The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections

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A recent article in the *Franchise Law Journal* sought to dispel "the myth of the vulnerable franchisee" as simplistic and outdated (referred to as *Modern Myth*).[1] But the article fails to address the reality of the economically dominant and oftentimes overreaching franchisor. If franchisees are not always "naive and unsophisticated" and lacking equal bargaining power, can it also be conceded that franchisors typically possess economic superiority, insist on one-sided agreements, and exercise substantial control? This reply article will provide an alternative analysis of the franchise relationship, franchise legislation, and applicable case law.

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At bottom, *Modern Myth* is emblematic of the centuries-old tensions between dominant and subservient populations that led to the Magna Carta, the Declaration of Independence, and, as relevant here, laws protecting franchisees. But then it paints franchisees as having grown in sophistication and economic power since the days when franchise legislation first passed and therefore argues that the need for protection is diminished.

However, *Modern Myth* fails to address key points that validate the value of franchise laws. First, franchisors continue to maintain and exploit their systemic economic superiority vis-à-vis franchisees. There is no empirical data suggesting equality of bargaining power between franchisors and franchisees. Rather, all indications are just the opposite. Indeed, there can be no doubt that most franchise agreements are drafted by a franchisor's lawyers to benefit the franchisor in every possible way and are usually presented to franchisees on a take-it-or-leave-it basis. Second, policy is left to the people through their elected legislatures. Once a statute is enacted to protect a class of people, it is the duty of the courts to enforce the statute with an eye toward quelling the mischief at which the statute is directed. Courts do not ignore statutory mandates merely because some members of the protected class might be more sophisticated than others. Third, under the common law and statutes, courts are to employ the full breadth of contract law and the doctrines of unconscionability, reasonable expectations, and good faith and fair dealing to resolve parties' disputes fairly. Application of such principles is particularly appropriate when dealing with disputes arising in adhesion contracts and those governing long-term relationships such as franchise agreements.

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THE VULNERABLE FRANCHISEE

Modern Myth is premised on the idea that because some franchisees may be experienced, intelligent, and, in some cases, represented by counsel, case law and statutes favoring franchisees should be jettisoned. *Modern Myth* challenges two cases from California, *Postal Instant Press, Inc. v. Sealy* (*PIP*)[2] and *Nagrampa v. MailCoups, Inc.*,[3] as unduly favoring vulnerable franchisees over freedom of contract notions. The author discusses the history of franchising and presents McDonald's Corporation as a model franchise. The advent of franchising regulation in the 1970s is chronicled as evolving in response to marketplace abuses. Finally, *Modern Myth* concludes with assertions that franchising statutes should no longer be construed liberally and that franchisee-favorable decisions should be overturned.

Modern Myth fails to address many current realities of franchising. Specifically, franchising is replete with overreaching and unfair practices by franchisors regardless of a given franchisee's experience and resources. Because franchise regulation is limited in scope and geography, with most states having no franchise statutes of any type, franchisees' rights and remedies are primarily governed by contract. The prevalence of one-sided and adhesive franchise agreements and the imposition of often one-sided arbitration schemes are not mentioned in the article. Also overlooked is the increased vulnerability of franchisees to exploitation on account of sunk capital and the undertaking of other long-term obligations. These realities show that more, not less, franchisee protections are needed.

PURPOSES OF FRANCHISE DISCLOSURE REGULATION

Franchise disclosure legislation followed employment, securities, banking, insurance, and other regulations implemented to temper abuses in the free-market economy. Core concerns leading to most such remedial legislation were fraud and other unfair or deceptive practices.[4] Despite widespread legislation and regulation of the marketplace, however, the need for such regulation unequivocally continues. Modern-day hucksters masquerading as "titans of industry" continue to engage in fraud and deceptive practices, costing billions in losses to even the most sophisticated investors. Names such as AIG, Enron, WorldCom, and Madoff serve as reminders for more, not less, regulation of those who wield economic power.[5] Franchising also has had, and continues to have, its share of fraud and misconduct.

The seminal franchise disclosure law in California was modeled after securities statutes seeking to protect aggrieved purchasers of franchises.[6] The express purpose of the California Franchise Investment Law (CFIL) reads as follows:

> The Legislature hereby finds and declares that the widespread sale of franchises is a relatively new form of business which has created numerous problems both from an investment and a business point of view in the State of California. . . . California franchisees have suffered substantial losses where the franchisor or his or her representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between franchisor and franchisee, and the prior business experience of the franchisor.
>
> It is the intent of this law to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered. Further it is the intent of this law to prohibit the sale of franchises where the sale would lead to fraud or likelihood that the franchisor's promises would not be fulfilled, and to protect the franchisor and franchisee by providing a better understanding of the relationship between the franchisor and franchisee with regard to their business relationship.[7]

At the California legislative hearings, Deputy Attorney General Richard Gilbert testified, in November of 1969, that within the past two to three years franchise fraud cases had moved from being relatively minor to the leading type of case in the Investment Crimes Unit.[8] Gilbert testified that this was also likely the tip of the iceberg and that local district attorneys in California and the chief postal inspector had reported similar findings.[9] Gilbert and other representatives also discussed complaints involving twenty to thirty different franchise systems as typically involving false earnings claims and false promises of training and volume discounts.[10] Gilbert concluded his testimony by quoting an American Bar Association article that "does an excellent job of summing up" the negative impact of franchising:

> There are personal tragedies by the thousands which are submerged in the statistics. Men who put in their life savings and lost all because they were in the wrong place or offered the wrong service or commodity or had the wrong franchisor. Other disasters do not show in the failure statistics. Men grimly holding on, making an inadequate income, unable to get their money out, homeless and embittered. And then there are the victims of true frauds. . . . [11]

The legislative purpose promulgated by the California Legislature was adopted by several other states.[12] Other states used differing language in their franchise disclosure laws. For example, Indiana enacted a disclosure and relationship statute in 1975 with an express liberal construction provision:

> All provisions of this chapter delegating and granting power to the secretary of state, the securities division and the commissioner shall be liberally construed to the end that the practice or commission of fraud may be prohibited and prevented, disclosure of sufficient and reliable information in order to afford reasonable opportunity for the exercise of persons involved may be assured, in connection with the issuance [and] . . . sale . . . of franchises in this state.[13]

Although both securities and franchise purchasers typically make an investment in the seller, franchising contemplates further investment in expenses and often becomes the entire livelihood of the franchisee. This latter feature, i.e., that many franchisees are "buying a job" with their franchises, is now recognized by courts.[14]

Federal regulation of the sale of franchises followed soon after enactment of the CFIL. The Federal Trade Commission (FTC) held hearings under its rulemaking authority and received testimony from franchisors, franchisees, trade groups, professors, and attorneys general representatives. Perhaps the most extensive and readily available legislative history regarding franchise marketing abuses is the Statement of Basis and Purpose of the FTC Franchise Disclosure Rule.[15]

At the hearings for the original Franchise Disclosure Rule, substantial record evidence was compiled regarding abuses in the offer and sale of franchises despite existing legal remedies.[16] Professor Urban Ozanne presciently testified about the "serious informational imbalance between prospective franchisees and their franchisors":[17]

> The prospective franchisee does not approach the contract negotiations with the franchisor as an equal. The usual tremendous economic disparity between the parties to the franchise agreement is obvious. Moreover, a severe informational disparity exists as well. First, the franchisor or his franchise salesman sets before the franchisee a franchise agreement that is long and complicated. The franchisee or his attorney is seldom in a position to fully evaluate this document or its implications. Second, the franchisor has substantial experience in negotiating with franchisees, while this may be the franchisee's one and only contract negotiation. Third, the franchisor presents the information about the franchise and its sales and profits. Unlike the franchisee, he knows how much of the information is fact and how much puffery.[18]

The FTC amended the Franchise Disclosure Rule on January 22, 2007.[19] The FTC specifically found a continuing need for the disclosure rules to prevent fraud and other misrepresentations in the offer and sale of franchises.[20]

PURPOSES OF FRANCHISE RELATIONSHIP REGULATION

Franchise relationship legislation also followed the path of labor law, reflecting the need for balancing unequal relationships. Labor law addressed working conditions, collective bargaining, discrimination, and the economics of employment relations (e.g., minimum wage and overtime laws). Franchise relationship laws similarly addressed problems stemming from power imbalances, such as territorial rights, termination, renewal, and other such issues. [21]

A few franchise relationship laws contain express legislative purposes finding an imbalance of economic power and legislating fair business practices. For example, the Wisconsin Fair Dealership Law provides:

> (2) The underlying purposes and policies of this chapter are:
>
> (a) To promote the compelling interest of the public in fair business relations between dealers and grantors, and the continuation of dealerships on a fair basis;
>
> (b) To protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships;
>
> (c) To provide dealers with rights and remedies in addition to those existing by contract and common law;
>
> (d) To govern all dealerships, including any renewals or amendments, to the full extent consistent with the constitutions of this state and the United States.[22]

Other states have made similar findings of inequality of bargaining or economic power between franchisor and franchisee.[23] States without express legislative purposes for franchise relationship statutes usually have similar legislative histories that are often recognized in court decisions under the statutes. For example, the Washington Franchise Investment Protection Act was recognized as a "fundamental policy of the state to protect its citizens from oppressive practices historically associated with the sale of franchises."[24]

LEGITIMATE EXERCISE OF POLICE POWER

The argument for eliminating the remedial construction of franchise statutes hearkens back to the substantive due process era view of freedom to contract über alles. *Modern Myth* opines that legislatures are wrong that franchisees need such protection, that such legislation is not rational given the prevalence of franchising in our free-market economy, and that franchisors are overburdened. But this notion of freedom to contract, and the second-guessing of police power, has been discredited by the Supreme Court for more than seventy years.

The high point for freedom of contract occurred at the beginning of the twentieth century when a series of legislative enactments were held unconstitutional under now-discredited theories of substantive due process. The leading case espousing that jurisprudence was the 1905 decision of *Lochner v. New York*,[25] in which elected legislatures were viewed as having limited power to enact laws providing for the health, safety, and welfare of their citizens. In *Lochner*, the Court found a state law providing a maximum sixty-hour workweek for bakers unconstitutional based on the view that the law interfered with the "liberty" interest of the employees and employers to contract for more than sixty-hour workweeks.[26]

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Lochner was overruled in 1937 by *West Coast Hotel Co. v. Parrish*,[27] which upheld a minimum wage law enacted by the State of Washington over a substantive due process challenge. The statute, as the U.S. Supreme Court observed, was aimed to remedy the "exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage."[28] The Court explained in *Parrish* that the "liberty" safeguarded in the Constitution was not the unfettered freedom to contract as one pleases but rather liberty to act within the confines of social organization, i.e., the kind of liberty that affords people the protection of laws against evils that menace health, safety, morals, and welfare. In turn, state legislation and regulation that are reasonable in relation to those subjects do not deny parties due process and are constitutional.

Undaunted, industry and businesses continued to mount constitutional challenges to such remedial legislation, but the U.S. Supreme Court repeatedly confirmed the constitutionality of such legislation. In *Williamson v. Lee Optical of Oklahoma*,[29] the Supreme Court concluded that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[30] And in *Ferguson v. Skrupa*,[31] the Supreme Court confirmed that it had returned to its pre-*Lochner* constitutional proposition, that "courts do not substitute their . . . economic beliefs for the judgment of legislative bodies."[32]

State courts similarly have rebuffed due process attacks on remedial legislation.[33] For example, in *Industrial Welfare Commission v. Superior Court*, the California Supreme Court acknowledged employer lamentations of overregulation but noted that the people properly may prioritize between competing interests:

> We are aware of the vexation that the managements of many regulated corporations must feel as to the multiple controls an administrative society is compelled to impose upon them. Perhaps this extensive regulation is the price we pay for the very life of a society based upon the conglomerate and the mass producer. Yet the incidence of such control hopefully should not endanger the very continuance of those fundamental protections of the workers that trace back over a half century and that the Legislature and responsible administrative officials have determined to be necessary to the workers' welfare. The likely chagrin of the regulated should not obscure the underlying social need that prompts the regulation.[34]

Modern Myth's argument to limit the remedial construction of franchise statutes alternatively contravenes express language or established rules of construction. Many legislatures have enacted franchise statutes with express nonwaiver provisions.[35] Some statutes contain express "liberal construction" provisions and note the remedial character of the legislation.[36] Others provide that terms like *fraud* and *deceit* are not limited to their common law meanings and hence must be broadly construed.[37] And many courts have noted that franchise statutes were intended as remedial and should be liberally construed.[38] Accepting *Modern Myth*'s proposition would therefore contravene legislative intent and public policy.

Even if legislative intent and established rules of construction could be contravened (and they cannot), *Modern Myth* presents no sufficient empirical evidence as to why that result is warranted. *Modern Myth* asserts that one FRANdata survey of 1,300 franchise brands found that approximately one-fifth of all franchise units were owned by multiunit franchises. But even if accurate, this leaves over 80 percent of all franchisees owning but a single unit.[39] *Modern Myth* further cites as evidence an article concluding that bargaining power must exist because many franchise agreements have longer terms.[40] But this is too thin a reed on which to lean such a broad proposition.

LIMITED SCOPE OF FRANCHISE DISCLOSURE LAWS

Franchise disclosure statutes exist in only thirteen states. The FTC rule requires franchise disclosure in all states, but no generally recognized federal private right of action exists under the rule.[41] And although federal or state agencies may bring actions on complaints by members of the public, the agencies often decline, fail, or simply cannot afford to act.[42] Even if the FTC staff proceeds with investigation, there is no assurance that a formal complaint will issue or that restitutionary relief will be sought and obtained.[43] And the FTC staff informed the Government Accounting Office [now the Government Accountability Office] "that the FTC generally lacks the authority to intervene in private franchise contracts and related relationship issues."[44]

Franchise disclosure laws also often do not provide for review of franchise disclosure documents (FDDs) by government attorneys. The FTC rule is solely a disclosure statute, i.e., FTC attorneys do not review the FDD documents for the completeness of disclosures or accuracy of financial performance representations. One of the thirteen disclosure states, Oregon, also does not require prior registration review.[45] In the remaining twelve states, exemptions from registration often exist for large franchisors, resulting in no prior review of FDDs of exempt franchisors.[46] The result is that a great number of franchise offerings are not screened by any government agencies. When substantive regulatory reviews do occur, they can be helpful in making sure that the FDD disclosure items meet technical requirements, but such reviews are limited by information disclosed by franchisors.

Contrary to *Modern Myth*'s view, many aspects of franchise laws may be viewed as inadequate for franchisees.

The above concerns about the technical requirements are not the only inadequacies of the disclosure process. Additional problems include co-opting of the disclosure document via disclaimers, failure to disclose earnings claims, the concealing or disguising of franchise failures, inadequate details of the opportunity and known business risks, violations of the Plain English rule, and issues involving dispute resolution and forum selection.

FRANCHISOR DISCLAIMER STATUTES

Contrary to *Modern Myth*'s view, many aspects of franchise disclosure law may be viewed as inadequate for franchisees. Indeed, with some success particularly in federal courts, franchisors and their counsel have convinced some courts to transform franchise disclosure laws into franchise disclaimer laws, contrary to the intent behind such laws.

In what courts and regulators should consider an unfair use of the disclosure process, many FDDs attempt to negate franchisors' duties and liabilities regarding the adequacy, accuracy, and compliance of their disclosures. For example, the following common provisions, written by and for franchisors, are often cited to negate common law fraud and statutory duties:

1. *No Representations*: No additional representations were made to a franchisee other than as set forth in the franchise agreement.
2. *No Financial Performance Representations*: No financial performance representations, including actual or projected revenues and profit and loss figures, were made to a franchisee.
3. *No Authorization*: No employee or agent of a franchisor is authorized to make financial performance statements, and a franchisee agrees immediately to report any such statements to the franchisor in writing.
4. *No Reliance*: Franchisee agrees that it has not relied on any representation not set forth in the franchise disclosure document in entering into a franchise agreement.[47]

5. *Independent Investigation*: Franchisee agrees that it has conducted independent investigation regarding the franchise offered.
6. *No Guaranty of Success*: Franchisee acknowledges that all businesses involve risk, and there is a risk the franchise business will never make a profit. The franchisor does not guarantee that a franchisee's franchise business will ever be successful or profitable.
7. *Damages*: The parties agree that a franchisee's damages in any action brought against its franchisor shall be limited to the amount of the franchise fee paid to the franchisor, and in no event shall a franchisee be entitled to recover lost profits or consequential, incidental, or punitive damages.
8. *Opportunity to Cure*: Franchisee shall not be entitled to recover damages against its franchisor unless the franchisee within sixty days of any claim provides its franchisor with a written notice of the claim and a sixty-day opportunity to cure the breach.
9. *Dispute Resolution Provisions*: Any disputes involving the franchise agreement or franchise relationship shall be resolved by binding arbitration in the county of the franchisor's headquarters at the time of the dispute. The arbitration shall be on an individual basis rather than a group or class action. The franchise agreement and relationship shall be governed by the law [of the franchisor's home state] without regard to its choice of law provision.

The purpose of these disclaimers is either to eliminate typical common law and statutory claims of franchisees or make them difficult, expensive, and risky to litigate. In a positive step, the FTC Franchise Disclosure Rule, as recently amended in 2007, prohibits disclaimers of reliance on FDD disclosures.[48] Many state franchise disclosure rules also prohibit waiver of the statutory provisions.[49] Nonetheless, such disclaimers continue to be included and asserted against franchisees seeking redress.

Another inadequacy in disclosures is lack of full disclosure of material information. For example, concealed pending mergers, acquisitions, or other major system changes can fundamentally alter the bargain with the franchisees. Similarly concealed failure rates or the covert propping up of failed franchises can give the false impressions of systemwide health. Item 8 of the FDD requires only the disclosure of the existence of franchisor rebates and total amounts. But the disclosure does not set forth the impact of the rebates. How is a prospective franchisee to know what the required product purchases for their franchise will mean for profitability or losses? In sum, FDD disclosures are often inadequate to educate properly a new franchisee about the risks being undertaken.

LACK OF REGULATION OF FRANCHISE AGREEMENT TERMS

Modern Myth does not address franchise relationship statutes. Such statutes cover substantive aspects of the franchise relationship rather than franchise disclosure regulation. Twenty states have franchise relationship statutes although several have only minimal provisions. The majority of the states have no franchise statutes of any kind, and only ten states have both franchise disclosure and franchise relationship statutes.

On the federal level, decades ago Congress enacted franchise relationship laws to protect car dealers (the Automobile Dealer Day in Court Act)[50] and gas station dealers (the Petroleum Marketing Practices Act (PMPA)).[51] Both of those statutes reflect a legislative concern that franchisees in those industries, due to their substantial investment in their franchises, needed special protections from unfair terminations and nonrenewals.[52] Many states also enacted similar industry-specific dealer relationship statutes, including for car dealers, gas station owners, beverage distributors, and farm equipment dealers.

Although a general franchise relationship law has not been enacted by Congress, the FTC received testimony in its franchise disclosure rulemaking proceedings regarding unfair and deceptive practices in franchise relations. The conduct included actions of inexperienced and financially unstable franchisors, hidden franchisor fees, kickbacks, and territorial protections.[53] But such conduct was not the center of the rulemaking effort and did not easily meet the commission standards for "unfair trade practices" rules.[54] Among the postexecution franchise relationship abuses for which the FTC nonetheless received evidence in recent rulemaking proceedings were "post contract covenants not to compete, encroachment of franchisees' market territory, and restrictions on the source of products or services."[55]

Legislatures in twenty states have enacted relationship legislation to limit one-sided franchise agreement terms covering such practices as franchise agreement termination, renewals, transfers, encroachment, and advertising funds, including the following:

1. Prohibition of franchise agreement termination without written notice and good cause.[56]
2. Prohibition of franchise agreement nonrenewal without notice, usually of 180 days, and an opportunity for the franchisee to sell.[57]
3. Limits on a franchisor's refusal of franchise agreement transfers by franchisees in certain instances.[58]
4. Prohibition on interference with franchisee associations.[59]
5. Protection of franchisee from encroachment in specified ways.[60]
6. Requirement to expend advertising funds on advertising.[61]
7. Prohibition of kickbacks on required purchases without franchisor disclosures.[62]
8. Prohibition on franchisor restricting source of supply unless reasonably necessary for a lawful purpose.[63]
9. Prohibition of discrimination by franchisor among franchisees for royalties and/or goods, unless under different franchisee agreements at different times.[64]
10. Requirement for franchisor to act in a commercially reasonable manner or in good faith.[65]
11. Prohibition of standards of conduct that are unreasonable or arbitrary.[66]
12. Prohibition of franchisor using economics or other influence to force a franchisee to relinquish rights.[67]

13. Prevention of a franchisee from negotiating all terms.[68]
14. Prohibition of jury trial waiver.[69]
15. Prohibition of limits on a right to litigate or to limit arbitration for breaches of a franchise agreement.[70]
16. Avoidance of out-of-state venue clauses.[71]

Although Congress has seen fit to establish industry-specific franchise relationship statutes and a number of states have enacted relationship protections for franchisees, most states have no relationship protections for franchisees. Furthermore, most states do not proscribe most of the sixteen practices identified above, but only a small subset of them.

CONTRACT LAW AND ONE-SIDED AGREEMENTS

Because the franchise relationship is largely unregulated, the legal relationships between franchisor and franchisee are predominantly governed by contract law. Few would deny that franchising is characterized by one-sided and mostly non-negotiable agreements. Franchisors and their lawyers draft such agreements to maximize benefits to the franchisor. And franchisors typically refuse to negotiate terms citing registration requirements and the need for uniformity.

Because the franchise relationship is largely unregulated, legal relationships between the two parties are generally covered by contract law.

Modern Myth posits that franchisees and franchisors are equals in knowledge about the opportunity and in negotiation of the agreement. But no one familiar with franchising should accept this generalization. The two studies cited in *Modern Myth* do not support the conclusion that franchisees are as knowledgeable as, and have equal bargaining power with, franchisors. The 2007 FRANdata study concluded that 82 percent of franchisees owned only a single unit. It does not follow that the vast majority of franchisees owning single units can be presumed to have equal bargaining power with their franchisor just because other franchisees own multiple units. The second study likewise analyzed franchise agreements based on a single initial term of the franchise. But no analysis was presented as to whether any bargaining occurred for the duration of the term. Even if term length is an indicium of equality, it is more than trumped by the requirement of virtually every franchise agreement conditioning renewal on execution of a to-be-determined "then current franchise agreement." Finally, it is telling that no analysis of equality is mentioned in connection with the forty-some or more other typical terms in a franchise agreement.

The absence of significant franchisor obligations in franchise agreements is almost universal and also signals inequality in bargaining power. Typically, franchisors agree to provide only the following: a nonexclusive trademark license, manuals, some level of training, some ongoing assistance, and some administration of some form of national advertising. In contrast, the franchisee obligations are highly specific and usually include the payments of royalties and other fees, use of required computers and software, standards compliance, hours of operation, product specifications, transfer limits, noncompetition, and many other provisions. Further, franchisors often reserve the right to change a franchisee's obligations by changing provisions in the operations manuals.

For these reasons, among others, courts have long recognized the differences among franchises, as well as the fact that franchisees often lack equal bargaining power:

> Although franchise agreements are commercial contracts they exhibit many of the attributes of consumer contracts. . . . 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-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. Indeed such contracts are sometimes so one-sided, with all the obligations on the franchisee and none on the franchisor, as not to be legally enforceable."[72]

Many commentators also have recognized the one-sided nature of franchise relations. In his groundbreaking article, franchise attorney Andrew Selden described the traditional franchise model as "heavily one-sided contracts that lock the franchisee into an unknown future determined by unilateral decisions of franchise management."[73] Paul Steinberg made the same point some years later:

> By use of Operations Manuals, compliance audits, contract renewal, and contractual collective action clauses (CACs), such as "agree to agree" and "conform to current," the franchisor can exercise nearly total discretion over the franchisee. Multiple methods exist to alter the obligations of the parties, but CACs are particularly troubling because they render the franchise contract itself an ephemeral document drafted on an Etch-a-Sketch.[74]

Professor Hadfield detailed the risks to franchisees from the "incomplete" franchise agreement.[75] Professor Spencer did the same and proposed a solution: increased recognition of the covenant of good faith and fair dealing to protect franchisees.[76]

Modern Myth's choice of *PIP v. Sealy* as a poster child for "courts gone wild" is wrong. Although franchisee Sealy obviously had profitability problems, the opinion does not delineate if Sealy was done in by a lousy franchise model, competitive environment, incompetence, or other factors. But Sealy could not pay his ongoing royalties, was terminated, and was sued by PIP for nine years of future royalties. The California Court of Appeal properly denied recovery on two grounds. The first ground was that PIP's decision to terminate Sealy proximately caused PIP's own damages. The second and more powerful ground was that granting lost future profits against a franchisee is simply too oppressive.[77] The *PIP* court got it right: involuntary servitude disguised as breach of contract has no place in our society.

ECONOMICS OF FRANCHISING

Few would disagree that franchising constitutes a significant part of our economy. But *Modern Myth* does not address the economics of franchising for the franchisee and thereby omits discussion of a significant reason for franchise regulations. At the franchisee level, franchising involves a significant capital investment and long-term legal commitments, usually in facility build-outs and multiyear lease and equipment agreements. Thus, "franchisors do not bear a significant share of capital cost or risk of setting up franchised units."[78]

In her article entitled "Problematic Relations: Franchising and the Law of Incomplete Contracts,"[79] Professor Hadfield compared various methods of a distributor taking its products and service to market. Hadfield studied the differences between using employees, using independent contractors, and using franchisees, noting that franchisees fall in between on the continuum endpoints marked by the former two. In employment, employers invest capital and retain nearly complete control over their employees.[80] With independent contractors, the reverse is true, with the contractor making capital investments and the hirer retaining little control over the method and means of accomplishing the desired result. Franchising, Professor Hadfield noted, involves a blend of those two extremes, with the franchisee putting up capital and the franchisor retaining control.[81]

Few would deny that franchising is characterized by one-sided and mostly non-negotiable agreements.

Franchisees, because they have their own capital at risk yet are under the control of the franchisor due to franchise agreement terms, are vulnerable to what economists call opportunism:

> The incentive that causes a business with sunk costs to stay in operation despite losses makes franchisees vulnerable to franchisor behavior known as "opportunism." Because the franchisee will continue to operate even if it is not recovering its sunk investment, the franchisor can make decisions that induce such losses without the franchisee going out of business. When these decisions benefit the franchisor at the expense of the franchisee, the franchisor opportunistically extracts a portion of the franchisee's sunk costs. A franchisor can potentially extract this value from the franchise directly in a number of ways: it can raise the price of goods sold to franchisees, increase rent, boost royalties through an increase in the required volume of a franchise, levy fees, or divert advertising funds to general corporate uses. Extractions can occur indirectly as well. To increase the price of new franchises, a franchisor could require franchisees to make excessive advertising investments, to participate in promotional programs which are not cost-effective, or to undertake unnecessary renovations.[82]

Courts are beginning to recognize these concepts. The New Jersey Supreme Court, in an action under the New Jersey Franchise Practices Act, explained that

> [o]nce a business has made substantial franchise-specific investments it loses all or virtually all of its original bargaining power regarding continuation of the franchise. Specifically, the franchise cannot do anything that risks termination, because that would result in a loss of much or all of the value of its franchise related investments.[83]

That even "sophisticated" multiunit operators can fall victim to opportunism was recently illustrated in *Darling v. McDonald's Corporation.*[84] Sandra Darling was the first female McDonald's franchisee, and she had participated in numerous associations and committees of McDonald's operators. Her problems apparently arose when she questioned the McDonald's senior management about McDonald's rewrite procedures, (i.e., improvements and investments required for renewal). At a time when Darling had financial difficulties, McDonald's informed her that the rewrite for her most profitable location, needed to support her new and as yet not profitable additional franchises, would require $450,000 in improvements. This reinvestment figure was an increase of $200,000 over prior estimates provided to Darling. Moreover, an internal field consultant for McDonald's did not believe that all the improvements were necessary. McDonald's embarked on a campaign of pressure and default notices, and eventually all of Darling's franchises were terminated. Darling had to sell her franchises for less than their value and sign a release in favor of McDonald's or lose everything.

After filing a bankruptcy petition, Darling commenced an action against McDonald's for fraud, recession of a release, and unfair business practices. The fraud theory centered on McDonald's having concealed its intention to drive her from her franchises for publicly complaining about McDonald's. In closing argument, Darling's counsel successfully contended that

> McDonald's decided to remove Darling from the franchise system because she had become an outspoken critic of McDonald's. He explained that McDonald's planned to achieve its goal by forcing Darling out of the very profitable Fontana franchise by requiring her to "spend money," which would take away significant cash flow for her entire operation, and then putting increased financial pressure on Darling to force her into default on her other franchise agreements. He also explained why McDonald's conduct constituted fraud.[85]

Darling prevailed on her claims notwithstanding that she did not meet the traditional notion of a vulnerable franchisee and was as a longtime multiple McDonald's unit owner.

CONCLUSION

The existence of a few multiunit franchisees does not diminish the one-sided nature of franchise agreements and the need for franchisees to be afforded protections by law. Indeed, the limited statutes providing protection for franchisees should be expanded. In the meantime, the courts should continue to interpret those statutes liberally, as they were intended.

ENDNOTES

1. William L. Killion, *The Myth of the Vulnerable Franchisee*, 28 Franchise L.J. 23 (2008).

2. 43 Cal. App. 4th 1704 (1996).

3. 469 F.3d 1257 (9th Cir. 2006).

4. The Madoff Ponzi scheme is illustrative. *See, e.g.*, United States v. Madoff, 316 F. App'x 58 (2d Cir. 2009); United States v. Madoff, 626 F. Supp. 2d 420 (S.D.N.Y. 2009); SEC v. Madoff, 2009 WL 980288 (S.D.N.Y. 2009); Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC, 2009 WL 980288 (S.D.N.Y. 2009); Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC, 401 B.R. 622 (Bankr. S.D.N.Y. 2009). Among the alleged victims, according to the *Washington Post* and as listed in the above decisions, were wealthy individuals, charitable entities, and some of the world's largest banks. *SEC Didn't Act on Madoff Tips, Regulator Was Warned as Early as 1999*, Wash. Post, Dec. 16, 2008, at D01.

5. *See, e.g.*, *Madoff*, 316 F. App'x at 58; *Madoff*, 626 F. Supp. 2d at 420; *Madoff*, 2009 WL 980288, at *1; *Bernard L. Madoff Inv. Sec., LLC*, 2009 WL 980288, at *1; *Bernard L. Madoff Inv. Sec., LLC*, 401 B.R. at 622 (among the alleged victims, some listed in the above decisions, are wealthy individuals, charitable entities, and banks).

6. The California Franchise Investment Law is codified at California Corporations Code § 31300, with the legislative purposes at § 3130. *See also* Keating v. Super. Ct., 645 P.2d 1192 (Cal. 1982), *rev. on other grounds*, 465 U.S. 1 (1984).

7. Cal. Corp. Code § 31001.

8. Cal. S. Comm. on Ins. & Fin. Inst., Interim Hearing on Franchises, Sacramento, Cal., at 19 (Nov. 7, 1969).

9. *Id.*

10. *Id.* at 19–24.

11. *Id.* at 22.

12. Hawaii, Illinois, Michigan, New York, and Rhode Island subsequently enacted franchise disclosure statutes with similar or nearly identical statements of legislative purpose. Haw. Rev. Stat. § 482E-1; 815 Ill. Comp. Stat. 705/2; Mich. Comp. Laws § P.A. 1974, No. 269; P.A. 1984, No. 92 § 1; N.Y. Gen. Bus. Law § 680; R.I. Gen. Laws § 19-28.1-2. Other states with disclosure statutes have different legislative purpose sections or none at all: Minnesota, North Dakota, Oregon, South Dakota, Virginia (Va. Code § 813.1-558), Washington, and Wisconsin.

13. Ind. Code § 23-2-2.5-47.

14. Indep. Ass'n of Mail Box Ctr. Owners, Inc. v. Super. Ct., 133 Cal. App. 4th 396, 410 (2005) ("These franchise agreements also resemble employment agreements to the extent that the franchisees' livelihoods are involved.").

15. The original Statement of Basis and Purpose for the FTC Rule is found at 43 Fed. Reg. 59,621 (Dec. 21, 1978) and 16 C.F.R. § 436.1, Bus. Franchise Guide (CCH) ¶ 6300.

16. Bus. Franchise Guide (CCH) ¶ 6304.

17. *Id.*

18. *Id.*

19. 16 C.F.R. § 436.

20. *See* New FTC Statement of Basis and Purpose to the FTC Franchise Disclosure Rule [hereinafter New SBP].

21. For purposes of this article, franchise statutes not addressing franchise registration and disclosure will be called franchise relationship laws.

22. Wis. Stat. § 135.025(2).

23. Neb. Rev. Stat § 87-401; N.J. Stat. Ann. § 56:102; R.I. Gen. Laws § 19-28.1-2; Va. Code § 13.1-558 ("establish a more even balance of power between franchisors and franchisees"); Wis. Stat. § 135.035.

24. Rutter v. BX of Tri-Cities, Inc., 806 P.2d 1266 (Wash. Ct. App. 1991); *see also* Hartford Elec. Supply Co. v. Allen-Bradley Co., 1997 WL 297256, at *3, *aff'd*, 750 A.2d 824 (Conn. 1999); Holiday Inns Franchising, Inc. v. Bransford, 537 N.W.2d 724, 728–29 (Iowa 1995); Geib v. Amoco Oil Co., 29 F.3d 1050 (6th Cir. 1994); Bitronics Sales Co., Inc. v. Microsemiconductor Corp., 610 F. Supp. 550, 556 (D. Minn. 1985); Elec. & Magneto Serv. Co., Inc. v. AMBAC Int'l Corp., 941 F.2d 660 (8th Cir. 1991); McDonald's Corp. v. Markim, 306 N.W.2d 158, 162 (Neb. 1981); Kubis & Perszyk Assocs., Inc. v. Sun Microsys., Inc., 680 A.2d 618, 626 (N.J. 1996).

25. 198 U.S. 45 (1905).

26. *Id.*

27. 300 U.S. 379 (1937); *see also* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (confirming the demise of the *Lochner* line of cases).

28. *Parrish*, 300 U.S. at 399.

29. 348 U.S. 483 (1955).

30. *Id*. at 488.

31. 372 U.S. 726 (1963).

32. *Id*. at 730 (citing Munn v. Illinois, 94 U.S. (4 Otto) 113, 24 L. Ed. 77 (1876)); *see also* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872).

33. *See, e.g.*, Indus. Welfare Comm'n v. Super. Ct., 613 P.2d 579 (Cal. 1980); State *ex rel.* Davis-Smith Co. v. Clausen, 117 P. 1101 (Wash. 1911).

34. *Indus. Welfare Comm'n*, 613 P.2d at 605.

35. Arkansas—Ark. Code Ann. § 4-72-206(1); Capital Equip., Inc. v. CNH Am., LLC, 471 F. Supp. 2d 951, 958 (E.D. Ark. 2006); California—Cal. Corp. Code § 31512; Connecticut—Conn. Gen. Stat. § 42-133g(a); R & R Assocs. of Conn., Inc. v. Deltona Corp., Bus. Franchise Guide (CCH) ¶ 7525 (D. Conn. 1980); Florida—VoiceStream Wireless Corp. v. U.S. Commc'ns, Inc., 912 So. 2d 34 (Fla. Dist. Ct. App. 2005); *see also* Orlando Plaza Suites Ltd.-A v. Embassy Suites, Inc., Bus. Franchise Guide (CCH) ¶ 10,456 (M.D. Fla. 1993); Hawaii—Haw. Rev. Stat. § 482 E-6(2)(F); Illinois—815 Ill. Comp. Stat. 705/41; Indiana—Indiana Deceptive Franchise Practice Act, Ind. Code § 23-2-2-2.7-1; *see also* Carrel v. George Weston Bakeries Distrib., Inc., 2006 WL 2524124 (S.D. Ind. 2006); Iowa—Iowa Code §§ 423H.4, 537A.10(4); Maryland—Md. Code Ann., Bus. Reg. § 14-226; Three M Enters., Inc. v. Tex. D.A.R. Enters., Inc., 368 F. Supp. 2d 450 (D. Md. 2005) (fundamental policy); Michigan—Mich. Comp. Laws § 445.1527(b); Minnesota—Minn. Stat. § 80C.21 (*overruled by* Carlock v. Pillsbury Co., 719 F. Supp. 791, 810–11 (D. Minn. 1989)); *see also* Culligan Int'l Co. v.

Culligan Water Conditioning of Carson Co., Inc., 563 F. Supp. 1265, 1271 (D. Minn. 1983); Missouri—Elec. & Magneto Serv. Co., Inc., 941 F.2d 660 (8th Cir. 1991) (Missouri protections); Nebraska—NEB. REV. STAT. § 87-406(1); New Jersey—N.J. STAT. ANN. § 56:107; New York: N.Y. GEN. BUS. LAW § 687(4)–(5); North Dakota—N.D. CENT. CODE § 51-19-16(7); Puerto Rico—P.R. LAWS ANN. tit. 10, § 278c; Rhode Island—R.I. GEN. LAWS § 19-28.1-15; South Dakota—S.D. CODIFIED LAWS § 37-5A-86; Virginia—VA. CODE ANN. § 13.1-571(c); Washington—WASH. REV. CODE § 19.100.180(2)(g); Wisconsin—WIS. STAT. § 553.76.

36. Puerto Rico—P.R. LAWS ANN. tit. 10, § 278c ("This chapter being of a remedial character, should, for the most effective protection of such right, be liberally interpreted."); Rhode Island—R.I. GEN. LAWS §§ 19-28.1-33, 6-50-3 (RIFDA "shall be liberally construed and applied to promote its underlying remedial purposes and policies."); WISCONSIN—WIS. STAT. § 135.025(1) ("This chapter shall be liberally construed and applied to promote its underlying remedial purposes and policies.").

37. California—CAL. CORP. CODE § 31012; Illinois—815 ILL. COMP. STAT. 705/3; Michigan—MICH. COMP. LAWS ANN. § 445.1503; Minnesota—MINN. STAT. § 80C.01; New York—N.Y. GEN. BUS. LAW § 681; North Dakota—N.D. CENT. CODE § 51-19-02; Rhode Island—R.I. GEN. LAWS § 19-28.1-3; Wisconsin—WIS. STAT. ANN. § 553.03.

38. California—Kim v. Servosnax, Inc., 53 Cal. Rptr. 2d 422 (Ct. App. 1992); *see also* Wimsatt v. Beverly Hills Weight Loss Clinics, 38 Cal. Rptr. 2d 612, 618 (Ct. App. 1995); Connecticut—Muha v. United Oil Co., Inc., 433 A.2d 1009, 1013 (Conn. 1980); Florida—*see VoiceStream Wireless*, 912 So. 2d at 34; Illinois—Salkeld v. V.R. Bus. Brokers, 548 N.E.2d 1151, 1157 (Ill. App. Ct. 1989); *see also* Barter Exch. Inc. v. Barter Exch., Inc., 606 N.E.2d 186, 192 (Ill. App. Ct. 1992); Indiana—*see* Sheldon v. Manford, Inc., 950 F.2d 403, 407 (7th Cir. 1991) (choice of law provision cannot contravene Indiana's franchise statute); Maryland—*see Three M Enters., Inc.*, 368 F. Supp. 2d at 450 (fundamental policy); Michigan—Martino v. Cottman Transmission Sys., 554 N.W.2d 17, 20 (Mich. Ct. App. 1996) (fundamental policy); Grand Kensington, LLC v. Burger King Corp., 81 F. Supp. 2d 834 (E.D. Mich. 2000); Vaughn v. Digital Message Sys. Corp., 1997 WL 115921 (E.D. Mich. 1997); Minnesota—Bitronics Sales Co. v. Microsonicon-ductor Corp., 610 F. Supp. 550, 556 (D. Minn. 1985); Missouri—C & J Delivery, Inc. v. Emery Airfreight Corp., 647 F. Supp. 867 (E.D. Mo. 1986); *see also* Ontario—305341 Ontario Ltd. v. Midas Can. Inc., Case No. 07-CV-333934CP 1, 6 (Ontario Super. Ct. 2009) ("Franchise agreements are contracts of adhesion and it has been recognized judicially on a number of occasions that the provisions of the AWA [Arthur Wishart Act (Franchise Disclosure) 2000, R.S.O. § 2000, ch. 3] are intended to mitigate and alleviate the power imbalance that exists between franchisors and franchisees.") (citations omitted).

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

40. James A. Brickley, Sanjob Misra & R. Lawrence Van Horn, *Contract Duration: Evidence from Franchising*, 49 LAW & E. ECON. 173 (2006).

41. *See, e.g.*, Carlson v. Coca Cola, 483 F.2d 579 (9th Cir. 1973); United States v. Phillip Morris, Inc., 263 F. Supp. 2d 72 (D.D.C. 2003). Some states, however, have Little FTC Acts or similar unfair business practices acts that may incorporate the FTC Act or FTC Franchise Disclosure Rule and provide a state law remedy. *See, e.g.*, CAL. BUS & PROF. CODE § 17200; *see also* Rodopoulos v. Sam Piki Enters., Inc., 570 So. 2d 661 (Ala. 1990).

42. This was tellingly illustrated by five detailed written complaints to the U.S. Securities and Exchange Commission by Harry Markopoulos regarding the Bernie Madoff Ponzi scheme that went unheeded over five years. *See 60 Minutes: The Man Who Figured Out Madoff's Scheme: Tells 60 Minutes Many Suspected Madoff Fraud; Says SEC Is Incapable of Finding Fraud* (CBS News television broadcast Mar. 1, 2009); *see, e.g.*, *SEC Didn't Act on Madoff Tips, Regulator Was Warned as Early as 1999*, WASH. POST, Dec. 16, 2008, at D01.

43. The FTC received expanded authority to seek injunctive relief, civil penalties, and consumer redress via the Magnusson Moss Warranty and FTC Improvements Act of 1975. S. REP. NO. 93-1408 (1974) (Conf. Rep.). Only consumer redress would provide monetary relief for defrauded franchisees. *See* 15 U.S.C. § 57b.

44. G.A.O. 2001 REP., at 8.

45. OR. REV. STAT. § 650.005.

46. *See, e.g.*, CAL. CORP. CODE § 31101; N.Y. GEN. BUS. LAW § 684.

47. The FTC Rule was amended to prohibit franchisors from disclaiming or requiring "a prospective franchisee to waive reliance on any representation made in the disclosure document or its exhibits or amendments." 16 C.F.R. § 436.9(b); *see also* Martrano v. Quiznos Franchise Co., 2009 WL 1704469 (W.D. Pa. 2009); Westerfield v. Quiznos Franchise Co., 2008 WL 2512467 (E.D. Wis. 2008).

48. *See* OR. REV. STAT. § 650.005.

49. *See supra* note 36.

50. 15 U.S.C. § 1221.

51. 15 U.S.C. § 2801.

52. The PMPA recognizes that "the original disparity of bargaining power [may lead] into continuing vulnerability." S. REP. NO. 95-731, at 17 (1978).

53. *Id.*; Bus. Franchise Guide (CCH) ¶¶ 6304–6306.

54. For example, the record evidence was deemed insufficient to show that franchise relationship practices were prevalent in franchising overall as distinct from particular franchise systems. New SBP, at 10–11.

55. New SBP, at 10–11.

56. ARK. CODE. ANN. § 4-72-209; CAL. BUS. & PROF. CODE §§ 20020–20021; CONN. GEN. STAT. §§ 42-135f(a), 42-133f(a) (lease termination); HAW. REV. STAT. § 482E-6(H); 815 ILL. COMP. STAT. 705/19; IOWA CODE §§ 523H.7(1), 537A.10(7)(c); MINN. STAT. § 80C.14(3)(b); MISS. CODE ANN. § 75-24-55; MO. ANN. STAT. § 407.405(1); NEB. REV. STAT. § 87-404; N.J. STAT. ANN. § 56:105; N.D. CENT. CODE § 51-20-2(02); P.R. LAWS ANN. tit. 10, § 278a; R.I. GEN. LAWS § 6-50-4; WASH. REV. CODE § 19.100.180(2)(j); WIS. STAT. § 135.03.

57. CAL. BUS. & PROF. Code § 20025; CONN. GEN. STAT. § 42-133f(a); HAW. REV. STAT. § 482E-6(H); 815 ILL. COMP. STAT. 705/20; IND. CODE § 23-2-2.5-37; IOWA CODE §§ 53H.8, 537A.10(8); MICH. COMP. LAWS § 445.1527(g); MINN. STAT. § 80C14(4); MISS. CODE ANN. § 75-24-55; NEB. REV. STAT. § 87-404; N.J. STAT. ANN. § 56:105; R.I. GEN LAWS § 6-50-4; WASH. REV. CODE § 19.100.180(2)(i); WIS. STAT. § 135.03.

58. ARK. CODE ANN. §§ 4-72-206(4), 4-72-205; CAL. BUS. & PROF. CODE § 20027 (survivals); HAW. REV. STAT. § 482E-6(I); IOWA CODE §§ 523H.5.12(a), 537A.10(5)(h); MICH. COMP. LAWS § 445.1527(g); MINN. STAT. § 80C.14(5); NEB. REV. STAT. §§ 87-405, 87-406; N.J. STAT. ANN. §§ 56:106, 107; P.R. LAWS ANN. tit. 10, § 278a(c).

59. ARK. CODE ANN. § 4-72-206(2); CAL. CORP. CODE §§ 31220, 31302.5; HAW. REV. STAT. § 482E-6(2)(A); 815 ILL. COMP. STAT. 705/17; IOWA CODE §§ 523H.9, 537A.10(9); MICH. COMP. LAWS § 445.1574; MINN. R. 2860.4400(A); NEB. REV. STAT. § 87-406; N.J. STAT. ANN. § 56:107(b); R.I. GEN. LAWS § 19-28.1-16.

60. HAW. REV. STAT. § 482E-6(2)(E); IND. CODE §§ 23-2-2.7-1(2), 23-2-2.7-1(9); IOWA CODE §§ 523H.6(1), 532A.10(6)(a); MINN. R. 2860.4400(e), (i); WASH. REV. CODE § 19.100.180(2)(f).

61. ARK. CODE ANN. § 4-72-206(7).

62. HAW. REV. STAT. § 482E-6(2)(F); *see also* WASH. REV. CODE § 19.100.180(2)(b), (d), (e).

63. HAW. REV. STAT. § 482E-6(2)(B); WASH. REV. CODE § 19.100.180(2)(b).

64. HAW. REV. STAT. § 482E-6(2)(c); 815 ILL. COMP. STAT. 705/20; IND. CODE § 23-2-2.7-2; MINN. R. 2860.4400(B); WASH. REV. CODE § 19.100.180(2)(c).

65. ARK. CODE ANN. § 4-72-206(6); HAW. REV. STAT. § 482E-6(1); IOWA CODE §§ 537A.10(11), 532H.10.

66. HAW. REV. STAT. § 482-6(2)(G); MINN. R. 2860.4400(G); NEB. REV. STAT. § 87-406; N.J. STAT. ANN. § 56:107(c); WASH. REV. CODE § 19.100.180(2)(h).

67. VA. CODE ANN. § 13.1-564.

68. *Id.* § 13.1-565(6).

69. MINN. R. 2860.4400(J).

70. IND. CODE § 23-2-2.7-1(10); P.R. LAWS ANN. tit. 10, § 2786-3; WIS. STAT. § 135.08.

71. CAL. BUS. & PROF. CODE § 20040.5; MICH. COMP. LAWS § 445.1574; MINN. STAT. § 80C.21; R.I. GEN. LAWS § 19-28.1-14.

72. Postal Instant Press v. Sealy, 43 Cal. App. 4th 1704, 1715–18 (1996) (citations omitted).

73. Andrew C. Selden, *Organizational Design for Successful Franchising*, 20 FRANCHISE L.J. 1 (2000).

74. Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN. ST. L. REV. 105 (2004).

75. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990).

76. Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 FRANCHISE L.J. 31 (2009).

77. *Postal Instant Press*, 43 Cal. App. 4th at 1704.

78. Hadfield, *supra*, note 75, at 934.

79. *Id.*

80. Many states have statutes forbidding employers from requiring employees to make work-related expenditures. *See, e.g.*, CAL. LAB. CODE § 2802.

81. Hadfield, *supra* note 75, at 931–32.

82. *Id.* at 952.

83. Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124, 140 (N.J. 1992).

84. 2006 WL 164986 (Cal. Ct. App. Jan. 24, 2006) (unpublished).

85. *Id.*

