchisees to obtain counsel. The same psychological reasons that underlie a franchisees decision not to seek counsel, overconfidence and over-optimism, may negate the positive effects of better disclosures.[ccclix] People tend to process information in "self-serving" ways, meaning that if an individual is biased toward one viewpoint, that individual may process information to lead to his "preferred" conclusion.[ccclx] Thus, an overconfident and overly-optimistic franchisee may only mentally process the information favorable to signing the franchise agreement, disregarding any warnings to the contrary. If the public policy of better disclosure is to impress upon the franchisee to obtain counsel, but the franchisee does not heed the advice, then better disclosures would be an exercise in futility.[ccclxi]

As previously discussed, all parties may suffer from an inexperienced franchisee conducting the transaction with no assistance from counsel. The more obviously aggrieved party is the franchisee himself.

Without knowing the business nor the intricacies and requirements of enfranchising a business, he may be venturing down a slippery slope. However, the franchisee is not the only party who may be injured in the transaction. Both the franchisor and the franchisor's attorney may suffer from the franchisee's inexperience. If a court decides to protect the franchisee from his inexperience, the agreement may be voidable. The franchisor's attorney could face repercussions from his client if the contract is voided as well as from the franchisee as a third-party beneficiary to the attorney's services. Essentially, the franchisee's decision to represent himself can produce injurious consequences for all parties involved.

Furthermore, requiring better disclosures for franchisees would be that it generally favors the plight of the franchisee, which may lead to unintended results, including harmful market effects to the franchise system. Franchisor lawyer William Killion argues against an interpretation of franchise laws that favors the franchisee.[ccclxii] Killion notes that the disparity between franchisors and franchisees may not be a problem, but simply market competition.[ccclxiii] Increasing the regulation of franchises, when current regulation is expansive in its disclosures and franchisees are arguably more sophisticated than ever before, would be favoring the franchisee by potentially "bail[ing] franchisees out of bad business decisions."[ccclxiv] Furthermore, Killion believes expanding regulation of the franchise market will lead to harmful economic results for franchisors, franchisees, and the millions of people who rely upon the franchise system.[ccclxv] Often, the actions of the franchisor, which may be "harmful" to the franchisee, are beneficial to the public,[ccclxvi] such as bargaining for terms that may keep the cost of the franchise's "product" down. In other words, the effects of more franchise regulation, including disclosures, could leave the economy, on balance, in a worse position than before.[ccclxvii] If public policy is to protect the franchisee, franchisor, and economy from the negative effects of an uneven agreement,[ccclxviii] and if more regulation will serve to exacerbate the problem in other ways, then perhaps more regulation is not the answer.[ccclxix]

Nevertheless, considering the current negative impact of uncounseled franchisees, commentators agree that prospective franchisees need better protection through amendments to franchise laws, either by creating a private right of action or better disclosures.[ccclxx] For example, Peter C. Lagarias and Robert S. Boulter, partners with Lagarias & Boulter, argue that some form of better franchisee protection is needed, considering the "abuses of the free market economy."[ccclxxi] Similarly, according to Paul Steinberg and Gerald Lescatre, both involved in franchising operations with Subway Sandwiches and Salads, "[f]ranchise regulation will never serve as a panacea for post-sale abusive practices by franchisors."[ccclxxii] Professors

Debra Burke and E. Malcolm Abel II suggest a private right of action explicitly for franchisees who have been misled by a franchisor's failure to disclose or misleading statements;[ccclxxiii] an action that may be both remedial for the franchisee and a deterrent for the franchisor in future franchise negotiations.

Additionally, the argument to increase the amount of disclosures to a contracting party is not novel considering the prevalence of disclosure requirements in other areas of law.[ccclxxiv] Based on the rampant use of disclosure rules in consumer, real estate, and marriage law,[ccclxxv] it may be argued that the best method for dealing with uncounseled franchisees, in conformity with a regulatory framework suitable to providing additional protections, is to deal with the predicament by requiring more from the franchisor, such the disclosure of more information about the importance of seeking independent counsel to prospective franchisees. New disclosures could take the form of an acknowledgement that the franchisee is fully aware of the potential issues that could arise from not seeking counsel in the franchise negotiation process and signing of the agreement. The acknowledgement need not be a waiver of a franchisee's right to sue a franchisor for misrepresentations but, if worded correctly, an explicit reminder that what the franchisee is about to sign would be better guided by the experience of a franchise attorney. New disclosure laws could also require the franchisor to include on the cover page of the disclosure document a general warning to seek counsel before signing. In either case, a new disclosure law should emphasize the importance of an attorney in reviewing the documents, negating the current impact of uncounseled franchisees on the franchise system and the courts.

## CONCLUSION

In certain limited instances, the franchisor and her attorney owe an unrepresented franchisee a duty of care during the negotiations of a new franchise.[ccclxxvi] While still owing a duty of zealous representation to his own client, the franchisor's attorney need not myopically fix his gaze upon just his clients. Rather, the attorney must not overlook any unfair consequences of the transaction to an unrepresented franchisee.

However, to place the burden of disclosure squarely upon a franchisor's attorney is a drastic, if not legally inconsistent, conclusion. Considering the conflicts that arise in holding lawyer's liable for informing the franchisee, the solution to the nonclient franchisee problem comes in the form of a written warning or acknowledgement in the disclosure documents submitted to potential franchisees. In this way, a franchisee can be forewarned or put on notice of the importance of obtaining counsel without imposing any substantial duty on a party. Indeed, this method for dealing with uncounseled franchisees conforms to a regulatory framework already emphasizing disclosure between the franchisor and franchisee. More disclosure is a relatively burden-free imposition on franchisors to counter the foibles of falsely confident prospective franchisees ready to make long-term, irrevocable commitments.

Common law contract principles, as evidenced in the Restatement (Second) of Contracts, set forth several reasons why a franchisee's lack of counsel often should void an agreement. These reasons include incapacity, undue influence, duress, preexisting duty, fraud, and unconscionability. A franchisor should not be permitted to obtain a windfall from dealing with unrepresented franchisees.

Most franchisees cannot rightly be considered sophisticated investors who have knowingly entered into a franchisee agreement. Ordinarily, franchisees ought *not* to be bound by the agreement. Indeed, many courts have ruled that when the franchisee has no business experience and reasonably relies on the franchisor's statements to his detriment, the franchise agreement may be voided as if the franchisor intended the mischief to take advantage of the franchisee's inexperience.[ccclxxvii] In these cases, as a practical matter, courts already hold franchisees with business experience to a higher standard than franchisees without that background or knowledge.[ccclxxviii]

The would-be franchisee's need for an attorney is critical. During a franchise's formative stages, however, many franchise applicants simply "go bare" (proceed without counsel). Lawyers for the franchisor recognize that this is extremely problematic for the potential franchisee and that it often impairs the franchise relationship and even the long-term interests of the franchisor. There are psychological reasons behind a franchisee's failure to consult an attorney before proceeding to the bargaining process and investing time and money in a franchise. Many franchisees believe themselves capable of self-representation. If a franchisee believes that he has the capability to represent himself, should additional protections be implemented to protect her from her own inexperience? The particularly confounding aspect of this state of affairs is that the investors who most need the assistance of a legal expert are the ones whose limited skills and self-awareness make them the least likely to realize that fact. They misjudge the situation and—much more so than a comparatively sophisticated businessperson—they overestimate their ability to understand legal concepts and to negotiate terms. These self-inflicted injuries cannot be remedied without any side effects. Indeed, a cure for such a deep-rooted, psychologically based quandary may be worse than the "disease."[cclxxix]

Still, the absence of an obvious, systemic solution does not make the predicament any less real, and the often-wiser people in franchising—

franchisor and counsel alike—should openly acknowledge the problem. In some circles, the fact that many new franchisees are unschooled and, in a sense, their own worst enemy, is an open secret apparently known to everyone but these franchisees themselves. They, of course, may learn later, but only after they have become ensnared in a business or legal dilemma. At this point, however, the damage is already done. While the franchisees cannot evade responsibility for these problems, which are certainly in part of their own making, the resultant difficulties often spill over into problems for the system as a whole—the other franchisees and the franchisor himself. Forewarned is, indeed, forearmed.

## APPENDIX – COPY OF SURVEY INSTRUMENT

Figures derived in response are in **bold.**

Dear ___________,

Information and Consent to Survey

My name is _______. I am a business law professor at _______. I am studying the degree to which franchise parties are represented by counsel in the franchise agreement negotiation and signing process. To that end, I have developed a short survey (16 questions), which should take about five to ten minutes for you to complete.

. . . .

The Survey

I understand that you are a lawyer who practices law on behalf of one or more franchisors. You are, I am sure, a very busy professional. As a former litigator, I am quite aware of the pressing demands on a lawyer's time. So, I just want you to know how much I appreciate your time and help. The information you and others provide will, I believe, be most useful.

Please just respond to this e-mail by pressing "Reply," typing your answers directly herein, and then sending your letter back to me at ___________. Again, thank you!

1. In the past two years, while acting on behalf of a franchisor, how many franchise "closings" did you attend or otherwise participate in, supervise, or review? **1459**

By closing, I mean the process in which the franchisor and franchisee, perhaps at a meeting (but not necessarily in such a face-to-face conference), sign the franchise agreement and perhaps related documents. NOTE: If you did not personally attend one or more of the closings but know about those closings in your role as a supervisor of another person acting on behalf of the franchisor, or otherwise in your role as counsel, please indicate such information (discuss those closings/transactions) in your answers. Thank you.

2. For how many of these closings from Question 1 was the franchisee represented by counsel? **308 (21.1%)**

*The Questions 3-10 now deal with these closings—the number answered for Question 2—in which a lawyer represented the franchisee*.

3. How many franchisees had, in your estimate, lawyers who engaged in negotiation of the franchise terms, seeking more favorable terms for the franchisee? **217—70.5% of those times (308, answer 2, above) where the franchisee had a lawyer**

4. How many franchisees instead had, in your estimate, lawyers who simply advised the franchisee, but did not negotiate with the franchisor? **86—27.9% of the times (308, answer 2, above) where the franchisee had a lawyer**

5. If there were one or more franchise lawyers for whom you simply cannot recall their role, between Question 3 and Question 4, please give that number here. **5 (re: franchisees with a lawyer, 1.6% unsure/cannot recall as to whether the lawyer engaged in negotiations or simply advised the franchisee)**

The answers to Questions 3 and 4 and 5 should add up to the number given in response to Question 2.

6. In your estimate, how many franchisees had a lawyer whose quality of representation was (state a number for each of the six answers immediately below)?

| | |
|---|---|
| Excellent | **25 (8.1%)** |
| Very Good | **135 (43.8%)** |
| Good | **67 (21.8%)** |
| Fair | **72 (23.4%)** |
| Poor | **9 (2.9%)** |

The total of the numbers given should add up to the number given in response to Question 2.

7. If you can, for each time period below, state how many of the franchisees had a lawyer who had been their counsel, before the closing, for

about that amount of time:

| | |
|---|---|
| Less than a week | **1 (0.3%)** |
| 1 to 4 weeks | **8 (2.6%)** |
| 1 to 6 months | **6 (1.9%)** |
| Over 6 months | **66 (21.4%)** |
| DID NOT KNOW | **227 (73.7%)** |

The answers to Question 7 should add up to no more than the number given in response to Question 2. If it is less than the answer given to Question 2, the assumption will be that the difference represents those franchisees for which you have no idea about how long their lawyer had represented them. **That is what the 227, above, is.**

8. Concerning the franchisee lawyers' experience with franchising, please give the number of such lawyers with:

A very high level of experience, with many previous times advising prospective franchisees **26 (8.4%)**

Some experience—having represented at least a few other prospective franchisees **13 (4.2%)**

Little experience in franchising, having counseled just one or two franchisees previously **11 (3.6%)**

No such experience before that franchisee **22 (7.1%)**

DID NOT KNOW **236 (76.6%)**

Again, the answers to Question 8 should add up to no more than the number given in response to Question 2. If it is less than the answer given to Question 2, the assumption will be that the difference represents those lawyers for whom you have no idea about their experience with franchising. **That is what the 236, above, is.**

9. Concerning the franchisee lawyers' experience with your particular industry (e.g., hotels, restaurants, hair care, retail stores, real estate, travel), please give the number where the franchisee counsel's level of experience was:

Very high, with many previous times advising clients about matters involving the industry **105 (34.1%)**

Some, having at least 3 or 4 previous clients involved in my industry **51 (16.6%)**

Little, having just 1 or 2 previous clients in my industry **44 (14.3%)**

None before that franchisee **21 (6.8%)**

DID NOT KNOW **87 (28.2%)**

Again, the answers to Question 9 should add up to no more than the number given in response to Question 2. If it is less than the answer given to Question 2, the assumption will be that the difference represents those lawyers for whom you have no idea about their experience with clients in your industry. **That is what the 87, above, is.**

10. For how many years have you practiced law concerning franchised enterprises? **16 years mean; 15 years median**

*Questions 11–13 ask for your impressions about the percentage of represented franchisees and the sophistication of that representation?*

11. In the past ten years (or however long you have practiced franchise law, if that period is shorter, the percentage of franchisees represented by lawyers at closings has:

Increased **31.8% of respondents (representing 32.7% of franchised units for which there was a response)**

Stayed about the same **68.2% of respondents (representing 67.3% of franchised units for which there was a response)**

Decreased **None of the respondents**

12. In the past ten years (or however long you have practiced franchise law, if that period is shorter), would you estimate that the franchise law sophistication of franchisee lawyers has:

Increased **60.0% of respondents (representing 57.3% of**

**franchised units for which there was a response)**

Stayed about the same **40.0% of respondents (representing 42.7% of franchised units for which there was a response)**

Decreased **None of the respondents**

13. In the past ten years (or however long you have practiced franchise law, if that period is shorter), the business sophistication of franchisees has:

Increased **70.8% of respondents (representing 59.7% of franchised units for which there was a response)**

Stayed about the same **29.2% of respondents (representing 40.3% of franchised units for which there was a response)**

Decreased **None of the respondents**

14. For the closings from Question 1, were any franchisees-to-be the beneficiaries of a standard form contract negotiated by the franchisor and a franchisee association?

Yes **______ 37.5% of respondents (representing 53.0% of franchised units for which there was a response)**

No **______ 62.5% of respondents (representing 47.0% of franchised units for which there was a response)**

15. Do you have any other information you would like to impart? Please write starting here, using as much space as you would like. **Reported in article by author**

16. Would you like me (the professor) to call or write to you?

I very much appreciate your assistance.

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[i] *See generally* Postal Instant Press v. Sealy, 51 Cal. Rptr. 2d 365, 375 (Cal. Ct. App. 1996) (discussing the franchisor-franchisee relationship in terms of the "small-business person" against the "whip of a giant").

[ii] ROBERT M. ROSENBERG, PROFITS FROM FRANCHISING 41 (1969). Four decades later, the definition remains accurate, although arguably incomplete. One can say that franchising is a business relationship based on contract law in which a franchised business, the franchisor, grants a franchisee the right to use its trademarks and proprietary information in exchange for royalties. For an extensive treatment of how franchising is defined, *see* Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905, 908 n.l (1994); Robert W. Emerson, *Franchising and the Collective Rights*, 43 VAND. L. REV. 1503, 1506 n.l, 1508–09 (1990). For a discussion of the growth and maturing of franchising, *see* Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 194–201 (2010).

[iii] Such as forming a joint venture, a general or limited partnership, or incorporating a business.

[iv] Agency is defined as "the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). Numerous courts have discussed these three defining characteristics of an agency relationship: (1) the agent acts on behalf of the principal; (2) the principal consents, expressly or implicitly, to the agent's actions; and (3) the agent is subject to the control, or right of control, of the principal. *See, e.g.*, Norris v. Cox, 860 So. 2d 319, 322 (Miss. Ct. App. 2003); Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981).

[v] Murphy v. Holiday Inns, Inc., 219 S.E.2d 874, 877 (Va. 1975) (holding that the relationship of the parties does not depend upon what the parties themselves call it, but rather in law what it actually is; and in determining whether a contract establishes an agency relationship, the critical test is the nature and extent of the control agreed upon).

[vi] *See generally* David Gurnick, *Case History of the American Business Franchise*, 24 OKLA. CITY U. L. REV. 37, 50 (1999) (stating, "[a] franchise is a relationship established by a contract. The contract is formed, interpreted, and governed by the rules of contract law").

[vii] *See* Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 596 (Tex. 1992) (finding that no fiduciary relationship existed between the franchisor and franchisee); *see also* Akkaya v. Prime Time Transp., Inc., 845 N.Y.S.2d 827, 828 (N.Y. App. Div. 2007); *see also* Marcella & Co., Inc. v. Avon Products, Inc., 724 N.Y.S.2d 192, 193 (N.Y. App. Div. 2001); *see also* Red Roof Inns, Inc. v. Murat Holdings, L.L.C., 223 S.W.3d 676, 690 (Tex. App. 2007).

[viii] *See* Mister Donut of Am. v. Harris, 723 P.2d. 670, 673 (Ariz. 1986) (holding that as a matter of law a fiduciary relationship existed between the franchisor and the franchisee); *see also* ABA Distribs., Inc. v. Adolph Coors Co., 542 F. Supp. 1272, 1286–87 (W.D. Mo. 1982); *see also* Arnott v. Am. Oil Co., 609 F.2d 873, 883 (8th Cir. 1979).

[ix] William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship*, 28 FRANCHISE L.J. 23, 24 (2008). By purchasing a franchise, a franchisee was able to combine "the economic efficiency of big business with the personal satisfaction and social advantages of small business ownership." *Id.*

[x] *Id.* at 26. Several factors led to the decline in the franchise business, including the declining stock market, the fact that many franchisors "recorded their entire initial franchise fee as income the day the franchise agreement was signed," and the emergence of the celebrity franchisor. *Id.*

[xi] These lawsuits were commonly filed as class actions against the franchisor. *Id.*

[xii] *Id.* In fact, the New York Attorney General, Louise Lefkowitz characterized the franchising business as "fly-by-night operations often with nothing more substantial than fancy multi-color brochures; citizens of this state are surrendering their life savings to buy worthless franchises; and criminal elements of high pressure salesmen have infiltrated into the franchise business." *Id.*

[xiii] The franchisee was further characterized as a person with no business experience at all "'but perhaps a plumber or electrician who has been told he needs no experience to profit handsomely and that the enfranchiser will teach him all he needs to know.'" *Id.* at 27 (quoting *Many Franchise Firms Fall on Hard Times After 15-Year Boom*, WALL ST. J., May 29, 1970, at 1).

[xiv] Killion, *supra* note ix, at 27.

[xv] *See id.* (discussing the federal and state regulations of the franchise industry).

[xvi] *Id.* at 28. There is some survey support for this contention that franchisees have increasingly acquired some degree of business and legal sophistication. *See* Copy of the Survey Instrument [hereinafter Franchise Lawyer Survey], attached as an Appendix to this Article, question 12. *But see infra* Part I, Subparts A (Franchisees Often Fail to Hire an Attorney) & B (Evidence from a Survey of Franchising Counsel: The Uncounseled Franchisee) for discussion of how franchisees still often know little and do not get lawyers who could assist them.

[xvii] Killion, *supra* note ix, at 29.

[xviii] *See* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 106–07 (2004) (discussing the franchise industry's opinion that previous legislation has successfully addressed the concern for nonclient franchisees).

[xix] *See generally Thirty Years of Franchising*, 27 FRANCHISE L.J. 85, 90 (2007) (discussing, in part, the greater sophistication of franchisors and franchisees in response to past litigation and "evaluation of their legal rights.").

[xx] Killion, *supra* note ix, at 29.

[xxi] *See generally* Papa John's Int'l, Inc. v. Dynamic Pizza, Inc., 317 F. Supp. 2d 740, 748 (W.D. Ky. 2004) (holding, in part, that the sophistication of the franchisee negated a claim of fraud by the franchisor in the negotiation of a franchise agreement); *see generally* Dunkin' Donuts Franchised Rests. LLC v. Manassas Donut Inc., 2008 U.S. Dist. LEXIS 1242 (E.D. Va. Jan. 8, 2008) (holding that waivers franchisee signed are enforceable because franchisee was an "experienced franchisee" who made a conscious decision not to seek counsel before signing the franchise agreement); *see generally* PostNet Int'l Franchise Corp. v. Amercis Int'l, Inc., 2006 U.S. Dist. LEXIS 42794 (D. Col. June 26, 2006) (holding that a waiver was enforceable against a franchisee who consciously did not seek counsel before signing the franchise agreement).

[xxii] Killion, *supra* note ix, at 29. Before signing a franchise agreement, franchisees are provided with documents containing such information as "the litigation history of the franchisor and even the names, addresses, and telephone numbers of current franchisees." *Id*.

[xxiii] *Id.*

[xxiv] *Id.* at 30.

[xxv] *Id.*

[xxvi] *Id.*

[xxvii] Killion, *supra* note ix, at 30.

[xxviii] In his article, Killion refers to the Modern Myth of the Vulnerable Franchise as collectively, (1) "that franchisees are generally naïve and unsophisticated in comparison to

franchisors and, therefore, need special protection from opportunistic conduct by comparably large franchisors"; and (2) "that there is a gross bargaining disparity" between the franchisor and franchisee resulting in one-sided franchise agreements that allow franchisors to control unfairly the fortunes of their franchisees." *Id.* at 23.

[xxix] *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

[xxx] *Id.* at § 73.

[xxxi] *Id.* at § 175.

[xxxii] *Id.* at § 164.

[xxxiii] *Id.* at § 177.

[xxxiv] U.C.C. § 2-302 (2004).

[xxxv] *See* Newark Motor Inn Corp. v. Holiday Inns, Inc., 472 F. Supp. 1143, 1152 (D.N.J. 1979).

[xxxvi] *See* Rochelle B. Spandorf & Beata Krakus, *Observations on Negotiating Franchise Agreements in Today's Legal Environment*, FRANCHISING BUS. & L. ALERT 1 (2007) (noting that franchisors often "resist prospective franchisee efforts to negotiate better terms for themselves").

[xxxvii] "While no empirical data exist on the percentage of franchisors that will negotiate the terms of their franchise contract with prospective franchisees, it is fair to conclude that they remain a minority." Spandorf & Krakus, *supra* note xxxvi, at 1. Rochelle B. Spandorf and Beata Krakus note that "[s]ome franchisors have no incentive to negotiate" because they have a plentiful number of prospects or a desire to avoid an administrative burden or fallout that may arise from negotiating the terms of each franchise contract separately. *Id.*

[xxxviii] ANDREW C. SELDEN & RUPERT M. BARKOFF, *Counseling Franchisees*, in FUNDAMENTALS OF FRANCHISING 289, 291 (Rupert M. Barkoff & Andrew C. Selden eds., 3rd ed. 2008) (noting that a lawyer may be seen as someone asked to do simply one thing—"bless" a franchise agreement that the franchisor already has proclaimed "nonnegotiable").

[xxxix] *Id. See* Byron E. Fox, *Franchise Regulation—Solutions in Search of Problems?*, 20 OKLA. CITY U. L. REV. 241, at 283 n.155 & 284 n.157 (discussing the reluctance of franchisees to seek counsel while negotiating a franchise agreement and the rampant belief among franchisees that obtaining an attorney is too cumbersome for the process of negotiations); James Zimmerman, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?*, 51 VAND. L. REV. 759, 761(1998) (discussing the inequalities of the franchise negotiation process when it concerns forum selection clauses); *see also* Nathan E. Ross, *Federalism Versus the Greater Good . . . Should Powerful Franchisors Be Allowed to Contract for the Home Court Advantage Through Forum Selection Clauses?*, 2000 J. DISP. RESOL. 199, 211–212 (2000) (citing Zimmerman in the statement that "the franchisor is usually a much larger company, represented by attorneys at the time the agreement is signed; whereas, the franchisee is often a single person unrepresented by legal counsel").

[xl] *Id.* at 277; Franchise Lawyer Survey, *supra* note xvi. The names, addresses, and other vital information for conducting the survey were obtained from FRANdata (Franchise Information Services, Inc.), an Arlington, Virginia, based company specializing in gathering and reporting data related to franchising. The author, with the assistance of student assistants, then used the FRANdata information to determine e-mail addresses and then to contact the surveyed lawyers both by e-mail and by telephone. The attorneys contacted averaged fifteen to sixteen years practice experience (fifteen years median; sixteen years mean). Franchise Lawyer Survey, question 10.

[xli] Franchise Lawyer Survey, question 2.

[xlii] Franchisees with an average investment between $150,000 and $350,000 were represented by counsel in 30.5% of closings, while franchisees with over $1.2 million in investments were represented in 26.6% of closings and franchisees with less than $70,000 in investments were represented by counsel in only 16.8% of closings. The author generated the data from the answers to Franchise Lawyer Survey, question 2, and the data furnished by FRANdata, *supra* note xl.

[xliii] The author generated the data from answers to Franchise Lawyer Survey, question 2, and the data furnished by FRANdata, *supra* note xl: (1) Franchisees entering into a franchise arrangement with franchisors that had ten or more years in business before becoming a franchisor were represented by counsel in 26.7% of closings; (2) franchisees dealing with franchisors that had no prior experience in the business before franchising that business were represented by counsel in only 6.1% of closings; and (3) franchisees contracting with franchisors that had between one and five years of business before starting to franchise were represented by counsel in 19.6% of closings.

[xliv] Franchisees dealing with franchisors having fewer than 500 units in the franchise system were represented by counsel in 42.7% of closings; franchisees entering into a contract with franchisors that have 500 or more units in the franchise system were represented by counsel in only 8.0% of closings. The author generated the data from the answers to Franchise Lawyer Survey, question 2, and the data furnished by FRANdata, *supra* note xl.

[xlv] Comments from Franchisors' Attorneys, Franchise Lawyer Survey, *supra* note xvi (on file with author).

[xlvi] *Id.*

[xlvii] *Id.*

[xlviii] *Id.*

[xlix] *Id.*

[l] *Id.*

[li] However, for the author's survey of franchisor lawyers, some franchisors commented that franchisees have "increased in sophistication," and come to the negotiations with "more money and higher level of business experience." *Id*.

[lii] Franchise Lawyer Survey, question 1.

[liii] Franchise Lawyer Survey, question 2.

[liv] Franchise Lawyer Survey, question 13 (on file with author) (over two-thirds opined that franchisee business sophistication has risen; the rest concluded it has remained about the same, with no one claiming it had fallen).

[lv] Such "closings" were defined, for purposes of the survey, as "process[es] in which the franchisor and franchisee, perhaps at a meeting (but not necessarily in such a face-to-face conference), sign the franchise agreement and perhaps related documents." *Id*., questions 1 & 11.

[lvi] *Id*., question 11 (on file with author). Note that this majority of the responding franchisor lawyers, as a class of respondents, in turn dealt with a large preponderance of the overall franchised business units in American franchising. Note further that the remainder of the respondents (31.8%) believed that the percentage of franchisees represented at closings had increased in the past decade: none thought the percentage had diminished. *Id.*

[lvii] Spandorf & Krakus, *supra* note xxxvi, at 1. Despite this public perception, "some degree of negotiation is not uncommon particularly in franchise systems requiring larger initial investments that tend to attract more sophisticated buyers." *Id.* at 2. Additionally, the Federal Trade Commission "'believes that franchise sellers and prospective franchisees should be free to negotiate the terms of the franchise agreement . . . .'" *Id.* at 5 (quoting

*Staff Report to the Federal Trade Commission of August 2004*, 16 C.F.R. Part 436.1 at p. 276–77).

[lviii] Selden & Barkoff, *supra* note xxxviii, at 291.

[lix] Franchise Lawyer Survey, question 6 (noting that only 8.1% of franchisees had a lawyer whose quality of representation was deemed excellent; while most franchisee counsel were considered good or very good, almost a quarter of franchisee lawyers were found to be only fair).

[lx] Franchise Lawyer Survey, question 12 (on file with author). On the other hand, some franchise lawyers wrote comments such as that the franchisees' lawyers "all [had] no understanding of the dynamics of franchising." One lawyer, while praising the sophistication of most of its franchisees—with hotel franchises having an ultimate construction cost of between $20 million and $100 million per location—wrote about how these franchisees tended to hire counsel who knew much about real estate or finance but very little about franchising.

[lxi] Comments from Franchisors, Franchise Lawyer Survey, question 15 (on file with author). Indeed, some franchisor lawyers opine that the franchisee attorney, if there is one, has very little, if any, experience in representing franchisees. *Id.* at question 8.

[lxii] Franchise Lawyer Survey, question 7 (on file with author) (noting that only 21.4% of franchisor attorneys worked with franchisees who had a lawyer that had been their counsel for more than six months prior to the closing; most simply did not know the degree of prior contact between a franchisee and her lawyer).

[lxiii] *See* Franchise Lawyer Survey, questions 7 & 9.

[lxiv] The author generated the data from the answers to Franchise Lawyer Survey, question 3, and the data furnished by FRANdata, *supra* note xl. Eighty-six percent of counsel for franchisees with investments over $1.2 million sought more favorable terms for their clients; 80% of franchisee lawyers sought to negotiate favorable terms for franchisees with investments under $70,000. *Id.* The enormous difference between these high figures and those of the mid-level investments—between $150,000 and $350,000—may be attributed to a relatively small sample size within that subcategory.

[lxv] *Id.* According to survey data, 62.5% of franchisee lawyers sought more favorable terms for clients dealing with franchisors with no prior time in business before becoming a franchisor; 45.5% of franchisee attorneys sought to negotiate better terms for franchisees dealing with franchisors having between one and five years of business prior to becoming a franchisor. *Id.*

[lxvi] *Id.* Only 64.8% of franchisees lawyers attempted to negotiate better terms for franchisees dealing with franchisors with 500 or more units in the franchise. *Id.*

[lxvii] Comments from Franchisor Lawyers, Franchise Lawyer Survey, *supra* note xvi (on file with author).

[lxviii] *Id.*

[lxix] *Id.*

[lxx] *Id.* Franchisees-to-be, though, are only sometimes the beneficiaries of a standard form contract negotiated by the franchisor and a franchisee association, according to the results of the Franchise Lawyer Survey, question 14 (on file with author).

[lxxi] *See generally* Selden & Barkoff, *supra* note xxxviii, at 291.

[lxxii] *Id.*

[lxxiii] Practicing franchise lawyers agree. In an interview, franchisor lawyer, Robert T. Joseph, asked, "[h]ow much does it cost a franchisee to get representation? Let's say it is $400 an hour. Is someone really going to pay $3,000 for eight hours of negotiation? Probably not. They should, but they don't." Telephone Interview by Jason Parnell, assistant to the author, with Robert T. Joseph, franchisor lawyer and partner, SNR Denton

(June 4, 2012).

[lxxiv] *Id.*

[lxxv] The lawyer is counsel to the franchisee in: (1) deciding whether to purchase a franchise; (2) selecting and investigating the franchise; (3) reviewing disclosure and registration documents; (4) negotiating franchise agreements; (5) site selection and preparation; (6) agreements with other parties; (7) a legal review of the franchisee's operations; (8) monitoring the franchisor's performance; and (9) termination and nonrenewal. W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 2:11-19 (2011).

[lxxvi] Franchise Lawyer Survey, question 4 (on file with author).

[lxxvii] In the latter situation, obviously the franchisee-to-be cannot make an educated determination as to her appropriate course of action.

[lxxviii] *See* DAVID DUNNING, SELF-INSIGHT: ROADBLOCKS AND DETOURS ON THE PATH TO KNOWING THYSELF 4 (2005) (noting "as a general rule, people's impressions of their abilities—whether arrogant or humble—are not anchored very closely to their actual level of skill . . . what people tend to think of themselves can be quite distinct from the truth of their competence and expertise").

[lxxix] *Id.* at 6; *see also* John R. Chambers & Paul D. Windschitl, *Biases in Social Comparative Judgments: The Role of Nonmotivated Factors in Above-Average and Comparative-Optimism Effects*, 130 PSYCHOL. BULL. 813, 813 (2004) (stating that "[p]eople have a pervasive tendency to believe they are better than others in a multitude of ways and that life's negative events are less likely to befall them than their peers."). In addition, in over-estimating their abilities, people may not realize that they would have been better off if they had been represented by counsel. *See, e.g.*, CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 329 (3d ed. 2006) (discussing how 30% of wives were awarded alimony when both parties were represented by counsel, while not one alimony award was made when neither party was represented by counsel).

[lxxx] *Id.* The average person's rating himself or herself as well above average (sometimes termed "illusory superiority") has been a theme in popular culture and has even been labeled the "Lake Wobegon Effect" after humorist Garrison Keillor's fictitious town "where all the women are strong, all the men are good-looking, and all the children are above average." *See* Vera Hoorens, *Self-enhancement and Superiority Biases in Social Comparison*, 4 EUR. REV. SOC. PSYCHOL. 113 (1993).

[lxxxi] *Id.* at 8.

[lxxxii] *Id.* However, Dunning does articulate instances when a person is not likely to be overly confident, including when "the task at hand is particularly easy and performance is high, people tend to be underconfident in their performance." DUNNING, *supra* note lxxviii, at 9.

[lxxxiii] Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 734–735 (2009).

[lxxxiv] *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443 (1993) (discussing how married couples will typically underestimate the likelihood of divorce, despite statistics to the contrary).

[lxxxv] Justin Kruger & David Dunning, *Unskilled and Unaware of It: Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121 (1999); *see also* DUNNING, *supra* note lxxviii, at 15 (suggesting that it is not that people who are performing poorly "fail to recognize their incompetence," but rather, "people performing poorly cannot be expected to recognize

their ineptitude. They are simply not in a position to know that they are doing poorly. The ability to recognize the depth of their inadequacies is beyond them.").

[lxxxvi] Kruger & Dunning, *supra* note lxxxv, at 1126.

[lxxxvii] *Id.*

[lxxxviii] *See id*. at 1120.

[lxxxix] *See id.* at 1130 (noting "competence . . . not only causes poor performance but also the inability to recognize that one's performance is poor").

[xc] *Id.* at 1122. *See also* figure 2, at 1125 (explaining that those who scored in the lowest percentile in perceived logical reasoning ability and test performances believed that they scored above average). There is no reason to believe franchisees are substantially different than employees who, on average, "think that they are well above average relative to everyone else"—more expertise, leadership, sophistication, and even idealism. Interview by Alix Spiegel with David Dunning, NPR, All Things Considered, *American's Flunk Self-Assessment* (Oct. 6, 2007) (further noting that this phenomenon of a populace tending to overestimate its relative abilities is restricted to North America and Europe; in Japan or China, Dunning explains, people are more likely to say that they are "average" or "slightly below average").

There may be other psychological reasons why a franchisee may believe that he is capable of self-representation. For example, Dunning also notes that it is possible that those who are incompetent are relatively aware of this fact, at some level. DUNNING, *supra* note lxxviii, at 28. Yet, these people are incompetent because "to admit to poor performance either to themselves or other people is an action that they are motivated to avoid." *Id*. Thus, Dunning proposes that some of those who are "incompetent are actively engaged in denial. They just refuse to recognize their errors; they deliberately short-circuit any awareness they may have of their mistakes." *Id*. Therefore, some franchisees may be cognitively aware that they are not adequately capable of representing themselves in the transaction. Yet, rather than admitting this fact, they engage in "denial" and convince themselves that they are capable of self-representation. *Id.* at 29.

[xci] Selden & Barkoff, *supra* note xxxviii, at 289.

[xcii] *See id.*

[xciii] *Id.* at 289–90. Although desirable, the doubly qualified advisor—knowledgeable about both business generally and about franchising in particular—may be a rarity. Usually, prospective franchisees have attorneys that are not capable of representing them. Telephone Interview by Jason Parnell, assistant to the author, with Lee J. Plave, franchisor lawyer and partner, Plave Koch PLC (May 17, 2012). For example, in some cases, a personal injury ("PI") lawyer will go beyond his typical area of practice and, for a current or past PI client who is a prospective franchisee, engage in franchise agreement negotiations. *Id*. In these circumstances, competence is a substantial issue. *Id.* Accordingly, even if a franchisee has an attorney, there is no guarantee that the lawyer chosen by a franchisee will be competent or effective. *Id*.

[xciv] *See generally* Warren Pengilley, *International Franchising Arrangements and Problems in Their Negotiation*, NW. J. INT'L L. & BUS. 185, 193 (1985) (describing how lawyer involvement in franchise negotiation is "desirable at an early stage").

[xcv] *Id.* at 290.

[xcvi] *Id.*

[xcvii] *Id.*

[xcviii] *Id.*

[xcix] *Id.*

[c] *Id.* Even at this stage, however, a lawyer still must recognize "the needs of the commercial community." Pengilley, *supra* note xciv. Too often lawyers think they can or

should run the direction of the negotiations. *Id*. This, however, is not always a commercial reality and can actually stifle the progress of the proposed business deal. *See id*. A lawyer's role, therefore, at least in this context, should be that of an advisor rather than an adversary. *Id*.

[ci] *Id*.

[cii] *Id*.

[ciii] *See infra* Part IV. B (The Inexperienced Investor).

[civ] *See* Dennis Jacobe, *Lessons Learned About Starting a Small Business: Small business owners share what would have made starting their business easier* (Sept. 18, 2006), http://www.gallup.com/poll/24574/Lessons-Learned-About-Starting-Small-Business.aspx.

[cv] *Id.*

[cvi] "Results for the Wells Fargo/Gallup Small Business Index poll are based on telephone interviews with 602 small business owners conducted May 22–June 9, 2006. For results based on the total sample of investors, one can say with 95% confidence that the maximum margin of sampling errors is ±4 percentage points." *Id.*

[cvii] *Id.* This factor ranked fourth among those polled regarding things that would have helped in starting a business.

[cviii] Franchise Lawyer Survey, question 9 (on file with author).

[cix] One in five of those surveyed reported that they had no business experience before beginning. *Id.*

[cx] *Id.*

[cxi] *See, e.g.*, Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1282 (9th Cir. 2006). However, some franchisor lawyers will not negotiate with a prospective franchisee unless that person has a lawyer present or on call. Email Interview by Jason Parnell, assistant to the author, with Tom Pitegoff, franchisor lawyer, Pitegoff Law Offices PLLC (Apr. 24, 2012). Similarly, some franchisor lawyers, just by the very nature of how the franchisor does business, will rarely interface with franchisees, with the exception of international development deals having a great amount of money at stake. Telephone Interview by Jason Parnell, assistant to the author, with Rochelle Spandorf, franchisor lawyer and partner, Davis Wright Tremaine LLP (June 14, 2012).

[cxii] *See* AM. JUR. 2D *Private Franchise Contracts* § 260 (1990) (discussing that franchisee may not be able to claim reasonable reliance when franchisee is a sophisticated investor).

[cxiii] 583 F. Supp. 691 (N.D. Ill. 1984).

[cxiv] *Id.* at 693.

[cxv] S.M.R. Enterprises, Inc was d/b/a Fantastic Sam's. *Id.*

[cxvi] *Id.*

[cxvii] Including violations of Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77(a)) and the Racketeering Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961). *Id.*

[cxviii] *Id.* at 697.

[cxix] *Id.*

[cxx] *Id.*

[cxxi] *Id.* at 698.

[cxxii] *See id.*

[cxxiii] North American alleged that Fantastic's president and director "misrepresented his past business ventures and successes expressly to induce North American into investing in Fantastic." *Id.* at 693. The court, however, held that North American failed to show that these were material misrepresentations or omissions. *See id.* at 698.

[cxxiv] *Id.*

[cxxv] *See id.*

[cxxvi] 957 F. Supp. 749, 761 (D. Md. 1997).

[cxxvii] Including McDonald's breach of the license agreement, breach of the implied covenant of good faith and fair dealing, and other fraud based claims. *See id*. at 751.

[cxxviii] *See id.*

[cxxix] *Id.* at 761 (quoting Miller v. Premier Corp., 608 F.2d 973, 981 (4th Cir. 1979)). Here, the assertions that the franchisee relied upon were all predictive statements, including "the projected cost of the rebuilding of the Broadway facility, the projected profits of the Broadway restaurant after it was rebuilt and the projected impact of the new restaurants on sales at the Broadway location." *Id*. Defendant franchisor argued that these assertions addressed the potential of what could occur, and therefore, were not actionable as fraud. *Id.*

[cxxx] *Id.*

[cxxxi] 608 F.2d 973 (4th Cir. 1979).

[cxxxii] *Id.* at 981.

[cxxxiii] *Payne*, 957 F. Supp. at 761.

[cxxxiv] *Id.* Additionally, the court noted:

> [n]ot only had [the franchisee] operated the Broadway restaurant itself for almost twenty years before 1994, but he had also operated restaurants at his other three Baltimore locations over a period of many years. Moreover, in 1976 and 1978, he operated for several years two additional McDonald's restaurants, one on Eutaw Street and the other on Liberty Road. Both in 1988 and later in 1990, [the franchisee] had objected to the opening of new facilities in the vicinity of his Broadway restaurant. Expressing his firm disagreement with the predictions made by McDonald's that the new restaurants would have minimal impact on sales at the Broadway facilities, [the franchisee] had his own decided views on the matter. Under such circumstances, it can hardly be claimed that [the franchisee] relied to his detriment on McDonald's predictions. *Id.*

[cxxxv] *Id.*

[cxxxvi] *See* AM. JUR. 2D *Private Franchise Contracts*, *supra* note cxii, at 283.

[cxxxvii] *Id*.

[cxxxviii] 527 P.2d 1026 (Kan. 1974).

[cxxxix] *Id*.

[cxl] *Id.* at 1035.

[cxli] *Id.* at 1028.

[cxlii] *Id.* Allegedly, Mr. Fisher desired to purchase a franchise of "Mr. Harold's" as a business investment in case the aerospace industry continued to decline. *Id.*

[cxliii] *Id*. at 1029. According to the three agreements executed between the parties, Mr. Fisher was entitled to own a franchise and to sell additional franchises of Mr. Harold's. *Id.*

[cxliv] *Id.*

[cxlv] *Id.* at 1030.

[cxlvi] *Id.* at 1033.

[cxlvii] *Id.* (quoting Griffith v. Byers Constr. Co., 212 Kan. 65, 73 (1973)).

[cxlviii] *Id.* (quoting 12 *Williston on Contracts*, 3d ed., § 1490 at 342–43).

[cxlix] *See, e.g.*, Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc., 976 F.2d 58, 65 (1st Cir. 1992) (recognizing that an expression of opinion may constitute fraud where the relation between the parties is such that they do not deal at arm's length or on

equal terms).

[cl] *Fisher*, 527 P.2d at 1033. (quoting 37 C.J.S. *Fraud* §§ 10, 226–27 (2013)).

[cli] *Id.* (citing 37 C.J.S. *Fraud* §§ 10(b), 230 (2013)). *See also* U.S.—Bank IV Salina, N.A. v. Aetna Cas. & Sur. Co., 810 F. Supp. 1196, 1208 (D. Kan. 1992) (finding that where the person expressing the opinion possesses, or professes to possess, superior knowledge of the subject, or special information regarding it, his or her opinion may be reasonably regarded as "fact"); Reynolds v. Mitchell, 529 So. 2d 227, 231 (Ala. 1988) (same); Reeve v. Georgia-Pacific Corp., 510 N.E.2d 1378, 1383 (Ind. Ct. App. 1987) (same); and McCollum v. P/S Investments, Ltd., 764 S.W.2d 252, 255 (Tex. App. 1988), writ denied, (Sept. 21, 1988) (same).

[clii] *Id.*

[cliii] *Id.*

[cliv] *Id.*

[clv] *Id.* (quoting 37 AM. JUR. 2D *Fraud & Deceit* § 115, 159–60) (emphasis added).

[clvi] *Id.* at 1034 (quoting James R. Ahrens, *Some Observations on the Law of Misrepresentation in Kansas*, 9 WASHBURN L.J. 315, 326 (1970)).

[clvii] *Id.*

[clviii] *Id.*

[clix] *Id.* (quoting Wolf v. Brungardt, 215 Kan. 272, at Syl. Para. 3 (Kan. 1974).

[clx] *Id.*

[clxi] *Id.*

[clxii] *Id.*

[clxiii] *Id.* at 1035 (quoting 37 AM. JUR. 2D *Fraud & Deceit* § 130, 180–81).

[clxiv] *Id.*

[clxv] Under this theory, opinions or predictions transform into existing material facts, which then makes them actionable.

[clxvi] *Id.*

[clxvii] *Id.*

[clxviii] *Id.*

[clxix] *See* N. Am. Fin. Grp. Ltd. v. S.M.R. Enter., Inc., 583 F. Supp. 691, 698 (N.D. Ill. 1984) (holding that a franchisee with a background in investments was sophisticated).

[clxx] *See id.*

[clxxi] *See* Payne v. McDonald's Corp., 957 F. Supp. 749, 761 (D. Md. 1997) (finding a franchisee sophisticated due to its extensive knowledge of the franchisor's business).

[clxxii] *See* Fisher v. Mr. Harold's Hair Lab, Inc., 527 P.2d 1026, 1033 (Kan. 1974) (discussing the unequal bargaining power of the parties).

[clxxiii] It should be noted that some legislators have also followed the trend of courts in protecting unsophisticated franchisees. For example, the Michigan legislature created a law with the specific purpose "to remedy perceived abuses by large franchisors engaged in manipulating, coercing, or lying to *unsophisticated* investor franchisees." Jerome-Duncan, Inc. v Auto-By-Te, LLC, 989 F. Supp 838, 842 (E.D. Mich. 1997) (citing Michigan House Legislative Analysis, HB 4203, August 2, 1974) (emphasis added); *see also* Geib v Amoco Oil Co, 29 F.3d 1050, 1056 (6th Cir. 1994).

[clxxiv] For a discussion of the general trends in the sophistication of franchisees, see *supra* notes cxi–cxxxiv and accompanying text.

[clxxv] *See supra* Part I.B & Part I.C (discussing the resistance of many franchisees to hire an attorney).

[clxxvi] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note xxix, at § 205.

[clxxvii] *Id*. at cmt. a; *see also id.* at § 109.

[clxxviii] *See* UNIF. FRANCHISE & BUS. OPPORTUNITY ACT [hereinafter UFBOA], § 201

(1987) (drafted by the National Conference of Commissioners on Uniform State Laws) (96th Annual Conference Meeting, Newport Beach, CA. July 31–Aug. 7, 1987) (Approved by the ABA, Philadelphia, PA, Feb. 9, 1988).

[clxxix] *Id.* The comments following Section 201 of the UFBOA note that the section adheres to the principles set forth in § 205 of the Restatement of Contracts and in U.C.C. § 2-103. *Id.* at cmt. 1.

[clxxx] *Id.* at cmt. 1; *see also* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note xxix, at § 9 (Parties Required), § 17 (Requirement of a Bargain) and § 71 (Requirement of Exchange; Types of Exchange) for the various requirements for the formation of a contract.

[clxxxi] UFBOA, *supra* note clxxviii, at § 201 cmt. 1. The comment notes, however, that the duty of good faith and fair dealing "does not apply in the give and take of bargaining preceding the formation of the agreement" and "[i]t is not intended to eliminate risk." *Id.*

[clxxxii] *Id.*

[clxxxiii] *Id.* (citing Bain v. Champlin Petroleum Co., 692 F.2d 43, 48 (8th Cir. 1982)). The *Bain* 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.

*Bain*, 692 F.2d at 48.

[clxxxiv] For example, in *Arnott v. American Oil Co*., 609 F.2d 873 (8th Cir. 1979), the court found that the defendant, American Oil, breached its fiduciary duty owed to plaintiff, George Arnott, when American Oil entered into a lease agreement with Arnott to become a service station dealer for American Oil. *Id.* at 876. Subsequently, defendant terminated the lease agreement and evicted Arnott from the station. *Id.* The court found that American Oil breached its fiduciary duty of good faith and fair dealing owed to Arnott by terminating the lease agreement without good cause. *Id.* at 884. The court specifically noted, "the franchise relationship imposes a duty upon franchisers not to act arbitrarily in terminating the franchise." *Id.* at 882.

[clxxxv] UFBOA, *supra* note clxxviii, at § 201 cmt. 1 (citing Charles Goetz & Robert Scott, *Principles of Relational Contract*, 67 VA. L.REV. 1089 (1981) and Steven Burton, *Breach of Contracts and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980)).

[clxxxvi] *See* Bain v. Champlin Petroleum Co., 692 F.2d 43 (8th Cir. 1982) (holding that the franchisor and franchisee are not in a fiduciary relationship); *see also In re* Sizzler Rests. Int'l, 225 B.R. 466, 473 (Bankr. C.D. Cal. 1998) (holding that a franchisor does not owe a franchisee a fiduciary duty); *see also* Eichman v. Fotomat Corp., 880 F. 2d 149 (9th Cir. 1989) (holding no special relationship exists in a franchisor-franchisee relationship).

[clxxxvii] *See* RESTATEMENT (THIRD) OF AGENCY, *supra* note iv, at § 1.01.

[clxxxviii] *See id.* at § 8.01 (establishing, "[a]n agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship[]"); *see also* RESTATEMENT GOVERNING LAWYERS, *supra* note**Error! Bookmark not defined.**, at § 16 (describing the fiduciary relationship established between a lawyer and their client).

[clxxxix] According to one practicing franchise lawyer, this may not always be true. In recent years, franchisor lawyers have started to be named as parties in lawsuits between the franchisor and franchisee. Telephone Interview by Jason Parnell, assistant to the author, with Andrew A. Caffey, franchisor lawyer, Law Offices of Andrew A. Caffey (June 8, 2012). In those lawsuits, the franchisee argues that the lawyer for the franchisor, as author

of the disclosure documents, conspired with the franchisor to create inaccurate disclosure documents designed to mislead franchisees. *Id*. Although in most, if not all, situations the franchisor's lawyer only acts as an agent for her client, the franchisee's attorneys are, as a tactical matter, naming that lawyer as a party in order to squeeze money out of the franchisor lawyer's insurance companies. *Id*. According to the practitioner, "[i]t is an ugly business—but a real one—that is plaguing those who practice franchising law." *Id*.

[cxc] *See* RESTATEMENT (THIRD) OF AGENCY, *supra* note iv, at § 8.14.

[cxci] *See id*., at cmt. (b) (*Agent's right to indemnification—-in general.* In general, a principal's obligation to indemnify an agent arises when the agent makes a payment or incurs an expense or other loss while acting on behalf of the principal. . . .).

[cxcii] *See supra* Part II, Subpart D (Are Franchisees Third-Party Beneficiaries?); *see also* RESTATEMENT GOVERNING LAWYERS, *supra* note **Error! Bookmark not defined.**, at § 51.

[cxciii] *See* RESTATEMENT (THIRD) OF AGENCY, *supra* note iv, at § 7.03 (describing principal's liability for tortious act of agent); *see also id*. at § 7.01 (describing agent's liability for tortious act).

[cxciv] *Id.* at § 7.02, reading:"An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party."

[cxcv] *See* RESTATEMENT GOVERNING LAWYERS, *supra* note **Error! Bookmark not defined.**, at § 49 (discussing liability of a lawyer for professional negligence and breach of their fiduciary duty).

[cxcvi] *See* RESTATEMENT (THIRD) OF AGENCY, *supra* note iv, at § 7.02.

[cxcvii] Franchise negotiations can include everything from procedural rights to business terms. Telephone Interview with Lee J. Plave, *supra* note xciii. For example, a franchisee may be able to negotiate rate structure and renewal. Telephone Interview with Robert T. Joseph, *supra* note lxxiii. Negotiations will depend on the market, the type of franchisor, and other market related issues. *Id*. Some franchisors will negotiate, and some will not. Telephone Interview with Lee J. Plave, *supra* note xciii. Moreover, some franchise lawyers believe that it is easier for a franchisee to negotiate with a new franchisor than an older, more established one. Telephone Interview with Robert T. Joseph, *supra* note lxxiii. Similarly, franchisees may have more success negotiating procedural terms rather than attacking the basic economic terms of the franchise agreement. *Id*. Rarely, however, will franchisors negotiate terms —procedural or otherwise—that plainly work to their detriment. Telephone Interview with Lee J. Plave, *supra* note xciii.

[cxcviii] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note xxix, at § 205 imposing "a duty of good faith and fair dealing in [the] performance and . . . enforcement" of a contract, which implies that that contract has already been established between the parties. *See also* UFBOA, *supra* note clxxviii, at § 201 cmt. 1 (The duty of good faith and fair dealing "does not apply in the give and take of bargaining preceding the formation of the agreement" and "[i]t is not intended to eliminate risk.").

[cxcix] *Id.* at cmt. c. These comments would also apply to the *Uniform Franchise and Business Opportunities Act* because comment 1 accompanying Section 201 states that this section follows the principles espoused in § 205 of the Restatement of Contracts. *See* UFBOA, *supra* note clxxviii, at § 201 cmt. 1.

[cc] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note xxix, at § 14.

[cci] *See id.* at § 175.

[ccii] *See id.* at § 164.

[cciii] *See id.* at § 177.

[cciv] *See* UFBOA, *supra* note clxxviii, at § 106.

[ccv] 970 F.2d 273 (7th Cir. 1992).

[ccvi] *Id.* at 275. Franchisor claimed that the franchisee continued to sell their product under their name after the franchisee's franchise terminated. *Id.*

[ccvii] *Id.* Defendant also claimed a violation of the Illinois Franchise Disclosure Act. *Id.*

[ccviii] *Id*. at 279.

[ccix] *Id.* at 280.

[ccx] *Id.*

[ccxi] *Id.*

[ccxii] *Id.*

[ccxiii] *Id*.

[ccxiv] *Id.* The court cited *Morin Building Products Co. v. Baystone Construction, Inc.*, 717 F.2d 413, 415 (7th Cir. 1983), where it found a contract was established in bad faith, "not because any provision of the contract was unreasonable and had to be reformed but because a provision had been invoked dishonestly to achieve a purpose contrary to that for which the contract had been made." *Id.*

[ccxv] This could have been accomplished if the franchisee had built an extremely profitable franchise and the franchisor looking to appropriate the franchisee's profits, determined to cancel the franchise agreement on the franchisee's trivial violations of the agreement. *Id.*

[ccxvi] *Id.* The court held that:

> [n]ot only were many of the violations not trivial, but there is no suggestion of exceptional performance by the [franchisee]. True, it was a new franchise, and it has been doing well ever since the incompetent manager was booted out; but it is in a prime location, and the company in negotiating the terms of the franchise rated it a 'good' franchise--one very likely to do well.

*Original Great Am. Chocolate Chip Cookie Co.*, 970 F.2d. at 280. Moreover, the court found that the franchisor was not attempting to take over the franchise in this case. *Id.*

[ccxvii] *Id.* The court cited *Promimos v. Fair Automotive Repair, Inc.*, 808 F. 2d 1273, 1275 (7th Cir. 1987) (noting "[t]hough a number of states do recognize liability in cases where out of pure spite a landowner builds a fence that blocks his neighbor's light or view . . . .) *Original Great Am. Chocolate Chip Cookie Co.*, 970 F.2d. at 281.

[ccxviii] *Id.* (noting that the duty of good faith is intended to prevent opportunistic behavior, which is "designed to change the bargain struck by the parties in favor of the opportunist[]") The *Cookie Company* court found that the franchisee failed to establish any opportunistic behavior on the part of the franchisor. *Id.*

[ccxix] The court also noted that unconscionability is also closely allied to the terms "fraud" and "duress." *Id.*

[ccxx] *Id.*

[ccxxi] *Id.*

[ccxxii] 932 F. Supp. 1420 (S.D. Fla. 1996).

[ccxxiii] *Id.* at 1422.

[ccxxiv] Barnes argued that he was forced to close his franchise because of substantial losses in profits he suffered as a result of another Burger King franchise operating five blocks from Barnes' franchise in downtown Los Angeles, California. *Id.* at 1424.

[ccxxv] Barnes' complaint against Burger King Corp. consisted of eight counts, including: fraud in the inducement, violation of the Florida Franchise Act, violation of the Florida Sale of Business Act, breach of the implied covenant of non-competition, breach of the implied covenant of good faith and fair dealing, breach of contract, promissory estoppel, and a request for permanent and injunctive relief. *Id.* at 1424.

[ccxxvi] *Id.* at 1423–24.

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[ccxxvii] *Id.* at 1437.

[ccxxviii] *Id.* at 1437–38.

[ccxxix] *Id.* at 1438.

[ccxxx] *Id.*

[ccxxxi] *Id.*

[ccxxxii] *Id.*

[ccxxxiii] *Id.*

[ccxxxiv] *Id.* at 1439 (citing Burger King Corp. v. Weaver, No. 90-2191-CIV-MARCUS (S.D. Fla. 1995), *aff'd*, 169 F.3d 1310 (11th Cir. 1999); *see also* Burger King v. Holder, 844 F. Supp. 1528, 1530 (S.D. Fla. 1993) (holding the implied covenant of good faith and fair dealing is not actionable absent a breach of the contract's express terms); *see also* Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1429 (11th Cir. 1990) (holding the covenant is not an undertaking that can be breached apart from expressed contract terms).

[ccxxxv] *Barnes*, 932 F. Supp. at 1439.

[ccxxxvi] *Id.*

[ccxxxvii] Am. Nursing Care of Toledo, Inc. v. Leisure, 609 F. Supp. 419, 431 (D.C. Ohio 1984).

[ccxxxviii] *See generally* Joel Iglesias, *Applying the Implied Covenant of Good Faith and Fair Dealing to Franchises*, 40 HOUS. L. REV. 1423, 1453 (2003) (discussing the ability of franchisors to draft agreements to better control the franchise, leaving franchisees "with few options for self-protection[]").

[ccxxxix] Lee A. Rau, *Implied Obligations in Franchising: Beyond Terminations*, 47 BUS. LAW. 1053, 1065 (1992) (citing RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981)).

[ccxl] *See* Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship*, 6 BARRY L. REV. 61, 64–66 (2006) (stating the contractual duties owed by the franchisor to the franchisee).

[ccxli] *Id.* at 99. The article gives as example of an arbitration clause: "Moreover, if an arbitration clause in the franchise agreement is too one-sided, for example, by requiring the franchisee but not the franchisor to arbitrate, a court may strike the arbitration clause down as an 'unconscionable' one." It should also be noted that some courts find that unconscionability should be applied at the contract-formation stage to prevent overreaching before the agreement is formed. *See* 8 WILLISTON ON CONTRACTS § 18.8, n.7 (4th ed. 2011) (quoting Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 281 (7th Cir. 1992)). These courts analyze whether the franchisor took advantage of the franchisee's ignorance or desperation prior to signing the contract "to force unreasonable terms upon them." *See id*.

[ccxlii] *Id.*; *see also* Spandorf & Krakus, *supra* note xxxvi, at 1 (citing Ticknor v. Choice Hotels Int'l, 265 F.3d 931 (9th Cir. 2001); Boltzer v. Super. Ct., 87 Cal. App. 4th 900 (2001)) ("Franchise law has long characterized franchise agreements as adhesion contracts.").

[ccxliii] *Id.* at 426. The franchisor claimed that no such agreement was ever concluded. *Id.*

[ccxliv] *Id.* at 430. The court held that there was no oral agreement which superseded the written franchise agreement as contended by the franchisee. *Id.* at 426. The court also noted that "[a]ll parties understood that a fair price would be paid for equity interests, but never proceeded to the point of setting a definitive price or number of shares." *Id.* Additionally, "[t]he franchisees were represented by counsel through these discussions." *Id.* The court ruled in favor of the franchisor holding that the franchisee breached the franchise agreement. *Id.* at 431–32. However, the court was unwilling to enforce the provision which stipulated that the franchisee could not compete with the franchisor,

because the franchisor failed to establish that the time and area that these covenants cover was reasonable. *Id.* at 433.

[ccxlv] *See* 16 C.F.R. §§ 436.1–436.11 (2012); *see also* ARK. CODE ANN. § 4-72-206(1) (2010); CAL. BUS. & PROF. CODE § 20010 (West 2006); CONN. GEN. STAT. § 42-133f(f) (2010); D.C. CODE § 36-303.1(a)(9) (2006); HAW. REV. STAT. § 482E-6(2)(F) (LexisNexis 2010); IND. CODE § 23-2-2.7-1(5) (2010); IOWA CODE § 523H.4 (2010); MD. CODE ANN. § 14-226 (LexisNexis 2010); MICH. COMP. LAWS § 445.1527(b) (2010); NEB. REV. STAT. § 87-406(1) (2010); N.J. REV. STAT. § 56:10-7(a) (2010); S.D. CODIFIED LAWS § 37-5A-86 (repealed 2008); MINN. R. 2860.4400(D) (2005).

[ccxlvi] We Care Hair Dev., Inc. v. Engen, 180 F.3d 838, 843 (7th Cir. 1999). The court noted, "[b]efore signing the franchise agreement and the sublease, each franchisee was provided with a copy of the uniform offering circular which clearly disclosed that the leasing company could bring eviction proceedings for any breach of the sublease, including a breach of the franchise agreement." *Id.; cf.* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1282 (9th Cir. 2006). The *Nagrampa* court held:

> Although franchise agreements are commercial contracts they exhibit many of the attributes of consumer contracts. The relationship between franchisor and franchisee is characterized by a prevailing, although not universal, inequality of economic resources between the contracting parties. Franchisees typically, but not always, are small businessmen or businesswomen or people like the Sealys seeking to make the transition from being wage earners and for whom the franchise is their very first business. Franchisors typically, but not always, are large corporations. The agreements themselves tend to reflect this gross bargaining disparity. Usually they are form contracts the franchisor prepared and offered to franchisees on a take-[it-]or leave-it basis . . . 'Franchising involves the unequal bargaining power of franchisors and franchisees and therefore carries within itself the seeds of abuse. Before the relationship is established, abuse is threatened by the franchisor's use of contracts of adhesion presented on a take-it-or-leave-it basis.'

*Id.* (quoting Postal Instant Press, Inc. v. Sealy, 51 Cal. Rptr. 2d 365, 373–74 (1996)).

[ccxlvii] We Care Hair Dev., Inc. v. Engen, 180 F.3d 838 (7th Cir. 1999).

[ccxlviii] *Id.* at 843 (citing Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 281 (7th Cir. 1992).

[ccxlix] 91 Fed. Appx. 810 (4th Cir. 2003).

[ccl] *Id.* at 815 (citing Meyer v. State Farm Fire & Gas Co., 582 A.2d 275, 278 (Md. Ct. Spec. App. 1990)). This is the definition of adhesion contract in accordance with Maryland law. *Choice Hotels Int'l, Inc.*, 91 Fed. Appx. at 815.

[ccli] *Id.*

[cclii] *Id.* The court further noted that the franchisee:

> has not demonstrated that it had no viable alternatives, or that it faced the possibility of being excluded from the hotel franchise business if it had refused such an arbitration contract. Rather, the facts of this case suggest that [the franchisee] made a conscious decision to contract with Choice Hotels and change its affiliation, because it believed that the Quality Inn mark, as opposed to the Holiday Inn mark, would increase profitability. Further, addendums to the Agreement make clear that at least some negotiations took place before the Agreement was finalized, and that [the franchisee] willingly accepted the burdens of the franchise agreement.

*Id.*

[ccliii] *Id.* In its motion, the franchisee relied on *Ticknor v. Choice Hotels Int'l, Inc.*, which held that an arbitration clause was unconscionable, not merely unenforceable against the franchisee. However, the *Ticknor* holding concerned Montana law, rather than the Maryland law applied in *Chewl's Hospitality*. Under Montana law, an adhesion contract is one that "lacks mutuality of obligation, is one-sided, and contains terms that are unreasonably favorable to the drafter" and is essentially decided as a matter of public policy. Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 939 (9th Cir. 2001) (citing Iwen v. U.S. West Direct, 1999 MT 63, 293 Mont. 512, 977 P.2d 989).

[ccliv] Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2002).

[cclv] *Id.* at 362.

[cclvi] *Id.*

[cclvii] *Id.* at 363.

[cclviii] *Id.* at 366. The article notes that a prospective employee, or likely franchisee for that matter, could ask the prospective employer or franchisor such a question but only if "he was an extraordinary talent in great demand in the employment market." *Id.* at 367.

[cclix] *Id.*

[cclx] *Id.*

[cclxi] *Id.*

[cclxii] GARNER, *supra* note lxxv, at § 8:37. Moreover, courts will rarely find a commercial contract unconscionable, while they will be more willing to do so for consumer contracts. *Id*

[cclxiii] However, this situation might be different if the franchisee was an individual rather than a business entity. When there are negotiations between two businesses courts likely will not find the business franchise was composed of unsophisticated parties. Yet, if the franchisee were an individual negotiating with a represented business franchisor, the court may be more willing to find the commercial contract unconscionable. It may also matter whether the individual franchisee had ever owned a franchise before and other business background he possesses.

[cclxiv] Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 72 Fed. Reg. 15444 (Mar. 30, 2007); *see* Gerald C. Wells & Dennis E. Wieczorek, *A Road Map to the New FTC Franchise Rules*, 27 FRANCHISE L.J. 105 (2007).

[cclxv] *Id.*

[cclxvi] *Id.*

[cclxvii] *Id.*

[cclxviii] *Id*. at 106–07.

[cclxix] *Id*. at 106; *see also* 16 C.F.R. § 436.2(a) (2012); 16 C.F.R. § 436.9(e) (2012).

[cclxx] *See id.*; *see also* 16 C.F.R. § 436.2(b) (2012).

[cclxxi] 16 C.F.R. § 436.2(c) (2012). The FTC lists "traditional hard copy, fax, CD-ROM, e-mail, or website access" as ways to submit disclosure documents. *Id*.

[cclxxii] *See* 16 C.F.R. § 436.6(g) (2012).

[cclxxiii] *See* 16 C.F.R. § 436.3(b) (2012).

[cclxxiv] *See* 16 C.F.R. § 436.3 (2012).

[cclxxv] *See* 16 C.F.R. § 436.5(a)(1) (2012). According to Wells & Wieczorek, the purpose of revealing the parent company as an "alert [to] prospective franchisees of competing company-owned outlets." Wells & Wieczorek, *supra* note 395, at 107.

[cclxxvi] *See* 16 C.F.R. § 436.5(c)(1);(c)(i)(B) (2012).

[cclxxvii] *See* 16 C.F.R. § 436.5(c)(1)(ii) (2012). According to Wells & Wieczorek, the "FTC's goal is to give a prospective franchisee more information on the nature and level of disputes within a franchise system." Wells & Wieczorek, *supra* note 395, at 108.

[cclxxviii] 16 C.F.R. § 436.5(k) (2012).

[cclxxix] 16 C.F.R. §§ 436.5(s)(1)- (2) (2012).

[cclxxx] *Id.*

[cclxxxi] *See* 16 C.F.R. § 436.5(t)(1) (2012); 16 C.F.R. § 436.5(t)(2)(i) (2012); 16 C.F.R. § 436.5(t)(2)(ii) (2012); 16 C.F.R. § 436.5(t)(2)(iii) (2012); and 16 C.F.R. § 436.5(t)(3) (2012).

[cclxxxii] Wells & Wieczorek, *supra* note 395, at 109; *see also* 16 C.F.R. § 436.5(t)(7) (2012).

[cclxxxiii] *See* Wells & Wieczorek, *supra* note 395, at 109*; see also* 16 C.F.R. § 436.5(t)(8) (2012).

[cclxxxiv] 16 C.F.R. § 436.5(u)(1) (2012).

[cclxxxv] *See* 16 C.F.R. § 436.5(u)(1)(v) (2012).

[cclxxxvi] *See* 16 C.F.R. § 436.7(a) (2012).

[cclxxxvii] 16 C.F.R. § 436.5(w) (2012).

[cclxxxviii] Wells & Wieczorek, *supra* note 395, at 110.

[cclxxxix] *Id*. at 105.

[ccxc] *Id*. at 107.

[ccxci] *See* Manitoba Law Reform Commission, *Event Summary: Franchise law Symposium Materials: Consultation Paper on Franchise Litigation*, 8 ASPER REV. INT'L BUS. & TRADE L. 181, 225 (2008) (detailing various differences between state and FTC disclosure laws); *see also* Debra Burke & E. Malcolm Abel II, *Franchising Fraud: The Continuing Need for Reform*, 40 AM. BUS. LJ. 355, 371 (2003) (citing Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1509–13 (1990) (discussing how some state legislatures grant franchisees a private cause of action for any losses to the franchisee caused by the franchisor's failure to comply with certain state laws).

[ccxcii] *See* Bryan Schwartz, et al., *Event Summary: Franchise Law Symposium Materials: Response to Consultation Paper on Franchise Law*, 8 ASPER REV. INT'L BUS. & TRADE L. 253, 299 (2008) (detailing ways in which states enforce the FTC franchise rules); *see also* Debra Burke & E. Malcolm Abel II, *Franchising Fraud: The Continuing Need for Reform*, 40 AM. BUS. L.J. 355, 371–73 (2003) (listing ways in which state laws enforce FTC franchise rules through private rights of action).

[ccxciii] *See* American Bar Association, *Thirty Years of Franchising*, 27 FRANCHISE L.J. 85, 102 (2007) (response from Rochelle Spandorf).

[ccxciv] Burke & Abel, *supra* note 422, at 383.

[ccxcv] *Id*. at 384. Alternatively, these commentators suggest that if a state does not want to create a private cause of action for franchisees, the state should make any violation of federal disclosure laws a violation of the states Deceptive Trade Practices Act. *Id*.

[ccxcvi] *See id*.

[ccxcvii] James A. Meaney, *Choice of Law: A New Paradigm for Franchise Relationships*, 15 FRANCHISE L.J. 75, 78–79 (1996) (discussing, in part, the role of franchise regulation and disclosures in "counteracting the effects of an informational imbalance").

[ccxcviii] When the FTC surveyed public opinion on the Franchise Rule in 2004, the Commission received many favorable comments about the rule from franchisors. Among the franchisors in support was Cendant, a publicly traded company that owns several franchise systems including Howard Johnson, Ramada, Century 21, Coldwell Banker, ERA, and Avis Rent-A Car. Clearly, the Rule not only protects franchisees, but it can also confer broad benefits to honest, ethical franchisors who engage in fair sales practices and thus continue to survive. That is, these honest franchisors engaging in only ethical practices find it easier to compete in franchisee recruitment when other franchisors play by the rules, too. Other franchisors supporting the Rule included Better Homes & Gardens Real Estate Service, Re/Max Corporation, The Prudential Real Estate Affiliates, Inc., Snap-On, Inc., Little Caesars, The Southland Corporation (7-Eleven), Medicap Pharmacies, Forte Hotels, PepsiCo Restaurants (Pizza Hut, Taco Bell, KFC, Inc.), Atlantic Richfield Company, and Papa John's Pizza. FTC, Disclosure Requirements and Prohibitions Concerning Franchising. August 2004. (Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule-16 CFR Part 436).

[ccxcix] Some practitioners believe that, under the current disclosure system, prospective franchisees still do not conduct thorough enough research on the franchises for which they are signing an agreement. Email Interview by Jason Parnell, assistant to the author, with Rupert Barkoff, franchisor lawyer and partner, Kilpatrick Townsend & Stockton LLP (May 12, 2012). In some cases, when the lawyer believes the prospective franchisee has performed insufficient research or is seeking counsel too early in the process, the lawyer will not accept the representation and will ask the prospective franchisee to do more research before seeking to hire the attorney. Telephone Interview with Rochelle Spandorf, *supra* note cxi.

These lawyers recognize that legal representation is expensive and believe that prospective franchisees should do their homework before calling a law firm. *Id*.

[ccc] *See, e.g.*, HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION 1, at § 1 (2011) (discussing consumer laws that require disclosure); 54B CAL. JUR. 3D REAL ESTATE § 1258 (2012) (discussing real estate disclosure requirements in California); and Johnston v. Weil, 946 N.E.2d 329, 336 (Ill. 2011) (discussing required disclosure for marriages in Illinois).

[ccci] *See* Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J. L. & PUB. POL'Y 199, 210–212 (2005).

[cccii] *See generally* Robert W. Gray, *The Applicability of Constructive Eviction, Implied Warranty of Habitability, Common-Law Fraud, and the Consumer Fraud Act to Omissions of Material Facts in a Commercial Lease*, 38 J. MARSHALL L. REV. 1289, 1289–1290 (2005) (discussing Illinois consumer real estate protection laws and, in part, comparing Illinois laws to other states).

[ccciii] *See generally* Andrew J. Kyreakakis, *Antenuptial Law in New Jersey*, 24 SETON HALL L. REV. 254 (1993) (discussing the requirement of independent legal counsel for each spouse dealing with a prenuptial agreement).

[ccciv] CAL. FAM. CODE § 1615(c)(1) (West 2012).

[cccv] *See generally* Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 360–362 (2007) (discussing, in part, California martial disclosure laws that require a party have independent counsel or a waiver to be found voluntary).

[cccvi] *See* GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES, § 544 (2011).

[cccvii] *Id*.

[cccviii] Franchise Lawyer Survey, question 11.

[cccix] *Id.*

[cccx] Alexander Meiklejohn, *UFOCs and Common Law Claims Against Franchise Counsel for Negligence*, 25 FRANCHISE L.J. 45, 62 (2005).

[cccxi] *Id.* This is important because franchisees are not financially situated to deal with these potential losses. *Id.*

[cccxii] *See supra* notes 385–423 and accompanying text*; see also* Meiklejohn, *supra* note cccx, at 63.

[cccxiii] Meiklejohn, *supra* note cccx, at 63. However, in light of the "FTC's limited enforcement resources and the lack of any private right of action under its rule, common law litigation is an important means of ensuring compliance."

[cccxiv] *Id.*

[cccxv] *Id.*

[cccxvi] *Id.*

[cccxvii] *Id.*

[cccxviii] *Id*. *See generally* Mark H. Miller, *Unintentional Franchising*, 36 ST. MARY'S L.J. 301, 389 (2005) (discussing various ways in which franchisor lawyers have a duty to inform both parties that they are participating in a franchise agreements; "The duty of the lawyer includes the obligation to exercise due diligence, including a reasonable inquiry, in connection with responsibilities he has voluntarily undertaken").

[cccxix] Meiklejohn, *supra* note cccx, at 63.

[cccxx] *Id.* Arguably, the franchisor's counsel is also in a better position to assess his own liability for the franchisee's reliance on information he provided because of his legal knowledge. For example, the franchisor's attorney already knows that he can be liable for information that the franchisor reasonably relies on to his detriment. *Id.* Because an attorney is generally in a better position to gauge the risk of reliance than the reliant party, he can evaluate what information should be communicated to the franchisee. *Id.* The franchisee, in contrast, is unlikely to fully appreciate the negative impact of his reliance and may not be able to determine what information he needs to request.

[cccxxi] *Id.*

[cccxxii] One practitioner notes that if more liability were imposed upon lawyers, it would not change his representation of his client. Telephone Interview with Robert T. Joseph, *supra* note lxxiii. It would, however, prompt him to ask the unrepresented franchisee to sign a disclosure, making the franchisee acknowledge that he is not the franchisee's lawyer and that he agrees not to hold the lawyer liable. *Id*. In his opinion, more liability for lawyers would simply mean *more* paperwork for the franchisee to sign, which may, at least in the long run, not really make much of a difference. *Id*. Similarly, another attorney for franchisors says that more liability for lawyers would cause him to issue a *pro forma* statement to unrepresented franchisees informing them that he is not their lawyer. Telephone Interview with Lee J. Plave, *supra* note xciii.

[cccxxiii]*Id. See generally* Bradford Cornell & James C. Rutte, *Collateral Damage and Securities Litigation*, 2009 UTAH L. REV. 717, 719–720 (2009) (discussing the harmfulness of over-disclosure in the securities law).

[cccxxiv] Meiklejohn, *supra* note cccx, at 64.

[cccxxv] *Id.*

[cccxxvi] *Id.*

[cccxxvii] *Id.*

[cccxxviii] *Id*.

[cccxxix] *E.g.*, when there are stock or bond offerings in which the lawyer provides a signed opinion letter to accompany the offering. *Id.*

[cccxxx] *Id*. Despite these potential risks, countries abroad have also chosen to adopt similar disclosure schemes. France, for example, amplified its franchise regulation scheme in 1999 and requires the offering of circulars by the franchisor to the franchisees prior to the sale of a franchise. *See* David J. Kaufmann, *An Overview of the Law of Franchising*, 823 PLI/COMM 55, 119 (2001).

[cccxxxi] *See generally* RESTATEMENT GOVERNING LAWYERS, *supra* note **Error!**

**Bookmark not defined.**, at § 16 (discussing the duties owed by a lawyer to a client).

[cccxxxii] *See* 62B AM. JUR. 2D PRIVATE FRANCHISE CONTRACTS § 174 (stating that franchise agreements are written to be "highly favorable to the franchisor[]") (citing Am. Nursing Care of Toledo, Inc. v. Leisure, 609 F. Supp. 419, 431 (N.D. Ohio 1984).

[cccxxxiii] *See, e.g.*, Ticknor v. Choice Hotels Int'l., Inc., 265 F.3d 931, 939 (9th Cir. 2001) (finding an arbitration clause in a franchise agreement to be too one-sided and, thus, unenforceable).

[cccxxxiv] Byron E. Fox & Harry C. Su, *Franchise Regulation—Solutions in Search of Problems?*, 20 OKLA. CITY U. L. REV. 241 (1995) (stating that a franchisee should not form a business relationship with a franchisor when the terms of the franchisee agreement are oppressive).

[cccxxxv] *See* Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Relationship*, 6 BARRY L. REV. 61, 103 (2006) (discussing the business benefits of a "rational, reasonable, fair, just, ethical, and honest" relationship between a franchisor and franchisee).

[cccxxxvi] *Id.*

[cccxxxvii] *Id.*

[cccxxxviii] *See generally* Ronald E. Mallen, *Duty to Nonclients: Exploring the Boundaries*, 37 S. TEX. L. REV. 1147, 1147–66 (1996) (discussing the increase in lawyer liability laws and the hardships on lawyers who may not anticipate a duty arising from the representation of a client).

[cccxxxix] *Id.*

[cccxl] *Id.*

[cccxli] Meiklejohn, *supra* note cccx, at 64.

[cccxlii] *Id.*

[cccxliii] *Id.*

[cccxliv] "[T]here is no time limit on the franchisor's use of the circular." *Id.*

[cccxlv] *Id.*

[cccxlvi] *Id.*

[cccxlvii] *Id.*

[cccxlviii] Certainly if such information may be deemed "material" by a court in an action by the potential investor. *Id.*

[cccxlix] *Id.*

[cccl] *Id.*

[cccli] That ultimately shifts the burden from the franchisor to the attorney. Even if the franchisor was liable, the franchisor could seek indemnification from the attorney via a malpractice claim.

[ccclii] Meiklejohn, *supra* note cccx, at 65.

[cccliii] *Id.*

[cccliv] *Id.*

[ccclv] One practitioner sees unrepresented franchisees as a less than desirable situation and would prefer to see more franchises secure representation. Telephone Interview with Robert T. Joseph, *supra* note lxxiii. He does not, however, feel it is duty to tell the unrepresented franchisee to do so. *Id*. In his view, telling unrepresented franchisees to seek counsel would impose a legal duty upon him that, at least under the current law, does not exist. *Id*.

[ccclvi] *See* 16 CFR §§436–437 (2012). Internationally, however, this is not the case. In Australia, the franchise agreement cannot be signed unless the franchisor receives signed statements from the franchisee stating that the franchisee received independent legal or business advice related the franchise agreement or chose not to do so. *See Trade Practices*

*(Industry Codes—Franchising) Regulations 1998* (Cth) s 11 pt 2 (Austl); *see also* Stephen Giles & Rupert M. Barkoff, *Australian Franchise Law: How to Avoid Being a Shrimp on the Australian Franchising Barbecue*, 29 FRANCHISE L.J. 164, 171 (2010) (discussing how franchisors in Australia must recommend that franchisees seek independent legal and business advice).

[ccclvii] Even more disclosures may not limit these harmful effects if the franchisees simply fail to read the disclosures. When this occurs, some practitioners question how much the law should protect franchisees who do not read their own contracts. Telephone Interview with Rochelle Spandorf, *supra* note cxi.

[ccclviii] *Id.* For example, Dunning explains "doctors confident that they understand an illness will fail to refer a patient to a specialist," or "elderly drivers who are brought in for an evaluation often say they are above average drivers. However, they are four times more likely at the end of the evaluation to be labeled as unsafe than those who are more cautious about their skill." *Id.*

[ccclix] Williams, *supra* note 84, at 734–35.

[ccclx] *Id.* at 746–47.

[ccclxi] At least one leading franchise law practitioner agrees. Since franchises are business arrangements with no fiduciary duty, more disclosure may not be effective if the franchisee does not read and, more importantly, understand the disclosure documents. Telephone Interview with Robert T. Joseph, *supra* note lxxiii. According to the practitioner, if the franchisee fails either to read and understand the documents or to obtain a lawyer to assist him in doing so, and later he sues the franchisor, at his deposition the first question the franchisee will be asked is whether or not he received the disclosure documents. *Id*. If the answer is "yes," then he will be asked two questions: whether he read the disclosure documents and, if so, whether he understood them. *Id*. Depending on how the franchisee answers these two questions, he will appear either uninformed or unintelligent, with neither outcome playing in his favor at trial. *Id*.

[ccclxii] Killion, *supra* note ix, at 24.

[ccclxiii] *Id.*

[ccclxiv] *Id.* at 31.

[ccclxv] *Id.* at 29.

[ccclxvi] *Id.*

[ccclxvii] However, disclosure can be "conductive to economic efficiency," by ensuring that those who invest in potential franchises are best suited and completely informed of the requirements for franchising. Meiklejohn, *supra* note cccx, at 63.

[ccclxviii] *See supra* text accompanying notes 413–414

[ccclxix] One leading franchise lawyer argues that franchisees are not nearly as unsophisticated as they were forty years ago and that current laws requiring a franchise disclosure document notifying the prospective franchisee to seek counsel, along with a mandatory cooling off period, are more than sufficient to protect prospective franchisees and prevent overreaching._Telephone Interview with Rochelle Spandorf, *supra* note cxi. Thus, if a prospective franchisee is uninformed or without counsel, it is by choice, not some flaw in the current regulations. *Id*. Rules should not automatically place a lawyer at the hip of every businessman or woman. *Id*.

[ccclxx] Such a proposal is already enforce abroad. For example, in Ontario, Canada, the franchise laws require franchisors to disseminate disclosures to prospective franchisees and also afford franchisees a private right of action against franchisors for misrepresentation or statutory non-compliance. *See* Arthur Wishart Act, R.S.O. 2000, c. P.3 s 4(5), 7(1) (Can.); *see also* Kaufmann, *supra* note 431, at 121 (discussing Canadian franchise laws).

[ccclxxi] Peter C. Lagarias & Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, 29 FRANCHISE L.J. 139, 139–45 (2010).

[ccclxxii] Steinberg & Lescatre, *supra* note xviii, at 313.

[ccclxxiii] Debra Burke & E. Malcolm Abel II, *Franchising Fraud: The Continuing Need for Reform*, 40 AM. BUS. L.J. 355, 382–84 (2003).

[ccclxxiv] *See supra* text accompanying notes 416–420.

[ccclxxv] *Id.*

[ccclxxvi] *See* Courtney v. Waring, 237 Cal. Rptr. 233, 239 (Cal. App. 1987).

[ccclxxvii] *I.e.*, to void the contract even if there was no wrongful intent on the franchisor's part, only harmful consequences to the franchisee.

[ccclxxviii] *Compare* Payne v. McDonald's Corp., 957 F. Supp. 749, 761 (D. Md. 1997) (noting that reliance on the franchisor's statements was unreasonable due to the franchisee's knowledge of the restaurant business), *with* Fisher v. Mr. Harold's Hair Lab, Inc., 527 P.2d 1026, 1034 (Kan. 1974) (holding that an investor with no background in business reasonably relied on the franchisor's statements).

[ccclxxix] On the individual level, there is no miraculous balm to treat the injuries incurred due to ignorance. As for a universal perspective, there is no overall solution; for example, one cannot increase the franchisee's opportunity to use her ignorance as an excuse (to thereby evade otherwise binding contractual duties) without decreasing the ability of franchisors and others to rely on the deals they make with franchisees.