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A World Wide Web of Potential Franchise Law Violations

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Table of Contents:

I. Introduction

II. Recent Cases Heighten Uncertainty

III. Consequences of Being a "Franchise"

IV. What is a "Franchise"?

V. Trademark License or Identification

VI. Assistance or Control

VII. Franchise Fee

VIII. Virtual Franchise Law Violations Virtually Everywhere

IX. State Exemptions for "Internet Offers"

X. The First "Personal Meeting" in Cyberspace

XI. Conclusion

I. Introduction

{1} Franchising -- whereby independent entrepreneurs are licensed to provide goods and services of uniform quality (hopefully) under their licensor's trademarks -- has long been the predominant method of distributing goods and services in the U.S. Time will tell how many suppliers use the Internet to "cut out the middleman", and instead, sell goods and services directly to the ultimate consumer. While franchising so far appears to be safe from the Internet, the Internet may not be safe from franchising -- or, perhaps more accurately, from the world wide web of laws that govern franchising. The explosive growth of Internet commerce has greatly increased the potential for unforeseen liability. In cyberspace, franchise law violations can occur in any jurisdiction from which someone can access the supplier's Internet website.

{2} The application of franchise laws in cyberspace has been the subject of recent proposals by the Federal Trade Commission and North American Securities Administrators Association ("NASAA"). If adopted, these proposals would clarify the application of franchise regulations in cyberspace. However, these proposals would not clarify whether various distribution relationships are subject to state and federal franchise laws in the first place. To the contrary, recent court decisions have only increased the risk that suppliers whose goods and services are sold through independent "distributors," "dealers," or "sales agents" may be "franchisors" within the meaning of federal or state law.

II. Recent Cases Heighten Uncertainty

{3} Last summer, the U.S. District Court in New Jersey held that two "distributorship[s]" were in fact "franchises" within the meaning of the New Jersey Franchise Practices Act. In each case, the federal court cited as authority the 1992 decision of the New Jersey Supreme Court in *Instructional Sys., Inc. v. Computer Curriculum Corp.* (2).

{4} If not for *Computer Curriculum*, it would have been far from clear that either distribution relationship was a "franchise" -- much less one subject to New Jersey law. In one case, the plaintiff had been granted an exclusive distributorship for the sale of pantyhose in Lithuania but was incorporated in New Jersey. (3) In the other case, the plaintiff had a contract with a Nevada corporation for the exclusive distribution of slot machines in New Jersey, Maryland, and the Caribbean. (4) In both cases, the federal district court held that -- under the standard articulated in *Computer Curriculum* -- each distribution relationship was governed by the New Jersey Franchise Practices Act and therefore could be terminated only for "good cause." (5)

{5} The defendant in *Computer Curriculum* was a California company marketing a combination of computer hardware, operating system software, and applications software for instructional use. According to the New Jersey Supreme Court, the defendant violated New Jersey franchise law by having one of its independent distributors -- upon the expiration of an exclusive reseller agreement -- sign a new contract whereby its exclusive territory was reduced from nine states, plus the District of Columbia, to three states, including New

Jersey. The federal courts later held that extraterritorial application of the New Jersey Franchise Practices Act was unconstitutional under the Commerce Clause. [\(6\)](#) However, the New Jersey Supreme Court's expansive definition of what constitutes a "franchise" was unaffected by the federal courts' decision.

{6} In *Computer Curriculum* and subsequent cases, the defendants' contracts were held subject to the New Jersey Franchise Practices Act notwithstanding choice of law provisions specifying that the contract was governed by the law of the supplier's home state. For example, in the 1996 decision of *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, [\(7\)](#) the New Jersey Supreme Court held that provisions of Sun Microsystems' Indirect Value Added Reseller Agreement mandating the application of California law were -- under the New Jersey Franchise Practices Act -- invalid. [\(8\)](#)

{7} In retrospect, the fact that California choice-of-law provisions were invalidated in *Computer Curriculum* and *Sun Microsystems* may not have been such a bad thing after all. Last year, a California appellate court held that a distributor agreement whereby the plaintiff solicited orders on behalf of the defendant was in fact a "franchise" within the meaning of the California Franchise Investment Law. In *Gentis v. Safeguard Bus. Sys., Inc.*, [\(9\)](#) the court so held even though all orders were subject to acceptance by Safeguard, which set prices and terms of sale, billed customers, and received customer payments. The court found the California Franchise Investment Law applicable notwithstanding the fact that the California legislature had enacted another statute governing the relationship between manufacturers and their sales representatives. [\(10\)](#) In *Safeguard*, the court held that the plaintiffs were franchisees rather than independent sales representatives because, "in addition to soliciting orders, they demonstrated products, solved customer problems, installed Safeguard systems, maintained contact with existing customers, generated new business, and provided ongoing service to customers." [\(11\)](#) The sales representatives' duties which established a "franchise" relationship in *Safeguard* are functions which virtually every supplier of goods and services expects its independent distributors to perform.

{8} In hindsight, neither *Safeguard*, nor the *Computer Curriculum* line of cases was unforeseeable in view of prior interpretations of both California and New Jersey law. For example, dicta in a 1987 Ninth Circuit decision suggested that a contract for the operation of a boat dealership was in fact subject to the California Franchise Relations Act. [\(12\)](#)

{9} In 1983, a federal court in New York, the opinion of which, was later upheld by the Second Circuit, held that a distributor of dictation machines was protected from termination by the New Jersey Franchise Practices Act. [\(13\)](#) Federal courts construing similar state statutes had also reached similar conclusions. A 1986 Eighth Circuit decision held that an office furniture dealer was protected from termination by the Missouri Franchises Law. [\(14\)](#) The Seventh Circuit had, in a 1990 decision, held that a photocopier distributor was protected from non-renewal by the Indiana Deceptive Franchise Practices Act. [\(15\)](#)

{10} The Supreme Courts of Minnesota, North Dakota, and Washington have also applied their states' franchise laws to business relationships that few attorneys -- let alone their clients -- ever would have recognized as a "franchise." A muffler dealer was therefore entitled to rescind its lease because the dealership, including the lease, was offered in violation of the Minnesota Franchises Law. [\(16\)](#) A candy distributor was entitled to seek treble damages and attorneys' fees because its distributorship had been offered in violation of the Washington Franchise Investment Act. [\(17\)](#) The North Dakota Securities Commissioner secured a cease and desist order against the offering of distributorship for the sale of dry milk because they were deemed to be unregistered franchises in violation of the North Dakota Franchise Investment Law. [\(18\)](#) These cases -- culminating in *Computer Curriculum* and *Safeguard* -- illustrate the potentially adverse consequences of establishing a dealership, sales agency, or other distribution relationship that is in fact a "franchise."

III. Consequences of Being a "Franchise"

{11} It is illegal under federal law and the law of many states to "offer a franchise" without having made certain required disclosures in a certain prescribed format. In approximately a dozen states, offering a franchise also requires compliance with registration requirements. Nor is the potential for unanticipated liability limited to the inadvertent *formation* of a franchise relationship. No matter what the distributorship or sales agency agreement might say, including that it is *not* a franchise, various state franchise laws may restrict the supplier's right to terminate the relationship. Some state franchise laws may even require renewal of a contract that -- by its express terms -- is about to expire, or prohibit variations to the terms and conditions of the contract upon renewal.

{12} FTC Franchise Disclosure Rule: If a distribution or sales agency relationship is a "franchise," the supplier must comply with regulations promulgated by the Federal Trade Commission ("FTC") before the "first personal meeting" to discuss the contract. The FTC Franchise Disclosure Rule requires anyone who "offers a franchise" to make detailed disclosure of a wide variety of information by means of an "offering circular," the form of which is prescribed by regulation.⁽¹⁹⁾ Anyone who "offers a franchise" in violation of the FTC Franchise Disclosure Rule is subject to a \$10,000 civil penalty.⁽²⁰⁾

{13} Contrary to the position advocated by the Federal Trade Commission, the federal courts have *not* allowed a private right of action for violations.⁽²¹⁾ However, a number of states have enacted "little FTC Acts" which *do* afford a private right of action for conduct that violates the FTC Act or is otherwise "unfair" or "deceptive."⁽²²⁾ For example, the North Carolina Unfair Trade Practices Act is one of many such statutes under which private plaintiffs can recover treble damages for violations.⁽²³⁾ In 1997, the plaintiffs in a franchisee class action in Charlotte, North Carolina obtained a \$590 million judgment for alleged violations of the North Carolina Unfair Trade Practices Act, including alleged failures to make certain disclosures.⁽²⁴⁾ In an August 1998 decision, the Fourth Circuit reversed and remanded the judgment of the federal court in Charlotte.⁽²⁵⁾ Nevertheless, both the size of the judgment and the fact that it was initially entered against not only the franchisor but also its parent and corporate officers demonstrate the risks associated with alleged failures to make disclosures required by franchise laws.

{14} State Registration Requirements: In approximately a dozen states, compliance with the FTC Franchise Disclosure Rule -- while obviously necessary -- is not sufficient. In these so-called "registration states,"⁽²⁶⁾ the franchisor must do more than simply provide prospective franchisees with the NASAA-promulgated Uniform Franchise Offering Circular ("UFOC"). The UFOC satisfies the disclosure requirements of both federal and state law. In registration states, the franchisor must file a registration with state regulators and -- with one exception⁽²⁷⁾ -- obtain their approval before providing the UFOC to prospective franchisees or otherwise offering a franchise. For violation of state registration laws, aggrieved franchisees can obtain rescission,⁽²⁸⁾ damages,⁽²⁹⁾ and costs and attorneys' fees.⁽³⁰⁾ Under certain circumstances, violation of state franchise registration laws may be punishable as a crime.⁽³¹⁾

{15} State "Relationship Laws:" Nor is state regulation necessarily limited to the *formation* of franchise relationships. In nineteen states (plus the District of Columbia, Puerto Rico, and the Virgin Islands), so-called "relationship laws" may override the express provisions of any distribution agreement deemed to be a "franchise."⁽³²⁾ In addition, some state "relationship laws" apply to distributorship and dealerships that might not constitute "franchises" for purposes of disclosure and registration requirements.⁽³³⁾

{16} If the franchise, distributorship, or dealership is subject to such a statute, the supplier may find that -- in certain states -- its contract has been rewritten by the legislature. Although the contract may say that it is terminable "at will," state law may allow its termination only for "good cause."⁽³⁴⁾ Regardless of what the contract says about notice of termination, state law may mandate a certain form of notice, a minimum amount

of advance notice, and even an opportunity to cure. [\(35\)](#) While the contract may contemplate amendments or reserve discretion to the supplier with respect to certain matters, if the agreement is deemed to be a "franchise," the supplier may be precluded from making certain changes to terms or "competitive circumstances." [\(36\)](#)

{17} Even if a termination is otherwise valid, the "franchisor" may -- in some states -- be statutorily obligated to repurchase unsold inventory. [\(37\)](#) In *Computer Curriculum* and *Safeguard*, the defendants learned the hard way about the consequences of terminating a relationship that -- as far as the supplier was concerned -- was never a "franchise" until the court said otherwise. In states whose relationship laws restrict terminations, non-renewals, or "changes in competitive circumstances," the aggrieved "franchisee" can recover compensatory damages, [\(38\)](#) sometimes expressly including loss of goodwill [\(39\)](#) and lost profits, [\(40\)](#) punitive damages, [\(41\)](#) injunctive relief [\(42\)](#) sometimes including preliminary injunctive relief without a showing of irreparable harm, and costs and attorneys' fees. [\(43\)](#) At least five states also impose criminal penalties for violation of their relationship laws. [\(44\)](#)

IV. What is a "Franchise"?

{18} Neither an adverse jury verdict nor the imposition of fines or penalties is the ideal method for determining whether an independent distributorship or sales agency relationship is in fact a "franchise." As the defendants in *Computer Curriculum* and *Safeguard* learned, the lines between franchising and other forms of branded distribution are far from clear. There are, however, three common elements to most definitions of a "franchise."

{19} The first element in the "franchise" definition is either a license to use, or some form of association with, the franchisor's trademark. This element is likely to exist in virtually every contract for the distribution of goods or services under the supplier's trademark.

{20} The second element is some form of franchisor assistance in, or control over, the franchisee's business. The FTC Rule requires "significant" assistance or control to satisfy this second element satisfied. In thirteen states, this second element is satisfied where goods or services are sold pursuant to a "marketing plan" prescribed by the franchisor. [\(45\)](#) Other states find this element present when the franchisor and franchisee share a "community of interest" in the franchisee's business. [\(46\)](#) The franchise "relationship laws" of Arkansas and Delaware define "franchise" differently. [\(47\)](#)

{21} Lastly, the third element of *most* definitions is some form of payment for the right to operate the franchised business (a "franchise fee"). Some states, however, regulate franchises, distributorships, and dealerships for which no franchise fee was paid. [\(48\)](#)

{22} The presence or absence of each of these three elements -- (1) license to, or association with the franchisor's trademark; (2) franchisor assistance and control (whether defined as a "marketing plan," "community of interest," or some other way); and (3) a franchise fee -- has been the subject of a great deal of regulation and litigation. In many industry relationships not traditionally considered as "franchises," all three elements have been found satisfied.

V. Trademark License or Identification

{23} Under the FTC Franchise Disclosure Rule, the *mere possibility* that a distributor *could* use the

manufacturer's trademark, suffices to establish a trademark license. (49). At the state level, courts have found the requisite trademark license or association with a franchisor's trademark where:

- a court granted a distributor a territory for the sale of trademarked products; (50)
- a management agreement granted the right to use a trade name in marketing buyers' club memberships; (51)
- a distributor obtained a license to use a manufacturer's trademark, was encouraged to associate his business with the trademark, and displayed the manufacturer's trademark at his business, and on corporate stationery; (52) and
- a dealer called himself an authorized dealer of the products of a manufacturer, who helped the dealer pay for Yellow Pages advertisements, listing the dealer as "authorized." (53)

{24} In *Computer Curriculum*, the independent distributor did *not* use the computer company's name as its own; instead, the distributor operated under his own trade name (emphasis added). In fact, the distributor did not use the "Computer Curriculum" name on his stationery, business cards, or any other business sign. The New Jersey Supreme Court, nevertheless, found a trademark license for two reasons. First, the reseller agreement at issue in *Computer Curriculum* authorized the distributor to use the supplier's trademark. Second, the distributor was contractually obligated to use his "best efforts" to maintain and promote the supplier's name, trademark, and logo on the products.

{25} In short, the trademark element of a "franchise" is likely to occur in virtually every relationship whereby an independent third party is granted the right to sell a manufacturer's trademarked goods or offer services associated with the manufacturer's trademark. Whether a franchise relationship exists, is therefore, likely to turn on the presence or absence of one or more other definitional elements.

VI. Assistance or Control

{26} Under the FTC Franchise Disclosure Rule, *any one* of the following conditions suffices to establish "significant assistance" or control:

- restricting business locations or sales areas;
- furnishing management, marketing, or personnel advice;
- restricting customers;
- providing formal sales, repair, or business training programs;
- furnishing a detailed operations manual;
- promoting campaigns requiring participation or financial contribution;
- mandating personnel policies and practices;
- controlling production techniques;

- establishing accounting systems or requiring accounting practices;
- approving locations and sites;
- requiring location designs or appearance specifications; or
- controlling hours of operation. [\(54\)](#)

{27} In states that define franchise in terms of a "marketing plan prescribed in substantial part" by a franchisor, courts have found this element satisfied when the following circumstances occurred:

- a manufacturer required a dealer to advertise the manufacturer's products intensively, to conduct a variety of promotions, and to carry the manufacturer's array of accessory sales devices; [\(55\)](#)
- distributors marketed products pursuant to a comprehensive advertising and promotional program developed by the supplier, and the supplier reserved the right to screen and approve all promotional materials used by distributors; [\(56\)](#) and
- a manufacturer required a distributor to perform warranty service in accordance with the manufacturer's warranty policy, to send representatives to sales meetings, to have his service personnel factory trained by the manufacturer, to maintain certain levels of inventory, to hire an extra salesman, and to provide periodic sales reports to the manufacturer. [\(57\)](#)

{28} In *Computer Curriculum*, the New Jersey Supreme Court found the requisite "community of interest," based upon evidence of "interdependence" between the supplier and its independent distributor. [\(58\)](#) According to the New Jersey Supreme Court, the provisions of the reseller agreement and the distribution relationship established a "community of interest" when they included the following terms:

- the distributor was obligated to maintain at least four full-time sales representatives, to promote and sell the supplier's products, and to submit monthly sales forecasts;
- the supplier had the right to inspect the distributor's books and records;
- the supplier trained the distributor's personnel and imposed restrictions on the way the distributor marketed certain products;
- the supplier controlled the quality of the distributor's services by requiring the distributor to prepare the customer site for installations in accordance with the supplier's specifications, and to maintain training programs for end users;
- the supplier and distributor cooperated in sales and marketing activities (e.g., joint presentations at educational conventions, provision of brochures and "leads" to the distributor); and
- the distributor was prohibited from selling competitive products, required to use "best efforts" to sell the manufacturer's products, and permitted to sub-license the manufacturer's products. [\(59\)](#)

{29} In short, many of the common contractual provisions by which manufacturers seek to ensure their products receive proper sales and support may also establish the second element of a franchise -- regardless of whether it is defined in terms of "assistance or control," a "marketing plan," or "community of interest."

VII. Franchise Fee

{30} In *Computer Curriculum*, the presence or absence of a franchise fee was irrelevant because it was not part of the New Jersey statutory definition. In most states that regulate franchising, however, there can be no franchise relationship without the payment of a "franchise fee." Typically, the "franchise fee" element is defined by statute as any payment above a de minimis threshold (typically \$500) required for the right to enter into the franchised business, excluding purchases of goods at bona fide wholesale prices and the purchase or lease of real property. [\(60\)](#)

{31} As interpreted by courts, such as the Seventh and Ninth Circuits, a franchise fee can include any number of payments that are often part of distributorship, dealership, and sales agency relationships. For example, the Seventh Circuit upheld a judgment of the federal district court in Chicago, which held that a distributorship contract required payment of a "franchise fee," within the meaning of the Illinois Franchise Disclosure Act. [\(61\)](#) The contractual provision at issue required the distributor to "maintain an adequate supply of current sales and service publications." [\(62\)](#) Over the nine-year history of the relationship, the distributor paid over \$1,600 for such manuals. The Seventh Circuit held that those payments constituted an "indirect" franchise fee because they exceeded \$500 and otherwise satisfied the statutory definition of a "franchise fee," [\(63\)](#) In hindsight, the supplier no doubt wishes the manuals were provided for free. One of the effects of the application of the Illinois franchise law to a distributorship contract, that said it was governed by Texas law, was to uphold a \$1.5 million judgment for wrongful termination. [\(64\)](#)

{32} Previously, the Ninth Circuit held similarly when it determined that franchise fees were not restricted to simply monetary terms. The court was willing to expand the definition beyond conventional financial terms. The Ninth Circuit concluded that a dealer's purchases of video cassettes, films, floats, banners, posters, and brochures -- all of which were necessary to promote the manufacturer's products -- represented a franchise fee. [\(65\)](#)

{33} Under the FTC Franchise Disclosure Rule, [\(66\)](#) any one of the following required payments may constitute a "franchise fee":

- rental payments;
- payments for advertising assistance or promotional materials;
- required purchases of inventory or supplies from the manufacturer or a third party supplier;
- payments for training, but excluding costs of attendance; or
- deposits for security or escrow. [\(67\)](#)

Required payments that are common in many distribution agreements may therefore qualify to satisfy the "franchise fee" definition. Again, the fact that a required payment is not called a "franchise fee" is not determinative.

VIII. Virtual Franchise Law Violations Virtually Everywhere

{34} In cyberspace, inadvertent violations of federal and state franchise laws can spread as quickly as a computer virus. Today, the company without an Internet website is the exception rather than the rule. Many manufacturers and other suppliers use the Internet to solicit potential distributors, VAR's, (68) or sales agents for their goods and services. By doing so, are they "offering a franchise" if the "distributorship" or "sales agency" is later deemed a "franchise"? If so, is the inadvertent franchisor making an "offer" within the meaning of franchise registration and disclosure laws in every jurisdiction from which its Internet website can be accessed?

{35} Many websites merely provide general information about the supplier, his goods and services, and his distribution system. Such a website, especially if it is passive, rather than interactive, arguably is analogous to a print article or advertisement in a publication such as *Inc.* or *Entrepreneur*. Articles or advertisements in such publications often prompt inquiries from prospective franchisees in "registration states" in which the franchisor has not registered. Most franchisors take the position that -- as long as they do not respond to inquiries from prospective franchisees in states where the franchisor has not satisfied all regulatory requirements -- there has been no "offer" in such states.

{36} Websites, however, offer the potential for a franchisor to do much more than can be accomplished in traditional, printed advertisement. Many franchisors use their websites to respond to general inquiries about the franchise system; others post franchise disclosure documents and allow prospective franchisees to download copies. The Internet also affords the franchisor the capability to negotiate and make changes to a standard-form franchise agreement. By way of "electronic signatures," parties can execute franchise agreements and related documents that result in the establishment of a franchise relationship. Franchisees can also make payment by electronics funds transfer of deposits and franchise fees.

{37} These capabilities raise a number of legal issues, such as:

- Does the mere potential for a franchise transaction to be consummated electronically with a franchisee, in a particular jurisdiction, mean that the franchisor is "offering a franchise" in that jurisdiction?
- Is it sufficient for the franchisor to state that the "offer" is only valid in certain jurisdictions, in order to comply with franchise registration and disclosure requirements?
- Should the franchisor be required to post something analogous to a "shrinkwrap" license, e.g., "BY ACCESSING THIS SITE, YOU REPRESENT AND WARRANT THAT YOU RESIDE IN ONE OF THE FOLLOWING JURISDICTIONS"?
- Should the franchisor be held liable for violating franchise registration and disclosure laws if -- notwithstanding conspicuous notice -- it unwittingly "offers a franchise" via the Internet to someone located in a jurisdiction in which the franchisor cannot lawfully sell franchises?

{38} In cyberspace, the potential for inadvertent franchise law violations is not limited to the *formation* of relationships for the distribution of goods and services. The Internet affords most suppliers the opportunity to market from "virtual stores" to customers located almost anywhere. In the process, suppliers can -- and often do -- bypass their pre-existing networks of distributors and dealers, VAR's, or independent sales agents. The potential for claims of violations of franchise "relationship laws" is obvious. For example, consider the implications of the following issues :

- Does a supplier who has decided to abandon a system of distribution based on independent franchisees or dealers have "good cause" for termination, non-renewal, or a "change in competitive circumstances," within the meaning of state law?

- Is the supplier engaged in de facto termination, non-renewal, or "change in competitive circumstances" within the meaning of franchise "relationship laws," by "going direct" on the Internet?

- Is the supplier guilty of "encroachment," in violation of contractual exclusivity provisions, or in the absence of such a contractual clause, in violation of the implied covenant of good faith and fair dealing, by selling over the Internet to customers located in territories assigned to franchisees or other distributors?

{39} At this juncture, there are more questions than answers, as regulators grapple with adapting regulations that were developed in a different era to the new realities of electronic commerce. However, a number of recent regulatory initiatives, at both, the federal and state level are beginning to provide some answers.

IX. State Exemptions for "Internet Offers"

{40} In 1997, the State of Indiana became the first state to clarify the application of its franchise laws to activities on the Internet. (69) At first blush, Indiana's regulatory initiative would appear to stretch the long arm of Indiana law to the outer limits of cyberspace. For purposes of the Indiana Franchise Disclosure Law, an "offer" of a franchise now includes "[a]n attempt to offer, or a solicitation of an offer to purchase, a franchise, made via a communication on a proprietary or 'common carrier' electronic delivery system, the World Wide Web or the Internet. . . ." (70) Nevertheless, an "Internet offer" is exempt from the registration requirements of Indiana law if the following conditions are met

- [t]he offer indicates, directly or indirectly, that such franchises will not be sold to persons in Indiana;
- [a]n offer is not otherwise specifically directed to any person in Indiana by, or on behalf of, the franchisor; and
- [n]o sales of such franchises are made in Indiana as a result of the offer. (71)

{41} Last year, the NASAA released a notice of request for public comment on a Proposed Statement of Policy Regarding Offers of Franchises on the Internet. (72) The NASAA proposal defines "Internet Offer" as "a communication made on the Internet about a franchise offering." (73) Consistent with the Indiana Franchise Disclosure Law, the NASAA proposal would exempt an "Internet Offer" from state franchise registration requirements if *all three* of the following conditions were satisfied:

- (1) [t]he Internet Offer indicates, directly or indirectly, that the franchise(s) is not being offered to the residents of [Jurisdiction];
- (2) [t]he Internet Offer is not directed to any person in [Jurisdiction] by or on behalf of the franchisor or anyone acting with the franchisor's knowledge; and
- (3) [n]o franchise(s) is sold in [Jurisdiction] by or on behalf of the franchisor until the offering has been registered and declared effective and [the Jurisdiction] Uniform Franchise Offering Circular has been delivered to the purchaser prior to the sale and in compliance with the [Jurisdiction] Franchise Law. (74)

The State of Maryland was the first state to adopt the NASAA proposal.

X. The First "Personal Meeting" in Cyberspace

{42} In their current form, the disclosure requirements of the FTC Franchise Disclosure Rule are triggered by the earlier event of the following two occurrences:

(1) the first "personal meeting," which is defined as "a face-to-face meeting between a franchisor or franchise broker and a prospective franchisee [to discuss] the sale or possible sale of a franchise"; (75) or

(2) the "time for making of disclosures", (76) which is defined as ten business days before the earlier of the prospective franchisee's 1) signing of a franchise agreement or "other agreement imposing a binding legal obligation in connection with the sale or proposed sale of a franchise"; (77) or 2) the prospective franchisee's "payment of any consideration in connection with the sale or proposed sale of a franchise." (78)

{43} The FTC issued an Advance Notice of Proposed Rulemaking ("NOPR") about possible changes to the foregoing provisions. (79) The NOPR raised the possibility that the FTC Franchise Disclosure Rule might be updated so that the term "first personal meeting" would be replaced with the term "first substantive discussion." (80) The NOPR also raised the possibility of allowing compliance with the FTC Franchise Disclosure Rule by posting disclosure documents on the Internet.

{44} The FTC has also solicited comments on a proposal to issue a policy statement regarding the applicability of FTC rules and guides to "electronic media," such as, e-mail, CD-ROMS, and the Internet. (81) The FTC Franchise Disclosure Rule is among the "rules and guides" specifically referenced in the proposal. If adopted, the FTC proposal would clarify that, as used in FTC rules and guides, the term "written" refers to information that is capable of being preserved in a tangible form and read.

{45} The FTC proposal would also clarify that, the term "direct mail" refers to "private communications, i.e., traditional mail[,] as well as electronic communications that are individually addressed and capable of being received privately." (82) The term would thus include "those communications that are directed to particular individuals, such as facsimiles or e-mail, but not directed to the public at large, as are Internet bulletin boards." (83) The FTC proposal also reflects an intention that its rules and guides not discourage the use of electronic media, and the proposal contains an extensive discussion of the extent to which disclosures made via electronic media are "clear and conspicuous." (84)

XI. Conclusion

{46} As a result of recent initiatives by state and federal regulators, the application of franchise registration and disclosure requirements to Internet commerce should be relatively clear soon. These clarifications, however, will not help suppliers determine whether their relationships with independent distributors, dealers, and sales agents are subject to franchise regulation in the first place. Suppliers who do not want to carry the legal baggage associated with being a "franchisor" may well try restructuring their relationships with independent distributors to minimize the risk that their contracts satisfy one or more of the various definitional elements of a franchise.

{47} For many companies, however, this approach represents a Hobson's Choice. A number of common contractual provisions which increase the risk of being deemed a "franchise" are desirable, if not necessary, provisions of most distribution agreements. Under the federal trademark statute, the Lanham Act, the trademark owner has the right (85) -- and indeed the affirmative duty (86)-- to control the quality and uniformity of goods and services furnished under its trademark. Failure to exercise such control may even constitute an abandonment of trademark rights. (87) Suppliers can ensure that end-users receive proper service and support, only by imposing various requirements on independent distributors, and only by providing assistance, such as training or promotional materials. Contractual provisions intended to protect trademarks and goodwill, and to ensure customer satisfaction may therefore, have unintended consequences, as well. These contractual provisions may establish the "assistance or control," "marketing plan," or "community of interest" element of a franchise. Eliminating such terms from the contract -- or providing no assistance, such as training or promotional materials -- is often not a viable option. Such drastic steps would not necessarily ensure that a "distributorship," "sales agency," or other "relationship" would rise to the level of constituting a franchise. (88)

{48} This dilemma has prompted some suppliers to conclude that they fare better in accepting both, the burdens, such as heightened regulation, and the benefits, such as the ability to collect up-front payments, of being a self-acknowledged franchisor. Many suppliers, however, are not willing to *voluntarily* subject themselves to increased government regulation. Franchise relationship laws in particular, can restrict the supplier's rights to impose additional responsibilities on the distributor or terminate the relationship altogether. Such restrictions may impair the supplier's flexibility to restructure his distribution system, or otherwise respond to changing market conditions. In an industry in which the only constant is change, many companies simply do not want to be hamstrung by franchise law requirements, until at least one of two events occurs: either they see the competition similarly shackled; or, a regulator, judge, or jury gives them no other choice.

[] NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Michael J. Lockerby, *A World Wide Web of Potential Franchise Law Violations*, 6 RICH. J.L. & TECH. 4, (Symposium 1999), at <http://www.richmond.edu/jolt/v6i1/lockerby.html>.

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[2]. 130 N.J. 324, 614 A.2d 124 (1992).

[3]. *See* Lithuanian Commerce Corp. v. Sara Lee Hosiery, 179 F.R.D. 450 (D.N.J. 1998).

[4]. *See* Atlantic City Coin & Slot Serv. Co. v. IGT, 14 F.Supp2d 644 (D.N.J. 1998).

- [5]. *Id.*
- [6]. *See* *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 826 F. Supp. 831 (D. N.J. 1993), 35 F.3d 813 (3d Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995).
- [7]. 146 N.J. 176, 680 A.2d 618 (1996).
- [8]. *See id.*
- [9]. *See* 60 Cal. App. 4th 1294, 71 Cal. Rptr. 2d 122 (1998).
- [10]. *See id.*
- [11]. 60 Cal. App. 4th at 1304-05, 71 Cal. Rptr. 2d at 128.
- [12]. *See* *Boat & Motor Mart v. Sea Ray Boats, Inc.*, 825 F.2d 1285(9th Cir. 1987).
- [13]. *See* *Carlos v. Philips Bus. Sys., Inc.*, 556 F. Supp. 769 (E.D.N.Y. 1983), *aff'd in part and rev'd in part*, 744 F.2d 287 (2d Cir. 1984).
- [14]. *See* *American Bus. Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135 (8th Cir. 1986).
- [15]. *See* *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir. 1990), *aff'd*, 980 F.2d 432 (7th Cir. 1992).
- [16]. *See* *Chase Manhattan Bank, N.A. v. Clusiau Sales & Rental, Inc.*, 308 N.W.2d 490 (Minn. 1981).
- [17]. *See* *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wash. App. 881, 658 P.2d 1267 (1983).
- [18]. *See* *Meadow Fresh Farms, Inc. v. Sandstrom*, 333 N.W.2d 780 (N.D. 1983).
- [19]. *See* 16 C.F.R. Part 436, *available at* the following website:
<<http://www.ftc.gov/bcp/franchise/nctfran.htm/16cfr436.htm>>.
- [20]. *Id.*
- [21]. *See* *Brill v. Catfish Shaks of America, Inc.*, 727 F. Supp. 1035, 1041 (E.D. La. 1989)(emphasis added); *Days Inn of America Franchising, Inc. v. Windham*, 699 F. Supp. 1581, 1582-83 (N.D. Ga. 1988); *Akers v. Bonifasi*, 629 F. Supp. 1212, 1221 (M.D. Tenn. 1984); *Freedman v. Meldy's, Inc.*, 587 F. Supp. 658 (E.D. Pa. 1984).
- [22]. *Id.* (emphasis added).
- [23]. *See* North Carolina Unfair Trade Practices Act, N.C. Gen. Stat § 58-63-1.
- [24]. *See* *Broussard v. Meineke Discount Muffler Shops, Inc.*, 958 F. Supp. 1087 (W.D.N.C. 1997), *rev'd*, 155 F.3d 331 (4th Cir. 1998).
- [25]. *See id.*
- [26]. California Franchise Investment Law (Cal. Corp. Code §§ 31000 - 31516); Hawaii Franchise Investment Law (Haw. Rev. Stat. §§ 482E-1, 482E-5, 482E-8, 482E-9, 482E-11, 482E-12); Illinois Franchise Disclosure Act (Ill. Comp. Stat. 1992, ch. 815 §§ 705/1-705/44); Indiana Franchises Law (Ind. Code §§ 23-2-

2.5-1 - 23-2-2.5-51); Maryland Franchise Registration and Disclosure Law (Md. Code Ann. §§ 14-201 - 14-233); Minnesota Franchises Law (Minn. Stat. §§ 80C.01 - 80C.30); New York Franchises Law (N.Y. Gen. Bus. Law § 680-95); North Dakota Franchise Investment Law (N.D. Cent. Code §§ 51-19-01 - 51-19-17); Rhode Island Franchise Investment Act (R.I. Gen. Laws §§ 19-28-1-1-19.28.1-34); South Dakota Franchises for Brand-Name Goods and Services Law (S.D. Codified Laws §§ 37-5A-1, 37-5A-87); Virginia Retail Franchising Act (Va. Code Ann. §§ 13.1-557, 13.1-574); Washington Franchise Investment Protection Act (Wash. Rev. Code §§ 19.100.010 - 19.100.940); and Wisconsin Franchise Investment Law (Wis. Stat. §§ 553.01 - 553.78).

[27]. Michigan is technically not a "registration state" because its Franchise Investment Law requires filing of only a notice of intent to do business in the state and to comply with disclosure obligations. *See* Mich. Comp. Laws §§ 445.1501a-445.1545.

[28]. *See e.g.* California (Cal. Corp. Code § 31-300); Hawaii (Haw. Rev. Stat. § 482E-9); Illinois (Ill. Comp. Stat. 1992, ch. 815 § 705/26), Maryland (Md. Code Ann. § 14-227); Minnesota (Minn. Stat. § 80C.17); New York (N.Y. Gen. Bus. Laws § 691); North Dakota (N.D. Cent. Code § 51-19-12); Rhode Island (R.I. Gen. Laws § 19-28.1-21); South Dakota (S.D. Codified Laws Ann. § 37-5A-83); Virginia (Va. Code Ann. § 13.1-565); Washington (Wash. Rev. Code § 19.100.190); Wisconsin (Wis. Stat. § 553.51).

[29]. *See e.g.* California (Cal. Corp. Code § 31-300); Hawaii (Haw. Rev. Stat. § 482E-9); Illinois (Ill. Comp. Stat. 1992, ch. 815 § 705/26), Indiana (Ind. Code § 23-2-2.5-28); Maryland (Md. Code Ann. § 14-227); Minnesota (Minn. Stat. § 80C.17); New York (N.Y. Gen. Bus. Law § 691); North Dakota (N.D. Cent. Code § 51-19-12); Rhode Island (R.I. Gen. Laws § 19-28.1-21); South Dakota (S.D. Codified Laws Ann. § 37-5A-83, 37-5A-85); Virginia (Va. Code Ann. § 13.1-571); Washington (Wash. Rev. Code § 19.100.190); Wisconsin (Wis. Stat. § 553.51).

[30]. *See e.g.* Hawaii (Haw. Rev. Stat. § 482E-9); Illinois (Ill. Comp. Stat. 1992, ch. 815 § 705/26), Indiana (Ind. Code § 23-2-2.5-28); Maryland (Md. Code Ann. § 14-227); Minnesota (Minn. Stat. § 80C.17); New York (N.Y. Gen. Bus. Law § 691); North Dakota (N.D. Cent. Code § 51-19-12); Rhode Island (R.I. Gen. Laws § 19-28.1-21); South Dakota (S.D. Codified Laws Ann. § 37-5A-83, 37-5A-85); Virginia (Va. Code Ann. § 13.1-571); Washington (Wash. Rev. Code § 19.100.190); Wisconsin (Wis. Stat. § 553.51).

[31]. *See e.g.* California (Cal. Corp. Code §§ 31410-12); Hawaii (Haw. Rev. Stat. §§ 482E10.6); Illinois (Ill. Comp. Stat. 1992 ch. 815 §§ 705/85); Indiana (Ind. Code §§ 23-2-2.536 - 23-2-2.5-37); Maryland (Md. Code Ann. §§ 14-211, 14-228, 14-230); Minnesota (Minn. Stat. § 80C.16); New York (N.Y. Gen. Bus. Law § 690); North Dakota (N.D. Cent. Code § 51-19-14); Rhode Island (R.I. Gen. Laws § 19-28.1-20); South Dakota (S.D. Codified Laws Ann. §§ 37-5A-79 - 37-5A-80); Virginia (Va. Code Ann. §§ 13.1-569); Washington (Wash. Rev. Code § 19.100.210); Wisconsin (Wis. Code § 553.52).

[32]. *See e.g.* Arkansas Franchise Practices Act (Ark. Code Ann. §§ 4-72-201 - 4-72-210); California Franchise Relations Act (Cal. Bus. & Prof. Code §§ 20000 - 20043); Connecticut Franchises Law (Conn. Gen. Stat. §§ 42-133e - 42133h); Delaware Franchise Security Law (Del. Code Ann. Tit. 6 §§ 2551-56); District of Columbia Franchising Act of 1988 (D.C. Code Ann §§ 29-1201 - 29-1208); Hawaii Franchise Investment Law (Haw. Rev. Stat. § 482E-6); Illinois Franchise Disclosure Act (Ill. Comp. Stat. ch. 815, §§ 705/18 - 705/20); Indiana Deceptive Franchise Practices Act (Ind. Code Ann. §§1-23-2-2.7 - 23-2-2.7-7)]; Iowa Franchise Law (Iowa Code §§ 523H.1 - 523H.17); Maryland Fair Distributorship Act (Md. Code Ann. §§ 11-1301 - 11-1307); Michigan Franchise Investment Law (Mich. Comp. Laws § 445.1527-27)); Minnesota Franchises Law (Minn. Stat. Ann. § 80C.14); Mississippi Franchises Law (Miss. Code Ann. §§ 75-24-51 - 75-24-63) (Miss. Code Ann. § 75-24-53); Missouri Franchises Law (Mo. Rev. Stat. §§ 407.400 - 407.420); Nebraska Franchise Practices Act (Neb. Rev. Stat. §§ 81-401 - 87-410); New Jersey Franchise Practices Act (N.J. Stat. Ann. § 56:10-1 - 56:10-15); Virginia Retail Franchising Act (Va. Code Ann. § 13.1-

564); Washington Franchise Investment Protection Act (Wash. Rev. Code Ann. § 19.100.180); Wisconsin Fair Dealership Law (Wis. Stat. §§ 135.01 - 135.07); Puerto Rico Dealers' Contracts Law (P.R. Laws Ann. Tit. 10, §§ 278 - 278d); Virgin Islands Franchised Business Law (V.I. Code Ann. Tit. 12A, Subch. III, §§ 130 -139). *See generally* Lockerby, "Franchise termination restrictions: a guide for practitioners and policy makers," *The Antitrust Bulletin* (Winter 1985), *cited in* *Cambe's Furniture, Inc. v. Doughboy Int'l, Inc.*, 825 F.2d 167 (8th Cir. 1987) (stating these statutory enactments are in addition to common law doctrines that, in some states, may limit the right to terminate or fail to renew a franchise relationship).

[33]. *Cf.* Maryland Franchise Registration and Disclosure Law (Md. Code Ann. §§ 14-201-14-233) with Maryland Fair Distributorship Law (Md. Code Ann. § 11-130); Wisconsin Franchise Investment Law (Wis. Code §§ 553.01-553.78) with Wisconsin Fair Dealership Law (Wis. Code §§ 135.01-135.07)

[34]. *See* Arkansas (Ark. Code Ann. §§ 4-72-202(7), 4-72-204); California (Cal. Bus. & Prof. Code §§ 20020, 20021); Connecticut (Conn. Gen. Stat. § 42-133(f)); Delaware (Del. Code Ann.6 § 2552); District of Columbia (D.C. Code Ann §§ 29-1201, 29-1202, 29-1203); Hawaii (Haw. Rev. Stat. § 482E-6); Illinois (Ill. Rev. Stat. ch. 815, § 705/19); Indiana (Ind. Code Ann. § 23-2-2.7-2); Iowa (Iowa Code § 523H.7); Michigan (Mich. Comp. Laws § 445.1527-27); Minnesota (Minn. Stat. Ann. § 80C.14); Nebraska (Neb. Rev. Stat. §§ 87-402, 87-404); New Jersey (N.J. Stat. Ann. § 56:10-3; 56:10-5); Virginia (Va. Code Ann. § 13.1-564); Washington (Wash. Rev. Code Ann. § 19.100.180(i) and (j)); Wisconsin (Wis. Stat. §§ 135.02, 135.03); Puerto Rico (P.R. Laws Ann. tit. 10, §§ 278, 278a, 278a-1); Virgin Islands (V.I. Code Ann. tit. 12A, Subch. III, §§ 130, 132).

[35]. *See e.g.* Arkansas (Ark. Code Ann. §§ 4-72-202(7), 4-72-204); California (Cal. Bus. & Prof. Code §§ 20020, 20021, 20030); Connecticut (Conn. Gen. Stat. § 42-133(f)); Delaware (Del. Code Ann. tit. 6 § 2554); District of Columbia (D.C. Code Ann §§ 29-1201, 29-1202, 29-1203); Hawaii (Haw. Rev. Stat. § 482E-6); Illinois (Ill. Rev. Stat. ch. 815, § 705/19); Indiana (Ind. Code Ann. § 23-2-2.7-3); Iowa (Iowa Code § 523H.7); Maryland (Md. Code Ann. § 11-1303); Michigan (Mich. Comp. Laws § 445.1527-27); Minnesota (Minn. Stat. Ann. § 80C.14); Mississippi (Miss. Code Ann. § 75-24-53); Missouri (Mo. Rev. Stat. § 407.405); Nebraska (Neb. Rev. Stat. §§ 87-402, 87-404); New Jersey (N.J. Stat. Ann. § 56:10-3; 56:10-5); South Dakota (S.D. Codified Laws Ann. § 37-5A-51); Virginia (Va. Code Ann. § 13.1-564); Washington (Wash. Rev. Code Ann. § 19.100.180(i) and (j)); Wisconsin (Wis. Stat. §§ 135.02, 135.03. 135.04); Puerto Rico (P.R. Laws Ann. tit. 10, §§ 278, 278a, 278a.1); Virgin Islands (V.I. Code Ann. tit. 12A, Subch. III, §§ 130, 132).

[36]. For example, the termination notice and inventory repurchase obligations of the Maryland Fair Distributorship Act apply to any "de facto cancellation," defined as: actions taken by the grantor that:

- (1) Materially alter the competitive business and economic conditions of a distributor;
- (2) Are not applicable to similarly situated distributors of that grantor's products; and
- (3) Are intended to be discriminatory and detrimental to the distributor.

Md. Code Ann. § 11-1301. The Virginia Retail Franchising Act makes it unlawful for a franchisor "to use undue influence to induce a franchisee to surrender any right given to him by any provision contained in the franchise." Va. Code Ann. § 13.1-564. The Wisconsin Fair Dealership Act requires "good cause" before the grantor can "substantial[ly] change [the] competitive circumstances" of a dealership agreement. Wis.Stat. § 135.04

[37]. In the following states, a franchisor that terminates or fails to renew the franchise without cause is required to repurchase the franchisee's inventory: *See, e.g.*, Arkansas (Ark. Code Ann. § 4-72-209 (Michie

1991)), California (Cal. Bus. & Prof. Code § 20035 (West 1990)), and Washington (Wash. Rev. Code Ann. § 19.100.180(2)(i) (West 1991)) (includes goodwill if one-year notice of nonrenewal requirement is breached).

The following states impose an inventory repurchase requirement for terminations with or without cause: *See e.g.*, Connecticut (Conn. Gen. Stat. § 42-133f(c) (1986)), Hawaii (Haw. Rev. Stat. § 482E-6(3) (1974)), Iowa (Iowa Code § 523H.11(1992)), Maryland (Md. Code Ann. Com. Law § 11-1304 (1980)), Michigan (Mich. Comp. Laws § 445.1527(d) (1984)) (for specified nonrenewals), and Wisconsin (Wis. Stat. § 135.045 (1984)).

[38]. *See e.g.*, Arkansas (Ark. Code Ann. § 4-72-208 (Michie 1991)), Connecticut (Conn. Gen. Stat. §42-133 (g)(a) (1986)), Delaware (Del. Code Ann. tit. 6 § 2553 (1980)), District of Columbia (D.C. Code Ann. §29-1206 (1989)), Hawaii (Haw. Rev. Stat. §§ 482E-6, 482E-9, 480-2, and 480.13 (1974)), Illinois (Ill. Comp. Stat. ch. 815, 705/26 (West 1992)), Indiana (Ind. Code Ann. §23-2-2.7-4 (Michie 1985)), Iowa (Iowa Code §§ 523H.6, 523H.13 (1992)), Minnesota (Minn. Stat. Ann. § 80C.17(3) (West 1990)), Mississippi (Miss. Code Ann. § 75-24-57 (1972)), Missouri (Mo. Rev. Stat. § 407.410 (1986)), Nebraska (Neb. Rev. Stat. § 87-409 (1989)), New Jersey (N.J. Stat. Ann. § 56:10-10 (West 1971)), Virginia (Va. Code Ann. § 13.1-571 (Michie 1992)), Washington (Wash. Rev. Code Ann. § 19.100.190(3) (West 1991)), Wisconsin (Wis. Stat. § 135.06 (1984)), Puerto Rico (P.R. Laws Ann. tit. 10, § 278b (1988)), and Virgin Islands (V.I. Code Ann. tit. 12A, §135 (1981)).

[39]. *See, e.g.*, Delaware (Del. Code Ann. tit. 6 § 2553 (c)(2) (1980)) ("damages recoverable shall include, but shall not be limited to [l]oss of goodwill") (emphasis supplied), and Puerto Rico (P.R. Laws Ann. tit. 10, § 278b (1988)):

If no just cause exists for the termination of the dealer's contract for detriment to the established relationship, or for the refusal to renew same, the principal shall have executed a tortious act against the dealer and shall indemnify it to the extent of the *damages* caused him, the amount of such indemnity to be fixed on the basis of the following factors (emphasis added):

(a) *the actual value of the amount expended by the dealer in the acquisition and fitting of premises, equipment, installations, furniture and utensils*, to the extent that these are not easily and reasonably useful to any other activity in which the dealer is normally engaged (emphasis added);

(b) *the cost of the goods, parts, pieces, accessories and utensils* that the dealer may have in stock, and from whose sale or exploitation he is unable to benefit (emphasis added);

(c) *the good will of the business*, or such part thereof attributable to the distribution of the merchandise or to the rendering of the pertinent services, said good will to be determined by taking into consideration the following factors (emphasis added):

- (1) number of years the dealer has had charge of the distribution;
- (2) actual volume of the distribution of the merchandise or the rendering of the pertinent services and the proportion it represents in the dealer's business;
- (3) proportion of the Puerto Rican market said volume represents;
- (4) any other factor that may help establish equitably the amount of said good will [sic];

(d) *the amount of the profit obtained in the distribution of the merchandise or in the rendering of the services, as the case may be, during the last five years, or if less than five, five times the average of the annual profit obtained during the last years, whatever they may be* (emphasis added).

[40]. See, e.g., Delaware (Del. Code Ann. tit. 6 § 2553(c)(3) (1980)) ("damages recoverable shall include, but shall not be limited to [*l*]oss of profits, which loss shall be presumed to be no less than [*five*] times the profit obtained by the franchised distributor, by virtue of the terminated franchise, in the most recently completed fiscal year") (emphasis supplied), and Puerto Rico (P.R. Laws Ann. tit. 10, § 278b (1988)).

[41]. See e.g., Arkansas (Ark. Code Ann. § 4-72-208(a) (Michie 1991)) (treble damages), Hawaii (Haw. Rev. Stat. §§ 482E-6, 482E-9, 480-2, 480-3.1, 480-13, and 480-15.1 (1974)) (treble damages, civil penalties), Iowa (Iowa Code § 523B.7(b) (1991)) (treble damages), Minnesota (Minn. Stat. Ann. § 80C.16 (1991)) (civil fines deposited into state treasury), Missouri (Mo. Rev. Stat. § 407.410 (1986)) (double damages), and Washington (Wash. Rev. Code Ann. § 19.100.190 (1991)) (discretionary treble damages).

[42]. See e.g., Arkansas (Ark. Code Ann. § 4-72-208 (1) (Michie 1991)), Connecticut (Conn. Gen. Stat. § 42-133g(a) (1986)), Delaware (Del. Code Ann. tit. 6, § 2553(c)(4) (1980)), District of Columbia (D.C. Code Ann. § 29-1206 (1989)), Hawaii (Haw. Rev. Stat. §§ 482E-6, 482E-9, 480-2, and 480-13 (1974)), Iowa (Iowa Code §§ 523H.6, 523H.13(1991)), Michigan (Mich. Comp. Laws § 445.1535 (1984)), Minnesota (Minn. Stat. Ann. § 80C.16 (West 1991)), Mississippi (Miss. Code Ann. § 75-24-57 (1972)), Missouri (Mo. Rev. Stat. § 407.410.2) (1986)), Nebraska (Neb. Rev. Stat. § 87-409 (1989)), New Jersey (N.J. Stat. Ann. § 56:10-10 (West 1971)), South Dakota (S.D. Codified Laws § 37-5A-51 (Michie 1991)), Virginia (Va Code Ann. § 13.1-568 (Michie 1992)), Washington (Wash. Rev. Code Ann. § 19.100.190(2) (1991)), Wisconsin (Wis. Stat. § 135.06 (1984)) ("[T]he dealer also may be granted injunctive relief against unlawful termination, cancellation, nonrenewal or substantial change of competitive circumstances."); see also § 135.065 ("[A]ny violation of this chapter by the grantor is deemed an irreparable injury to the dealer for determining if a temporary injunction should be issued."); see e.g., Puerto Rico (P.R. Laws Ann. tit. 10, § 278b-1 (1988)).

[43]. See e.g., Arkansas (Ark. Code Ann. § 4-72-208(a) (Michie 1991)), Connecticut (Conn. Gen. Stat. § 42-133g (a) (1986)) Delaware (Del. Code Ann., tit. 6, § 2553 (5)(1980)), District of Columbia (D.C. Code Ann. § 29-1206 (1989)), Hawaii (Haw. Rev. Stat. §§ 482E-6, 482E-9, 480-2, and 480-13 (1974)), Illinois (Ill. Comp. Stat. ch. 815, 705/26 (West 1992)), Iowa (Iowa Code § 523H.13 (1991)), Minnesota (Minn. Stat. Ann. § 80C.17(West 1991)), Mississippi (Miss. Code Ann. § 75-24-57 (1972)) Missouri (Mo. Rev. Stat. § 407.410(2) (1986)), Nebraska (Neb. Rev. Stat. § 87-409 (1989)), New Jersey (N.J. Stat. Ann. § 56:10-10, :10-29 (West 1971)), Virginia (Va. Code Ann. § 13.1-571(a) (Michie 1992)), Washington (Wash. Rev. Code Ann. § 19.100.190(8) (West 1991)), Wisconsin (Wis. Stat. § 135.06 (1984)), and Virgin Islands (V.I. Code Ann. tit. 12A, § 135 (1981)).

[44]. See, e.g., Hawaii (Haw. Rev. Stat. §§ 482E-6, 482E-9, 480-2, and 480-16 (1974)), Michigan (Mich. Comp. Laws § 445.1538 (1984)) (fine of up to \$10,000, imprisonment for up to seven years), Minnesota (Minn. Stat. Ann. § 80C.16 (West 1991)) (willful violators fined not more than \$10,000 or imprisoned not more than five years), Mississippi (Miss. Code Ann. § 75-24-61 (1972)) (willful violators fined not more than \$500 or imprisoned not more than six months), and Missouri (Mo. Rev. Stat. § 407.420 (1986)) (willful violation a felony).

[45]. See e.g., California (Cal. Corp. Code § 31005 (West 1992)), Connecticut (Conn. Gen. Stat. § 42-133e(b) (1986)), Illinois (Ill. Comp. Stat. ch. 815, 705/3(a)(1) (West 1992)), Indiana (Ind. Code § 23-2-2.5-1(a)(a) (1991)), Iowa (Iowa Code § 523H.1.3.a.(1)(a) (1992)), Maryland (Md. Code Ann. § 14-201(e)(1)(i) (1992)), Michigan (Mich. Comp. Law § 445.1502(2)(3)(a) (1989)), New York (N.Y. Gen. Bus. Laws § 681(3)(a) (McKinney 1989)), North Dakota (N.D. Cent. Code § 51-19-02.5.a.(1) (1991)), Rhode Island (R.I. Gen.

Laws § 19-28-3(a)(1) (1991)), Virginia (Va. Code Ann. § 13.1-559(b)(1) (Michie 1992)), Washington (Wash. Rev. Code § 19.100.010(4)(a)(i) (West 1991)), and Wisconsin (Wis. Admin. Code § 553.03(4)(a)(1) (1992)).

[46]. *See e.g.*, District of Columbia (D.C. Code § 29-1201(2)(b) (1989)), Hawaii (Haw. Rev. Stat. § 482E-2 (1974)), Minnesota (Minn. Stat. § 80C.01(4)(2) (1991)), Mississippi (Miss. Code Ann. § 75-24-51(6) (1972)), Missouri (Mo. Rev. Stat. § 407.400(1) (1986)), Nebraska (Neb. Rev. Stat. § 87-402(1) (1989)), New Jersey (N.J. Stat. Ann. § 56:10-3(a) (West 1971)), South Dakota (S.D. Codified Laws § 37-5A-1(2) (Michie 1991)), and Wisconsin (Wis. Stat. § 135.02(b) (1984)) (The Wisconsin Fair Dealership Law, a "relationship law," also defines "dealership" in terms of a "community of interest"). *But see* Wisconsin, (Wis. Admin. Code § 553.03(4)(a)(1) (1992) (In contrast, the Wisconsin Franchise Investment Law defines "franchise" in terms of a "marketing plan").

[47]. *See e.g.*, Arkansas Franchise Practices Act, Ark. Code Ann. § 4-72-202 (Michie 1991):

'Franchise' means a written or oral agreement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic within an exclusive or non-exclusive territory, or to sell or distribute goods or services within an exclusive or non-exclusive territory, at wholesale, retail, by lease agreement, or otherwise.

and Delaware Franchise Security Law, Del. Code Ann. tit. 6 § 2551 (1980):

'Franchised distributor' means an individual, partnership, corporation, or unincorporated association with a place of business within the State, and engaged in the business of:

(a) Purchasing or taking on consignment products which bear the trademark or trade name of the manufacturer, producer or publisher for the primary purpose of selling such products to retail outlets; or

(b) Selling in or through retail outlets products which bear the trademark or trade name of no more than [three] manufacturers, producers, publishers, trademark licensors, or trade name licensors; or

(c) Purchasing or taking on consignment, books, magazines, journals, newspapers, or other publications for the primary purpose of selling such publications to retail outlets; or

(d) Operating a service station, filling station, store, garage or other place of business for the sale of motor fuel for delivery into the service tank or tanks of any vehicle propelled by an internal combustion engine.

[48]. *Supra* note 46.

[49]. *See Informal FTC Staff Advisory Opinion to U.S. Marble, Inc.*, [Laws-Rules-Federal-State] Bus. Franchise Guide (CCH) ¶ 6424, at 9592 (Oct. 9, 1980)(emphasis added).

[50]. *See e.g.*, 33 Wash. App. at 883-84.

[51]. *See e.g.*, Brenkman v. Belmont Mktg., Inc., 87 Ill. App. 3d 1060, 1061-62, 410 N.E. 2d 500 (3d Dist. 1980).

[52]. *See e.g.*, 556 F.Supp. at 776.

[53]. *See e.g.*, 798 F.2d. at 1140.

[54]. *See* FTC Trade Regulation Rules, Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. § 436.2 (1986)(emphasis added).

[55]. *See e.g.*, 825 F.2d. at 1289.

[56]. *See e.g.*, 333 N.W.2d. at 784.

[57]. *See e.g.*, 556 F.Supp. at 771.

[58]. *See supra* note 1.

[59]. *See id.*

[60]. *See e.g.*, California (Cal. Corp. Code § 31005(a)(3) (West 1992)), Hawaii (Haw. Rev. Stat. § 482E-2 (1974)), Illinois (Ill. Comp. Stat. ch. 815, 705/3(1)(c) (West 1992)), Indiana (Ind. Code § 23-2-2.5-1(a)(3)(i) (1991)), Iowa (Iowa Code § 523H.1(3a)(1)(b) (1991)), Maryland (Md. Code Ann. § 14-201(g) (1992)), Michigan (Mich. Comp. Law § 445-1502 (2)(3)(e) (1989)) Minnesota (Minn. Stat. § 80C.01 (4)(c) (1991)), New York (N.Y. Gen. Bus. Law § 681(7) (McKinney 1989)), North Dakota (N.D. Cent. Code § 51-19-02(6) (1991)), Rhode Island (R.I. Gen. Laws § 19-28-3(c)(3) (1973)), South Dakota (S.D. Codified Laws § 37-5A-1(3) (Michie 1991)), Virginia (Va. Code Ann. § 13.1-559(b)(3) (Michie 1992)), Washington (Wash. Rev. Code § 19.100.010(4)(a)(iii) (1991), and Wisconsin (Wis. Admin. Code § 553.03 (1992))(emphasis added).

[61]. *See* To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift America, Inc., No. 97-1395, 152 F.3d 658, 1998 U.S. App. LEXIS 18184, at **1-2, (7th Cir. Aug. 6, 1998).

[62]. *Id.*

[63]. The definition of a "franchise fee" is as follows: "any fee or charge that a franchisee is required to pay directly or indirectly for the right to enter into a business or sell, resell, or distribute goods, services or franchises under an agreement" *Id.*

[64]. *See id.*

[65]. *See* 825 F.2d. at 1290.

[66]. *See* 16 C.F.R. § 436 (1986).

[67]. *See* FTC Franchise Disclosure Rule, 16 C.F.R. § 436.2(a)(2) (1986).

[68]. VAR's are value-added resellers.

[69]. On Dec. 24, 1997, the Indiana Securities Commissioner, Bradley W. Skolnik issued Order No. 97-0378AO, "Regarding Franchises Offered on the Internet, but not Sold in Indiana." The Administrative Order can be found on the Internet on Indiana's official state homepage (visited Apr. 10, 1999) <<http://www.state.in.us/sos/security/orpol.html>>.

[70]. *Id.*

[71]. *Id.*

[72]. A copy of the NASAA "Proposed Statement of Policy Regarding Offers of Franchise on the Internet"

and a "Request for Public Comment" on the proposal can be found on the Internet on the NASAA homepage (Request for Public Comment dated Mar. 7, 1998) <<http://www.nasaa.org/bluesky/proposals/IOF1.html>>.

[73]. *Id.*

[74]. *Id.* (emphasis added).

[75]. 16 CFR § 436.1(a)(1986), 16 CFR § 436.2(o) (1986).

[76]. 16 CFR 436.1(a) (1986).

[77]. *Id.*

[78]. 16 CFR § 436.2(g) (198).

[79]. A copy of the Advanced NOPR, along with various responses to it, can be found on the Internet on the FTC homepage (visited Apr. 10, 1999) <<http://www.ftc.gov/bcp/franchise/franrulmkg.htm>>..

[80]. *Id.*

[81]. A copy of the FTC's News Release seeking public comment can be found on the Internet on the FTC homepage (visited Apr. 10, 1999) <<http://www.ftc.gov/opa/1998/9805/greenhorse.htm>>.

[82]. *Id.*

[83]. *Id.*

[84]. *Id.*

[85]. *See* 15 U.S.C.A. § 1127 (West Supp. 1996).

[86]. *See, e.g.,* Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 387 (5th Cir. 1977).

[87]. *See* 15 U.S.C.A. § 1055 (West Supp. 1988), § 1127 (West Supp. 1996); *see e.g.,* McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1239-40 (E.D. Mich. 1978).

[88]. *Id.*