

**American Bar Association
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**THE FIGHT OVER WHERE TO FIGHT: REMOVAL, TRANSFER
OF VENUE AND COMPELLING ARBITRATION**

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I. INTRODUCTION

Despite careful planning about how to resolve disputes that arise in franchise relationships, parties still “fight over where to fight” as they jockey to obtain the most favorable forum to resolve their dispute. Whether removal or remand, motions to transfer or forum non conveniens, or suits to compel arbitration, strategic fights can overshadow the actual dispute—and for good reason. Far from presenting mere “side issues,” strategic fights over where to fight can place a party in prime position to win or lose on the merits and can produce an early settlement. For example, the determination of where the fight must take place may expose a party to the prospects of litigating or arbitrating in a hostile forum where unfavorable statutes and laws will be applied.

To manage their risks and bring greater predictability to the dispute resolution process, many franchisors include clauses within their franchise agreements designating the forum and law that constitute the “rules of engagement.” As detailed throughout this paper, courts afford great weight to contractual provisions governing parties’ relationships and the procedural aspects of dispute resolution. Accordingly, courts generally will defer to parties’ written agreements where permitted by statutory and common law. While not every franchise agreement necessarily includes a detailed dispute resolution plan, every party should consider which elements are most valuable and drive negotiations accordingly. Agreeing to the procedural aspects of dispute resolution before problems arise can increase speed, decrease costs and help parties plan their business activities more precisely and effectively. This tendency toward customization manifests itself most often in three key aspects of dispute resolution: forum selection, choice of law and arbitration.

This paper first discusses the legal and strategic implications of forum selection and choice of law clauses, including the enforceability issues inherent to each. Next, the authors examine the potential ramifications of litigating in state versus federal court and consider jurisdictional concerns and petitions for removal. Finally, the authors address arbitration of disputes, including an examination of arbitration’s characteristics versus litigation, challenges to the enforceability of arbitration provisions, and the potential for a single dispute spawning proceedings both in court and in arbitration.

II. CONSIDERATIONS FOR FORUM SELECTION

A. Contractual Venue & Forum Selection Clauses

In a civil case, the plaintiff usually has the right to choose the forum where the parties’ disputes will be heard. To avoid litigation in less favorable courts, franchise and dealership agreements often attempt to limit that right by including provisions establishing the venue or forum where suit must be filed.¹ These clauses are critical in franchise agreements and should

¹ “Venue” refers to locality, meaning the place where the lawsuit should be heard according to the contract or applicable statutes. *Riley v. Union Pac. R.R. Co.*, 177 F.2d 673 (7th Cir. 1949), *cert. denied*, 338 U.S. 911 (1949). Venue is sometimes confused with jurisdiction over the subject matter, but the concepts are distinct and different:

The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of the litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court’s power and the litigant’s convenience is historic in the federal courts.

Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939).

be given significant attention. Both franchisors and franchisees should be concerned with the appropriate location for the litigation because a particular jurisdiction may affect the likely outcome of the case.

1. Permissive & Mandatory Forum Selection Clauses

There are two types of forum selection clauses, permissive and mandatory.² A permissive forum selection clause is often described as a “consent to jurisdiction clause,” meaning that the parties authorize jurisdiction and venue in a designated forum, but the clause does not prohibit litigation elsewhere.³ Thus, if a plaintiff chooses a different, but otherwise proper forum, a motion to transfer to another federal district court is still available under 28 U.S.C. § 1404. A mandatory forum selection clause contains clear language indicating that jurisdiction and venue are exclusive in the designated forum.⁴ It is important when drafting a forum selection clause that the language clearly delineates the provision as either permissive or mandatory because the type of clause can affect the party’s ability to transfer venue. In order for a forum selection clause to be exclusive, “it must go beyond establishing that a particular forum will have jurisdiction and must *clearly* demonstrate the parties’ intent to make that jurisdiction *exclusive*.”⁵ If a mandatory clause clearly limits jurisdiction to a specific jurisdiction, then a court may find that a party has waived his or her ability to request transfer under 28 U.S.C. § 1404.⁶

2. Enforcement of Forum Selection Clauses

Historically, American courts disfavored forum selection clauses, often finding them invalid on the basis that they were “contrary to public policy,” or that their effect was to “oust the jurisdiction” of the court.⁷ The American courts’ reluctance to enforce forum selection clauses waned after the United States Supreme Court held in *M/S Bremen v. Zapata Off-Shore Co.* in 1972 that forum selection clauses are *prima facie* valid.⁸ After *M/S Bremen*, courts have generally enforced forum selection clauses unless the party resisting their enforcement can prove that they are invalid due to fraud or overreaching. Courts are now highly deferential to a

² See W. Michael Garner, *Litigating Franchise Disputes*, 3 Franch. & Distr. Law & Prac. § 17.20 (2010).

³ 14D Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *FEDERAL PRACTICE & PROCEDURE* § 3803 (3d ed. 2009).

⁴ *Id.*

⁵ *City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 504 (5th Cir. 2004).

⁶ Some courts have held that when analyzing a transfer under 28 U.S.C. section 1404, a permissive clause is entitled to less weight than a mandatory clause. Other courts have held that the permissive nature of the clause should not affect its weight. See, e.g., *GE Capital Franchise Fin. Corp. v. Cosentino*, No. 08-CV-202S, 2009 WL 1812821, at *3 (W.D.N.Y. June 25, 2009) (finding a permissive clause is entitled to less weight in a transfer analysis); *Orix Credit Alliance, Inc. v. Mid-South Materials Corp.*, 816 F. Supp. 230, 234 (S.D.N.Y. 1993) (finding a permissive clause is entitled to less weight in a transfer analysis). *But cf.*, *Hagen-Dazs Shoppe Co., Inc. v. Born*, 897 F. Supp. 122, 125 (S.D.N.Y. 1995) (finding that the permissive nature of a forum selection clause doesn’t affect weight in a transfer analysis).

⁷ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). See also *Benson v. Eastern Bldg. Loan Ass’n*, 66 N.E. 627 (N.Y. 1903); *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. 174 (Mass. 1856).

⁸ *M/S Bremen*, 407 U.S. at 1.

forum selection clause when determining whether venue is proper. This is largely because the enforcement of a forum selection clause is consistent with concepts of freedom of contract and it removes elements of uncertainty from business relationships.⁹

The party opposing the enforcement of the forum selection clause has the burden to establish that the forum selection clause is unfair or unreasonable, or that it is invalid for reasons such as fraud or overreaching.¹⁰ When examining whether a forum selection provision is unreasonable, courts will consider if: (1) the forum selection clause was obtained through fraud or overreaching; (2) if the complaining party will be deprived of his day in court due to the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) the enforcement of the clause contravenes a strong public policy of the forum state.¹¹

In *Sebascodegan Enterprises, LLC v. Petland, Inc.*, the franchisee filed suit against the franchisor for fraudulent inducement, fraud, breach of contract, and punitive damages regarding a franchise agreement to operate a retail pet store.¹² In this case, the franchisee argued that the fraudulent inducement claim was beyond the scope of the forum selection clause because it involved behavior occurring before execution of the agreement.¹³ In upholding the forum selection clause, the court held that choice of the clause itself involved behavior leading up to the agreement.¹⁴ The franchisee also argued that the presence of fraud voided the agreement and therefore prevented enforcement of the forum selection clause.¹⁵ In rejecting this contention, the court held that for fraud to void the forum selection clause, the alleged fraud must specifically relate to the clause itself, which the franchisee failed to plead or prove.¹⁶ The burden to overcome enforcement of a forum selection clause is significant.¹⁷ Courts also have held that mere inconvenience and additional expense are insufficient reasons to invalidate a forum selection clause.

⁹ See, e.g., *JTH Tax, Inc. v. Whitaker*, No. 2:07-CV-170, 2007 U.S. Dist. LEXIS 52672, at *8 (E.D. Va. July 16, 2007) (finding that a forum selection clause should be given "substantial weight" in a determination of whether to transfer venue under 28 U.S.C. § 1404).

¹⁰ *M/S Bremen*, 407 U.S. at 15; *Rafael Rodriguez Barril, Inc. v. Conbraco Indus.*, 619 F.3d 90, 93 (1st Cir. 2010) (citing *Bremen*, 407 U.S. at 15-18).

¹¹ *CK DFW Partners Ltd. v. City Kitchens, Inc.*, No. 3:06-CV-1598-D, 2007 U.S. Dist. LEXIS 60934, *7 (N.D. Tex. Aug. 17, 2007); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

¹² 647 F. Supp. 2d 71 (D. Me. 2009).

¹³ *Id.* at 75.

¹⁴ *Id.* (noting that the clause stated that it applied to "any litigation or legal action to enforce or relating to this agreement and the relationship of the parties hereunder.").

¹⁵ *Id.* at 76.

¹⁶ *Id.* The court also rejected the franchisee's argument that the franchise agreement was an unconscionable contract of adhesion, and thus the entire agreement, including the forum selection clause, was unenforceable. *Id.*

¹⁷ See also, e.g., *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 753 (8th Cir. 1999) (enforcing forum selection clause in franchise agreement requiring litigation in Utah, over the South Dakota plaintiff's objection that he could not afford to litigate in Utah); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986) (upholding clause requiring Missouri company to litigate in Germany).

Moreover, even where the forum selection clause is contained in an adhesion contract, courts will validate the provision. In *Carnival Cruise Lines*, the United States Supreme Court expanded the presumption that forum selection clauses are *prima facie* valid even when the clause is contained in an adhesion contract.¹⁸ In *Carnival Cruise Lines*, the forum selection clause was printed on a cruise passenger ticket.¹⁹ The clause required the Washington resident to file suit in Florida.²⁰ The court emphasized that because the plaintiff failed to claim lack of notice of the forum selection clause, the plaintiff failed to meet her heavy burden of proof.²¹ Moreover, the court noted that Florida was not a “remote alien forum,” and ultimately held that *M/S Bremen* controlled to make the clause enforceable.²²

B. Laws Governing Venue & Forum Selection & Anti-waiver Statutes

If the franchise or dealership agreement does not contain a forum selection clause, then venue will be determined by relevant state or federal statutes. In order to initiate a suit in federal court, a party must first be able to obtain federal jurisdiction, as discussed more thoroughly below. If a party is able to obtain federal jurisdiction, then the party must initiate the lawsuit in the appropriate district court pursuant to 28 U.S.C. § 1391. Section 1391(a) provides for venue in diversity and federal question cases in:

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.²³

In addition, under section 1391(c), “[f]or purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.”²⁴

A party generally should bring an action in state court in the county where one or more of the defendants resides when the action begins or where the cause of action arose in whole or in part.²⁵ Some state statutes allow venue based on the county or city where the defendant is “transacting business” or “conducting business.”²⁶

¹⁸ *Carnival*, 499 U.S. at 595.

¹⁹ *Id.* at 587.

²⁰ *Id.* at 587-88.

²¹ *Id.* at 595.

²² *Id.* at 594.

²³ 28 U.S.C. § 1391(a) (2011).

²⁴ *Id.* at 1391(c).

²⁵ See, e.g., MINN. STAT. § 542.09 (2010) (“All actions . . . shall be tried in a county in which one or more of the defendants reside when the action is begun or in which the cause of action or some part thereof arose. If none of the parties shall reside or be found in the state, the action may be begun and tried in any county which the plaintiff shall designate.”).

Despite the deference traditionally afforded forum selection clauses, their enforcement is not a foregone conclusion. An increasing number of states have adopted anti-waiver laws that limit the contracting rights of parties to a franchise agreement and govern the place for litigation or arbitration of contract related actions.²⁷ These states include California, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Texas, Washington, and Wisconsin.²⁸ For example, in *Cottman Transmission Systems v. Kershner*, the court noted that California, New York and Wisconsin have franchise disclosure statutes that contain anti-waiver provisions which preclude a franchisor from using a contract clause to evade the protections of each state's respective franchise act.²⁹

Some state courts have gone as far as to declare forum selection clauses to be presumptively invalid. For example, in *Kubis & Perszyk Associates v. Sun Microsystems*, the Supreme Court of New Jersey held that such clauses should not be enforced unless the franchisor can satisfy the burden of proving that the clause was not imposed on the franchisee unfairly on the basis of the franchisor's superior bargaining position.³⁰ The New Jersey Supreme Court also noted that evidence that the forum selection clause was included as part of the standard franchise agreement, without more, is insufficient to overcome the presumption of invalidity.³¹ In *FOG Motorsports No. 3 v. Arctic Cat Sales*, the New Hampshire Supreme Court

²⁶ See Gregory J. Swain, *Place Where Corporation is Doing Business for Purposes of State Venue Statute*, 42 A.L.R. 5th 221 (2004); Jay M. Zitter, *Place Where Claim or Cause of Action "Arose" under State Venue Statute*, 53 A.L.R. 4th 1104 (2004).

²⁷ While state anti-waiver laws have had a degree of success in restricting forum selection for litigation in the courts, these state laws have been ineffective in limiting the selection of arbitration forums due to the Federal Arbitration Act ("FAA") and its preemption of state laws. See *Doctor's Assocs. v. Hamilton*, 150 F.3d 157, 163 (2nd Cir. 1998) (ruling that state law restrictions on arbitrable forum selection clauses are preempted by FAA).

²⁸ California: CAL. BUS. & PROF. CODE § 200040.5 (2011); Connecticut: CON. GEN. STAT. § 42-133g (2011) see *Pepe v. GNC Franchising, Inc.*, 750 A.2d 1167 (Conn. Super. Ct. 2000); Florida: FLA. STAT. § 501.204 (2008), see *America Online, Inc. v. Pasioka*, 870 So.2d 170 (Fla. Dist. Ct. App. 2004), *rev. denied*, 880 So.2d 1209 (Fla. 2004); Idaho: IDAHO CODE ANN. § 29-110 (2011); Illinois: 815 ILL. COMP. STAT. 705/4,(2011); ILL. ADMIN. CODE 200.608 (2008); Indiana: IND. CODE ANN. § 23-2-2.7 (2011); Iowa: IOWA CODE § 523H.3 (2011); Louisiana: LA. REV. STAT. ANN. § 32:1269 (2010); Maryland: MD CODE ANN. BUS. REG. §§ 14-201-14-233 (1992); Michigan: MICH. COMP. LAWS § 600.745 (2011); Minnesota: MINN. R. 2860.4400 (2011); New Jersey: N.J. COMP. STAT. ANN. § 56:10-7.2 (2011); *Kubis & Perszyk Assoc. v. Sun Microsystems*, 680 A.2d 618 (N.J. 1996); New York: N.Y. GEN. BUS. LAW § 687(5) (McKinney 2007); North Carolina: N.C. GEN. STAT. § 22B-3 (2011); North Dakota: N.D. CENT. CODE § 51-19-09(9) (1996); Rhode Island: R.I. GEN. LAWS § 19-28.1-14 (2010); South Dakota: S.D. CODIFIED LAWS § 37-5-11 (2011); Texas: TEX. OCC. CODE § 2301.478 (West 2011); Washington: WASH. REV. CODE § 46.96.240 (2011); Wisconsin: WIS. STAT. §553.76 (2011); WIS. ADMIN. CODE § 32.06 (2011).

²⁹ *Cottman Transmission Sys., LLC v. Kershner*, 492 F. Supp. 2d 461, 476 (E.D. Pa. 2007) (Citing CAL. CORP. CODE § 31512 ("Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or hereunder is void."); N.Y. GEN. BUS. LAW § 687(4) ("Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law, or rule promulgated hereunder, shall be void."); N.Y. GEN. BUS. LAW § 687(5) ("It is unlawful to require a franchisee to assent to a release, assignment, novation, waiver or estoppel which would relieve a person from any duty or liability imposed by this article."); WIS. STAT. § 553.76 ("Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this chapter or any rule or order under this chapter is void.")).

³⁰ *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 627-28 (N.J. 1996).

³¹ *Id.*

agreed with the franchisee that a forum selection clause is unenforceable where a statute confers exclusive jurisdiction upon a court.³² In *FOG*, the court held that the claim was governed by New Hampshire's Dealership Act,³³ which granted New Hampshire courts exclusive jurisdiction and made the forum selection clause unenforceable. In *Huddle House v. Paragon Foods*, the court held that forum selection provisions in a franchise agreement are unenforceable as against public policy where both the franchisee and franchisor are state corporations; all acts giving rise to a breach of contract action are alleged to have occurred in Georgia; and there is an applicable state statute governing venue.³⁴

Courts also have discretion to refuse enforcement of a forum selection clause where transfer would "contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision."³⁵ In *Jones v. GNC Franchising*, a forum selection clause requiring the franchisee to file any suit against the franchisor in Pennsylvania (where the franchisor's principal office was located), was deemed unenforceable.³⁶ The court found that the forum selection clause violated a California statute that expresses a strong public policy to protect California franchisees from the expense, inconvenience and possible prejudice of litigating in a non-California venue.³⁷ *T-Bird Nevada LLC v. Outback Steakhouse, Inc.*, further addressed California's public policy against forum selection clauses that provide for out-of-state forums in franchise disputes. The franchisor (Outback) sued the franchisee (T-Bird) in a Florida state court for the balance due on a loan. T-Bird then sued for breach of contract and other claims in a California court. The California trial court dismissed the case based on the forum selection clause that specified Florida as the agreed on forum for litigation. T-Bird appealed, and the California Court of Appeals reversed and held that the forum selection clause was void as against California public policy.³⁸

³² *FOG Motorsports No. 3, Inc. v. Arctic Cat Sales, Inc.*, 982 A.2d 963, 965 (N.H. 2009) (finding that a court may not enforce a forum selection clause where it "is required by statute to entertain the action").

³³ N.H. REV. STAT. ANN. §357-C:6 (2011), III (providing that "Every new selling agreement . . . between a motor vehicle dealer and a manufacturer or distributor shall include, and if omitted, shall be presumed to include, the following language: 'If any provision herein contravenes the valid laws or regulations of the state of New Hampshire, such provision shall be deemed to be modified to conform to such laws or regulations; or if any provision herein . . . denies or purports to deny access to the procedures, forums, or remedies provided for by such laws or regulations, such provisions shall be void and unenforceable; and all other terms and provisions of this agreement shall remain in full force and effect.'")

³⁴ *Huddle House, Inc. v. Paragon Foods, Inc.*, 587 S.E.2d 845 (Ga. Ct. App. 2003).

³⁵ *Bremen*, 407 U.S. at 15.

³⁶ *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 497-498 (9th Cir. 2000) (A provision . . . that requires a California franchisee to resolve claims related to the franchise agreement in a non-California court directly contravenes this strong public policy and is unenforceable under the directives of *Bremen*).

³⁷ CAL. BUS & PROF. CODE § 20040.5 (prohibiting such provisions in franchise agreements), *but see, Big O Tires, LLC v. Felix Bros., Inc.*, 724 F. Supp. 2d 1107, 1114 (D. Colo. 2010) (the court found that CAL. BUS & PROF. CODE § 20040.5 applies only to provisions that restrict venue to a forum outside of California, not to provisions that merely permit or consent to outside forums).

³⁸ *T-Bird Nevada LLC v. Outback Steakhouse, Inc.*, Bus. Franchise Guide (CCH) ¶ 14,391 (Cal. Ct. App. May 17, 2010)(holding that although the franchise agreements have a Florida forum selection clause, that provision is clearly void under § 20040.5 with respect to claims arising under or relating to the franchise agreements, which must be brought in California).

But even in these jurisdictions it is difficult to predict whether venue or forum selection clauses will be enforced. Sometimes the anti-waiver law applies only in specific contexts. For example, under Idaho state law, "Any condition, stipulation or provision in a *franchise* agreement is void to the extent it purports to waive, or has the effect of waiving *venue* or jurisdiction of the state of Idaho's court system."³⁹ The Idaho Supreme Court has interpreted this statute as articulating a strong public policy against the enforcement of forum selection clauses,⁴⁰ but held that Idaho public policy should not apply in a case involving admiralty law.⁴¹

C. Challenging Venue & Forum Selection

When drafting a forum selection clause, careful attention should be paid to the language used, because the precise wording can affect the outcome of venue challenges during litigation. In *Jitterswing, Inc. v. Francorp, Inc.*, the language used in a forum selection clause in a contract between a dance school and a franchise development company stated, "Parties agree that any dispute arising under this Agreement shall be resolved in the state or federal courts, within the State of Illinois, and each party expressly consents to jurisdiction therein." The court, however, held that the language was not specific enough to encompass the school's statutory tort action against the development company alleging the practice of law without a license, and thus, the forum selection clause was found to be unenforceable.⁴²

In another recent case, the language of the contract was critical, as the outcome of the transfer motion ultimately rested on the interpretation of a single phrase in the forum selection clause. In *The Learning Experience Systems v. Foxborough Child Care*, a franchisor of childcare and development centers entered into franchise agreements allowing franchisees to open franchised childcare and development centers in Massachusetts.⁴³ The agreement contained a forum selection clause which stated the following: "You and we consent and irrevocably submit to the jurisdiction and venue of the state ... where the franchisor is located, and waive any objection to the jurisdiction and venue of such courts." At the time the agreements were executed, the franchisor was located in New Jersey. The franchisor relocated to Boca Raton, Florida prior to filing a lawsuit against the franchisees, claiming breach of the franchise agreements and trademark infringement. The franchisor brought suit in the Southern District of Florida, and the franchisees moved for a transfer of venue to the District of New Jersey because, among other reasons, the choice of venue clause in the franchise agreements required venue in New Jersey (according to their interpretation of the clause). Both parties agreed that the forum selection clause was valid and enforceable, and should control the determination of venue, but disagreed with respect to how the forum selection clause should be interpreted. Ultimately, the dispute boiled down to the meaning of "is located" in the phrase "where the franchisor is located". In the end, the court decided that the franchisor's construction of the forum selection clause was flawed, because the franchisor was asking the court to

³⁹ IDAHO CODE ANN. § 29-110 (West 2011) (emphasis added).

⁴⁰ *Fisk v. Royal Caribbean Cruises, Ltd.*, 108 P.3d 990, 993 (Idaho 2005).

⁴¹ *Id.*

⁴² *Jitterswing, Inc. v. Francorp, Inc.*, 311 S.W.3d 828, 831 (Mo. Ct. App. 2010).

⁴³ *The Learning Experience Systems, LLC v. Foxborough Child Care, LLC*, No. 10-80561-CIV-Hurley/Hopkins (S.D. Fla. Dec. 1, 2010) (order granting defendants' motion to transfer venue). Co-author Jason M. Murray represented the franchisor, The Learning Experience Systems, LLC, in the case reported in these materials.

construe the present-tense verb "is located" as a future-tense verb, which the court concluded would be improper.⁴⁴ The court therefore granted the defendant's motion to transfer venue to the District Court for the District of New Jersey, where the franchisor's principal place of business was located at the time the agreement was executed.⁴⁵

In contrast, the forum selection clause in *RM Yogurt Hawaii v. Red Mango Franchising* seemed to be more carefully drafted and led to less speculation concerning how the court should interpret it. The clause specified that "any action brought by either party against the other in any court, whether federal or state, shall be brought within the state and federal judicial district in which the [franchisor] has its principal place of business *at the time the action is initiated*."⁴⁶ The court found that transfer to the District Court for the Northern District of Texas (the location of the franchisor's principal place of business when suit was filed) was appropriate, and in keeping with the unambiguous language of the forum selection clause.⁴⁷

1. Forum Non-Conveniens

Courts may enforce forum selection clauses in franchising contracts by granting transfers to a contractually designated forum in accordance with motions for forum non conveniens brought under 28 U.S.C. § 1404(a). Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In *Stewart Organization v. Ricoh Corp.*, the U.S. Supreme Court held that Section 1404(a) not only authorizes federal judges to transfer cases from one federal court to another for the convenience of the parties, but also gives them authority to enforce contractual forum selection clauses.⁴⁸ But the Court declined to rule that such clauses must *always* be enforced under federal law.⁴⁹ Instead, the Supreme Court held that "[t]he forum selection clause, which represents the parties' agreement as to the most proper forum should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)."⁵⁰

In evaluating a motion to transfer venue under Section 1404(a), courts traditionally defer to the plaintiff's choice of forum. But some courts have held that when the parties have contractually selected a venue for litigation, the burden of proof may be shifted to the party

⁴⁴ The Court noted: "To the extent that it could be argued that the verb 'is located' is ambiguous because it could reasonably refer to the present and future, . . . the court notes that, rather than straining to find that one interpretation should prevail over the other, the court must construe the phrase against plaintiff as the drafter." *Id.*

⁴⁵ *Id.*

⁴⁶ *RM Yogurt Hawaii LLC v. Red Mango Franchising Co.*, Bus. Franchise Guide (CCH) ¶ 14,405 (D. Haw. June 29, 2010) (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988).

⁴⁹ *Id.* at 31.

⁵⁰ *Id.*; cf. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (§ 1404(a) accords broad discretion to district court, and plaintiff's choice of forum is only one relevant factor for its consideration).

opposing the forum selection clause, which is typically the plaintiff.⁵¹ In *Viron International v. David Boland, Inc.*, the court explained the rationale for shifting the burden to the plaintiff in the presence of a valid forum selection clause: "Requiring defendants to prove that [the transferee district] is a *more* convenient forum is not appropriate when [the] plaintiff has already contractually agreed that [the transferee district] is the most proper forum for handling disputes arising out of the parties' agreements."⁵²

In *Medicine Shoppe International, Inc. v. TLC Pharmacy*, a Delaware franchisor ("Med. Shoppe") with its principal place of business in Missouri sued TLC Pharmacy, one of its franchisees that resided in New York.⁵³ Alleging breach of the franchise agreement by the franchisee, Med. Shoppe sued in the Eastern District of Missouri—the venue designated by the agreement's forum selection clause. The franchisee's motion for a change of venue was denied despite its argument that all witnesses testifying on its behalf resided in the Northern District of New York. The court noted that federal courts generally give considerable deference to a plaintiff's choice of forum, and thus the party seeking a transfer under Section 1404(a) typically bears the burden of proving that a transfer is warranted. Further, the court explained that "a party seeking to avoid a forum selection clause must demonstrate that proceeding in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."⁵⁴ The court concluded that assertions of inconvenience were insufficient to overcome the presumption of validity of the forum selection clause, and that shifting the burden of inconvenience and cost from TLC Pharmacy to Med. Shoppe was not a permissible justification for a change of venue.⁵⁵

Another example of a court enforcing a forum selection clause by denying a Section 1404(a) motion is *Rescuecom Corp. v. Chumley*. There, a New York district court denied transfer from New York to Louisiana of the New York-based franchisor's diversity breach of contract action against a Louisiana-based former franchisee.⁵⁶ The franchise agreement contained a New York forum selection clause, it had been signed by the franchisor and delivered to the franchisee in its completely executed form in New York, and the franchisee failed to identify any witnesses other than himself who were located in Louisiana. The agreement also contained a New York choice of law clause.⁵⁷ The Court noted that "most significantly, Defendants have not adduced evidence demonstrating special circumstances to

⁵¹ See, e.g., *Candela Mgmt. Grp., Inc. v. The Taco Maker*, Bus. Franchise Guide (CCH) ¶ 14,351 (S.D. Ohio Mar. 30, 2010) (concluding that in instances in which a valid forum selection clause is present, the burden of proof on a § 1404(a) motion should be on the party opposing the forum selection clause to demonstrate why he should not be bound by his contractual choice of forum).

⁵² *Viron Int'l v. David Boland, Inc.*, 237 F. Supp. 2d 812, 815 (W.D. Mich. 2002).

⁵³ No. 4:09CV00683 AGF, 2010 U.S. Dist. LEXIS 40954, *6 (E.D. Mo. Apr. 27, 2010).

⁵⁴ *Id.* at *7 (quoting *Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 727 (8th Cir. 2001) and *M/S Bremen*, 407 U.S. at 18).

⁵⁵ *Id.* at *8 (citing *Medicine Shoppe Int'l, Inc. v. Tambellini*, 191 F. Supp. 2d 1065, 1069–70 (E.D. Mo. 2002) (denying motion to transfer venue of breach of contract action filed by franchisor in Missouri against Washington franchisees)).

⁵⁶ *Rescuecom Corp. v. Chumley*, 522 F. Supp.2d 429 (N.D.N.Y. 2007).

⁵⁷ *Id.*

explain why the Court should disregard the parties' private expression of their venue preferences in the forum-selection clause of the Franchise Agreement."⁵⁸

But sometimes, notwithstanding the existence of a forum selection clause, a court will balance the convenience of the parties, witnesses, and the interest of justice as mandated by 1404(a) and refuse to transfer a case to the contractually designated forum. In *Standard Office Systems, Inc. v. Ricoh Corp.*, an Arkansas district court denied a motion for transfer despite the presence of a clause in the contract designating New York State as the forum of choice.⁵⁹ The court observed that the existence of a forum selection clause in a contract is but one of a number of factors for determining the propriety of a Section 1404(a) transfer. The court concluded that this particular clause had no integral connection with the nature of the contract, and that the action was not brought "under" the contract, since it did not contest any particular term of the contract, but alleged fraud in the inducement of the contract itself.⁶⁰

2. Improper Venue

28 U.S.C. § 1406(a) provides that if a case is filed in the wrong division or district, the district court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." When faced with a Section 1406(a) motion, courts have often found that dismissal is too harsh of a remedy, and have transferred the case "in the interest of justice."⁶¹ A forum selection clause does not render improper a forum other than the contractually-designated one, it merely allows the defendants an opportunity to bring a motion to transfer under Section 1404(a).⁶²

3. Pending Related Litigation in Different Venue

When balancing the foregoing factors, courts may also consider whether related litigation is currently pending in the district to which transfer is sought.⁶³ The Supreme Court suggests that great weight should be given to the consideration of efficiency. Writing for the court, Justice Black said:

To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent, and the fact

⁵⁸ *Id.* at 450.

⁵⁹ *Standard Office Systems, Inc. v. Ricoh Corp.*, 742 F. Supp. 534 (W.D. Ark. 1990).

⁶⁰ *Id.*

⁶¹ See *Bbdova, LLC v. Auto, Techs., Inc.*, 358 F. Supp. 2d 387, 391 (D. Del. 2005) (denying defendant's motion to dismiss, but granting defendant's motion to transfer); *Jennings v. Entire Computer Centers, Inc.*, 660 F. Supp. 712 (D. Me. 1987) (transfer in the interest of justice where dismissal might preclude institution of new suit because of statute of limitation problems).

⁶² *Road Mach. & Supplies, Co., v. Fed. Signal Corp.*, (D. Minn. 2003); Bus. Fran. Guide (CCH) ¶ 12,676.

⁶³ See *Codex Corp. v. Milgo Elec. Corp.*, 553 F.2d 735, 739 (1st Cir. 1977) ("The pendency of related litigation in another forum is a proper factor to be considered in resolving choice of venue questions").

that such cases can be consolidated to conserve judicial resources weighs in favor of transfer.⁶⁴

In *Pressdough of Bismarck, LLC v. A & W Restaurants, Inc.*, the U.S. District Court for the District of North Dakota refused to require a franchisor to submit to suit in North Dakota when there was already pending litigation in Kentucky.⁶⁵ The court held that in the interest of justice, venue should exist for the entire action where the first-filed case was pending. The court considered the fact that although several of the contracts between the parties designated North Dakota as an appropriate venue, none of them *required* adjudication in North Dakota. In contrast, some of the contracts designated Kentucky as the *exclusive* venue. Although the court recognized that the North Dakota Securities Commissioner previously determined that it was unfair for out-of-state franchisors to force in-state franchisees to travel to distant locations for the purpose of litigation, the court nonetheless held that the interest of justice weighed in favor of litigating the case as a whole in Kentucky, particularly since the Kentucky case was the first-filed.⁶⁶

But some courts are less sympathetic to the "first to file" rule. The "first to file" rule states that a second court will defer to a first if two lawsuits are filed raising very similar or identical issues, with the exception of "situations where the earlier-filing party has clearly received knowledge of the defendant's intent to file and has engaged in a race to the courthouse."⁶⁷ In *Megadance USA Corp. v. Knipp*, a Massachusetts district court found that the franchisees, awaiting expiration of a notice period, knew that they would be sued by the franchisor to enforce termination of their franchise agreements, so the exception to the first filed rule would apply. The court therefore denied the franchisees' motion to dismiss or alternately transfer the case to the Northern District of Georgia, because the franchisees knew the franchisor would likely employ the franchise agreement's forum selection provision to bring suit in its home venue.⁶⁸

Finally, when related litigation is pending in another district, courts routinely transfer cases filed in an improper venue to the venue mandated by a valid forum selection clause.⁶⁹

D. Arbitration

Arbitration clauses are also commonly found in franchise or dealership agreements, requiring the parties to engage in arbitration rather than commencing a lawsuit. If a franchisor wants to ensure that disputes with franchisees will be resolved in a particular forum, the

⁶⁴ *Cont'l Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1960). See also *Davox Corp. v. Digital Sys. Int'l*, 846 F. Supp. 144, 149 (D. Mass. 1993) (Where two or more cases involve similar issues and "will involve common discovery and witnesses, the cases should be heard in a single forum, to conserve judicial resources and to promote an efficient resolution").

⁶⁵ *Pressdough of Bismarck, LLC v. A & W Rests., Inc.*, 587 F. Supp. 2d 1079, 1088 (D. N.D. 2008).

⁶⁶ *Id.*

⁶⁷ See, e.g., *EEOC v. Univ. of Pa.*, 850 F.2d 969 (3d Cir. 1988); *Ven-Fuel, Inc. v. Dept. of Treasury*, 673 F.2d 1194 (11th Cir. 1982).

⁶⁸ *Megadance USA Corp. v. Knipp*, 623 F. Supp. 2d 146, 148 (D. Mass. 2009).

⁶⁹ See *TDY Indus., Inc. v. Hamilton Sundstrand Corp.*, No. 07-388, 2007 U.S. Dist. LEXIS 43277, at *4 (W.D. Pa. June 14, 2007) (transferring case to venue mandated by a forum selection clause).

franchisor should include an arbitration clause that designates the location for arbitration. Under the Federal Arbitration Act, arbitration provisions that designate the venue are enforceable and any state law that contravenes the arbitration venue clause will be preempted.⁷⁰

When drafting arbitration provisions, it is critical that arbitration and forum selection clauses do not conflict with each other. For example, in *New Concept Construction Company, Inc. v. Kirbyville Consolidated Independent School District*, the forum selection clause stated that the contractor "shall not institute an action of [sic] proceeding in any way relating to this agreement against the Owner except in a court of competent jurisdiction in the County in which the work was performed."⁷¹ After taking parol evidence into consideration, the trial court concluded that the parties did not intend to arbitrate their disputes.⁷² The appellate court disagreed holding that the forum selection provision at issue is consistent with the arbitration provision.⁷³ The court held that when the provisions are read together they mean that the contractor "must file any court proceeding not precluded by the arbitration provision in the County in which the work was performed."⁷⁴

For a more in-depth discussion of arbitration, see section VIII below.

III. THE LAW GOVERNING CHOICE OF LAW CLAUSES

A. Choice of Law Clauses

1. Validity & Enforceability

In franchise agreements, parties typically select at the time of contracting what substantive law will govern their relationship by including a clause choosing the laws of a particular state. There are several motivations for picking the law of a given jurisdiction, including that a state's substantive law is more favorable to a party. Manufacturers, for example, may select the law of a jurisdiction without a franchise protection statute in an effort to avoid restrictions on their termination rights.

In general, courts enforce choice of law provisions agreed to by the parties. However, the courts often narrowly interpret choice of law provisions. When substantive state law chosen by the parties is in direct conflict with the statutory provisions afforded a franchisee under his state's franchise statute, the court often overrides the choice of law provision in question; this is especially common when the home state's franchise statute includes an anti-waiver provision.

In *Cottman Transmission Systems v. Kershner*, several franchisees whose businesses were located in the states of California, Wisconsin, and New York sought leave to amend their pleadings to add claims against the franchisor's president for violations of the franchise

⁷⁰ *Doctor's Assocs. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (ruling that state law restrictions on arbitrable forum selection clauses are preempted by the FAA).

⁷¹ 119 S.W.3d 468, 469 (Tex. App. 2003).

⁷² *Id.*

⁷³ *Id.* at 470.

⁷⁴ *Id.* at 470-71.

disclosure statutes of their respective states.⁷⁵ The franchisor opposed the franchisees' motion, arguing that the motion would be futile because all of the franchise agreements provided for the application of Pennsylvania law.⁷⁶ The court considered whether the application of the Pennsylvania choice of law provision would be contrary to the public policy of the franchisees' respective home states, relying on the "anti-waiver" provisions contained in the franchise statutes of the respective states. The court found that in all three states, the courts "had recognized that the inclusion of an anti-waiver provision in a franchise statute expresses the state's strong public policy favoring the application of the statute to protect its citizens."⁷⁷

Because the Court in *Cottman* found that the relevant state franchise disclosure statutes provided for a heightened degree of protection that would be substantially eroded if the Court were to enforce the choice of law provision to preclude the franchisees from asserting claims under those statutes, it refused to apply the choice of law provision.⁷⁸ On the other hand, courts have held that the more closely related the state of the chosen law to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law denying effect to the choice of law provision.⁷⁹

As *Cottman* demonstrates, a state franchise statute's anti-waiver provision can be an important factor in a court's determination whether to enforce a contract's choice of law clause.⁸⁰

2. Scope

Even when a choice of law provision is valid and enforceable, claims might be outside of the scope of that provision. Disputes often arise over whether a contractual choice of law provision is broad enough to cover non-contractual claims such as tort or statutory claims. One example of a broadly written provision: "CONTROLLING LAW: The validity, interpretation and performance of this Agreement shall be controlled by and construed in accordance with the laws

⁷⁵ *Cottman Transmission Sys., LLC v. Kershner*, 492 F. Supp. 2d 461 (E.D. Pa. 2007).

⁷⁶ *Id.* at 466.

⁷⁷ *Id.* at 468. See also *Randall v. Lady of Am. Franchise Corp.*, 532 F. Supp.2d 1071 (D. Minn. 2007) (despite Florida choice of law provision contained in parties' franchise agreement, the Minnesota Franchise Act applied where the Act specifically voided any contractual provision "that explicitly waives compliance with a provision of the Act or that has the effect of waiving compliance with a provision of the Act.").

⁷⁸ *But cf. Cottman Transmission Sys., LLC v. Kershner*, 536 F. Supp.2d 543, 551 (E.D. Pa. 2008). This same court in a later decision found that Florida's Franchise Law was overridden by the Pennsylvania choice of law provision contained in the parties' franchise agreement: "The application of the choice of law provision is not contrary to Florida's public policy; therefore, the choice of Pennsylvania law will be enforced...the Florida statute contains no anti-waiver provision."

⁷⁹ *Sherman v. PremierGarage Sys., LLC*, No. CV 10-0269-PHX-MHM, 2010 WL 3023320 (D. Ariz. July 30, 2010) (applying Restatement (Second) of Conflict of Laws § 187). See also *Paul Green Sch. of Rock Music Franchising, LLC v. Smith*, No. 08-cv-5507, 2009 WL 426175 (E.D. Pa. Feb. 17, 2009), where a court declined to review an arbitrator's decision to enforce a non-compete agreement as its enforcement was not a manifest disregard for the law. The arbitrator did not have to apply California law to the non-compete agreement as a choice of law provision in the agreement was still valid. Further, the company that sought to enforce the non-compete agreement provided a provision of California law that it argued held the agreement to be enforceable.

⁸⁰ *Id.*

of New York.⁸¹ Conversely, a narrowly constructed choice of law provision might state simply the following: "the parties agree that this contract shall be governed by the laws of the State of Texas."⁸² Even if the choice-of-law provision in question is narrow, claims dependent upon the contract may be subject to a contract's choice of law clause.⁸³

3. Extraterritorial Application

Parties to a franchise agreement are sometimes confronted with the question of whether the franchise law of the designated state applies to the pending dispute between the parties. In most cases, courts confronted with a dispute over the extraterritorial application of the designated state's franchise law look to the franchise statute itself to determine whether the language of the statute limits its applicability to persons either residing or doing business in that state.

In cases where the franchise law of the designated state specifically limits its application to state residents or businesses operating within the state, courts generally do not give extraterritorial effect to that particular law.⁸⁴ However, when the particular law does not specifically mention extraterritorial application, courts will often apply the designated state's franchise laws, subject to the scope of the choice of law provision contained in the parties' agreement.

At least one court has held that the parties' contractual choice of law will override express statutory language limiting the statute's extraterritorial application.⁸⁵

⁸¹ *Baumgardner v. Bimbo Food Bakeries Distrib., Inc.*, 697 F. Supp.2d 801 (N.D. Ohio 2010) (holding that distribution agreement's choice of law provision applied to both contract and tort claims).

⁸² *Nicor Int'l Corp. v. El Paso Corp.*, 318 F. Supp.2d 1160, 1164-65 (S.D. Fla. 2004). See also *El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F. Supp.2d 986 (S.D. Tex. 2004) (stating "The choice of law clause plainly governs Plaintiff's contract claims, but it is not equally clear whether it also applies to Plaintiff's tort claims. The Fifth Circuit has narrowly construed choice of law clauses so as only to apply to contract claims, and not tort claims arising out of the contractual dispute; however, the choice of law clauses that have been narrowly construed have also been more narrowly written than the clause at issue here.")

⁸³ See *Medline Indus. Inc. v. Maersk Med. Ltd.*, 230 F. Supp.2d 857 (N.D. Ill. 2002) (finding fraudulent inducement claim dependent on contract and thus subject to choice of law clause; but holding that tortious interference claim was independent and governed by different law).

⁸⁴ *Cromeens, Holloman, Siber, Inc. v. AB Volvo*, 349 F.3d 376 (7th Cir. 2003) (despite Illinois choice of law provision in parties' dealer agreements, Illinois Franchise Disclosure Act did not apply to claims brought by dealers whose residences and businesses were located outside the state). See also *New England Surfaces v. E.I. Du Pont de Nemours & Co.*, 517 F. Supp. 2d 466, 490 (D. Me. 2007) (noting that it is doubtful that the Connecticut franchise law applies extraterritorially because the act "only applies to franchise agreements "the performance of which contemplates or requires the franchisee to establish or maintain a place of business in" Connecticut); *Taylor v. 1-800-GOT-JUNK?, LLC*, 632 F. Supp. 2d 1048, (W.D. Wa. 2009) (franchise agreement expressly stated that it was to be construed and interpreted according to Washington law and selected Washington as forum for all disputes, and thus district court was required to apply Washington law to franchisee's action under agreement.)

⁸⁵ *Dep't of Motor Vehicles v. Mercedes-Benz of N. Am., Inc.*, 408 So.2d 627, 629 (Fla. Dist. Ct. App. 1981) ("It is well established that when the parties to a contract have indicated their intention as to the law which is to govern, it will be governed by such law in accordance with the intent of the parties.")

B. Common Law Choice of Law Analysis

1. Most Significant Relationship

Courts are often called upon to decide the controlling law when the parties themselves have not agreed on what law applies to a particular issue – either because of the scope or lack of a choice of law provision. In these cases, courts hesitate to make choice of law determinations when the substantive laws of the two states would yield similar results. When these moot conflicts occur, courts will apply the laws of the forum state.⁸⁶ The party seeking the application of the law of a foreign jurisdiction must show that the foreign law is different from the laws of the forum state.

Absent a valid choice of law clause, courts usually apply the “most significant relationship” test from Section 188 of the Restatement (Second) of Conflicts of Laws to determine what law governs the contractual rights and duties of the parties.⁸⁷ According to Section 188, the contacts considered to determine the applicable law in a contract dispute are: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.⁸⁸

In *Momentum Marketing Sales & Services, Inc. v. Curves International*, a Texas federal court brushed aside a number of anti-waiver provisions in state franchise law to hold that Texas law applied, rather than the franchise laws of the states in which the franchisees operated.⁸⁹ In finding that Texas law should apply, the court applied the facts of the case to Texas’ adopted section of the Restatement and found that although the injury alleged (over-saturation of markets) occurred in each franchisee’s home state, the injury from the misrepresentation took place in Texas. Thus, the court held, this factor was neutral. The court then found that the conduct leading up to the over-saturation took place in Texas.⁹⁰ This factor supported applying Texas law. The court also found that the relationship between the franchisor and franchisees was based around each franchise agreement. Each franchise agreement provided that Texas law governed. Again, this factor supported the application of Texas law.

2. Governmental Interest

Some states apply the “governmental interest” test in determining applicability to a particular issue. The “governmental interest” analysis looks at which state has the greatest

⁸⁶ *Berg Chilling System v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006) (“where the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a ‘false conflict,’ and the Court should avoid the choice of law question”). See also *Progressive Septic, Inc. v. Septitech, LLC.*, No. ELH-09-03446, 2011 WL 939022 (D. Md. Mar. 15, 2011).

⁸⁷ *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, 2007 U.S. Dist. LEXIS 91947, 31-32 (N.D. Tex. 2007).

⁸⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §188(2). See also *Specialty Surfaces Int’l, Inc. v. Cont’l Cas. Co.*, 609 F.3d 233 (Fed. Cir. 2010).

⁸⁹ *Momentum Mktg. Sales & Servs., Inc. v. Curves Int’l Inc.*, No. W-07-CA-048, 2209 WL 3977773, Bus. Franchise Guide (CCH) ¶ 14,047 (W.D. Tex. Dec. 17, 2008).

⁹⁰ *Id.*

interest in the application of its own law to the particular issue. This analysis requires the court to consider the interests of any state having a significant interest in the particular issue, including the states where the parties reside and the states in which the conduct occurred. The court will assess which state has the greatest interest by evaluating the narrative of the case and the facts that relate specifically to the laws in conflict.⁹¹

A General Nutrition franchisee in Indiana challenged the application of Pennsylvania law, as selected in the GNC franchise agreement in *Bishop v. GNC Franchising, LLC*.⁹² Because the plaintiff could not identify any specific strong Indiana public policy that the application of Pennsylvania law would offend, the court granted GNC's motion to dismiss. On appeal, the franchisee defined an Indiana public policy allegedly violated by the application of Pennsylvania law. By then it was too late – having failed to preserve the issue in the court below, the franchisee could not raise it on appeal.

3. Vested Rights

When confronted with a choice of law issue, a minority of states apply the traditional "vested rights" theory. Under this theory, a court must apply the state law in which the parties' rights vest. Rights are vested in the place they originate – in the state where the conduct or act occurred or the relationship began.⁹³ In more modern times, the vested rights doctrine has been criticized as outdated and inflexible; as such it is rarely applied.

IV. TACTICAL CONSIDERATIONS FOR STATE COURT OR FEDERAL COURT SELECTION

Many plaintiffs prefer to litigate in their local state court, believing that judges (and juries) will be more sympathetic, summary judgment will be less likely, the admissibility of expert opinion will be easier, and there will be increased permissive joinder of claims; also, there is often no requirement for unanimous jury verdicts.⁹⁴ It is important to note, however, that it is generally easier to obtain discovery from out-of-state witnesses in federal court, and federal court judgments are generally easier to enforce in other states.⁹⁵ In franchise cases, a potential

⁹¹ *Keamey, v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922-23 (Cal. 2006). "[T]he governmental interest approach generally involves three steps. First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law 'to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state' . . . and then ultimately applies 'the law of the state whose interest would be the more impaired if its law were not applied.'" *Id.* (citations omitted).

⁹² *Bishop v. GNC Franchising, LLC*, 248 Fed. Appx. 298 (3d Cir. 2007).

⁹³ *Simon v. Phillip Morris*, 124 F. Supp. 2d 46, 66 (E.D.N.Y. 2000).

⁹⁴ FRANCHISE LITIGATION HANDBOOK 6 (Dennis LaFiura & C. Griffith Towle eds., 2010) (citing Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 2006 n.110 (2005)) [hereinafter FRANCHISE LITIGATION].

⁹⁵ *Id.* (citing FED. R. CIV. P. 45 (providing for the authority to compel a witness to attend a deposition as long as the witness does not have to travel more than 100 miles from where the person resides); 28 U.S.C. § 1963 (2011) (allowing for a federal judgment to be efficiently enforced in another federal district without the need to relitigate the case.)).

litigant may prefer federal court because federal judges are more likely to be familiar with the Lanham Act and other federal intellectual property statutes.⁹⁶

A. Franchisee

Franchise agreements most often will heavily favor the franchisor. Therefore, the ability to select the jurisdiction and forum in which to commence a lawsuit is a critical tool that a franchisee can use to gain a tactical advantage over an otherwise one-sided agreement. Thus, a franchisee must assess and determine what jurisdiction and forum will be the most favorable to its cause. The ultimate success or failure of a lawsuit may depend on the strategic decision of where to commence the litigation. In addition, by controlling the location of the litigation, the franchisee is better able to control its expenses and costs. For example, filing close to where the franchisee is located may afford significant cost savings permitting a franchisee to see the lawsuit through trial.

Several factors must be considered when deciding where to sue. This decision, and other preliminary strategic decisions, however, may be controlled by the presence of arbitration clauses, forum selection clauses, choice of law clauses, the laws of the franchisee's state, and the particular facts of the case.⁹⁷ Assuming that the agreement does not contain an arbitration clause, if both the franchisee and franchisor reside in the same state, then the matter will be heard in state court unless there is a federal statute or question at issue.⁹⁸ Even if there is a federal statute or question at issue, the state court may have concurrent jurisdiction over the matter and federal jurisdiction would depend upon whether the defendant removes the lawsuit.⁹⁹ The matter will be heard in federal court, however, if a federal statute provides for exclusive jurisdiction.¹⁰⁰

If the franchisee and franchisor reside in different states, in the absence of a forum selection clause, the state where the franchisee is located will most often be a convenient forum to commence a lawsuit against the franchisor.¹⁰¹ Notably, the sale and operation of the franchise will nearly always satisfy the minimum contacts requirements under a state's long-arm statute.¹⁰² If the franchisee is seeking jurisdiction over individual defendants who reside in different states and whose contact with the franchisee's state are tenuous, the result could be different.¹⁰³ If the parties' agreement contains forum selection and choice of law clauses, then

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (citing *Berlitz Schs. of Languages of Am. v. Everest House*, 619 F.2d 211, 216 (2d Cir. 1980) (noting that state courts have concurrent jurisdiction with federal courts to determine Lanham Act claims)).

¹⁰⁰ *Id.* at 6-7.

¹⁰¹ *Id.* at 7.

¹⁰² *Id.*

¹⁰³ *Id.*

the issue becomes more complex. For example, certain state statutes may preempt forum selection clauses, as may principles of unconscionability.¹⁰⁴

B. Franchisor

If the franchisor is the first to file a lawsuit, then the franchisor will have the ability to control the forum of the litigation, subject to several conditions, including whether there is a forum selection clause, an arbitration provision, or a choice of law clause. If the franchisor is not the first to file the lawsuit, the franchisor can always seek to challenge the forum selected by the franchisee depending on, for example, whether there is a forum selection clause, an arbitration clause, a choice of law clause, a federal question, or diversity of citizenship.

A franchisor can move to transfer a case to a more convenient forum pursuant to 28 U.S.C. § 1404(a). As discussed above, this statute allows a district court to transfer a lawsuit “[f]or the convenience of parties and witnesses, in the interest of justice.”¹⁰⁵ Factors that the court will consider include the convenience of the parties, the convenience of the witnesses, ease of access to sources of proof, availability of process to compel the attendance of witnesses, the cost of obtaining the attendance of witnesses, and the public interest.¹⁰⁶ In *Medicap Pharmacies, Inc. v. Faidley*, the court addressed the convenience element of Section 1404(a) in a franchise litigation matter and concluded that the franchisees “essentially waived the right to argue inconvenience when they agreed to the franchise agreement and the forum selection clause.”¹⁰⁷

In addition, a defendant may file a motion for dismissal for forum non conveniens when the plaintiff files an action in an improper federal court and the action cannot be transferred to another federal court.¹⁰⁸ In such circumstances, federal common law will govern the motion, and the lawsuit may be dismissed.¹⁰⁹ In analyzing whether to dismiss the action, the private interest factors that the court will consider include “ease of access to proof, compulsory process for attendance of unwilling participants and the cost of obtaining their presence, the possibility of an inspection of the premises (if appropriate), the enforceability of any judgment obtained, and, generally, ‘all other practical problems that make trial of a case easy, expeditious and inexpensive.’”¹¹⁰ The public interest factors that the court will consider include “congested dockets, the interest in having local matters tried locally, and the appropriateness of conducting a diversity case where the law of the forum matches the law applicable in the case.”¹¹¹

¹⁰⁴ *Id.*

¹⁰⁵ 28 U.S.C. § 1404(a) (2011).

¹⁰⁶ FRANCHISE LITIGATION, *supra* note 93, at 7–8 (citing *Stateline Power Corp. v. Kremer*, 404 F. Supp. 2d 1373, 1380 (S.D. Fla. 2005)).

¹⁰⁷ *Id.* at 8 (citing 416 F. Supp. 2d 678, 686–90 (S.D. Iowa 2006)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 8–9 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

¹¹¹ *Id.* at 9.

Further, a franchisor can use 28 U.S.C. § 1406(a) when an action is brought in an improper venue. This statute allows the court to dismiss the action or, in the interests of justice, transfer the matter to a district or division in which it could have been brought.¹¹² For example, in *Cottman Transmission Systems, Inc. v. Martino*—a case that involved a franchise agreement that did not have a forum selection clause—the court transferred the case to Michigan, where the former franchisee was located, instead of Pennsylvania, where the franchisor’s headquarters were located.¹¹³ The court held that the alleged Lanham Act violations primarily occurred in Michigan, where the franchisee was located, and not where the franchisor’s headquarters were located in Pennsylvania.¹¹⁴ In addition, the franchise agreement, which formed the grounds for the state law claims asserted in the action, was executed and performed in Michigan.¹¹⁵

V. PETITIONS FOR REMOVAL

A. Defendant May Remove to Federal Court

If the case is originally filed in state court, the practitioner must analyze whether it is prudent and feasible to remove the case to federal district court either because the claims asserted arise under the Constitution, treaties or laws of the United States under 28 U.S.C. § 1331, or because there is diversity jurisdiction under 28 U.S.C. § 1332.¹¹⁶ Removal under 28 U.S.C. § 1441 requires notice of removal to be filed within 30 days of receipt, by the defendant, of the initial pleading setting forth the claim for relief.¹¹⁷ The party that seeks removal has the burden of establishing that federal jurisdiction exists and that removal of the suit was proper.¹¹⁸ This burden is met by demonstrating federal jurisdiction by a preponderance of the evidence.¹¹⁹

In cases involving multiple defendants, the removal notice must generally show that each of the defendants desires and is eligible for removal.¹²⁰ It is not necessary for all defendants to sign the notice of removal but instead they may consent to removal within the 30 days allotted by the removal statute.¹²¹ An exception to the rule requiring unanimous concurrence in removal among multiple defendants exists where a removal is premised on a separate and independent federal question claim that is joined with otherwise nonremovable

¹¹² 28 U.S.C. § 1406(a) (2011).

¹¹³ FRANCHISE LITIGATION, *supra* note 93, at 8 (citing 36 F.3d 291, 292 (3d Cir. 1994)).

¹¹⁴ *Id.* (citing 36 F.3d at 293).

¹¹⁵ *Id.* (citing 36 F.3d at 293).

¹¹⁶ 28 U.S.C. §§1331, 1332 (2011).

¹¹⁷ 28 U.S.C. § 1441(b) (2011).

¹¹⁸ *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002).

¹¹⁹ See *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1409 (5th Cir. 1995), *cert. denied*, 516 U.S. 865 (1995) (involving a “preponderance of the evidence” standard to determine whether removal was proper in the face of conflicting facts).

¹²⁰ 28 U.S.C. § 1446 (2011).

¹²¹ *Esposito v. Home Depot, U.S.A., Inc.*, 436 F. Supp. 2d 343 (D.R.I. 2006).

claims.¹²² In this instance, only defendants subject to the federal claim need to join in the removal. Exceptions are also recognized where the nonjoining defendants have not been served with process at the time the removal notice is filed, and where the nonjoining defendants are nominal or formal parties. If any of the defendants fail either to join in or consent to the notice or fail to file a removal notice of their own, the notice that has been filed will be deemed insufficient on its face to perfect removal, unless a valid reason is stated for that failure.¹²³ If any defendant is ineligible for removal, removal will be improper for all.¹²⁴

In *Toyz, Inc. v. Wireless Toyz, Inc.*, the court addressed the issue of when the 30 day removal period begins to run when multiple parties are involved.¹²⁵ In this case, several franchisees sued their Michigan-based franchisors in California state court.¹²⁶ All defendants moved to transfer the action to the Eastern District of Michigan.¹²⁷ The defendants were served on different days.¹²⁸ This court adopted the “last-served rule,” finding that the national trend was that the 30-day period for filing a notice of removal began to run on the date the last defendant was served.¹²⁹ The court noted that this was consistent with United States Supreme Court precedent.¹³⁰

B. Federal Court Jurisdiction

As indicated above, any action over which the federal district courts have original jurisdiction based upon a claim under federal law may be removed without regard to the citizenship of the parties. However, jurisdiction can also be based on diversity of citizenship. Because the removal deprives the state courts of jurisdiction, federal removal statutes are strictly construed and any doubt about the propriety of removal will be resolved in favor of remand to state court.¹³¹

1. Federal Question Jurisdiction

Subject matter jurisdiction can be obtained by raising a federal question as discussed in more depth in section VI.B.1 below. If a defendant seeks to remove a case to federal court on federal question grounds, “the federal issue must be disclosed upon the face of the complaint,

¹²² *Mehney-Egan v. Mendoza*, 124 F. Supp. 2d 467 (E.D. Mich. 2000).
¹²³ *Egle Nursing Home, Inc. v. Erie Ins. Grp.*, 981 F. Supp. 932 (D. Md. 1997).
¹²⁴ *Baldwin v. Perdue, Inc.*, 451 F. Supp. 373 (E.D. Va. 1978).
¹²⁵ No. C 09-05091 JF (HRL), 2010 U.S. Dist. LEXIS 12032 (Jan. 25, 2010).
¹²⁶ *Id.* at * 2–3.
¹²⁷ *Id.* at *33.
¹²⁸ *Id.* at *37–40.
¹²⁹ *Id.*
¹³⁰ *Id.*
¹³¹ *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281 (5th Cir. 2007).

unaided by the answer or by the petition for removal.¹³² It is immaterial that a federal question may arise in connection with a defendant's defense, a counterclaim, cross-claim, or third-party claim.¹³³ Proof of existence of federal question jurisdiction rests on the removing party.¹³⁴ Because the plaintiff is the master of the claim, he or she may avoid bringing federal claims. Thus, a plaintiff can rely solely on state law to avoid federal question jurisdiction.¹³⁵ However, three exceptions to the well-pleaded complaint rule exist: (1) a state law claim may be totally preempted by federal law; (2) removal is proper if a plaintiff's complaint includes or involves a substantial question of federal law—please note that incidental federal issues are insufficient; or (3) under the artful pleading doctrine, removal is proper if a plaintiff attempts in bad faith to disguise a federal claim as a state claim.¹³⁶

What constitutes a federal claim for removal purposes was recently addressed in *Kennynick, LLC v. Standard Petroleum Co.*¹³⁷ In *Kennynick*, the plaintiffs were franchise dealers of gasoline products supplied by the defendant.¹³⁸ The franchises claimed that defendant charged them a higher federal gasoline tax rate than that which was actually applicable to the gasoline product that was sold to them.¹³⁹ The franchisees asserted that defendant breached their contracts, engaged in unjust enrichment and misrepresentation, and violated the Connecticut Franchise Act and Connecticut's Unfair Trade Practices Act.¹⁴⁰ The defendant removed the case to federal court arguing that the allegations in the complaint "arose under" federal law, specifically 26 U.S.C. §§ 4081 and 6426.¹⁴¹ The court held that for federal question jurisdiction to apply, the state-law claim must necessarily raise a federal issue and the federal issue must be disputed and substantial.¹⁴² Thus, if the franchisees could not obtain the relief they sought without prevailing on the underlying federal issue in dispute, then their claims raised a federal issue.¹⁴³ In this case, the court granted the franchisees' motion to remand, holding that the franchisees' claims were not dependent on resolution of any substantial

¹³² *California ex. rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004).

¹³³ See *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983) ("For better or worse . . . a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law."); *Redevelopment Agency of City of San Bernardino v. Alvarez*, 288 F. Supp. 2d 1112, 1115 (C.D. Cal. 2003) (citing *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 327 (5th Cir. 1998)).

¹³⁴ *Boone v. Citigroup, Inc.*, 416 F.3d 382, 388 (5th Cir. 2005).

¹³⁵ *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986).

¹³⁶ *Halfmann v. USAG Ins. Servs., Inc.*, 118 F. Supp. 2d 714, 717 (N.D. Tex. 2000).

¹³⁷ No. 3:09-CV-257 (CFD), 2009 U.S. Dist. LEXIS 46449 (D. Conn. June 1, 2009).

¹³⁸ *Id.* at *1–3.

¹³⁹ *Id.* at *3.

¹⁴⁰ *Id.* at *3–4.

¹⁴¹ *Id.* at *1.

¹⁴² *Id.* at * 4–7.

¹⁴³ *Id.*

question about the validity or interpretation of federal gasoline tax statutes and that the claims could be entirely resolved by addressing factual and state-law disputes.¹⁴⁴

2. Diversity Jurisdiction

Alternatively, diversity jurisdiction can be obtained if the parties are in complete diversity as discussed in more depth in section VI.B.2 below. Even when complete diversity exists between the parties, removal is only proper if “none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”¹⁴⁵ For purposes of federal jurisdiction, a corporation is a citizen of its state of incorporation and the state of its “principal place of business.”¹⁴⁶ A plaintiff may attempt to avoid federal court jurisdiction by adding a defendant to destroy diversity. Under the doctrine of fraudulent joinder, if a plaintiff adds a sham, nominal, or unknown defendant to the lawsuit for the sole purpose of destroying a federal court’s jurisdiction, the presence of that non-diverse defendant is not a proper basis for remand. To win a fraudulent joinder argument, the removing defendant must show that there is no reasonable basis supporting the claim against the non-diverse defendant, or no real intention in good faith to pursue the action against that defendant or seek a joint judgment. The burden of establishing fraudulent joinder is high. Under most circumstances, if there is any chance that the claim against the non-diverse defendant is viable, the federal court will find that joinder was proper and remand the case.

C. Class Action Fairness Act

The Class Action Fairness Act (“CAFA”) was enacted in 2005 and transfers the jurisdiction for many large class action lawsuits to federal court from state court.¹⁴⁷ CAFA confers original jurisdiction to federal district courts of any class action in which the amount in controversy exceeds \$5 million, exclusive of interest and costs, and (1) any member of a class of plaintiffs is a citizen of a different state of any defendant; (2) any member of a class of plaintiffs is a foreign state or citizen of a foreign state and any defendant is a citizen of a state; or (3) any member of a class of plaintiffs is a citizen of a state and any defendant is a foreign state or citizen of a foreign state.¹⁴⁸

CAFA was enacted, among other reasons, to reduce the effect of “forum shopping” by plaintiffs in state courts that would be friendly to their causes by expanding federal diversity jurisdiction to class actions where there was not complete diversity of citizenship. CAFA has resulted in an increase in the amount of class actions filed or removed to federal court based on diversity of jurisdiction. CAFA is an important tool that franchisors can utilize to remove putative class actions from plaintiff-friendly state courts. CAFA also reduces a plaintiff’s ability to destroy diversity of citizenship and thereby prevent removal.

¹⁴⁴ *Id.* at *7.

¹⁴⁵ 28 U.S.C. § 1441(b) (2011).

¹⁴⁶ 28 U.S.C. § 1332(c) (2011).

¹⁴⁷ 28 U.S.C. § 1332(d) (2011).

¹⁴⁸ *Id.* at § 1332(d)(2).

D. Waiver of Right to Remove

Venue is for the convenience of the litigants. It is a personal privilege of the defendants and it can be waived.¹⁴⁹ In order for a defendant to waive his right to remove, there must be positive action by the defendant indicating his intent to waive this right, and the waiver must be clear and unequivocal.¹⁵⁰ If a defendant does nothing inconsistent with the continuation of his desire to remove, the waiver will not be assumed.¹⁵¹ A mandatory and enforceable forum selection clause constitutes a contractual waiver of a defendant's right to remove an action to federal court.¹⁵² In addition, failure to file a notice of removal in a timely manner will result in a finding of waiver.¹⁵³ Filing a permissive counterclaim also waives the right to remove, but filing a compulsory counterclaim does not.¹⁵⁴ Does submitting to state court jurisdiction waive removal? Generally, short of proceeding to adjudication of the merits, a waiver of the defendants' right to remove will not occur by defensive action in state court.¹⁵⁵ Taking part in preliminary actions in state court brought about by the filing of a complaint, such as opposing a preliminary injunction, filing an answer, or asserting an affirmative defense, will not waive the right to remove. If a defendant, however, has argued and lost on an issue in state court, a defendant may not remove an action to federal court for what is in effect an appeal of an adverse state court decision.

VI. JURISDICTIONAL CONSIDERATIONS

A. Personal Jurisdiction

In order to sue in a particular venue, a plaintiff must satisfy jurisdictional requirements. A party's choice of venue will be limited to forums that have both personal jurisdiction over all defendants, and, in the case of federal court, subject matter jurisdiction over the key claims.

Counsel for a party to a franchise dispute must first determine which courts have personal jurisdiction to hear the case. To establish personal jurisdiction, both federal and state courts will determine if the defendants are subject to service of process under a federal statute or state long-arm statute.¹⁵⁶ If the defendants are subject to service of process, the court will ask whether the exercise of personal jurisdiction is consistent with the due process clause.¹⁵⁷

¹⁴⁹ 28 U.S.C. § 1406(b) (2011).

¹⁵⁰ *Tedford v. Wamer-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003).

¹⁵¹ *Genie Mach. Products, Inc. v. Midwestern Mach. Co.*, 367 F. Supp. 897 (W.D. Mo. 1974).

¹⁵² *Snapper, Inc. v. Redan*, 171 F.3d 1249 (11th Cir. 1999).

¹⁵³ *Home Ins. Co. of New York v. Morse*, 87 U.S. 445 (1874).

¹⁵⁴ *Blue Ox Corp. v. Murphy Oil Corp.*, 524 F. Supp. 1019 (D. Mont. 1981).

¹⁵⁵ *Tedford v. Wamer-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003).

¹⁵⁶ Section 12 of the Clayton Act, 15 U.S.C. § 22, provides for nationwide service of process on defendants in federal antitrust matters.

¹⁵⁷ See *Roe v. Arnold*, 502 F. Supp. 2d 346 (E.D.N.Y. 2007) (finding that jurisdiction under New York Statute CPLR § 302(a)(1) requires the transaction of business in New York; however, the franchisees satisfied this requirement because they could not operate independently of their New York-based franchisor).

In *Hertz Corp. v. Friend*, the Supreme Court held that a corporation's "principal place of business" is "where the corporation's high level officers direct, control, and coordinate the corporation's activities."¹⁵⁸ In doing so, the court adopted the "nerve center" test as the sole test for determining a corporation's principal place of business, ending some circuits' practice of also evaluating where the majority of the corporation's "business activities" occur. The Court held that a corporation's principal place of business will usually be its headquarters.¹⁵⁹

To satisfy due process, the defendant must have "constitutionally sufficient minimum contacts with the forum state which demonstrate that the defendant purposefully availed itself of the state's benefits and protections."¹⁶⁰ These minimum contacts should be such that the maintenance of the suit would not offend traditional notions of fair play and substantial justice.¹⁶¹

Most courts recognize two categories of personal jurisdiction over non-residents: (1) "general jurisdiction," where the non-resident defendant's contacts with the forum are so "continuous and systematic" that the defendant can be sued in the forum over any controversy, whether or not the cause of action has any relationship to the defendant's forum activities; and (2) "specific jurisdiction," where the forum can exercise jurisdiction with respect to the defendant only with respect to claims that arise out of the defendant's in-state contacts.¹⁶²

1. Minimum Contacts

Whether a defendant has sufficient minimum contacts with a particular forum is a fact-intensive inquiry. In one franchise case, *Burger King v. Rudewicz*, the U.S. Supreme Court held that a Florida fast food franchisor could sue a Michigan franchisee in the federal district court in Miami pursuant to Florida's long-arm statute.¹⁶³ The court rejected the franchisee's contention that the court lacked personal jurisdiction over it because the franchisee was a Michigan resident and the breach of contract claim arose outside Florida. Thus, a forum may assert jurisdiction over a nonresident where the alleged injury arises out of or relates to actions that are purposefully directed toward residents of the forum and where jurisdiction would not otherwise offend fair play and substantial justice.

A recent California case has illustrated when contacts are not sufficient to establish personal jurisdiction.¹⁶⁴ In *Toyz, Inc. v. Wireless Toyz, Inc.*, the court determined that California did not have personal jurisdiction over the four individual defendants in the case. The court noted that their limited contacts with California, a few visits per year, were insufficient to

¹⁵⁸ *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010).

¹⁵⁹ *Id.*

¹⁶⁰ *Hanson v. Denkla*, 357 U.S. 235, 253 (1958) (explaining that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus, invoking the benefits and protections of its laws").

¹⁶¹ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)

¹⁶² *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 418 (1984).

¹⁶³ *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 475 (1985).

¹⁶⁴ *Toyz, Inc. v. Wireless Toyz, Inc.*, 2010 U.S. Dist. LEXIS 12032, (N.D. Cal. Jan. 25, 2010), Bus. Franchise Guide (CCH) ¶ 14,313

establish specific jurisdiction.

In another 2010 case, *Nicastro v. McIntyre Machinery America, Ltd.*, the New Jersey Supreme Court affirmed its earlier decision in *Charles Gendler & Co. v. Telecom Equipment Corp.*, which held that the state may exercise personal jurisdiction over a foreign manufacturer of a defective product if the manufacturer's "distribution scheme . . . targets a national market" such that it "knows or reasonably should know that . . . its products are being sold in New Jersey."¹⁶⁵

2. Internet & Personal Jurisdiction

The advent and growth of Internet sales has changed the way business and franchise agreements are undertaken. A business can buy and sell products in an entirely virtual environment.¹⁶⁶ "As the technological process has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase."¹⁶⁷

In order to determine whether a state can exercise personal jurisdiction based upon virtual contacts, courts have applied the "sliding scale" test established in *Zippo Manufacturing v. Zippo Dot Com*.¹⁶⁸ In *Zippo*, the court found that the likelihood that personal jurisdiction can be constitutionally exercised over a party is directly proportionate to the nature and quality of the commercial activity that the party conducts over the Internet.¹⁶⁹ If the defendant uses the website to enter into contracts with residents of the forum state, or engages in a knowing and repeated transmission of computer files between the website and forum state, then personal jurisdiction is proper. In contrast, a more passive website that does little more than make information available to those who are interested is not grounds for the exercise of personal

¹⁶⁵ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575 (N.J. 2010) (holding that State has strong interest in protecting its citizens from defective products, whether those products are toys that endanger children, tainted pharmaceutical drugs that harm patients, or workplace machinery that causes disabling injuries to employees; state also has a paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace). See also *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127 (N.J. 1986) (holding that determining whether a nonresident defendant has had sufficient minimum contacts to subject the defendant to the jurisdiction of the forum state, the first step is to determine whether defendant has sufficient contacts with the forum state and the second step is to evaluate those contacts in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice and thus, the decision whether it is fair and reasonable to compel the nonresident defendant to defend a suit may depend upon a balancing of various factors in addition to the defendant's contacts with the forum); *Go Figure, Inc. v. Curves Int'l, Inc.*, 2010 U.S. Dist. Lexis 34614 (S.D. Tex. Apr. 8, 2010) (One party, Curves, argued that venue should be transferred to the district in which the contract was executed. The court concluded that Curves did not meet its burden of proving that transfer would be "for the convenience of parties and witnesses, in the interest of justice." In determining whether transfer is appropriate, a court considers both private interest factors, such as access to the evidence and witnesses, and public factors, such as local interest in the action and court congestion.)

¹⁶⁶ See *Burger King Corp.*, 471 U.S. at 467 ("Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted.")

¹⁶⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

¹⁶⁸ *Zippo Mfg. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Penn. 1997).

¹⁶⁹ *Id.*

jurisdiction.¹⁷⁰ In between “active” and “passive” sites is a middle area of “interactivity” where websites may exchange a minimal amount of information with residents in the forum state. In this “middle” area, personal jurisdiction must be determined case-by-case based on the extent of interactivity between the website and the residents of the forum state.¹⁷¹

More recently, the court in *Foley v. Yacht Management Group, Inc.*, set aside the *Zippo* sliding scale analysis in determining whether internet activity can create minimum contacts with a forum state to confer personal jurisdiction.¹⁷² The court distinguished the *Zippo* approach and said that the sliding scale approach is generally applied to cases involving a defendant's conduct over its own website, not to a public auction site such as eBay. The court stated that the *Zippo* test is not particularly helpful and should not be applied to a public internet auction site. The court instead employed a traditional analysis focusing on the defendant's purposeful availment of the forum.

In *Toys “R” Us, Inc. v. Step Two, S.A.*, the court held that the defendant's maintenance of an interactive, commercial website in Spain and its two sales to New Jersey residents did not establish minimum contacts sufficient to support the exercise of personal jurisdiction but that the plaintiff was entitled to jurisdictional discovery with regard to defendant's business activities in the United States.¹⁷³ Further, the court held that mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world; rather, there must be evidence that the defendant “purposefully availed” itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.

3. Jurisdiction over Non-Resident Officers & Directors

In order for the franchisee to sue the franchisor's officers and/or directors, courts require that the franchisee establish minimum contacts for each of the officers and directors. The analysis for jurisdiction over such individuals is independent of the analysis for jurisdiction over the corporation. In general, “jurisdiction over the individual officers of a corporation may not be based merely on jurisdiction over the corporation.”¹⁷⁴ This requires that an individual officer's conduct rise to the level of minimum contacts so as to satisfy due process. In addition, the officer will need to be amenable to service of process. Where the state's long-arm statute extends to the limits of due process, personal jurisdiction may be exercised over corporate officers who had the minimum contacts with the state, even if they had only been made in a corporate capacity.¹⁷⁵

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., *Vandermark v. Jomoto Corp.*, 839 N.Y.S.2d 670 (N.Y. App. Div. 2007) (reversing an order to dismiss for lack of personal jurisdiction because there was a genuine issue of fact as to whether the franchisor's website was interactive enough to constitute the transaction of business in New York).

¹⁷² *Foley v. Yacht Mgmt. Grp., Inc.*, No. 08 C 7254, 2009 WL 2020776 (N.D. Ill. July 9, 2009).

¹⁷³ *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003).

¹⁷⁴ *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 906 (1st Cir. 1980).

¹⁷⁵ See *Chicago Blower Corp. v. Air Sys. Assoc.*, 623 F. Supp. 798 (E.D. Mich. 1985). But see *Citizens Bank v. Howard L. Parnes*, 376 Fed. Appx. 496 (6th Cir. 2010) (holding that personal jurisdiction over nonresident guarantor, pursuant to Michigan's long-arm statute in bank's action to enforce a guaranty, comported with due process where he voluntarily signed personal guaranty which facilitated the loan, allowing purchase of shopping

Some states go one step further to protect individual non-resident officers and directors. Some courts have adopted the fiduciary shield (also known as corporate shield) doctrine as a defense to personal jurisdiction.¹⁷⁶ The fiduciary shield doctrine protects non-resident officers or directors from suit in a certain forum if their actions are solely for the benefit of the corporation, and the officer or director does not personally avail herself of the laws and protection of the state.¹⁷⁷ Courts are divided over whether or when corporate officers and directors can escape personal jurisdiction under the fiduciary shield doctrine.

4. Consent & the Effect of Forum Selection Clause on Personal Jurisdiction

Even without minimum contacts between the defendant and the forum state, personal jurisdiction may be based solely on the consent of the defendant. Consent to personal jurisdiction can be implied or express. Consent is implied if the defendant voluntarily appears to litigate the action without raising lack of personal jurisdiction as a defense.¹⁷⁸ Consent is express if the parties contractually agree to the court's jurisdiction.

Consent to personal jurisdiction can be included in a franchise agreement. For example, in *Super 8 Motels, Inc. v. AUM Corp.*, the court held that it had personal jurisdiction over AUM by virtue of the forum selection clause in the franchise agreement which included a waiver of objections to personal jurisdiction.¹⁷⁹ Specifically, the agreement stated that AUM "consents and waives its objections to the non-exclusive personal jurisdiction of and venue in the New Jersey state courts...." If a party consents to personal jurisdiction, the constitutional analysis for personal jurisdiction is obviated because the defendant should "reasonably anticipate being hailed into court" after consenting to personal jurisdiction.¹⁸⁰

5. Effect of Choice of Law Provision on Personal Jurisdiction

The existence of a choice of law provision in a franchise agreement does not amount to consent to personal jurisdiction.¹⁸¹ It can be taken into account when considering whether a defendant has sufficient "minimum contacts" or has purposefully invoked the benefits and protections of a state's laws for jurisdiction purposes.¹⁸²

center in Michigan by an entity in which he had an economic interest; he sought a forbearance agreement from the bank upon borrower's original default; the guaranty agreement was the basis for the action; he personally sought after and voluntarily chose Michigan as location for his business venture; and he signed the guaranty agreement.)

¹⁷⁶ *Jones v. SABIS Educ. Sys.*, 52 F. Supp. 2d 868, 883 (N.D. Ill. 1999).

¹⁷⁷ *Id.*

¹⁷⁸ *QFA Royalties, LLC v. Majed*, 2006 U.S. Dist. LEXIS 87445 (D. Colo. Dec. 1, 2006).

¹⁷⁹ *Super 8 Motels, Inc. v. AUM Corp.*, 2008 WL 4951217 (D.N.J. 2008).

¹⁸⁰ *Kitchen Inv. Grp., Inc. v. K.B. Rest., Inc.*, No. CT-02-001205, 2009 WL 3967904, Bus. Franchise Guide (CCH) ¶ 12,385 (D. Minn. July 22, 2002).

¹⁸¹ *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 482 (1985).

¹⁸² *Id.* at 481-482.

A choice of law provision designating the forum state can help demonstrate that a defendant has contacts sufficient to warrant the exercise of personal jurisdiction. A choice of law provision that designates a state other than the forum state will not affect an analysis of personal jurisdiction in the forum state.

B. Subject Matter Jurisdiction & Federal Courts

Once it is settled that courts within a specific geographic area can exercise personal jurisdiction over the defendant based on its contacts, a plaintiff must determine whether to file suit in state or federal court. Considerations for deciding between state or federal court include: risk of local bias, being afforded more appealing procedural rules, pace of the litigation docket, judicial competence, jury pool differences, and judicial pre-trial involvement.¹⁸³ Typically, attorneys representing out-of-state parties have been reluctant to litigate in state courts because of the perception of local bias.¹⁸⁴ Franchisors generally prefer to litigate in federal rather than state court. Counsel for franchisees typically prefer to litigate in their home state court whenever possible. Parties should always consult with local counsel to learn about potential state or local bias and to gather information about the contemplated forum.

A party can file a claim in federal court if they meet one of the categories enumerated in Article III, Section 2 of the United States Constitution.¹⁸⁵ These include cases that involve a federal question or those involving diversity of citizenship.¹⁸⁶

1. Diversity Jurisdiction

Parties can have their case heard in federal court if their case meets the requirements for diversity jurisdiction under 28 U.S.C. § 1332.¹⁸⁷ Section 1332(a) provides for federal jurisdiction when the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and the dispute is between "citizens of different States."¹⁸⁸

In order to satisfy the diversity requirements, there must be "complete diversity" between the parties.¹⁸⁹ All plaintiffs must be from states that are different from all defendants.¹⁹⁰ Under

¹⁸³ For greater discussion of studies conducted about choosing state or federal court as the forum of choice, see Vincent E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961 (Summer 1995). See also Jeffrey M. Jensen, *Personal Jurisdiction in Federal Courts Over International E-Commerce Cases*, 40 LOY., L.A. L. REV. 1507 (Summer 2007).

¹⁸⁴ See Debra Lyn Bassett, *The Rural Venue*, 57 ALA. L. REV. 941 (Summer 2006).

¹⁸⁵ Generally, any case not included in Article III, § 2 of the U.S. Constitution must be brought in state court.

¹⁸⁶ U.S. CONST. ART. III, § 2.

¹⁸⁷ The U.S. Constitution Article III, § 2 authorizes the federal courts to hear cases "between citizens of different states." The framers' apparent reason for singling out diversity cases for federal jurisdiction was a fear that out-of state citizens would suffer prejudice if they were forced to litigate against local citizens in the local state courts.

¹⁸⁸ 28 U.S.C. § 1332(a) (2011).

¹⁸⁹ The importance of properly alleging diversity jurisdiction and the discretionary nature of supplementary jurisdiction over state claims in franchising agreements are illustrated by *Dunkin' Donuts Franchising LLC v. Komal Int'l Inc.*, (S.D. Fla. 2008). The issue of whether a statutory claim for attorney fees counts towards the amount in controversy for federal diversity jurisdiction was addressed in *Cole v. Captain D's*, No. 5:08CV21-V, 2008 WL 4104577 (W.D.N.C. Aug. 29, 2008).

Section 1332(c)(1), a corporation is deemed to be a citizen, for diversity purposes, of both the state where its principal place of business is located and the state in which it is incorporated.¹⁹¹ Thus, if an opposing party is a citizen of either state, there is no diversity of citizenship.

2. Federal Question

Another way to secure federal jurisdiction is by pleading a federal question. Federal question jurisdiction under 28 U.S.C. § 1331, requires that the action "aris[e] under the Constitution, laws, or treaties of the United States." A claim "arises under" federal law only if "a right or immunity created by the constitution or laws of the United States is an element, and an essential one, of the plaintiff's cause of action."¹⁹² "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."¹⁹³ The case must "really and substantially involve a dispute or controversy respecting the validity, construction, or effect of [federal] law, upon the determination of which the result depends" in order for the action to "arise under" federal law.¹⁹⁴

In franchise cases, federal questions often arise, particularly with respect to trademark infringement under the Lanham Act,¹⁹⁵ as a franchisee that continues to use a franchisor's marks may be liable for trademark infringement or unfair competition. A recent example of a typical franchise case under the Lanham Act is *Patsy's Italian Rest., Inc. v. Anthony Banas*, where two New York area Italian restaurants using the name "Patsy's" managed to keep their fight going for over 60 years. In 2008, their fight reached a peak for the right to use the "Patsy's" name for restaurant services.¹⁹⁶ The court finally determined that the defendants' actions in using the "Patsy's" name at their Staten Island and Syosset locations constituted unfair competition under New York Law and the Lanham Act.¹⁹⁷

VII. REMAND FROM FEDERAL COURT TO STATE COURT

If an action lies within federal removal jurisdiction, it cannot be remanded for the convenience of the parties or the court, or by the parties' agreement, consent, or waiver.¹⁹⁸

¹⁹⁰ *Strawbridge v. Curtiss*, 7 U.S. 267 (1806); *cf.*, 28 U.S.C. § 1332 (d) (providing subject matter jurisdiction over multi-state class actions based on minimal diversity).

¹⁹¹ 28 U.S.C. §1331(c)(1) (2011).

¹⁹² *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936).

¹⁹³ *Id.* at 115.

¹⁹⁴ *Id.* at 114 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912)).

¹⁹⁵ *Ramada Worldwide, Inc. v. Jay-Dahrma, LLC*, 2006 U.S. Dist. LEXIS 77969 (D.N.J. Oct. 23, 2006).

¹⁹⁶ *Patsy's Italian Rest., Inc. v. Anthony Banas*, 575 F. Supp. 2d 427 (E.D.N.Y. 2008).

¹⁹⁷ *Id.* at 436.

¹⁹⁸ *Preston v. Cigna Prop. and Cas. Ins. Co.*, 785 F. Supp. 1466 (N.D. Ga. 1992).

Moreover, a federal district court may not remand a properly removed case on the sole ground that its crowded docket would unjustly delay the plaintiffs in going to trial on the merits.¹⁹⁹

A. By Court Sua Sponte

Federal courts are required to inquire *sua sponte* into whether they have jurisdiction when it appears that jurisdiction may be lacking.²⁰⁰ In removed cases, federal courts must analyze the limits of their jurisdiction, and a district court may remand a case of its own accord if the court lacks subject matter jurisdiction. Moreover, “[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.”²⁰¹ However, non-jurisdictional defects in removal to federal court could be waived or forfeited. A district court cannot of its own accord remand a case to state court because of a non-jurisdictional procedural defect in the removal process. Thus, in order to remand a case to state court on the basis of procedural defects in the removal process, the plaintiff must file a motion to remand.²⁰²

B. By Party Motion

As indicated above, remand is required if, at any time before final judgment, it appears that the district court lacks subject matter jurisdiction.²⁰³ Remand based on a jurisdictional defect may occur at any time, with or without a motion. In addition, courts may grant motions to remand for defective or untimely notice of removal,²⁰⁴ but “[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under Section 1446(a).”²⁰⁵ Notably, a plaintiff must timely move for remand in order to preserve any objection that may exist to the removal. The plaintiff, however, is not required to seek an interlocutory appeal in order to avoid waiving whatever ultimate appeal right she may have.²⁰⁶

C. Abstention

Abstention is a judicially created doctrine under which a federal court will decline to exercise its jurisdiction so that a state court or state agency will have the opportunity to decide the matters at issue.²⁰⁷ Under this doctrine a court may, or in some cases must, refuse to hear a case when doing so would potentially infringe upon the powers of another court. However, when federal and state courts find themselves exercising concurrent jurisdiction over the same

¹⁹⁹ *Morgan v. Ranger Ins. Co.*, 413 F. Supp. 678 (M.D. Fla. 1976).

²⁰⁰ *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1261 (11th Cir. 2000).

²⁰¹ FED. R. CIV. P. 12(h)(3).

²⁰² *In re Allstate Ins. Co.*, 8 F.3d 219, 223 (5th Cir. 1993).

²⁰³ *Avitts v. Amoco Prod. Co.*, 53 F.3d 690 (5th Cir. 1995).

²⁰⁴ *Jacobson v. Holiday Travel, Inc.*, 110 F.R.D. 424 (E.D. Wis. 1986).

²⁰⁵ 28 U.S.C. § 1447(c) (2011).

²⁰⁶ *Cont'l Ins. Co. v. Foss Maritime Co.*, No. C 02-3936 MJJ, 2002 WL 31414315 (N.D. Cal. Oct. 23, 2002).

²⁰⁷ *Heritage Farms, Inc. v. Solebury Twp.*, 671 F.2d 743 (3d Cir. 1982).

subject matter, a federal court is not required to abstain, that is dismiss the case before it, nor to defer to the state court proceedings.²⁰⁸ Federal abstention is appropriate in certain delineated cases due to the discretion federal courts enjoy in fashioning certain types of relief.

In *Miracle Appearance Reconditioning Specialists International, Inc. v. Harris*, the court issued injunctive relief against a former franchisee who performed the same services through the same company for the same clients.²⁰⁹ In this case, a lawsuit was previously filed in federal court in Indiana, but was remanded to state court.²¹⁰ In the lawsuit filed in federal court in Texas, the defendants argued that the "first filed" doctrine required the court to abstain and await the outcome of the Indiana case.²¹¹ The court disagreed and held that the doctrine applied when two related cases were pending in two different federal courts and that it did not apply here because one action was pending in federal court and the other in state court.²¹²

D. Appellate Review

Generally, no appeal lies from an order remanding a removed action to state court based on lack of subject matter jurisdiction. Specifically, 28 U.S.C. § 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise."²¹³ However, CAFA provides one exception to this rule. 28 U.S.C. § 1453(c)(1) states that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order."²¹⁴

In *BP America, Inc. v. Oklahoma*, the court noted that CAFA states that a court *may* hear remand appeals in mass actions.²¹⁵ However, no set criteria exist for when a court should exercise its discretion to accept such an appeal. The court in *BP America* noted that the First Circuit outlined a number of factors to consider in deciding whether to grant leave to appeal under CAFA.²¹⁶ These factors include:

- (1) "the presence of an important CAFA-related question";
- (2) whether the question is "unsettled";
- (3) "whether the question, at first glance, appears to be either incorrectly decided or at least fairly debatable";
- (4) "whether the question is

²⁰⁸ *Growe v. Emison*, 507 U.S. 25 (1993).

²⁰⁹ No. 4:07-CV-524-A, 2007 U.S. Dist. LEXIS 76116, *7-10 (N.D. Tex. Oct. 11, 2007).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at * 9-10.

²¹³ 28 U.S.C. § 1447(d) (2011).

²¹⁴ 28 U.S.C. U.S.C. § 1453(c)(1) (2011).

²¹⁵ 613 F.3d 1029, 1034 (10th Cir. 2010).

²¹⁶ *Id.* (citing *Coll. of Dental Surgeons of Puerto Rico v. Connecticut Gen. Life Ins. Co.*, 585 F.3d 33 (1st Cir. 2009)).

consequential to the resolution of the particular case"; (5) "whether the question is likely to evade effective review if left for consideration only after final judgment"; (6) whether the question is likely to recur; (7) "whether the application arises from a decision or order that is sufficiently final to position the case for intelligent review"; and (8) whether "the probable harm to the applicant should an immediate appeal be refused [outweighs] the probable harm to the other parties should an immediate appeal be entertained."²¹⁷

The court in *BP America* concluded that all of these factors are worthy of consideration but that other factors may exist and that this list is by no means exhaustive, nor does it constitute rigid rules that must be followed in determining whether to accept an appeal.²¹⁸ Thus, the decision to permit an appeal under 28 U.S.C. § 1453(c)(1) is ultimately a decision left up to the appellate court.

VIII. ARBITRATION

A. Arbitration and the Federal Arbitration Act

When a party initiates litigation in connection with a franchise agreement that contains an arbitration provision, the defendant may choose to respond to the lawsuit by moving to compel arbitration, thereby avoiding many of the strategic litigation issues discussed earlier, such as removal and remand, forum selection clauses and personal jurisdiction. The specter of arbitration, however, brings its own host of questions and concerns, not the least of which is whether compelling arbitration represents the best strategic move. This section discusses the factors to consider in determining whether to compel arbitration. It then examines attacks on arbitration provisions and arbitration awards, and looks at the possibility of a two-front war, where parties arbitrate while at the same time litigating claims carved out of the arbitration provision or pursue claims against nonsignatories to arbitration provisions.

Congress enacted the Federal Arbitration Act²¹⁹ (the "FAA") in 1925 to overcome judicial resistance to arbitration.²²⁰ Section 2 of the FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts"²²¹ by providing that an arbitration provision contained in a contract or agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²²²

The FAA sets forth the procedure for compelling arbitration. According to section 3 of the FAA, if a party brings a lawsuit in a district court which is referable to arbitration pursuant to a written arbitration provision, the court in which the suit is pending shall stay the matter pending

²¹⁷ *Id.* (quoting *Coll. of Dental*, 585 F.3d at 38–39).

²¹⁸ *Id.* at 1035.

²¹⁹ 9 U.S.C. §§ 1-16 (2011).

²²⁰ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

²²¹ *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 443–44 (2006).

²²² 9 U.S.C. § 2 (2011).

arbitration.²²³ Section 4 of the FAA provides for compelling a party to proceed with arbitration in accordance with an arbitration agreement.²²⁴

B. To Compel or Not to Compel?

When confronted with a dispute over a contract which contains an arbitration provision, defense counsel must decide whether or not to compel arbitration. The decision of whether to compel is not easily made. It is a question attorneys routinely wrestle with because there is no "right" answer.

While no consensus may ever develop as to the desirability of arbitration,²²⁵ one thing is clear: Whether arbitration presents the best option depends upon a party's assessment of a number of factors, including the parties' control over procedure; cost and efficiency; and the informality and finality of arbitration proceedings. The relative importance of each of these factors (and others) depends upon the circumstances of each dispute and each party's goals, so no one of these factors alone controls the decision of whether to compel arbitration. To be sure, accurate generalizations about whether arbitration favors franchisors or franchisees are impossible; counsel should carefully consider all relevant factors before deciding whether to compel arbitration.

C. Factors Influencing the Decision of Whether to Compel Arbitration

This section discusses seven of the many factors which influence the decision of whether to compel arbitration, as compared to litigation: (1) speed and cost; (2) control over the selection and quality of decisionmakers; (3) evidentiary rules; (4) motion practice and settlement; (5) class proceedings; (6) control over venue; and (7) appellate review.

1. Speed and Cost

Ideally, the informality of arbitration proceedings allows parties to resolve disputes more quickly and cheaply than through litigation. As the Supreme Court recently stated, moreover, "the informality of arbitral proceedings is itself desirable, and theoretically reduces the cost and increases the speed of dispute resolution."²²⁶ The American Arbitration Association rules, geared towards the expedited resolution of disputes, vest in the arbitrator the power to direct discovery "consistent with the expedited nature of arbitration."²²⁷ In the twelve months ending September 30, 2010, the median time from filing to disposition of federal civil cases during or after pretrial was 15.4 months,²²⁸ and time to disposition by trial was 22.9 months.²²⁹ By

²²³ *Id.* § 3.

²²⁴ *Id.* § 4.

²²⁵ See generally Rupert M. Barkoff, *Arbitration: Franchisor's Friend or Foe?*, 16 FRANCHISING BUSINESS AND LAW ALERT, No. 12, 2010 at 3-4; see also Edward W. Dunham and Michael J. Lockerby, *Shall We Arbitrate? The Pros and Cons of Arbitrating Franchise Disputes*, ABA 28TH ANNUAL FORUM ON FRANCHISING (2005), §L3 at 1.

²²⁶ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

²²⁷ *Commercial Arbitration Rules*, Rule R-21, AMERICAN ARBITRATION ASSOCIATION (2010), <http://www.adr.org/sp.asp?id=22440#R21>.

contrast, in 2010, the median time from filing to award for cases before the American Arbitration Association with claims between \$75,000 and \$499,000 was 266 days (8.7 months) for franchise cases and 305 days (10 months) for all commercial cases.²³⁰

Yet arbitration does not always produce these benefits. In many ways arbitration has become more akin to litigation, with all of its attendant cost and delay. One scholar refers to arbitration as the "New Litigation,"²³¹ attributing much of the "judicialization" of arbitration to the use of extensive pre-hearing discovery,²³² causing discovery in arbitration proceedings to become more like its civil court counterpart. Lawyers, who grow accustomed to all of the discovery tools set forth in the Federal Rules of Civil Procedure, are often hesitant to take a case to hearing without engaging in the same discovery practice as is common in litigation. What is more, arbitrators may be reluctant to deny a party the right to engage in significant discovery for fear of having their award subject to vacation for appearing biased, or losing subsequent arbitrator appointments.²³³

Even if an arbitration moves more expeditiously and informally than litigation, however, arbitration carries significant additional costs, including the cost to initiate a proceeding, which could exceed \$10,000,²³⁴ plus additional administrative fees and the hourly fee of the arbitrator for pre-hearing and hearing services. This extraordinary cost compares to the small fee (\$350) to initiate a civil action in a United States district court,²³⁵ where the parties need not pay the decisionmaker. What is more, compelling arbitration may not remove the matter from court entirely. Parties may still seek judicial assistance to compel arbitration, enforce awards of injunctive relief, confirm an arbitration award, or seek vacatur or modification, and certain disputes may not fall under the parties' agreement to arbitrate.²³⁶

²²⁸ UNITED STATES COURTS, U.S. District Courts – Median Time Interval From Filing to Disposition of Civil Cases, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C05Sep10.pdf> (last visited July 7, 2011).

²²⁹ *Id.*

²³⁰ For 2010 data, see E-mail from Ryan Boyle, Vice President, Statistics & In-House Research, Am. Arbitration Ass'n (July 7, 2011) (on file with author Michael J. Boxerman). The AAA's commercial arbitration caseload has continued to expand in recent years, with 25,604 filings in 2010, compared to 20,711 in 2007 – a 23.6% increase over the period. For 2007 caseload data, see Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 6 n. 20 (2010).

²³¹ Stipanowich, *supra* note 230, at 8-14 (discussing the "judicialization" of arbitration proceedings, especially with regard to pre-hearing discovery).

²³² *Id.*

²³³ See *id.* at 13.

²³⁴ The American Arbitration Association's initial filing fee for a claim between \$500,000 and \$1,000,000 is \$6,200, plus a final fee of \$2,500, excluding the hourly fee of the arbitrator or arbitration panel. See *Commercial Filing Fees*, AMERICAN ARBITRATION ASSOCIATION (2010), <http://www.adr.org/si.asp?id=5379>.

²³⁵ 28 U.S.C. § 1914(a) (2011).

²³⁶ See *infra* subsection F.

2. Selection of Decisionmakers

The selection of decisionmakers and the absence of a jury also influence the decision of whether to compel arbitration. In entering into an arbitration agreement, the parties dispense with the right to trial by jury, the members of which may be seen to hold unfavorable opinions about large corporate defendants²³⁷ and therefore be more pro-franchisee.

On the flipside, by submitting to arbitration, the parties vest in themselves the power to choose the finder of fact (typically a practicing attorney or retired judge) thereby allowing them a degree of control not found in litigation. Parties are free to select arbitrators with expertise in franchise matters to save the time and expense of educating the finder of fact on common issues and points of law. Parties may also designate that disputes will be heard by a panel of arbitrators rather than by a single arbitrator, potentially undercutting the possibility of a "rogue" arbitrator crafting an erroneous or biased award.

3. Evidentiary Rules

Depending on the attorney, the relaxed rules of evidence in an arbitration proceeding may be seen as a positive or negative attribute. In practice, counsel often find that arbitrators allow into evidence testimony and documents which would be excluded by a court of law, with arbitrators often taking all evidence "for what it's worth."²³⁸ This common arbitrator practice invariably allows a party to submit evidence that would be inadmissible at trial, and could also unnecessarily draw out proceedings, resulting in a corresponding increase in costs and fees.

4. Motions and Settlement

Arbitrators are often reluctant to rule on dispositive motions, a feature of arbitration that can allow parties to take claims to hearing which may not have survived a motion to dismiss or for summary judgment in court. Several factors may dissuade arbitrators from granting dispositive motions, including the relative finality of arbitration rulings,²³⁹ grounds for vacatur including an arbitrator's refusal to hear evidence²⁴⁰ and, perhaps cynically, an arbitrator's desire to collect more hourly fees.

Also, arbitrations tend to go to award more often than lawsuits go to verdict. While the vast majority of civil lawsuits result in disposition through settlement or dispositive motion, a larger percentage of arbitrations go to hearing, in large part due to arbitrators' reluctance to grant pre-hearing motions and arbitrators' having little incentive to encourage settlement.²⁴¹ Lawyers may therefore find that, contrary to its intended goal, arbitration disputes may last longer and involve higher costs than litigation.

²³⁷ Dunham, *supra* note 225, at 7-8 (discussing survey results showing potential jurors' unfavorable views toward corporate defendants).

²³⁸ AMERICAN ARBITRATION ASSOCIATION, *supra* note 227, Rule R-31, <http://www.adr.org/sp.asp?id=22440#R31>. ("Conformity to legal rules of evidence shall not be necessary," and the "arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered. . .").

²³⁹ 9 U.S.C. §§ 10-11 (2011).

²⁴⁰ *Id.* § 10.

²⁴¹ Dunham, *supra* note 225, at 22-23 (discussing lower rates of resolution by dispositive motion and settlement for arbitration proceedings compared to litigation).

5. Class Proceedings and AT&T Mobility v. Concepcion

The Supreme Court has recently defined more precisely the role of class arbitration within the FAA framework. In *AT&T Mobility LLC v. Concepcion*,²⁴² the Court ruled that the FAA preempted a California doctrine that invalidated certain types of class action waivers as unconscionable contract provisions.²⁴³

The plaintiffs in *Concepcion*, a class of consumers who entered into agreements with AT&T Mobility for mobile phone sales and servicing, complained that AT&T charged sales tax on the retail price of “free” phones, and sought classwide relief for fraud and false advertising.²⁴⁴ The plaintiffs objected to the contractual requirement that claims be brought in arbitration in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”²⁴⁵ The district court denied AT&T’s motion to compel individual arbitrations, finding the class arbitration waiver unconscionable and therefore unenforceable under California law (the so-called *Discover Bank* rule, under which class action waivers – both for litigation and arbitration – in consumer contracts of adhesion routinely involving small amounts of damages are unconscionable).²⁴⁶ The Ninth Circuit affirmed,²⁴⁷ finding the *Discover Bank* rule consistent with the savings clause of section 2 of the FAA, which allows for invalidation of arbitration provisions for “generally applicable contract defenses, such as . . . unconscionability.”²⁴⁸

A five-justice majority of the Supreme Court reversed, finding the *Discover Bank* rule incompatible with, and preempted by, the FAA. In an opinion written by Justice Scalia, the Court explained that “[t]he overarching purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms. . . . Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”²⁴⁹ The Court explained that the “overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”²⁵⁰ Writing a four-justice dissent, Justice Breyer explained that the *Discover Bank* rule “does just what §2 requires, namely, puts agreements to arbitrate and agreements to litigate upon the same footing,”²⁵¹

²⁴² 131 S. Ct. 1740 (2011).

²⁴³ *Id.* at 1753; *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (holding class arbitration waivers in consumer contracts of adhesion unconscionable where disputes predictably involve small amounts of damages).

²⁴⁴ *Concepcion*, 131 S. Ct. at 1744.

²⁴⁵ *Id.*

²⁴⁶ *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 853 (9th Cir. 2009), *rev’d sub nom. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

²⁴⁷ *Id.* at 857-59, *rev’d sub nom. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

²⁴⁸ *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996).

²⁴⁹ *Concepcion*, 131 S. Ct. at 1748.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1758 (Breyer, J., dissenting).

which, according to Justice Breyer, is the primary purpose of the FAA.²⁵² *Concepcion* thus displays a disagreement among the justices as to whether the primary purpose of the FAA is to place arbitration agreements on equal footing with other contracts or to ensure that private arbitration agreements are enforced according to their terms.²⁵³ It appears that, in light of this decision, a party can preclude class proceedings altogether by inserting a contractual requirement that all disputes be submitted to arbitration only in a party's individual capacity.

Concepcion represents one of several recent Supreme Court decisions disfavoring class arbitration. In *Stolt-Nielsen, S.A. v. Animalfeeds International Corp.*,²⁵⁴ the Supreme Court clarified that, when parties have not expressly agreed to authorize class arbitration, an arbitrator may not impose class arbitration procedures.²⁵⁵ Because "the differences between bilateral and class-action arbitration are too great," an arbitrator may not presume that silence equals consent to class arbitration procedures.²⁵⁶ Read together, *Stolt-Nielsen* and *Concepcion* demonstrate the Court's recognition of arbitration's contractual basis and its antipathy toward the imposition of class arbitration procedures.

6. Control Over Venue

Compelling arbitration allows a franchisor to avoid litigating in a franchisee's home state, which is required by many state franchise acts, instead allowing the franchisor to engage in an arbitration proceeding on its home turf.²⁵⁷ This way, franchisors can avoid the cost of litigating disputes in jurisdictions throughout the country and the time and expense of having the franchisor's witnesses travel to those locations, as well the potential benefit of having arbitrators who reside in the same location as the franchisor's headquarters.

7. Vacatur and Modification

One of the most important features of arbitration is the degree to which the judiciary defers to arbitration awards: "[T]he scope of judicial review for an arbitrator's decision is among the narrowest known at law."²⁵⁸ Given the limited judicial review of arbitration awards, an arbitrator is freer to act in a manner he or she views as equitable or as doing "the right thing." This sometimes means that the arbitrator crafts an award without a well-founded basis in the parties' agreement or the facts, but rather one designed to prevent what the arbitrator sees as

²⁵² *Id.* at 1757-58 (Breyer, J., dissenting) (citing S. Rep. No. 536, at 2 for the proposition that the FAA's purpose "is clearly set forth in section 2.")

²⁵³ *Id.* at 1748.

²⁵⁴ 130 S. Ct. 1758 (2010).

²⁵⁵ *Id.* at 1776.

²⁵⁶ *Id.*

²⁵⁷ Although many states have attempted to restrict the enforcement of arbitral forum selection clauses that mandate out-of-state forums, courts have declared that the FAA preempts such laws. See, e.g., *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001); *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878 (6th Cir. 2002); *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001).

²⁵⁸ *Raymond James Fin. Servs. v. Bishop*, 596 F.3d 183, 190 (4th Cir. 2010).

an injustice or unfair outcome. Similarly, it is said that arbitrators have a tendency to “split the baby,” which may mean an award of money to one party where such an award would have been unlikely in court. For a more comprehensive discussion of vacatur and modification, see subsection E below.

D. Attacking the Enforceability of Arbitration Provisions

It is no wonder parties seek to avoid arbitration. Given that doubts as to arbitrability are resolved in favor of arbitration,²⁵⁹ however, most attempts to avoid arbitration fail. Nonetheless, challenges to arbitration provisions persist.

According to section 2, arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁶⁰ Section 2 allows arbitration agreements to be invalidated by generally applicable state law contract defenses, such as fraud, duress or unconscionability, provided that the state law contract defense governs issues concerning the validity, revocability, and enforceability of contracts generally.²⁶¹ As the Supreme Court recently stated in *Concepcion*, however, nothing in section 2’s savings clause “suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”²⁶²

1. Unconscionability

Under section 2 of the FAA, a court may refuse to enforce an arbitration provision which, under applicable state law, is unconscionable.²⁶³ To escape the enforceability of an arbitration provision due to unconscionability, a party must establish that the arbitration provision itself is unconscionable and, therefore, unenforceable.²⁶⁴

While the law governing unconscionability varies by state, many jurisdictions apply a two-part test and analyze the contract for both procedural and substantive unconscionability. Procedural unconscionability relates to the formation of the contract – is it the product of oppression or surprise? – while substantive unconscionability looks to the terms of the contract

²⁵⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 650 (1986) (when a contract contains an arbitration clause, a strong presumption in favor of arbitration exists and courts must order arbitration “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”).

²⁶⁰ 9 U.S.C. § 2 (2011).

²⁶¹ *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

²⁶² 131 S. Ct. at 1748.

²⁶³ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) (“unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance”).

²⁶⁴ *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (explaining that the language of FAA §2 only implicates the arbitration provision and not the contract as a whole); see also *Buckeye Check Cashing*, 546 U.S. at 445 (“as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”)

to determine whether they unfairly favor the party with greater bargaining power.²⁶⁵ Some courts take an additional step and analyze the procedural and substantive elements on a sliding scale, so that a court may declare a contract unconscionable in the presence of a high degree of procedural unconscionability and a low degree of substantive unconscionability, or vice versa.²⁶⁶ Other states apply a less formalized analysis, but still recognize unconscionability as a defense to the enforcement of a contract provision, including arbitration provisions.²⁶⁷

Arbitration provisions within franchise agreements provide fertile ground for challenges founded in unconscionability, with mixed results. Courts have found arbitration provisions unconscionable for reasons including lack of mutuality in terms,²⁶⁸ surprising and overly burdensome arbitration terms²⁶⁹ and waiver of right of class arbitration.²⁷⁰ For example, in *Bridge Fund Capital Corp. v. Fastbucks Franchising Corp.*,²⁷¹ the Ninth Circuit examined an arbitration clause that (i) granted the franchisor the ability to litigate claims for injunctive relief but denied the same right to the franchisee; (ii) waived claims for consequential and punitive damages; (iii) reduced the period of limitations; (iv) waived class arbitration; (v) designated a favorable arbitral forum for the franchisor; and (vi) designated specific arbitrator qualifications. The appellate court, affirming the district court, found the franchise agreement to be a procedurally unconscionable contract of adhesion and found the arbitration provision's various terms to be "one-sided," "non-mutual," "exculpatory," or "unduly oppressive" and, therefore, substantively unconscionable.²⁷² Due to the "overwhelming[ly]" unconscionable nature of the arbitration provision and the fact that unconscionability so "permeated" the entire arbitration agreement, the court refused to sever the unconscionable terms and did not enforce the obligation to arbitrate.²⁷³

By contrast, in *Fallo v. High-Tech Institute*,²⁷⁴ the Eighth Circuit approved of an arbitration provision where the more powerful party drafted the arbitration provision without

²⁶⁵ See *Parada v. Superior Court of Orange County*, 98 Cal. Rptr. 3d 743, 755 (Cal. Ct. App. 2009); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181-84 (3d Cir. 1999) (applying Pennsylvania law); *Sosa v. Paulos*, 924 P.2d 357, 360-61 (Utah 1996); *English v. Cornwell Quality Tools Co., Inc.*, No. 22578, 2005 WL 3556281, at *2 (Ohio Ct. App. Dec. 30, 2005).

²⁶⁶ *Parada*, 98 Cal. Rptr. 3d at 755.

²⁶⁷ See, e.g., *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 843 (7th Cir. 1999) ("A contract is unconscionable when, viewed as a whole, it is improvident, oppressive, or totally one-sided") (applying Illinois law) (internal quotation marks omitted).

²⁶⁸ *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004-05 (9th Cir. 2010).

²⁶⁹ *Parada*, 98 Cal. Rptr. 3d at 769 (finding unconscionable arbitration clause mandating arbitration before three arbitrators where fees would exceed \$20,000 and weaker bargaining party was unsophisticated and unaware of cost).

²⁷⁰ *IJL Dominicana S.A. v. It's Just Lunch Int'l, LLC*, No. CV 08-5417-VAP, 2009 WL 305187 (C.D. Cal. Feb. 6, 2009) (severing class arbitration waiver as unconscionable but enforcing obligation to arbitrate).

²⁷¹ 622 F.3d 996 (9th Cir. 2010).

²⁷² *Id.* at 1004-06.

²⁷³ *Id.* at 1006.

²⁷⁴ 559 F.3d 874 (8th Cir. 2009).

negotiation, and placed the provision in fine print on the back of the parties' agreement.²⁷⁵ In finding no unconscionability, the court gave weight to the arbitration provision's readability, the clarity of the language used therein, and the absence of coercive "high-pressure" sales tactics.²⁷⁶ In *Bess v. Check Express*,²⁷⁷ moreover, the Eleventh Circuit examined an arbitration provision that granted litigation rights to the drafting party while requiring the less powerful party to arbitrate. The court stated that "this lack of mutuality does not, in and of itself, render the arbitration agreement unconscionable."²⁷⁸ Because the arbitration provision left the arbitrator free to grant "the full panoply of relief" available under state law, the court found that the arbitration provision did not "grossly favor" the drafting party and was therefore enforceable.²⁷⁹

2. Fraud

Courts may also refuse to enforce an arbitration provision – or a portion of an arbitration provision – which was procured by fraud. The party seeking to avoid arbitration or a portion of an arbitration provision must allege fraud relating to the arbitration provision, and not merely allege fraudulent inducement in the execution of the agreement as a whole.²⁸⁰ In other words, a party "cannot get out from under the arbitration clause simply by alleging the entire contract was a product of fraud."²⁸¹ Courts decide claims of fraud in the inducement of arbitration provisions, while arbitrators rule on challenges to the contract as a whole.²⁸²

In most decisions seeking to evade enforcement of arbitration provisions due to allegations of fraud, courts often find that challengers direct allegations toward the contract as a whole, and not the arbitration provision itself. Accordingly, these challenges fail.²⁸³ Nonetheless, in several recent cases, courts have found fraud in connection with arbitration provisions. Rather than altogether voiding the arbitration provision, however, because doubts

²⁷⁵ *Id.* at 878-79.

²⁷⁶ *Id.*

²⁷⁷ 294 F.3d 1298 (11th Cir. 2002).

²⁷⁸ *Id.* at 1308.

²⁷⁹ *Id.*

²⁸⁰ *Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 811 (7th Cir. 2011) ("The only relevant inquiry at this stage is whether the arbitration clause *itself* was fraudulently induced—that is, whether there was fraud that "goes to the 'making' of the agreement to arbitrate") (emphasis in original) citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

²⁸¹ *Id.*

²⁸² *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) ("if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally").

²⁸³ *But see WW, LLC v. Coffee Beanery Ltd.*, 300 Fed. Appx. 415 (6th Cir. 2008) (vacating arbitration award and holding arbitration agreement unenforceable because of fraud in the inducement where franchisor's failure to disclose an officer's grand larceny conviction deprived franchisee "of a mandatory, statutorily required notice" prior to signing the franchise agreement and, therefore, franchisee was "fraudulently induced into signing" the franchise agreement).

as to arbitrability are to be resolved in favor of arbitration,²⁸⁴ courts have severed the fraudulently induced arbitration terms while still enforcing the agreement to arbitrate.

For example, in *Great Earth Companies, Inc. v. Simons*,²⁸⁵ the franchisor's offering circular mandated arbitration in New York while also stating that Michigan law precluded enforcement of out-of-state forum selection clauses.²⁸⁶ A Michigan franchisee filed a lawsuit against the franchisor in Michigan state court.²⁸⁷ The franchisor responded with a motion to compel arbitration in New York District Court, seeking enforcement of the franchise agreement's arbitration provision.²⁸⁸ The Sixth Circuit recognized that, although the FAA preempts Michigan's statutory prohibition on out-of-state forum selection clauses, the franchisor had fraudulently obtained consent to the New York forum selection portion of the arbitration provision by representing in the offering circular that Michigan law precluded enforcement of out-of-state forum selection clauses.²⁸⁹ The court severed the New York forum selection clause while enforcing the obligation to arbitrate (in Michigan).²⁹⁰

3. Waiver

While not directly addressing the enforceability of an arbitration provision, a court may refuse to compel arbitration in the presence of an enforceable arbitration provision where the moving party has waived its right to compel arbitration. Applying state law governing waiver, courts have found the right to compel arbitration waived where the moving party has delayed compelling arbitration until after proceeding with litigation²⁹¹ or where the non-moving party would be prejudiced by being compelled to arbitrate.²⁹² Indeed, some courts describe waiver as comprised of delay and prejudice elements.²⁹³

²⁸⁴ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

²⁸⁵ 288 F.3d 878 (6th Cir. 2002).

²⁸⁶ *Id.* at 883-84.

²⁸⁷ *Id.* at 883.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 889-91.

²⁹⁰ *Id.* at 891-92. ("doubts as to the parties' intentions should be resolved in favor of arbitration." (*quoting Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000)).

²⁹¹ See *Morales v. Superior Living Products, LLC*, No. 07-CV-04419, 2009 WL 3234434 (E.D. Pa. Sept. 30, 2009) (holding that defendant-franchisor waived right to invoke arbitration clause after filing two motions to dismiss even though discovery had not commenced); *but see In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356, 367 (Tex. App. 2008) (no waiver occurred where defendant-franchisor filed answer, filed counterclaim and waited 14 months to request arbitration).

²⁹² See *Morales*, No. 07-CV-04419, 2009 WL 3234434 at *6-7 (time and expense of participating in settlement conferences and contesting motions to dismiss constitutes prejudice to plaintiff); *but see In re Bath Junkie Franchise, Inc.*, 246 S.W.3d at 368 (delay and pursuit of discovery did not automatically prejudice plaintiff-franchisee; opponent bears burden of showing actual prejudice).

²⁹³ See, e.g., *Rossi Fine Jewelers, Inc. v. Gunderson*, 648 N.W.2d 812, 815 (S.D. 2002) (describing two-part test and explaining that prejudice may result from lost evidence, duplication of efforts and use of discovery methods unavailable in arbitration).

E. Vacatur and Modification of Arbitral Awards

The FAA's expressly enumerated grounds for judicial vacation or modification of arbitration awards mean that judicial review of such awards is "narrowly limited,"²⁹⁴ and courts rarely reverse arbitral awards. "[T]he fact that a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision."²⁹⁵

The FAA provides for expedited judicial review to confirm, vacate or modify arbitration awards.²⁹⁶ Pursuant to section 9 of the FAA,²⁹⁷ a court "must" confirm an award "unless" it is vacated, modified, or corrected "as prescribed" in sections 10 and 11. Section 10²⁹⁸ sets forth the grounds for vacating an award, including where the award was procured by "corruption, fraud, or undue means",²⁹⁹ where there was "misconduct in refusing to postpone the hearing or in refusing to hear evidence" or "misbehavior";³⁰⁰ or where the arbitrators "exceeded their powers."³⁰¹ Review under section 10 focuses on "misconduct rather than mistake" by the arbitrator.³⁰² Section 11 allows for modification of an award where there is a "miscalculation" or "an evident material mistake" in a description referred to in the award;³⁰³ the arbitrators "awarded upon a matter not submitted to them";³⁰⁴ or "the award is imperfect" in a way that does not affect the merits.³⁰⁵

1. Hall Street Associates v. Mattel

In *Hall Street Associates v. Mattel*,³⁰⁶ the Supreme Court resolved a split among the Courts of Appeals over whether the specifically enumerated grounds for vacation and modification in sections 10 and 11 are exclusive. Some Circuits regarded them as "mere

²⁹⁴ *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 999 (11th Cir. 2007).

²⁹⁵ *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); see also *Medicine Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485 (8th Cir. 2010) ("[t]he bottom line is we will confirm the arbitrator's award even if we are convinced that the arbitrator committed serious error, so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority").

²⁹⁶ 9 U.S.C. § 9-11 (2011).

²⁹⁷ *Id.* § 9.

²⁹⁸ *Id.* § 10.

²⁹⁹ *Id.* § 10(a)(1).

³⁰⁰ *Id.* § 10(a)(3).

³⁰¹ *Id.* § 10(a)(4).

³⁰² *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

³⁰³ 9 U.S.C. § 11(a) (2011).

³⁰⁴ *Id.* § 11(b).

³⁰⁵ *Id.* § 11(c).

³⁰⁶ 552 U.S. 576 (2008).

threshold provisions open to expansion by agreement.³⁰⁷ The Court in *Hall Street* held that parties cannot contract for expanded review of arbitration awards because sections 10 and 11 “provide exclusive regimes for the review provided by” the FAA.³⁰⁸ The Court explained that permitting parties to expand the scope of review contractually would “rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”³⁰⁹

The Court expressly stated that its ruling applies only to agreements governed by the FAA,³¹⁰ and that states may permit parties to expand by contract the scope of judicial review of arbitration awards, where state statute or common law governs the arbitration proceeding.³¹¹ Other states mirror *Hall Street* and mandate that arbitration awards may only be vacated or modified on grounds set forth in state arbitration statutes.³¹²

2. Post-Hall Street “Manifest Disregard” of the Law

Before *Hall Street*, several Courts of Appeals held that “manifest disregard” of the law was a ground for vacating an arbitral award. “Manifest disregard” may be found where “the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.”³¹³

In *Stolt-Nielsen, S.A. v. Animalfeeds International*,³¹⁴ the Supreme Court declined to decide whether “manifest disregard” survives *Hall Street* “as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.”³¹⁵

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 590.

³⁰⁹ *Id.* at 588 (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

³¹⁰ *Id.* at 590.

³¹¹ See, e.g., *Cable Connection, Inc. v. DirecTV, Inc.*, 190 P.3d 586 (Cal. 2008) (California) (reversing appeals court ruling that parties could not contract to allow for review of arbitrator’s legal error); *HH East Parcel, LLC v. Handy and Harman, Inc.*, 947 A.2d 916, n. 16 (2008) (Connecticut) (“Parties to agreements remain... free to contract for expanded judicial review of an arbitrator’s findings”).

³¹² See, e.g., *Pugh’s Lawn Landscape Co., Inc. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 260 (Tenn. 2010) (Tennessee); *Brucker v. Mickinlay Transp., Inc.*, 557 N.W.2d 536 (Mich. 1997) (Michigan); *John T. Jones Constr. Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003) (North Dakota); *Barnett v. Hicks*, 829 P.2d 1087, 1095 (Wash. 1992) (Washington); *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725, 734-35 (Me. 2011) (Maine); *Chicago SouthShore & S. Bend R.R. v. N. Ind. Commuter Transp. Dist.*, 682 N.E.2d 156, 159 (Ill. App. Ct. 1997), *rev’d on other grounds*, 703 N.E.2d 7 (Ill. 1998) (Illinois); *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 696 S.E.2d 663, 666-67 (Ga. 2010) (Georgia).

³¹³ *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 217 (2d Cir. 2002); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) (defining manifest disregard as occurring where “(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.”)

³¹⁴ 130 S. Ct. 1758 (2010).

³¹⁵ *Id.* at 1768, n. 3.

Accordingly, disagreement continues in the Courts of Appeals over whether *Hall Street* precludes vacation of an award for manifest disregard, or whether manifest disregard fits into one of the permissible section 10 grounds for vacatur, such as the arbitrator exceeding or imperfectly executing his power.³¹⁶

F. The Two-Front War: Simultaneous Arbitration and Litigation of Related Claims

Compelling arbitration of a dispute does not necessarily mean avoiding litigation. The potential for a single dispute spawning multiple proceedings arises when an arbitration provision preserves the right to litigate certain claims while requiring arbitration of others (i.e., "carve-outs"), and when a party brings claims against both signatories and nonsignatories to an arbitration provision. While concurrent litigation and arbitration of disputes may result in duplicated efforts, fights in different jurisdictions, additional costs, delay, and inconsistent decisions, the Supreme Court has instructed that the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement."³¹⁷ Under the FAA, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.³¹⁸

1. Carve-Outs

While many franchise agreements contain what are referred to as "generic" arbitration provisions (providing that any dispute arising out of the contract at issue must be submitted to arbitration³¹⁹), other arbitration provisions contain "carve-outs" which provide that certain claims or causes of action are not arbitrable.³²⁰ Common "carve-outs" allow a franchisor to initiate litigation to enforce franchise agreement terminations, to seek injunctive relief to enjoin Lanham Act and related violations and to file a lawsuit to collect unpaid fees or other charges.³²¹

³¹⁶ 9 U.S.C. § 10(a) (2011). The Second and Ninth Circuits retain manifest disregard as a ground for vacatur as implied by §10. *Stolt-Nielsen S.A. v. AnimalFeeds, Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008), *rev'd and remanded on other grounds*, 130 S.Ct. 1758 (2010); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (explaining that manifest disregard for the law "remains a valid ground for vacatur because it is a part of §10(a)(4).") By contrast, the Fifth, Eighth and Eleventh Circuits now refuse to apply manifest disregard as a ground for vacatur. *CitiGroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2010); *Medicine Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485 (8th Cir. 2010); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010). The Sixth Circuit retains manifest disregard, though so far only in unpublished opinions. See *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 419 (6th Cir. 2008).

³¹⁷ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in original); *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 308 (3d Cir. 2009) ("rather than containing a strong policy against piecemeal litigation, the FAA has a policy in favor of it, at least to the extent necessary to preserve arbitration rights").

³¹⁸ *Moses H. Cone*, 460 U.S. at 20.

³¹⁹ *S. Ill. Beverage, Inc. v. Hansen Beverage Co.*, No. 07-CV-391-DRH, 2007 WL 3046273 (S.D. Ill. Oct. 15, 2007).

³²⁰ See *Foot Solutions, Inc. v. Washio*, No. 1:09-CV-1207-JOF, 2009 WL 2778263 (N.D. Ga. Aug. 27, 2009) (arbitration clause reserved for franchisor the option to enforce agreement by judicial process).

³²¹ See *id.* (exempting from arbitration actions involving termination of the franchise agreement, unpaid fees, franchisor's rights under franchisee contracts); *Gill v. World Inspection Network Int'l, Inc.*, No. 06-CV-3187, 2006 WL 2166821 (E.D.N.Y. July 31, 2006) (exempting from arbitration actions to collect sums due and payable under the franchise agreement and to obtain relief regarding trademark infringement issues).

The presence of a carve-out in an arbitration provision means that the same parties may simultaneously engage in several fights in different venues or jurisdictions. Because state contract law governs the enforceability of carve-outs, they may be invalidated for the same reasons as arbitration clauses generally.³²² Carve-outs allow parties to customize their agreements and precisely define the issues to arbitrate or litigate, but this convenience comes with the attendant risks of eviscerating the arbitration provision or risking unenforceability.

2. Nonsignatories

A dispute involving both signatories and nonsignatories to an arbitration provision may also result in a two-front war, requiring a party to arbitrate against signatories and litigate against nonsignatories. Traditional principles of state law, however, may allow enforcement of an arbitration provision by or against nonsignatories,³²³ thereby permitting a nonsignatory to compel a signatory to arbitrate³²⁴ and to allow a signatory to compel arbitration against a nonsignatory.

When a nonsignatory seeks to enforce an arbitration provision against a signatory, courts will look to whether the signatory should be estopped from avoiding enforcement of the arbitration provision it has signed. Under one circumstance, a court will determine whether "the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided."³²⁵ A court may also enforce an arbitration provision against a signatory when the signatory "must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory."³²⁶ That is, when "each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate."³²⁷

The test for a signatory to enforce an arbitration provision against a nonsignatory is different. For a signatory to compel a nonsignatory to arbitrate, the signatory must proceed under one of five theories which arise out of state common law principles of contract and

³²² See *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155 (2006) (finding unconscionable and unenforceable a carve-out that reserved for dominant party right to litigate while requiring other party to submit all claims to arbitration).

³²³ *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896 (2009); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) ("nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles").

³²⁴ See, e.g., *PRM Energy Sys., Inc. v. Primenergy, L.L.C.*, 592 F.3d 830, 834 (8th Cir. 2010); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

³²⁵ *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798-99 (8th Cir. 2005) (permitting non-signatory principals of franchisor to compel arbitration against plaintiff-franchisee in connection with franchisee's tort claims arising out of principals' conduct while acting as officers of franchisor).

³²⁶ *Id.*

³²⁷ *Id.*

agency law. These five theories include (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.³²⁸

It is important to note, however, that in *Arthur Andersen LLP v. Carlisle*,³²⁹ the Supreme Court did not draw a distinction between compelling arbitration against a signatory and a nonsignatory, as have appellate courts. Rather, the Court noted in its decision that "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'"³³⁰

*Donaldson Co. v. Burroughs Diesel*³³¹ demonstrates the potential for a two-front war in a dispute involving a signatory and nonsignatory to an arbitration agreement. In *Donaldson*, a truck dealer and manufacturer executed a dealer agreement with an arbitration clause. During litigation the dealer filed cross-claims against the manufacturer and against a nonsignatory parts supplier. Both the signatory-manufacturer and nonsignatory-supplier moved to compel arbitration of the cross-claims, with the supplier urging the court to invoke the doctrine of equitable estoppel, and thereby require the dealer to arbitrate its cross-claim against the nonsignatory supplier.³³² Construing Mississippi law, the Eighth Circuit declined to apply equitable estoppel, instructing that the cross-claim against the supplier did not "rely on" the existence of the dealer agreement which contained the arbitration provision, and the cross-claim did not allege concerted misconduct and a close relationship (i.e. principal/agent, parent/subsidiary) between the signatory-manufacturer and nonsignatory-supplier.³³³ The court's refusal to compel arbitration of the dealer's cross-claim opened a two-front war, with the dealer pursuing its cross-claim against the supplier in court, and against the manufacturer in arbitration.

In contrast, the Fourth Circuit in *American Bankers Insurance Group, Inc. v. Long*³³⁴ applied equitable estoppel, compelling arbitration of a signatory's claims against a nonsignatory. The plaintiffs in *Long*, signatories to a promissory note containing an arbitration provision, brought suit against a nonsignatory insurance company for fraud and other causes of action

³²⁸ *Thomson-CSF, S.A. v. Am. Arbitration Assn.*, 64 F.3d 773, 776 (2d Cir. 1995); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003) ("nonsignatories may be bound to an arbitration agreement under ordinary contract and agency principles"); *Cleveland-Akron-Canton Adver. Coop. v. Physician's Weight Loss Ctrs. of Am.*, 922 N.E.2d 1012 (Ohio Ct. App. 2009) (holding that plaintiff co-op could not avoid arbitration because co-op was a third-party beneficiary of franchise agreements between franchisor and franchisees); *Noodles Dev., LP v. Latham Noodles, LLC*, No. CV 09-1094, 2009 WL 2710137 (D. Ariz. Aug. 26, 2009) (holding franchisor estopped from refusing to arbitrate against a nonsignatory because franchisor alleged interdependent and concerted misconduct between signatory and nonsignatory); *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010) (discussing application of "direct-benefit estoppel" to compel a non-signatory to arbitrate)

³²⁹ 129 S. Ct. 1896 (2009).

³³⁰ *Id.* at 1902.

³³¹ 581 F.3d 726 (8th Cir. 2009).

³³² *Id.* at 730-31. The manufacturer's motion to compel arbitration was granted in a separate proceeding.

³³³ *Id.* at 733-36.

³³⁴ 453 F.3d 623 (4th Cir. 2006).

related to the notes.³³⁵ The nonsignatory insurer sought to compel arbitration under an equitable estoppel theory, arguing that since the plaintiffs sought to enforce certain of the note's terms, they may not avoid enforcement of the note's arbitration clause.³³⁶ The Fourth Circuit determined that the signatories' claims "relied on" the existence of the contract containing the arbitration provision and, therefore, they were estopped from avoiding arbitration.³³⁷

IX. CONCLUSION

Forum selection, choice of law, and arbitration clauses can have a strategic effect on the outcome of a case. The resolution of franchise disputes often turns on such clauses included in franchise agreements. A thoughtful evaluation of these clauses is an essential aspect of a franchise relationship.

³³⁵ *Id.* at 625-26.

³³⁶ *Id.* at 627-28.

³³⁷ *Id.* at 630-31.

MICHAEL J. BOXERMAN

Michael J. Boxerman is a partner with the law firm of Marcus & Boxerman, LLP. He has practiced in the area of commercial litigation since 1995, representing individuals and business in resolving franchise, business and corporate, partnership, real estate and related disputes in state and federal courts and in arbitration and other proceedings. His franchise practice includes the representation of franchisors, sub-franchisors and franchisees.

Michael earned his Bachelor of Arts in political science from Northwestern University in 1991. In 1995 he earned his J.D. from Washington University School of Law in St. Louis, where he was a member of the *Washington University Law Quarterly* and recipient of the Gerald K. Presberg Scholar in Law Award. He is co-author of "Franchise Renewals: Considerations for Franchisors and Franchisees," 19 *Franchise Law Journal* 2 (Fall 1999) and was a speaker at the Chicago Bar Association's 2008 "Fundamentals of Franchising" and the 2009 American Bar Association's Forum on Franchising. He has a Martindale-Hubbell AV Peer Review Rating.

Michael is admitted to practice in the states of Illinois and Missouri, is a member of the Trial Bar of the United States District Court for the Northern District of Illinois and is admitted to practice before the United States Court of Appeals for the Seventh Circuit.

JASON M. MURRAY

Jason M. Murray is a Shareholder with the law firm of Carlton Fields, P.A. He provides counsel and assistance with creating, managing, licensing, protecting and enforcing franchised business relationships, product distribution systems and dealership networks. His franchise and distribution law practice specifically relates to licensing and development, regulation and compliance, and dispute resolution through mediation, arbitration and litigation. He is a member of the American Arbitration Association Commercial Arbitrator Panel and also serves as an arbitrator for Franchise Arbitration and Mediation Services.

Jason's litigation experience consists of general commercial litigation in state and federal courts including franchise and distribution law, intellectual property, real property, securities, and insurance matters. His franchise area of practice includes the representation of franchisors, subfranchisors, master franchisees, area developers and manufacturers. He is a member of The Florida Bar and the District of Columbia Bar, and is admitted to practice in the U.S. Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Courts for the Southern, Middle and Northern Districts of Florida. He is a member of the American Law Institute and a Fellow of the American Bar Foundation.

Jason is an active member of the ABA Forum on Franchising and served as an Associate Editor of *The Franchise Lawyer*. In addition, he has co-authored a book and several papers and presented them at annual meetings of the ABA Forum on Franchising. Jason is also a member of the ABA Section of Litigation and served from 2000-2006 as an Associate Editor for *Litigation*, The Journal of the Section of Litigation. He serves on the Executive Council of the Business Law Section of the Florida Bar and is Chairman of the Antitrust, Franchise & Trade Regulation Committee of the Business Law Section. Jason is a member and officer of the Dade County Bar Association. He serves as the organization's Treasurer and serves on the Board of Directors as well as the Executive Committee. He is also a member of the Wilkie D. Ferguson, Jr. Bar Association and served as the organization's President during 2000-2001. He is a member of the National Bar Association, Virgil Hawkins Florida Chapter National Bar Association and the Federal Bar Association. Jason also served on the Florida Supreme Court Task Force on Management of Cases Involving Complex Litigation. Jason is the Chairman of the Eleventh Judicial Circuit Grievance Committee "B" for The Florida Bar and previously served on the Ad Hoc Committee on Attorney Admissions, Peer Review and Attorney Grievance for the United States District Court, Southern District of Florida from 2003-2005.

He is AV rated by *Martindale-Hubbell*® and has been listed in *The Best Lawyers in America*®, *Florida Super Lawyers*®, *Florida Trend* magazine's Florida Legal Elite™, *Franchise Times*® magazine's Legal Eagles™, and *Miami Metro* magazine's South Florida Legal Guide® for Top Lawyers. Jason is the recipient of Diversity Best practices' 2008 Diversity Officer Leadership Award, The Florida Bar Young Lawyers Division's 2003 Diversity and Gender Sensitivity Award, and a 2001 Twelve Good Men honoree of the Ronald McDonald House. In 1999 and 1995 he was presented with Pro Bono Service Awards from "Put Something Back," a joint pro bono project of the Eleventh Judicial Circuit and the Dade County Bar Association.

Jason graduated from Duke University in 1988 with a B.A. degree in History, Political Science and English. He received his law degree from the University of Virginia School of Law in 1991. After graduating from law school, Jason served as a judicial clerk for the Honorable Joseph W. Hatchett, United States Circuit Judge, United States Court of Appeals for the Eleventh Circuit from 1991 to 1992.

JAMES M. SUSAG

James M. Susag is a shareholder and trial lawyer with Larkin Hoffman. His trial practice focuses on franchise, dealer and contract disputes. Mr. Susag has extensive first-chair trial experience, representing clients in numerous jury and court trials, arbitrations, administrative proceedings and appeals. Some of his recent successes include enforcement of franchise and dealer agreements in Federal District Courts in California, Wisconsin, and Minnesota, and in arbitration.

Mr. Susag joined Larkin Hoffman in 1997 after two years with a Minneapolis-based litigation boutique. Between 2005 and 2007, he was Chief Litigation Counsel for U.S. Bancorp. There, Mr. Susag was responsible for complex litigation on a nationwide basis, and learned about litigation from the client's perspective. He resumed his trial practice with Larkin Hoffman in 2007.

A member of the state bars in Minnesota and Wisconsin, Mr. Susag is admitted to practice in state and federal courts in both states as well as the United States Court of Appeals for the Seventh and Eighth Circuits, and the United States District Court for the Northern District of New York. He is a member of the American Bar Association Forum on Franchising and the International Franchise Association. Mr. Susag is also certified as an arbitrator and mediator by the Minnesota Alternative Resolution Review Board.

Mr. Susag is a frequent writer, public speaker and panelist. He recently presented on the topic "Enforcing Post-Termination Rights in a Down Economy" at the 43rd Annual International Franchise Association Legal Symposium (held on May 16-18, 2010 in Washington, D.C.). Mr. Susag also recently published the articles "Non-Compete Cases: Does Anyone Really Win?" for the *LJN Franchising Business & Law Alert* (co-authored with Charles Modell) and "Are Franchisors More Vulnerable after Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.?" for the *ABA Franchise Lawyer*. He is a regular contributor to Larkin Hoffman's *E-News: Franchise and Distribution Law Update*.

Mr. Susag is a *summa cum laude* graduate of William Mitchell College of Law and a *summa cum laude* graduate of the University of St. Thomas, both located in St. Paul, Minnesota. He serves as a volunteer arbitrator for the Hennepin County Bar Association Legal Fee Arbitration Program, a volunteer mentor to high school, college and law school students and as career day speaker to both junior high and high school students.