

# **VIVE LA DIFFERENCE? SELECTIVE ENFORCEMENT OF FRANCHISE AGREEMENT TERMS AND SYSTEM STANDARDS**

MARK J. BURZYCH AND EMILY L. MATTHEWS\*

Franchisors typically employ standard contract terms and conditions to establish the nature of their relationships with franchisees. Although franchisors also draft complex operations manuals to ensure conformity in appearance and operation of franchised establishments, they do not always enforce the requirements of their franchise agreements and operations manual strictly and uniformly against all franchisees.

When franchisees are on the receiving end of such selective enforcement, they may assert unlawful discrimination as a defense to a termination action or as a claim or counterclaim for damages. A franchisee may allege that the franchisor's selective enforcement violated federal or state civil rights statutes,<sup>1</sup> federal antitrust statutes, federal or state industry-specific statutes, state relationship laws with antidiscrimination or good cause standards, the implied covenant of good faith and fair dealing, or other common law principles.

This article reviews the various bases for franchisee claims of discriminatory treatment, summarizing the legal concepts and offering some general conclusions about the likely success of different categories of discrimination claims.

## **The Elements of the Analysis**

Although the written agreement is the starting place for judicial analysis, the outcome of franchisee discrimination claims depends largely upon whether there is an applicable relationship statute that expressly prohibits discriminatory treatment or that courts interpret as doing so. Absent such a statute, the analysis rests upon common law, which generally permits disparate treatment among franchisees.

Although there is no federal franchise statute of general applicability, Congress has enacted industry-specific statutes to prohibit franchisors from discriminating among franchisees. If a discrimination issue arises in the petroleum or automotive industries, lawyers should first look to the antidiscrimination provisions of industry-specific federal legislation.<sup>2</sup>

## **Petroleum Marketing Practices Act**

In 1978, Congress enacted the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §§ 2801-2806, seeking "to protect franchisees from arbitrary or discriminatory termination or non renewal of their franchisees."<sup>3</sup> The PMPA addresses three specific concerns: (1) that franchisee

\*Mark J. Burzych is a shareholder and Emily L. Matthews is an associate with Foster, Swift, Collins & Smith, P.C., with offices in Lansing and Farmington Hills, Michigan. The authors appreciate the assistance of Tom Ognisanti and Jenny Upham. This article was originally published in the Franchise Law Journal, Volume 23:2 (2003). © American Bar Association 2003.

independence may be undermined by the use of actual or threatened termination or nonrenewal to compel compliance with franchisor marketing policies; (2) that gross disparity of bargaining power may result in franchise agreements that are or tend to become contracts of adhesion; and (3) that termination or nonrenewal may disrupt the reasonable expectation of the parties that the franchise relationship will be a continuing one.”<sup>4</sup> Given this congressional intent, courts “must grant the PMPA a liberal construction consistent with its overriding purpose to protect franchisees.”<sup>5</sup> The statute “prohibits termination of any franchise agreement or nonrenewal of any franchise relationship except on the basis of specifically enumerated grounds and upon compliance with certain notification requirements.”<sup>6</sup>

However, in adopting the PMPA, Congress struck “an explicit statutory balance between the interest of franchisees in freedom from arbitrary and discriminatory franchise terminations and the interest of franchisors in freedom to transfer motor fuel marketing assets in response to changing marketing conditions.”<sup>7</sup> Thus, “although Congress . . . intended strong protection of the interest of franchisees, . . . in an age of increasing corporate competition, the major petroleum firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions.”<sup>8</sup>

Under the PMPA, when a franchisor sells its interest in the real estate where the franchise is located, the purchaser must offer to the existing franchisee, in good faith, a franchise on terms and conditions not discriminatory to the franchisee as compared to franchises then being offered by the purchaser.<sup>9</sup>

### **Motor Vehicle Franchises**

In 1956, Congress passed the Automobile Dealer Franchise Act (ADFA)<sup>10</sup> to establish a balance of power between automobile manufacturers and dealers.<sup>11</sup> One of the principal evils that the Act was designed to remedy was manufacturers pressuring dealers to accept automobiles, parts, accessories, and supplies that the dealers neither needed nor wanted and that they felt their markets would not absorb.<sup>12</sup>

The ADFA specifically provides a cause of action against an automobile manufacturer that fails to “act in good faith in performing or complying with any of the terms or provisions of the franchise.”<sup>13</sup> The statute defines “good faith” as “the duty to each party to any franchise to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion, or intimidation from the other party.”<sup>14</sup> The ADFA provides that persuasion, urging, or argument shall not be construed as a lack of good faith.<sup>15</sup> To be actionable, conduct must clearly involve “coercion or intimidation” or “threats of coercion or intimidation” of the dealer.<sup>16</sup>

A number of states have enacted complementary motor vehicle franchise acts that prohibit a manufacturer-franchisor from discriminating among franchisees. For example, in Delaware, it is unlawful for a manufacturer to delay or refuse to deliver new motor vehicles within a reasonable time or to discriminate unfairly among new motor vehicle dealers with respect to warranty periods.<sup>17</sup> Vermont and Wyoming have identical language and prohibitions in their statutes.<sup>18</sup> In Georgia, it is unlawful for a franchisor to engage in any predatory practice or discrimination against any dealer.<sup>19</sup> In Nevada, it is an unfair act or practice for any manufacturer to discriminate unfavorably among its dealers.<sup>20</sup> In New Mexico, it is unlawful for a manufacturer to “willfully discriminate, either directly or indirectly, in price between different purchasers of commodities of like grade or quality where the effect of the discrimination may be to lessen substantially competition or tend to create a monopoly or to injure or destroy the business of a competitor.”<sup>21</sup>

Ohio prohibits motor vehicle manufacturers from terminating a franchise agreement except for good cause, which cannot be based on the franchisee's failure to achieve discriminatory performance criteria.<sup>22</sup> In Washington, a manufacturer may not discriminate among franchisees in the price of new vehicles of like kind;<sup>23</sup> the price of accessories;<sup>24</sup> promotion plans, marketing plans, or other schemes that result in different pricing to franchisees;<sup>25</sup> the adoption of a new method or the alteration of an existing method for the allocation, scheduling, or delivery of vehicles, parts, or accessories that is not fair, reasonable, or equitable;<sup>26</sup> or the preferential treatment given to some new motor vehicle dealers over others.<sup>27</sup>

### **State Relationship Laws with Express Antidiscrimination Provisions**

Six states have enacted general franchise statutes that expressly address franchisors' disparate treatment of franchisees.

#### **Arkansas**

Under the Arkansas Franchise Practices Act, a franchisor may not terminate a franchisee without good cause,<sup>28</sup> which the Act defines, among other things, as a failure to comply substantially with the franchisor's nondiscriminatory standards.<sup>29</sup>

The Act also prohibits a franchisor from "refusing to deal with a franchise in a commercially reasonable manner and in good faith."<sup>30</sup> "Good faith" means "honesty in fact in the conduct or transaction concerned."<sup>31</sup> To demonstrate a breach of "good faith," the franchisee must demonstrate that the franchisor was "not honest in fact and that [it] acted with a bad motive."<sup>32</sup>

#### **Hawaii**

Hawaii's Franchise Rights and Prohibitions Act makes it illegal for a franchisor to "discriminate between franchises in charges offered or made for royalties, goods, equipment, rentals, advertising, or in any other business dealing."<sup>33</sup> The statute provides a series of defenses to disparate treatment including regional experimentation, programs designed to make franchises available to less fortunate individuals, and "nonarbitrary discrimination."<sup>34</sup>

In *Lui Ciro, Inc. v. Ciro, Inc.*,<sup>35</sup> the franchisee alleged that the franchisor of jewelry stores in Hawaii made affirmative misrepresentations regarding the franchisor's management, financial condition, and anticipated performance by the franchisee. The U.S. District Court for the District of Hawaii held that the franchisee stated a claim by alleging that the franchisor intentionally discriminated against the plaintiff in supplying inventory.<sup>36</sup> Although the court never decided the ultimate issue as to whether the franchisor's alleged discrimination among franchisees in the supply of inventory violated the Hawaii statute, the allegations were held sufficient to reach a jury. No other Hawaii courts have addressed Hawaii's antidiscrimination statute.

The Hawaii statute also requires the parties to deal with each other in good faith,<sup>37</sup> and the franchisor must have "good cause" to terminate a franchisee. Termination or nonrenewal must be in accordance with the current items and standards established by the franchisor then equally applicable to all franchisees, unless and to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is reasonable, is based on proper and justifiable distinctions considering the purposes of this chapter, and is not arbitrary.<sup>38</sup>

#### **Illinois**

Under the Illinois Franchise Disclosure Act, franchisors may not "unreasonably and materially discriminate between franchisees operating a franchised business located in this State in

charges offered or made for franchise fees, royalties, goods, services, equipment, rentals, or advertising services. . . .”<sup>39</sup> This provision does not apply if the franchises were: (1) granted at different times; (2) related to programs designed to make franchises available to underprivileged or undercapitalized individuals; (3) related to regional experimentation; (4) related to efforts by the franchisees to cure deficiencies in the operation of the business; and (5) treated differently because of reasonable distinctions that are not arbitrary.<sup>40</sup>

In *P&W Supply Co. v. E.I. DuPont de Nemours & Co.*,<sup>41</sup> P&W sued under the Illinois Act, alleging that DuPont unfairly discriminated against it by terminating its franchise agreement without good cause. According to P&W, DuPont terminated the “jobber” agreement because of P&W’s refusal to sign the revised franchise agreement, and DuPont refused to sell a “specific DuPont product” to P&W before terminating the contract.<sup>42</sup>

The court found that P&W failed to state a cause of action for discriminatory treatment because the statute only prohibits a franchisor from discriminating among Illinois franchisees in the “charges offered or made for franchise fees, goods, services, equipment, rentals or advertising services, if such discrimination will cause competitive harm to a franchisee who competes with a franchisee that received the benefit of the discrimination.”<sup>43</sup> The court recognized that the Illinois Act’s antidiscrimination provision prohibited, for example, a fast-food franchisor from selling meat to one franchisee at a set price per pound while selling the same meat to a competitive franchisee for twice as much,<sup>44</sup> but since P&W did not allege any form of price discrimination among competing franchisees, its claim failed.

### Indiana

Indiana’s Deceptive Franchise Practices Act (IDFPA) provides in relevant part that “it is unlawful for any franchisor who has entered into any franchise agreement with a franchisee . . . to engage in any of the following acts and practices in relation to the agreement. . . .(5) Discriminate unfairly among its franchisees.”<sup>45</sup>

In practice, courts have used employment discrimination principles to construe this provision.<sup>46</sup>

In order to establish a prima facie case under this section of the IDFPA, plaintiffs must establish that “as between two or more similarly situated franchisees, and under similar financial and marketing conditions, a franchisor engaged in less favorable treatment toward the [plaintiff] than toward other franchisees. Thus, proof of ‘discrimination’ requires a showing of arbitrary disparate treatment among similarly situated individuals or entities.”<sup>47</sup>

There is considerable case law concerning this provision of the Indiana Act. In *Implement Service, Inc. v. Tecumseh Products Co.*,<sup>48</sup> the U.S. District Court for the Southern District of Indiana held that the plaintiff did not meet the definition of “franchisee,”<sup>49</sup> but nevertheless addressed in dicta whether the plaintiff was the victim of unlawful discrimination. The plaintiff alleged that the defendant illegally discriminated through the allocation of its central warehouse distributors. The court disagreed, explaining that, even if the plaintiff had been a franchisee under the Indiana Act: “whether a plaintiff/franchisee is ‘similarly situated’ to other franchisees will, of course, depend on which factors about the franchisees are compared. The factors compared should be those factors that are relevant to the underlying business decision being made.”<sup>50</sup>

In *Implement Service*, the underlying business decision was based upon geographic considerations, and because the plaintiff’s location was not geographically similar to the locations of other authorized service distributors, the plaintiff could not establish a prima facie case of discriminatory conduct.<sup>51</sup>

In *Wright-Moore Corp. v. Ricoh Corp.*,<sup>52</sup> Ricoh refused to renew its national distributorship agreement with Wright-Moore after a one-year term expired. Wright-Moore claimed that this was unlawful discrimination because there were four national distributors and, although all were terminated, at least one was offered a regional distributorship.<sup>53</sup> The U.S. Court of Appeals for the Seventh Circuit held that this evidence did not support a claim of discrimination, noting that “discrimination among franchisees means that as between two or more similar franchisees, and under similar financial and marketing conditions, a franchisor engaged in less favorable treatment towards the discriminate than towards other franchisees.”<sup>54</sup>

Wright-Moore did not establish that its distributorship was similarly situated to others, and it admitted that it was in fact the only true national distributor; all other “national distributors” operated only in smaller regions of the country. Thus, even under Wright-Moore’s evidence, there was no other similarly situated franchisee. Even if all of the other so-called national distributors were considered to be similarly situated, none of their agreements, in the same status, was renewed. The court concluded, therefore, that there was no discrimination.<sup>55</sup>

In *Canada Dry Corp. v. Nehi Beverage Co.*,<sup>56</sup> Nehi sued Canada Dry for breaches of contract and illegal discrimination in violation of the IDFPFA.<sup>57</sup> Nehi alleged that Canada Dry unfairly discriminated against it by refusing to initiate a “soft drink program” for ginger ale<sup>58</sup> and by terminating the agreement prematurely. At trial, the jury found for Nehi.

Nevertheless, the Seventh Circuit reversed, holding that Nehi had failed to introduce sufficient evidence for a reasonable jury to find even a prima facie case of discrimination. According to the court, discrimination among franchisees means that, as between two or more similarly situated franchisees, and under similar financial and marketing conditions, a franchisor engaged in less favorable treatment toward the plaintiff than toward other franchisees, and proof of “discrimination” requires a showing of arbitrary, disparate treatment among similarly situated individuals or entities.<sup>59</sup>

Nehi introduced no evidence of more favorable treatment of similar bottlers under similar marketing conditions, either as to the soft drink program or as to termination of the franchise agreement. For example, Nehi did not show that it was as qualified to enter the soft drink program as were the eight bottlers offered the program, nor did it demonstrate that it was more qualified than other bottlers that were also not offered the program. With respect to termination, Nehi presented no evidence indicating that any bottler had acted comparably to Nehi, which had a record of many deficiencies. The Seventh Circuit held that, absent an adequate showing of comparability between the alleged deficiencies of Nehi and the deficiencies of other bottlers, it was error to submit Nehi’s discrimination claim to the jury.<sup>60</sup>

Finally, in *Ford Motor Credit Co. v. Garner*,<sup>61</sup> Ford Motor Credit Company (FMCC) sued the defendants-guarantors seeking payment under a guaranty agreement. The defendants counterclaimed, alleging a breach of the implied duty of good faith, fraud, and unfair discrimination in violation of the IDFPFA.

The defendants argued that FMCC unfairly discriminated against them in the enforcement of their guaranty, but the court held that the antidiscrimination provision of the Act was inapplicable because the defendants were not franchisees.<sup>62</sup> This case is important in part because of the court’s dicta. The court said that if the guarantors had been franchisees, it would have had to decide whether FMCC had “discriminated unfairly” against them. The court observed that “although the guarantor’s evidence supported the conclusion that FMCC discriminated against them in enforcing the guaranty, it did not support the conclusion that they were unfairly discriminated against.”<sup>63</sup>

In order to prevail on a claim of illegal discrimination under the IDFPA, therefore, a franchisee must establish that as between (1) two or more similarly situated franchisees, (2) under similar financial and marketing conditions, (3) the franchisor unfairly and arbitrarily discriminated against the franchisee. This is a very difficult standard to meet.

### Washington

The Washington Franchise Investment Protection Act (WFIPA) requires parties to deal with one another in good faith, and prohibits franchisors from “discriminating between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless and to the extent that the franchisor satisfies the burden of proving that any . . . discrimination . . . is reasonable.”<sup>64</sup>

The WFIPA also prohibits a franchisor from “terminating a franchise prior to the expiration of its term except for good cause,”<sup>65</sup> which includes a failure by the franchisee to comply with the franchise agreement and a failure to cure the default after receiving reasonable notice.<sup>66</sup> In addition, violation of the termination and nonrenewal provisions<sup>67</sup> is a violation of the Washington Unfair or Deceptive Practices Act.<sup>68</sup>

In *Armstrong v. Taco Time International, Inc.*,<sup>69</sup> Armstrong contracted with Taco Time for an exclusive franchise with a fifty-mile radius. The agreement also contained Armstrong’s covenant not to compete with Taco Time for the term of the contract and five years after the contract’s termination. Armstrong opened a competitive franchise within that fifty-mile radius and then sued to invalidate the noncompetition covenant. The trial court found the covenant enforceable. It upheld it in full as an in-term covenant, and upheld it, although reduced in duration and geographical scope, as a post-term covenant. The court of appeals affirmed.<sup>70</sup>

Armstrong asserted that enforcement of the covenant would violate the antidiscriminatory provisions of the WFIPA,<sup>71</sup> but the appellate court rejected that argument. The court held that the statute allows discrimination if the franchisor shows that the treatment is nonetheless (1) reasonable, (2) based on the franchises granted at materially different times and is reasonably related to that difference in time or based on other proper and justifiable distinctions considering the purposes of the WFIPA, and (3) not arbitrary.<sup>72</sup> The record demonstrated that the covenants not to compete provided to other franchisees varied in relation to the time they were imposed and therefore were not arbitrary under the Washington statute.<sup>73</sup>

The U.S. District Court for the Western District of Washington followed *Armstrong* in *Precision Enterprises, Inc. v. Precision Tune, Inc.*<sup>74</sup> holding that selective enforcement was not a defense in that covenant-not-to-compete case: “The decision to sue a franchisee with multiple franchise while foregoing suit against a franchisee with a single franchise under the facts of this case is not arbitrary and does not amount to discrimination under R.C.W.A. § 19.100.180(2)(c).”<sup>75</sup>

### Wisconsin

The Wisconsin Fair Dealership Act (WFDA) prohibits a franchisor from terminating or failing to renew a franchise agreement without “good cause,”<sup>76</sup> defined as “failure by a dealer to comply substantially with essential and reasonable requirements imposed upon the dealer by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with the requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement.”<sup>77</sup>

The Act provides that the requirements imposed by the franchisor “must not be discriminatory as compared with requirements imposed on other similarly situated [franchisees]

either by their terms or in the manner of enforcement”<sup>78</sup> and authorizes a franchisee to bring a civil action against its franchisor for damages, costs, reasonable attorney fees, and injunctive relief.<sup>79</sup>

In *Morley-Murphy Co. v. Zenith Electronics Corp.*,<sup>80</sup> Zenith failed to renew a fifty-year-old distributorship agreement with Morley-Murphy as part of its nationwide strategy to shift from independent distributors to direct marketing. The WFDA imposes on the franchisor the burden of establishing good cause, and, in *Morley-Murphy*, the court declared that a manufacturer’s economic circumstances may constitute good cause to alter its method of doing business with its dealers, but that the changes must be essential, reasonable, and nondiscriminatory. The fact that the franchisor is losing substantial amounts of money in the relationship may constitute good cause for changes in the contract. To justify its proposed changes, the franchisor must show: (1) an objectively ascertainable need for change, (2) a proportionate response to that need, and (3) nondiscriminatory action.<sup>81</sup> The Seventh Circuit remanded the case to give Zenith the opportunity to demonstrate that it had good cause to terminate the agreement.<sup>82</sup>

In *Deutschland Enterprises v. Burger King Corp.*,<sup>83</sup> Burger King notified Deutschland that its franchise would be terminated because Deutschland had violated its in-term covenant not to compete by also owning several Hardee’s franchises. Deutschland contended that the contract provision violated the WFDA.<sup>84</sup> The franchise agreement prohibited the franchisee from engaging in a restaurant or prepared food business that was the same or similar to the business of Burger King during the term of the agreement. Deutschland argued that the clause was unenforceable because Burger King had not enforced similar provisions against other franchisees, including Horn & Hardart and Marriott Corp.

The court held that Deutschland could not show that it was a victim of discriminatory treatment because it was not “similarly situated” to Horn & Hardart and Marriott, two large, publicly held corporations, and Burger King could not reasonably have expected those franchisees to devote their full time and attention to the operation of Burger King franchises.<sup>85</sup>

Furthermore, Deutschland also could not show that it was unfairly treated in comparison with Marriott or Horn & Hardart. Marriott had sold its competing restaurant chain and Horn & Hardart had sold certain Burger King franchises or otherwise attempted to divest itself of Burger King franchises.<sup>86</sup>

In *ReMax v. Cook*,<sup>87</sup> ReMax alleged that Patricia Cook sold real estate purporting to be a ReMax franchisee after her franchise was terminated. Cook counterclaimed that the termination violated the WFDA. She asserted that ReMax had discriminated against her by requiring her to employ a certain number of sales associates. The court noted that the 1993 and 1999 franchise agreements contained the identical term. Accordingly, the requirement in the 2000 agreement was not even a contractual change, let alone a discriminatory one.<sup>88</sup>

In *Tiesling Corp. v. White Hen Pantry*,<sup>89</sup> White Hen sought to terminate Tiesling’s franchise after it refused to operate its White Hen store, as the contract required, twenty-four hours a day. Tiesling alleged that White Hen did not have good cause to terminate its franchise because the requirement was discriminatory in violation of the WFDA.<sup>90</sup> The court rejected that claim, finding that the requirement applied to all White Hen Pantry stores in the region.<sup>91</sup>

In *F.R.I.C. Business Facilitators Corp., Inc. v. Werve*,<sup>92</sup> Werve and McDonald’s entered a three-year franchise agreement under which McDonald’s owned the land, building, furniture, fixtures, and equipment of the franchise. At the end of the initial three-year term, McDonald’s gave Werve notice, before an eviction action, that the franchise would terminate in ninety days unless Werve exercised the option to buy the furniture, fixtures, and equipment. Werve declined to exercise the option.

The court found that Werve's decision gave McDonald's good cause to terminate if the option requirement was essential and not discriminatory as compared with requirements imposed on similarly situated franchisees.<sup>93</sup> For purposes of this discrimination analysis, it appears that the contract expiring on a definitive date would certainly not be discriminatory as compared with other requirements imposed on similarly situated franchisees. However, whether exercise of the option to purchase the furniture, fixtures, and equipment was required of other franchisees is an issue that, in this case, deserved closer attention.<sup>94</sup>

In *L-O Distributors, Inc. v. Speed Queen Co.*,<sup>95</sup> a dealer accused its distributor of discriminatory termination of the dealership, contrary to the Wisconsin statutory definition of good cause. The Minnesota federal court disagreed because the distributor had a clear policy of termination when a dealer failed to increase its market share. Since all dealers were required to increase market share and the plaintiff had failed to do so, the court held that there was good cause to terminate.<sup>96</sup>

Similarly, in *Open Pantry Food Marts of Wisconsin v. Howell*,<sup>97</sup> a Wisconsin circuit court upheld the termination of a franchisee whose net worth had dramatically decreased over a two-year period and was considerably lower than that of twenty-three other franchisees that also had negative net worths but had not been terminated. Although all of these franchisees were in violation of the franchisee agreement's net worth clause, the court relied on the difference in the degree of noncompliance in rejecting the franchisee's claim of discrimination.<sup>98</sup> Notably, other franchisees being terminated at the same time were in better financial condition than nineteen of the twenty-three negative net worth franchisees. As to these terminated franchisees, the court held that the franchisor had no "good cause" to terminate and engaged in discriminatory treatment in violation of the WFDA.<sup>99</sup>

### **Relationship Laws with No Antidiscriminatory Provisions**

As noted above, other states have enacted relationship laws that generally provide a definition of "good cause" for termination or nonrenewal, without including express antidiscrimination provisions. Occasionally, issues of discrimination can arise as the franchisee attempts to show that allegedly discriminatory treatment was not good cause to terminate. This section of the article surveys the case law addressing discrimination claims under these statutes.

#### **California**

There is no specific antidiscrimination provision in the California Franchise Relations Act (CFRA), but section 20037 authorizes a franchisee to sue under any other law.<sup>100</sup> Thus, franchisees may seek recourse for disparate treatment under other state and federal laws.

Section 20020 of the CFRA provides in relevant part that: "Except as otherwise provided by this chapter, no franchisor may terminate a franchise prior to the expiration of its term, except for good cause. Good cause shall include, but not be limited to, the failure of the franchisee to comply with any lawful requirement of the franchise agreement after being given notice thereof and a reasonable opportunity, which in no event need be more than 30 days, to cure the failure."<sup>101</sup>

Immediate termination is nonetheless allowed if, for example: (1) the franchisee is declared bankrupt; (2) the franchisee abandons the franchise by failing to operate the business for five consecutive days when required to be open under the franchise agreement; (3) the franchisor and franchisee agree in writing to terminate the franchise; (4) the franchisee makes any material misrepresentation as to the acquisition of the franchised business or the franchisee engages in conduct that damages the franchisor's system; (5) the franchisee fails to comply with any

applicable federal, state, or local laws or regulations; (6) the franchisee engages in recurrent noncompliance; (7) a government official seizes, takes over, or forecloses the franchised business or business premises of the franchise; (8) the franchisee is convicted of a felony or any other criminal misconduct; (9) the franchisee fails to pay any franchise fees or other amounts due to the franchisor; or (10) the franchisor makes a reasonable determination that continued operation of the franchise by the franchisee will result in an imminent danger to public health or safety.<sup>102</sup>

The plaintiff dealer in *Burke v. General Motors Corp.*<sup>103</sup> proposed a purchaser for its dealership, but GM refused to approve the sale because it had a policy of recommending only one franchise candidate at a time and had already begun negotiation with a potential minority franchisee. Ultimately, the minority candidate did not purchase the dealership and Burke was forced to go out of business. Burke claimed that GM's refusal to approve the proposed sale to a nonminority purchaser was discriminatory. The court disagreed and found that since GM's policy of considering only one franchisee candidate at a time applied to all dealers, the policy was not discriminatory.<sup>104</sup>

### **Connecticut**

Under Connecticut law, "no franchisor shall directly, or through any officer, agent or employee, terminate, cancel, or fail to renew a franchise, except for good cause."<sup>105</sup> The Connecticut Franchise Act (CFA) defines "good cause," as those acts that "include, but [are] not limited to the franchisee's refusal or failure to comply substantially with any material and reasonable obligation of the franchise agreement."<sup>106</sup>

In *In the Matter of Doctors' Associates, Inc. v. O'Neill*,<sup>107</sup> Subway terminated the development agreement of a development agent because the agent had failed to meet his development schedule.<sup>108</sup> The arbitrator found that the evidence was clear that the development agent never met his development schedule, which constituted a material breach of the development agreement sufficient for the franchisor to terminate the agent.<sup>109</sup> The arbitrator flatly rejected the development agent's attempts to avoid the consequences of its failure to meet the development schedule under many theories, including allegations of waiver with respect to enforcement of the development obligations in other circumstances, estoppel, noncooperation, and violations of the CFA and the Connecticut Unfair Trade Practices Act.<sup>110</sup> The arbitrator found that the Connecticut statutes, if they applied, did not provide a defense to the development agent's breach of the agreement.<sup>111</sup>

### **Michigan**

Michigan regulates franchise relationships under the Michigan Franchise Investment Law (MFIL), but the statute does not expressly address disparate treatment in termination.<sup>112</sup> However, section 27 of the MFIL enumerates certain franchise agreement provisions that Michigan deems void and unenforceable. For example, Section 445.1527(c) invalidates: "a provision that permits a franchisor to terminate a franchise prior to the expiration of its term except for good cause. Good cause shall include the failure of the franchisee to comply with any lawful provision of the franchise agreement and to cure such failure after being given written notice thereof and a reasonable opportunity, which in no event need be more than 30 days, to cure such failure."<sup>113</sup>

In *Tractor and Farm Supply, Inc. v. Ford New Holland Inc.*,<sup>114</sup> the plaintiff entered a written dealership agreement with defendant Ford New Holland, Inc., that provided for a three-year extension unless either party gave six months' notice of an intention not to renew. The contract also

provided that either party could elect, without cause, not to renew. After the three-year term, Ford decided not to renew the agreement and gave the plaintiff notice.

The plaintiff alleged that it consistently met Ford's sales and performance requirements, and claimed that Ford's decision not to renew was motivated by animosity toward the plaintiff's son and a desire for consolidated dealerships in the plaintiff's trade area. The Kentucky federal court held that the MFIL requires a legitimate, nondiscriminatory reason for nonrenewal of a franchise agreement and that all similarly situated franchisees must be treated similarly.<sup>115</sup> The plaintiff's evidence was held sufficient to create a material issue of fact as to whether the nonrenewal was unlawfully discriminatory.<sup>116</sup>

The U.S. Court of Appeals for the Sixth Circuit addressed a franchisee's discrimination claim in *General Aviation v. Cessna Aircraft Co.*<sup>117</sup> General Aviation entered a series of one-year franchise agreements allowing it to sell and service Cessna aircraft. Each agreement was renewable at the option of the parties. General Aviation claimed that Cessna discriminated against it in violation of the MFIL<sup>118</sup> when it decided not to renew. Although the MFIL does not contain a good cause requirement for nonrenewal, the Sixth Circuit read that requirement into the statute. Thus, whenever a franchisor renews some franchisees and not others, the disparate treatment must meet a good cause standard.<sup>119</sup> Cessna could have treated General Aviation differently from other franchisees with expired contracts if it had provided legitimate reasons for the treatment, but the court found insufficient grounds for nonrenewal when Cessna simply asserted that it "needed to cut back on the size of its operation by eliminating one dealer without any change in its policies regarding other dealers."<sup>120</sup>

### Minnesota

Under Minnesota law, "no person, whether by means of a term or condition of a franchise or otherwise, shall engage in any 'unfair and inequitable' practice."<sup>121</sup> At least one court has interpreted the provision to mean that a franchisor may not discriminate among franchisees.<sup>122</sup> In Minnesota, a franchisor also may not terminate a franchise except for "good cause,"<sup>123</sup> which is defined "as a failure by the franchisee to substantially comply with the material and reasonable franchise requirements imposed by the franchisor, including, but not limited to" bankruptcy, assignment for the benefit of creditors, voluntary abandonment, criminal conviction, or materially impairing the goodwill associated with the franchisor's trademark.<sup>124</sup>

In *Novus de Quebec v. Novus Franchising, Inc.*,<sup>125</sup> a Minnesota federal court rejected the franchisee's selective enforcement defense in a case involving an unsuccessful challenge to termination of a franchise agreement. The court reasoned that the franchisor's forbearance toward alleged breaches of certain contract requirements by other franchisees, but not by the plaintiff, was justified because the other franchisees' breaches were of a "lesser magnitude" than the plaintiff's breach.<sup>126</sup>

In *Basco, Inc. v. Buth-Na-Bodhaige*,<sup>127</sup> however, a franchisee sued its franchisor alleging, among other things, violations of the Minnesota statute<sup>128</sup> by discriminating between franchisees and by unreasonably withholding consent for transfer of the franchise. Basco wanted to sell its franchise, and, when The Body Shop refused to consent, Basco sued. At trial, Basco presented the testimony of a certified public accountant, who compared the franchise application of the proposed buyer for the franchise to the applications of fourteen franchisees that the franchisor had approved. According to the accountant, the prospective buyer was stronger financially than the majority of these accepted applicants. The record also revealed that Basco's alleged lack of retail experience and inability to work in the store full time (items cited in support of the refusal to approve the

transfer to the prospective buyer) had not prevented The Body Shop from approving other applicants.<sup>129</sup> On these facts, the court held that there was sufficient evidence for a jury to determine whether The Body Shop had unreasonably withheld its consent to the transfer or had otherwise discriminated against Basco, and affirmed a verdict in favor of Basco.<sup>130</sup>

No other reported Minnesota decisions have addressed Minnesota's antidiscrimination provisions.

### **Other States**

In several other states,<sup>131</sup> state relationship laws exist that contain "good cause" requirements for termination or prohibit "unfair" treatment of franchisees, but do not contain express antidiscrimination provisions. Generally, courts have not interpreted these relationship laws in a fashion that includes discrimination in the scope of the relationship law. Lawyers should be aware of these states' relationship laws, however, because a court may interpret these statutes in a manner that includes discrimination within the scope of the relationship law in a selective enforcement action, as courts in other states have done.<sup>132</sup>

### **Common Law Discrimination Claims**

In addition to state and federal statutes, courts also consider common law challenges to franchisors' allegedly discriminatory treatment of franchisees.

Many courts have ruled that disparate treatment is not a defense to termination for breach of contract. The classic statement of this rule came (not surprisingly) from Chief Judge Posner of the U.S. Court of Appeals for the Seventh Circuit. In *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies*,<sup>133</sup> the court considered the termination of a franchise agreement for what the court concluded were a number of material breaches by the franchisee.<sup>134</sup> The court held that, although the franchisor may have treated other franchisees more leniently, disparate treatment was no defense.<sup>135</sup> In Judge Posner's memorable formulation "the fact that the Cookie Company may . . . have treated other franchisees more leniently is no more a defense to a breach of contract than laxity in enforcing the speed limit is a defense to a speeding ticket."<sup>136</sup>

The Eleventh Circuit adopted the same reasoning in *McDonald's Corp. v. Robertson*. There, the franchisee alleged that McDonald's wanted to make a greater profit by moving the location of the restaurant, and that when the franchisee refused, McDonald's used claims of food safety deficiencies as an excuse to terminate the franchise agreement. The Robertson franchisee did not specifically argue that McDonald's treated other franchisees differently; rather, the franchisee urged that McDonald's selectively enforced food safety standards were a mere pretext for terminating the agreement.<sup>137</sup>

The *Robertson* court cited *Original Great American Chocolate Chip Cookie Co.* for the proposition that disparate treatment is not a defense to a breach-of-contract action even where the franchisor may have an ulterior motive for terminating the franchise agreement.<sup>138</sup> The Eleventh Circuit held that termination is justified as long as there is a material breach of the agreement: "We find that the Robertsons' failure to comply with McDonald's QSC [quality, safety, and cleanliness standards] and food safety standards constituted a material breach of the franchise agreement sufficient to justify termination, and *thus, it does not matter whether McDonald's also possessed an ulterior, improper motive for terminating the Robertsons' franchise agreement.*"<sup>139</sup>

The court further explained that "[a] franchisor's right to terminate a franchisee exists independently of any claims the franchisee might have against the franchisor. The franchisor has the power to terminate the relationship where the terms of the franchise agreement are violated."<sup>140</sup>

In a more recent decision, the U.S. District Court for the Northern District of Illinois followed *Original Great American Chocolate Chip Cookie Co.* and *Robertson*. In *Dunkin' Donuts, Inc. v. Donuts, Inc.*,<sup>141</sup> the franchisee had fallen behind on payments due under the agreement.<sup>142</sup> In response, the franchisor sent notices of default and notices to cure, but ultimately sought to terminate the relationship for breach of contract.<sup>143</sup> Acknowledging his deficiencies in paying franchise fees, the franchisee asserted a number of affirmative defenses, including that any material breach was due to Dunkin' Donuts' bad faith actions<sup>144</sup> in three respects: first, that Dunkin' Donuts targeted him for "franchisee activism" by classifying him as a "C" franchise and blocking his attempt to open another franchise;<sup>145</sup> second, that Dunkin' Donuts failed to support the Branded Products Program, causing the franchisee heavy financial losses;<sup>146</sup> and third, that Dunkin' Donuts failed to maintain the leased premises. The franchisee argued that, as a result, he was prevented or hindered from complying with the agreement and should not be forced to comply fully with its terms.<sup>147</sup>

The court examined the continued performance under contract after a material breach as follows: "A material breach does not automatically and *ipso facto* end a contract. It merely gives the injured party the right to end the agreement; the injured party can . . . [choose] between canceling the contract and continuing it. If he decides to close the contract and so conducts himself, both parties are relieved of their further obligations and the injured party is entitled to damages to the end of the contract term. (To put him in the position he would have occupied if the contract had been completed.) If he elects instead to continue the contract, the obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach."<sup>148</sup>

The *Dunkin' Donuts* court considered whether the franchisor had sufficient grounds to terminate the agreement, and, echoing *Robertson*, held that "it does not matter whether [plaintiff] also possessed an ulterior, improper motive for terminating the [defendant's] franchise agreement."<sup>149</sup>

The court acknowledged that, in the franchisor-franchisee relationship, a franchisee might prevail if it could demonstrate sufficient bad faith on the part of the franchisor.<sup>150</sup> In this case, however, the court concluded that the franchisee could not show that termination was based on any pretext, and upheld Dunkin' Donuts' termination of the franchise agreement.

In *Bonanza International, Inc. v. Restaurant Management Consultants, Inc.*,<sup>151</sup> the U.S. District Court for the Eastern District of Louisiana approached the question of termination from an altogether different angle.<sup>152</sup> That case addressed whether the franchisor had dealt with the franchisee in a manner consistent with the covenant of good faith and fair dealing. After the franchisor terminated the agreement for failing to remit timely payments and failing to adhere to standards of sanitation and cleanliness, the franchisee alleged that the franchisor had breached the covenant of good faith and fair dealing by selectively enforcing the default and termination provisions of the agreement and that the franchisor intentionally failed to provide a reasonable amount of training and assistance.<sup>153</sup>

The court cited the hornbook rule that, in every agreement, the parties have an implicit covenant of good faith, requiring them to treat the other party fairly and not "hinder" or "prevent" the other party from performing under the contract. More important, however, the court also concluded that, whether the franchisor treated other franchisees differently had no bearing on whether the franchisor had acted in good faith and dealt fairly with the aggrieved franchisee under its particular contract.<sup>154</sup> The court explained that "regardless of the relevancy or irrelevancy of Bonanza's dealings with third parties, any evidence of good faith and fair dealing cannot be used to override express provisions of the written contract."<sup>155</sup>

Once again, a material breach of the franchise agreement was held sufficient to terminate the contract without regard to how the franchisor may or may not have dealt with other franchisees.

In *Williston Farm Equipment, Inc. v. Steiger Tractor, Inc.*,<sup>156</sup> a farm equipment dealer alleged that its supplier had terminated its dealership with the ulterior motive of offering a dealership to someone else. The plaintiff claimed that the termination was arbitrary and discriminatory because the supplier imposed stricter financial conditions on it than on other dealers. The termination, argued the dealer, was without good cause and in bad faith. The appellate court affirmed the trial court's exclusion of evidence regarding the manufacturer's dealings with other distributors because the marginal relevance of that evidence was substantially outweighed by unfair prejudice, confusion of issues, undue waste or delay, and needless presentation of cumulative evidence.<sup>157</sup>

Lest the reader think that no selective enforcement claim has ever succeeded, *Phillips v. Crown Central Petroleum Corp.* proves otherwise.<sup>158</sup> Two of the successful dealer plaintiffs in an antitrust suit<sup>159</sup> later violated their dealer agreements, one by failing to sell his monthly quota of gasoline, and another by submitting several checks that were returned for insufficient funds. Crown terminated their dealer agreements again. After reviewing the evidence of Crown's relationship with its other Maryland dealers, the Maryland federal court held that, where there was evidence that Crown had not terminated other dealers that had committed the same (or worse) violations, the inference was that Crown had terminated the plaintiffs in retaliation for successful prosecution of their antitrust claims, and the court therefore blocked the terminations.<sup>160</sup>

On rare occasions, a party defending against enforcement of a post-term covenant not to compete can present "selective enforcement" evidence, especially in a preliminary injunction proceeding. Proof of the defense of waiver is the customary rationale for admitting of the evidence. *Surgidev Corp. v. Eye Technology, Inc.*<sup>161</sup> illustrates the unusual noncompete case in which evidence of "selective enforcement" was admitted. There, the basis was waiver and equitable estoppel: the plaintiff had countenanced violations of its covenants not to compete; it had never sued anyone except the defendant; and the defendant was told that he would be free to work with a competitor.<sup>162</sup> The court concluded that "under the circumstances, it would be inequitable to permit plaintiff to now rely on a non compete agreement which it has so blithely ignored in the past."<sup>163</sup>

With respect to standards enforcement, in *Kilday v. Econo-Travel Motor Hotel Corp.*,<sup>164</sup> the Tennessee federal court, acting in the absence of a franchise relationship law, heard the discrimination claim of the franchisee who asserted that the franchisor breached its franchise agreement by requiring the franchisee to comply with standards of quality, maintenance, and cleanliness specified in the franchise agreement, but not required of other franchises. The court dismissed this part of the franchisee's case because the standards imposed upon the franchisee did not "appear to obligate the defendant to require all its franchisees to conform to the standards required of the plaintiffs."<sup>165</sup>

## Conclusion

In determining the outcome in selective enforcement cases, courts consider the terms of the contract, applicable state statutory law, and the common law. The outcome of these cases depends largely upon whether the jurisdiction has a statute that prohibits disparate treatment and/or sets forth the requirements for termination. In states with antidiscrimination relationship laws, it is logical that franchisees are more likely to recover, since the statutes generally prohibit disparate treatment. However, as summarized above, even in these states, there are many defenses available for a franchisor to justify disparate treatment. Further, in states that have relationship laws without

antidiscrimination provisions, and states that have not adopted relationship statutes, discrimination cases will be analyzed under the common law, affording the franchisor many defenses to disparate treatment claims.

In making their business decisions to enforce the provisions of the franchise agreements, even selectively, franchisors argue that the failure by the court to enforce the contractual provision will “send a message” to other franchisees, thereby threatening to “ruin” the system. Indeed, this argument often finds a receptive ear, as in *ATL International, Inc. v. Baradar*.<sup>166</sup> There, the Maryland federal court granted a preliminary injunction enforcing the post-term covenant not to compete: “I have no doubt that the [franchisor] would suffer irreparable harm if I were to deny the preliminary injunction. . . . I think it is very realistic to expect that if a franchisee simply were to stop paying fees or stop other things that were due and then, after having operated under the franchise name for several years, were simply to then say okay, I’m breaking away, I’ll stop using various things that I’ve received as a franchisee and will go out on my own, that would be a clear signal that other franchises could do the same thing.”<sup>167</sup>

*ATL* and similar cases suggest that, if the court’s failure to enforce the post-term covenant really is a “clear signal” to other franchisees, selective enforcement should be a more potent weapon for franchisees than it has been to date. Franchisors require the ability to make judgments concerning when to expend the resources to enforce provisions. Nevertheless, as the issue of selective enforcement is litigated further, particularly in states with relationship statutes that include antidiscrimination provisions, courts may unwisely add teeth to the selective enforcement defense.

#### Endnotes

1. This article will not address any civil rights issues, *but see* Robert W. Emerson, *Franchise Terminations: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates*, 35 AM. BUS. L.J. 559 (1998).
2. This article does not focus on the industry-specific antidiscriminatory legislation but rather examines state relationship laws with and without antidiscrimination provisions.
3. *Massey v. Exxon Corp.*, 942 F.2d 340, 342 (6th Cir. 1991); *see Mobil Oil Corp. v. Va. Gas. Marketers and Auto. Repair*, 34 F.3d 220 (4th Cir. 1994).
4. *Massey*, 942 F.2d at 343.
5. *Id.*
6. *Id.*
7. *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989).
8. *Id.*
9. 15 U.S.C. § 2802 (b)(2)(E)(iii)(II) (2003).
10. *Id.* §§ 1221–1225 (2003).
11. *Swartz v. Chrysler Motors*, 297 F. Supp. 834, 839 (D.N.J. 1969).

12. *Id.*
13. 15 U.S.C. § 1222 (2003).
14. *Id.* § 1221(e) (2003).
15. *Id.*
16. *Zarbock v. Chrysler Corp.*, 235 F. Supp. 130, 133 (D. Colo. 1964).
17. DEL. CODE ANN. tit. 6, § 4913(b)(1)(8).
18. VT. STAT. ANN., tit. 9, § 4097(1), (9); WYO. STAT. ANN. § 31–16–108, (c)(i)(viii) (1977).
19. GA. CODE ANN. § 10–1–662(a)(9).
20. NEV. REV. STAT. § 482.36385(2).
21. N.M. STAT. ANN. § 57–16–1 (1978). This is a state antiprice discrimination statute, the mirror image of the federal Robinson-Patman Act, 15 U.S.C. § 13(a)-(f). Many states have enacted such price discrimination prohibitions.
22. OHIO REV. CODE § 4517.55(B)(5).
23. WASH. REV. CODE ANN. § 46.96.185(1)(a).
24. *Id.* § 46.96.185(1)(b).
25. *Id.* § 46.96.185(1)(c).
26. *Id.* § 46.96.185(1)(d).
27. *Id.* § 46.96.185(1)(e).
28. ARK. CODE ANN. § 4–72–204(1).
29. *Id.* § 4–72–204(2).
30. *Id.* § 4–72–206(1).
31. *Id.* § 4–72–204(8).
32. *S. Implement Co. v. Deere & Co.*, 122 F.3d 503 (8th Cir. 1997), citing *JRT, Inc. v. TCBY Sys., Inc.*, 52 F.3d 734, 736 (8th Cir. 1995).

33. HAW. REV. STAT. ANN. § 482E-6(2)(C).

34. *Id.* The authors were unable to uncover any legislative history as to what the state legislature meant by the term “nonarbitrary discrimination.”

35. 895 F. Supp. 1365 (D. Haw. 1992).

36. *Id.* at 1388.

37. HAW. REV. STAT. ANN. § 482E-6(1).

38. *Id.* § 482 E-6(1)(H).

39. 815 ILL. COMP. STAT. § 705/18.

40. *Id.*

41. 747 F. Supp. 1262 (N.D. Ill. 1990).

42. *Id.* at 1264.

43. *Id.*

44. *Id.*

45. IND. CODE ANN. § 23–2-2.7–2(5).

46. *Kinnard v. Shoney’s Inc.*, 100 F. Supp. 2d 781, 795 (D. Tenn. 2000), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

47. *Id.*, quoting *Canada Dry Corp. v. Nehi Beverage Co., Inc.*, 723 F.2d 512, 521 (7th Cir. 1983) (internal addition in original).

48. 726 F. Supp. 1171 (S.D. Ind. 1989).

49. *Id.* at 1181.

50. *Id.*

51. *Id.* The court reached this analysis even though it found that plaintiff was not a franchisee under the Act and the analysis was unnecessary.

52. 908 F.2d 128 (7th Cir. 1990).

53. *Id.* at 130.

54. *Id.* at 139.

55. *Id.*

56. 723 F.2d 512 (7th Cir. 1983).

57. IND. CODE ANN. § 23–2-2.7–1; *Nehi*, 723 F. 2d at 514.

58. Ginger ale was used as a mixer with alcoholic beverages but *Nehi* sought to market it as a “soft drink.” *Nehi* was never allowed to market ginger ale as a soft drink under a “soft drink program” for various reasons. *See Nehi*, 723 F.2d at 519–20.

59. *Id.* at 522.

60. *Id.*

61. 688 F. Supp. 435 (N.D. Ind. 1988).

62. *Id.*

63. *Id.* at 445; *see also* *Anderson v. Indianapolis Ind. Aamco Dealers Advertising Pool*, 678 N.E.2d 832 (Ind. Ct. App. 1997) (any claim against a franchisor under the Indiana Deceptive Franchise Practices Act’s prohibition against “discriminating unfairly among its franchisees” must be brought within the Act’s two-year statute of limitations).

64. WASH. REV. CODE ANN. § 19.100.180(1), (2)(c).

65. *Id.* § 19.100.180(2)(j).

66. *Id.*

67. *Id.* § 19.100.180.

68. *Id.* § 19.100.190(1).

69. 635 P.2d 1114 (Wash. Ct. App. 1981).

70. *Id.* at 1120.

71. WASH. REV. CODE ANN. § 19.100.

72. *Armstrong*, 635 P.2d at 1120.

73. *Id.*

74. *Bus. Franchise Guide* (CCH) P10,472 (W.D. Wash. 1993).

75. *Id.* at 25,700. *See also* Creel Enters., Ltd. v. Gatti's, Inc., 933 F.2d 1022 [\*119] (11th Cir. 1991) (franchisor's failure to enforce standards against other marginal franchisees did not constitute breach of contract, but instead was a statement of present intent to waive those standards).

76. WIS. STAT. § 135.03.

77. *Id.* § 135.02(4)(a).

78. *Id.*

79. *Id.* § 135.06.

80. 142 F.3d 373 (7th Cir. 1998).

81. *Id.*

82. *Id.*

83. 957 F.2d 449 (7th Cir. 1992).

84. WIS. STAT. § 135.01-.07.

85. *Deutschland*, 957 F.2d at 453.

86. *Id.*

87. 160 F. Supp. 2d 1004 (E.D. Wis. 2001).

88. *Id.* at 1009.

89. 361 N.W.2d 311 (1984).

90. WIS. STAT. § 135.02(6).

91. *Tiesling Corp.*, 361 N.W.2d at 311.

92. 359 N.W.2d 181 (Wis. Ct. App. 1984) (unpublished).

93. *Id.* Although the issue presented to the Wisconsin Court of Appeals dealt with whether the Wisconsin Fair Dealership Act should be applied to franchise agreements that specify a definitive termination date (which the court found it did), the discussion of the discriminatory treatment is interesting in that a franchisor must provide a notice pursuant to the terms of the Wisconsin Fair Dealership Act even though there was a definitive termination date. Thus, even though the franchise agreement contained a definite termination date, McDonald's was required to comply

with the Wisconsin Fair Dealership Act termination notice provisions under section 135.04 by providing the franchisee notice at least ninety days before the termination date.

94. *Id.*

95. 611 F. Supp. 1569 (D. Minn. 1985).

96. *Id.* at 1581.

97. Bus. Franchise Guide (CCH) P8072 (Wis. Cir. Ct. 1983).

98. *Id.* at 14,008.

99. *Id.* at 14,009.

100. CAL. BUS. & PROF. CODE § 20037.

101. *Id.* § 20020.

102. *Id.* § 20021.

103. 180 Cal. Rptr. 537 (Cal. Ct. App. 1982).

104. *Id.* at 540.

105. CONN. GEN. STAT. § 42-133(f)(a).

106. *Id.*

107. Bus. Franchise Guide (CCH) P12,098 (2001).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. MICH. COMP. LAWS § 445.1501-.1546.

113. *Id.* § 445.1527(c).

114. 898 F. Supp. 1198 (W.D. Ky. 1995).

115. *Id.* at 1205, relying upon MICH. COMP. LAWS § 445.1527.

116. *Id.*
117. 13 F.3d 178 (6th Cir. 1993).
118. MICH. COMP. LAWS § 445.1527.
119. *Gen. Aviation*, 13 F.3d at 182.
120. *Id.* at 183.
121. MINN. STAT. ANN. § 80C.14(1).
122. *Basco, Inc. v. Buth-Na-Bodhaige*, 198 F.2d 1053 (8th Cir. 1999).
123. MINN. STAT. ANN. § 80C.14(3)(b).
124. *Id.*
125. *Bus. Franchise Guide (CCH) P10,823 (D. Minn. 1995).*
126. *Id.* at 22,625.
127. 198 F.2d 1053 (8th Cir. 1999).
128. The case cites to no specific Minnesota statute, but one must conclude that it is MINN. STAT. ANN. § 80C.14(3)(b).
129. *Basco, Inc.*, 198 F.2d at 1058.
130. *Id.*
131. *I.e.*, Delaware, Iowa, Mississippi, Missouri, Nebraska, New Jersey, South Dakota, and Virginia.
132. *See* 6 DEL. CODE ANN. §§ 2551–2556; IOWA CODE § 523H.1-H.17; MISS. CODE ANN. § 75–24–51 through § 75–24–63; MO. REV. STAT. § 407.401 through § 407.420; NEB. REV. STAT. § 87–401 through § 86–414; N.J. STAT. ANN. § 56:10–1 through § 56:10–29; S.D. CODIFIED LAWS § 37–5A-1 through § 37–5A-87; VA. CODE ANN. § 13.1–557 through § 13.1–574.
133. 970 F.2d 273 (7th Cir. 1992).
134. *Id.* at 278.
135. *Id.*

136. *Id.* at 279.

137. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1309 (11th Cir. 1998).

138. *Id.*

139. *Id.* (emphasis added).

140. *Id.* (emphasis added).

141. No. 99-CV-1141, 2000 WL 1808517 (N.D. Ill. Dec. 6, 2000).

142. *Id.* at \*2.

143. *Id.* at \*7.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*, quoting *Dunkin' Donuts of Am., Inc. v. Minerva, Inc.*, 956 F.2d 1566, 1571 (11th Cir. 1992) (additional citations omitted).

149. *Id.*, quoting *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1309 (11th Cir. 1998), citing *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies*, 970 F.2d 273, 279 (7th Cir. 1992).

150. *Id.* at \*8.

151. 625 F. Supp. 1431 (E.D. La. 1986).

152. *Id.*

153. *Id.* at 1445.

154. *Id.*

155. *Id.* at 1448. *See also* *Bauer, Inc. v. Yorkshire Amoco*, Bus. Franchise Guide (CCH) P11,344 (E.D. Mo. 1998) (no violation of implied duty of good faith and fair dealing where oil company did not make substantial capital improvements to plaintiff's service stations, even though it had done so for other franchisees).

156. 504 N.W.2d 545 (N.D. 1993).

157. *Id.* at 550. For discussion of the evidentiary issues involved with selective enforcement claims, see Barry J. Heller and Allan P. Hillman, *Essentials of Dispute Resolution for Business Lawyers*, 1998 ABA FORUM ON FRANCHISING (Oct. 28–30, 1998).

158. 1977 Trade Cas. (CCH) P61,526 (D. Md. 1976), *aff'd*, 602 F. 2d 616 (4th Cir. 1979).

159. *Phillips v. Crown Cent. Petroleum Corp.*, 395 F. Supp. 735 (D. Md. 1975), *aff'd*, 602 F.2d 616 (4th Cir. 1979).

160. *See Phillips*, 1977 Trade Cas. P61,526.

161. 648 F. Supp. 661 (D. Minn. 1986), *aff'd*, 828 F. 2d 452 (8th Cir. 1987).

162. *Id.* at 697–98.

163. *Id.* at 698.

164. 516 F. Supp. 162 (E.D. Tenn. 1981).

165. *Id.* at 163. *See also* *Staten Island Rustproofing, Inc. v. Ziebart Rustproofing Co.*, Bus. Franchise Guide (CCH) P8492 (E.D.N.Y. 1985). Ziebart enforced certain standards in its operations manual for the plaintiff, but not to a franchisee in Jersey City, New Jersey. The court held that Ziebart was free to terminate the Staten Island franchisee and not take any action against the Jersey City franchisee.

166. Bus. Franchise Guide (CCH) P11,345 (D. Md. 1997).

167. *Id.* at 30,335.