CITATIONS:

Bluebook 22nd ed.
Beata Krakus & John R. F. Baer, Do Franchise Agreements without Formal Expiration Dates Continue in Perpetuity?, 28 Franchise L.J. 206 (Spring 2009).

ALWD 7th ed.
Beata Krakus & John R. F. Baer, Do Franchise Agreements without Formal Expiration Dates Continue in Perpetuity?, 28 Franchise L.J. 206 (2009).

APA 7th ed.
Krakus, Beata, & Baer, John R. F. (2009). Do franchise agreements without formal expiration dates continue in perpetuity?. Franchise Law Journal, 28(4), 206-248.

Chicago 18th ed.
Krakus, Beata, and Baer, John R. F. "Do Franchise Agreements without Formal Expiration Dates Continue in Perpetuity?." Franchise Law Journal 28, no. 4 (2009): 206-248. HeinOnline.

McGill Guide 10th ed.
Beata Krakus & John R. F. Baer, "Do Franchise Agreements without Formal Expiration Dates Continue in Perpetuity?" (2009) 28:4 Franchise LJ 206.

AGLC 4th ed.
Beata Krakus and John R. F. Baer, 'Do Franchise Agreements without Formal Expiration Dates Continue in Perpetuity?' (2009) 28(4) Franchise Law Journal 206

MLA 9th ed.
Krakus, Beata, and John R. F. Baer. "Do Franchise Agreements without Formal Expiration Dates Continue in Perpetuity?." Franchise Law Journal, vol. 28, no. 4, Spring 2009, pp. 206-248. HeinOnline.

OSCOLA 4th ed.
Beata Krakus & John R. F. Baer, 'Do Franchise Agreements without Formal Expiration Dates Continue in Perpetuity?' (2009) 28 Franchise LJ 206

Do Franchise Agreements Without Formal Expiration Dates Continue in Perpetuity?

Beata Krakus and John R. F. Baer

It is well-established common law in most states that an agreement that is silent with respect to its term and has no expiration date can be terminated by either party at will without having to show cause for the termination.[1] The reasoning behind this rule is based in the belief that the world is an ever-changing place and that, as the world changes, prior business relationships may need to be adjusted to meet the new reality in which the parties operate.[2]

Beata Krakus

John R.F. Baer

This article will discuss what happens when that indefinite term agreement is a franchise agreement. Are courts willing to take into account the special circumstances present in the franchising context, i.e., the investment made by the franchisee in the business, the expectation of a long-term relationship, and the fact that many states today mandate that termination can only be for good cause? Does it matter if the agreement specifically says that it is to be perpetual or for an indefinite term? Does it matter if there is a termination provision, enumerating events of default, even if no term is stated? Is the law consistent throughout the United States?

Franchising started to take off in the late 1960s and early 1970s. In the early days of franchising, agreements were often only a few pages long; but they have grown, on average, about one page per year since then. Either the world was a much simpler place forty years ago, or there were many issues that the pioneers of franchising did not believe needed to be covered in the first franchise agreements. Whatever the answer to that speculation may be, one subject that frequently was not covered in the early franchise agreements was their term. As such, many older franchise systems may have a few franchisees that are still operating on very old forms of agreements with no stated terms and lacking many provisions that would today be considered standard, such as provisions regulating advertising and periodic updates to the franchised locations.

Although the short form of franchise agreement is no longer in style and today's experienced franchisors will certainly take care to include term provisions in their agreements, contracting parties to other forms of agreements that are later found to be franchises are the parties often using agreements with indefinite terms. The problem of the unintentional franchise continues to be very much a current issue, and that is where the indefinite term agreement problem is most likely to appear today.

Contract Interpretation

Whether a franchise agreement is for a fixed or for an indefinite term is oftentimes the first inquiry that courts have to resolve in franchise termination cases. This is not as simple a job as it may appear to be. As a starting point, courts often express a strong presumption against perpetual agreements.[3] However, the way courts resolve this issue is as varied as the contract terms before them with the resolution often colored by the court's view of the scope of the general rule. Two distribution cases illustrate the extremes of court reasoning on the issue.

On one end of the spectrum, the general common law rule was both the starting and ending point in the Illinois Supreme Court decision in *Jespersen v. Minnesota Mining & Manufacturing Co.*[4] The case involved an exclusive distributor of Trim-Line auto body trim that was terminated when the manufacturer was acquired by the Minnesota Mining and Manufacturing Company, which decided to merge the Trim-Line business into its automotive trades division. The written distribution contract expressly provided that it would "continue indefinitely" unless terminated pursuant to the termination provision in the agreement. The termination provision seemingly was of the kind that is common in franchise agreements, enumerating a long list of potential defaults. However, the lead-in to the termination provision stated that the manufacturer "may" terminate for the various enumerated defaults upon thirty days' notice. It also permitted the distributor, but not the manufacturer, to terminate without cause, also upon thirty days' notice.

Based on the particular language in the termination provision, the court framed the issue before it narrowly: does the general rule that indefinite term agreements are terminable at will apply when there is a termination provision that states that the agreement may be terminated for cause?[5] The court's reasoning focused around the basic premise that contracts of indefinite duration are generally terminable at will.[6] Perpetual contracts are disfavored by the courts because the courts do not believe that it would be the intention of the contracting parties to create a never-ending agreement. Noting that "'[f]orever' is a long time"[7] and that the world is an ever-changing place, where "[a]dvances in technology, changes in consumer taste and competition mean that once profitable

Beata Krakus is an associate and John R.F. Baer is a partner in the Chicago office of Sonnenschein Nath & Rosenthal LLP. The authors gratefully acknowledge Neal Patel, an associate with the firm, for his research assistance.

businesses perish—regularly,"[8] the court observed that the parties' agreement had been in force for thirteen or more years and that the parties must have expected that one of them might eventually try to terminate the agreement pursuant to its terms. The *Jespersen* court held that the termination provision in the agreement before it was not the sole grounds available for termination. Specifically, the court found that because the enumerated events of default in the *Jespersen* agreement were only examples of material breach and because all agreements are terminable for material breach, the termination provision was not sufficient to overcome the presumption that indefinite term agreements are terminable at will.[9] Based on the court's reading of the termination provision, it distinguished the case before it from cases such as *Lichnovsky v. Ziebart International Corp.* (discussed below), where the termination provision was found to set forth the exclusive grounds for termination. The *Lichnovsky* court found the agreement terminable only pursuant to such exclusive termination provision.

Although subsequent decisions of other courts have split about the analysis of the *Jespersen* court,[10] the *Jespersen* court is far from alone in interpreting enumerations of material breaches in an agreement as only being reflective of the common law rule that agreements are always terminable for material breach. What distinguishes the *Jespersen* court is the immense importance that a three-letter word—*may*—played in the analysis. The court read the word *may* as indicative that the termination provision was only a nonexclusive list of defaults that reflected only the common law rule that a contract is always terminable for a material breach.[11] In a seemingly contradictory comment, the court expressly stated that an agreement without a fixed duration, but with a provision that it is only terminable for cause (i.e., does not use the word *may*), can only be terminated for cause.[12]

It is odd that there is no mention in the opinion of the possibility that the word *may* could simply have been used by the parties to indicate that the manufacturer had a choice upon the occurrence of a default whether to terminate. In this sense, the court's analysis seems disconnected from business realities. When parties use the words *may terminate* in agreements, whether franchise agreements or others, likely the drafter's reasoning for the use of the word *may* is to indicate that the party entitled to terminate is not required to do so but may, at its option, waive the default.

Likewise, enumerated instances of material breach are usually used at the time that an agreement is entered as a way to highlight what will constitute a material breach and, also, in more complex termination provisions, as a way to categorize different types of defaults into categories for which different notice periods are required. Although the authors would generally counsel against entering into a franchise agreement without a fixed term, if that is the intention of the parties, the parties may be well advised, in light of the *Jespersen* decision, to be exceedingly specific in describing any terminating circumstances or events.

On the other end of the spectrum is the California Court of Appeal decision two years later in *Zee Medical Distributor Ass'n, Inc. v. Zee Medical, Inc.*[13] In *Zee*, an association of distributors brought a declaratory relief action asking the court to declare that their agreements with Zee Medical, Inc. were terminable at will. There were three different versions of distribution agreements in question. Two of the versions stated that the "[a]greement shall continue until terminated as follows"[14] and then proceeded to enumerate various grounds for termination. The third version read that "the term of this Agreement . . . shall continue until it is terminated in accordance with the provisions of this Agreement."[15] It also enumerated various grounds for termination.

The court took an inclusive approach to how parties can define a term or unambiguously express in a contract that they intend the term to continue indefinitely. It explained that a term of duration does not have to be tied "to the calendar, but to the conduct of the contracting parties"[16] and that if an agreement lacks an express term, the courts should examine if a term can be implied from the subject matter of the agreement or the totality of circumstances.[17] Discussing case law supporting at-will termination of indefinite term agreements on the basis of the inevitable changes due to time and technological change, the court focused on the risk that a contracting party be deprived of its bargained-for upside at the "threshold of success" if its agreement was terminated at will.[18] The court concluded that under California law, "express contractual terms for indefinite periods of time are valid."[19]

Although not a franchise case, *Zee* focused on the interrelationship between the parties and the fact that the agreements contemplated a long-term relationship. The court differentiated the relationship from a casual employment relationship or the sale of fungible goods.[20] The California court discussed *Jespersen* critically and said that it disagreed both with the conclusion and the analysis. In the agreements at issue in *Zee*, the court found the language to be plain and unambiguous and that it expressed the parties' intent to create agreements that would continue for indefinite periods and that could only be terminated as stated in the agreements.[21]

One interesting sidelight to *Jespersen* is that the governing law under the contract was California law. The parties apparently did not raise this issue, so the court proceeded to apply Illinois law. In light of the *Zee* decision, that may have been the biggest mistake of the distributor's trial strategy.

Although analytically *Jespersen* and *Zee* clearly reflect different ends of the spectrum, with *Jespersen* representing the view that perpetual agreements are strongly disfavored and *Zee* representing the minority view that favors perpetual agreements if that is the parties' express intention, many of the courts that have grappled with issues regarding indefinite term contracts have come out somewhere in between. Although neither *Jespersen* nor *Zee* was a franchise case, franchise decisions follow similar principles, but oftentimes the courts try to protect the franchisee's interests, as discussed below.

Refinement of the Common Law Rule in Franchise Cases

Even though most courts in franchise cases start out articulating the general common law rule that indefinite term contracts are always terminable at will, that rule is not always so strictly applied.[22] Some courts may work hard to find that the contract really is not an indefinite term contract. For example, several courts have held that a specific term does not have to be ascertainable in years if it can be otherwise determined from the nature of the contract, its subject matter, or the relationship of the parties.[23] Though not a franchise case, one colorful example can be found in *City of East Chicago v. East Chicago Second Century, Inc.*,[24] where the City of East Chicago and Showboat Marina Partnership entered into a letter agreement providing for revenue sharing from the casino that Showboat intended to open, provided that the Indiana Gaming Commission granted it a gaming license. The city's share of the revenue was supposed to be divided among the city and several entities, one of which was Second Century, a private corporation. A few years later, the mayor of East Chicago left office after election fraud was unveiled in connection with his election, and the agreement between the city and Showboat came under scrutiny. The city council passed an ordinance directing the casino to pay Second Century's share of the revenue to the city. Second Century brought a declaratory action against Showboat's successor, Resorts East Chicago, seeking a declaration that it was still entitled to receive a share of the casino revenue. Resorts East Chicago brought a third-party complaint against the city asking the court to clarify to whom it should pay the city's share of the revenue, and the city responded with a counterclaim asking the court to declare that the Showboat agreement was terminable at will because of its indefinite duration. Contrary to the city's assertions, the court found that the agreement was for a definite term. The casino could only generate revenue for as long as it had a valid gaming license, and therefore the revocation of the gaming license was the happening upon which the agreement would terminate.

Some courts have found that enumerating grounds for termination takes the contract out of the indefinite term category.

Other courts have found that a person's lifetime is an adequate measure of time. For example, in *Bradner v. Vasquez*,[25] Bradner had agreed with Vasquez by a letter agreement to attend to Vasquez's business affairs in connection with an oil venture in exchange for a 10 percent share of the revenue from the venture. In the letter agreement, Bradner stated that "[i]t is realized by me that my compensation in the near future will be rather small, but as more wells are developed, I will be more adequately compensated."[26] The letter further read: "'It is understood that this arrangement shall cease and terminate upon my death.'"[27] The California Court of Appeal found that the term of the agreement was made dependent on Bradner's death, an event that was, of course, certain to occur, and therefore the agreement was for a definite term.[28]

Likewise, if an agreement provides that it will continue for as long as the franchisee or distributor continues to sell the franchisor's product, some courts say it is not an agreement of indefinite duration.[29] One such example is *Marskill Specialties, Inc. v. Barger*,[30] where Marskill was to pay commissions to Barger on the amount of sales to the Dexter Axle Company. The agreement stated that it would continue as long as the "agent 'sells any products to any company listed.'"[31] The court concluded that it was an agreement with an express termination provision, which should be honored.[32]

Other courts, following the *Zee* approach, find that the enumeration of termination grounds takes the contract out of the indefinite term category. One such example is *Lichnovsky*,[33] where the Supreme Court of Michigan reviewed an agreement between a franchisee and a manufacturer of a special car rustproofing process. The franchise agreement stated that it would remain in "'full force and effect indefinitely, unless terminated at an earlier date' '[s]hould licensee fail to perform any of the terms, conditions or provisions' of the agreement and 'remain in default for a period of thirty days after the receipt of a notice.'"[34] Even though the termination provision in the *Lichnovsky* agreement did not contain a detailed list of defaults but simply referred to the breach by the franchisee of the agreement, the court found that the presence of an "elaborate procedure for termination"[35] would not have been included in the agreement if the parties had intended that the agreement could be terminated at will. It also looked at other provisions in the agreement, such as the provision requiring the franchisor's permission for the franchisee to transfer, and concluded that such a provision was inconsistent with an agreement terminable at will.[36]

The court in *Lichnovsky* elaborated on the meaning of the general common law rule, concluding that it is only where the parties have truly not agreed upon the term of their agreement or the manner of its termination that the agreement is presumed to be terminable at will. The inclusion of a termination provision only allowing termination for cause, concluded the court, was indeed enforceable in spite of the lack of a term. It is only where both the term and manner of termination are lacking from an agreement that it would be terminable at will.[37]

Not all courts have agreed with the *Lichnovsky* limitation of the general rule for agreements that do not contain term or termination provisions.[38] Some courts hold that termination for cause provisions are common to all agreements and only reflective of the common law rule that agreements are always terminable for cause.[39] That was the conclusion of the Fifth Circuit in *Trient Partners I Ltd. v. Blockbuster Entertainment Corp.*[40] Trient was a successful Blockbuster franchisee operating forty-three Blockbuster Video Superstores in Portland, Oregon, and Washington State. After a few years of operation by Trient, Blockbuster decided to open up music stores in close proximity to several of Trient's franchised locations. Because the music stores also sold videotapes, Trient sued Blockbuster, claiming that it had breached the noncompete provision in the license agreement between the parties. Thereafter, Trient decided to get out of the video rental business and to sell all assets unrestricted by the terms of the license agreement, including the leases for the forty-three locations, to the highest bidder. Blockbuster took issue with the sale of the leases. On appeal, the first issue for the court to determine was whether Trient could unilaterally terminate the license agreement absent a breach thereof by Blockbuster.[41] The license agreement was for an indefinite term, stating that it would "'continue indefinitely . . . until terminated in accordance with the provisions hereof.'"[42] Further, it stated that it could be terminated in the event of default by either party that was not cured within a specified number of days, if one of the parties was insolvent, or in connection with changes to the ownership of Trient. The court held that a termination provision that simply restated the common law rule that a contract is terminable for material breach was not sufficient to turn an indefinite term agreement to one for a fixed term, and, therefore, Trient was entitled to terminate the agreement at will.[43]

The limits of *Jespersen* under Illinois law were tested in *Baldwin Piano, Inc. v. Deutsche Wurlitzer GmbH*,[44] where Judge Easterbrook delivered the opinion of the Seventh Circuit. A subsidiary of the Wurlitzer Company was spun off with a license to Baldwin as the buyer to use the Deutsche Wurlitzer name in connection with jukeboxes and similar products. The trademark license agreement provided that it would "continue in force without limit of period but may be cancelled by the Licensor for material breach."[45] It also provided that Baldwin Piano needed to get the licensor's approval prior to any assignment of substantially all of its assets or its business to a third party.[46] Judge Easterbrook noted that the spin-off did not make economic sense unless the parties intended for the license to be perpetual.[47] "Businesses are not compelled to make sensible bargains, but courts should not demolish the economic basis of bargains that would be sound if the contract were given a natural reading."[48] He distinguished *Jespersen* by stating that the enumerated list of possible defaults in this case was exclusive, but the list in *Jespersen* had been open-ended. Likewise, he described the relationship in *Jespersen* as one of vertical integration, but the one in *Baldwin Piano* was a trademark license agreement where the parties were not like a manufacturer and distributor, but competitors.[49]

Although the Seventh Circuit in *Baldwin Piano* did not overrule *Jespersen*, it put significant effort into distinguishing *Jespersen* from the situation in *Baldwin Piano*. It is hard to tell what impact *Baldwin Piano* may have on the interpretation of indefinite term franchise agreements in Illinois. Although the case did not involve a franchise agreement, it did involve a trademark license, which is an integral part of a franchise agreement. As with the agreement in *Baldwin Piano*, considering the investment that a franchisee makes in its business and the reliance of a franchisor on the success of its franchisees in building its name and network, it is hard to make financial sense of a franchise agreement that can be terminated at any time at the whim of either party.

There are several cases directly discussing franchise agreements that come to that conclusion: *Armstrong Business Services, Inc. v. H & R. Block*[50] and *Sensormatic Security Corp. v. Sensormatic Electronics Corp.*[51]

In *Armstrong Business Services*, a group of franchisees appealed a trial court grant of summary judgment in favor of H & R Block holding that the franchise agreements with the appellant franchisees were indefinite term agreements that were terminable at will. The agreements had an unusual term provision: "The term of this Agreement shall run for a period of five years from the date hereof, with further provisions that it shall be automatically renewed for successive periods of five years each, unless mutually terminated or terminated pursuant to paragraph 12."[52] Paragraph 12 permitted the franchisor to terminate the agreement due to the franchisee's breach. The court reasoned that the effect of the term provision was to create a perpetual contract, but not an enforceable perpetual contract, because the parties' intent to do so was not unequivocally expressed in the agreement.[53] Instead, the court found that the agreements were not for an indefinite period at all but simply for a fixed, five-year term and that they could only be renewed if both parties agreed to renewal. Recognizing the unique nature of franchise agreements, the large investment of both time and money that go into a franchise, and, consequently, the importance of the agreement's duration to a franchisee, the court discussed the notice that a franchisor has to give the franchisee upon terminating a franchise agreement.[54] The court referred to the Missouri Franchise Act requirement of ninety days' notice as a fundamental policy of state law intended to strike a balance between the interests of franchisees and franchisors, and also referred to the common law recoupment doctrine as additional protection for franchisees whose agreements are for an indefinite term.[55]

In *Sensormatic*, the Maryland federal district court had little trouble interpreting the language in a 1976 franchise agreement that provided that it would "continue in full force and effect so long as the Franchisor shall be engaged in the business of manufacturing and marketing Equipment."[56] The franchisee was given the right to terminate the agreement upon sixty days' notice, and the franchisor had the right to terminate if the franchisee defaulted in one of the enumerated ways.[57] The court held that even though there was no express term in the agreement, the court would examine whether the parties' intent could be inferred from the surrounding circumstances. If a term could be inferred, the court said that it would give effect to the parties' intent.[58] Focusing on the fact that the franchisee was given an explicit right under the franchise agreement to terminate without cause but that no such explicit right was granted the franchisor, the court found that the Sensormatic franchise agreement was not terminable at will by the franchisor but only for the objectively verifiable default events listed in the termination provision.[59]

Reasonable Notice

Where courts have found that franchise and distribution agreements are terminable at will, whether because the agreement has no term or expiration provision at all or as a result of the court's interpretation of the term and termination language in the agreement, most jurisdictions temper the general common law rule by application of the concepts of reasonable notice or reasonable duration.[60]

Many courts have found support in article 2 of the Uniform Commercial Code (U.C.C.) for the notion that reasonable notice is required for termination of certain types of franchise agreements and distribution agreements that lack term or expiration provisions. Section 2-309(2) and (3), as adopted by most states, provides as follows:

> (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
> (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

Official Comments 5, 7, and 8 explain the need for notice:

5. The obligation of good faith under this Act requires reasonable notification before a contract may be treated as breached because a reasonable time for delivery or demand has expired. . . .
7. Subsection (2) applies a commercially reasonable view to resolve the conflict which has arisen in the cases as to contracts of indefinite duration. The "reasonable time" of duration appropriate to a given arrangement is limited by the circumstances. When the arrangement has been carried on by the parties over the years, the "reasonable time" can continue indefinitely and the contract will not terminate until notice.
8. Subsection (3) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. . . .

Several decisions have applied the U.C.C. to franchise or distribution agreements in the context of indefinite term contracts. In *Best Distributing Co., Inc. v. Seyfert Foods, Inc.*,[61] Best had been a distributor of snack foods for Seyfert since 1953; Seyfert terminated their oral agreement in 1995 by giving Best thirty days' notice. The Indiana Court of Appeals, without any discussion about whether it is proper to apply article 2 of the U.C.C. to a franchise or distribution agreement, relied on the Indiana U.C.C. §§ 26-1-2-309 and 26-1-1-204(2) (U.C.C. article 1, § 204(2); U.C.C. article 2, § 2-309) and held that Best was entitled to reasonable notice of termination, taking into account that "'[w]hat is reasonable time for taking any action depends on the nature, purpose, and circumstances of such action.'"[62] Because Best had found a substitute agreement with Jay's, albeit not an equally profitable agreement, the court found that the thirty-day notice had been sufficient and refused to extend "reasonable time" to be sufficient time for a distributor to find a replacement agreement that actually was as profitable as the terminated agreement.[63]

Likewise, in *Delta Services & Equipment, Inc. v. Ryko Manufacturing Co.*,[64] the Fifth Circuit made the same distinction as the Illinois Supreme Court did in *Jespersen* between illustrative and exclusive termination provisions and found that a vehicle wash equipment distribution agreement that provided for termination upon the party's default, but was silent with respect to its term, was terminable at will but that under § 554.2309 of the Iowa Code Annotated, reasonable notice of termination was required.[65]

In *Monarch Beverage Co. v. Tyfield Importers, Inc.*,[66] Tyfield terminated an oral agreement with an Indiana distributor of Tosti sparkling wine with no notice. The Seventh Circuit applied Indiana U.C.C. § 2-309(3) to the agreement,[67] holding that reasonable notice must give the terminated party reasonable time to seek a substitute agreement. The court found that the trial court's holding that thirty days' notice would have been sufficient was not clearly erroneous, considering that the Tosti distributorship accounted for no more than 1 percent of the distributor's total sales and that its own sales manager testified that the distributor could have replaced its Tosti distributorship with distribution of a competing brand of sparkling wine.[68]

Other courts have refused to apply article 2 of the U.C.C. to franchise agreements. In *Kansas City Trailer Sales v. Holiday Rambler Corp.*,[69] Kansas City Trailer Sales (KCTS) was a distributor for Holiday Rambler Corp. (HRC), selling HRC brand recreational vehicles since the 1970s. Each year, the parties entered into a new agreement. In 1991, giving one month's notice, HRC informed KCTS that it would not renew the agreement for another year. KCTS alleged that it was a franchisee of HRC and that the nonrenewal was therefore subject to the Missouri Franchise Act. HRC attempted to argue that the action it had taken was a good faith attempt to exercise its rights as a seller under article 2 of the U.C.C. and was therefore excused from compliance with the Missouri Franchise Act. The court disagreed and held that article 2 of the U.C.C. did not apply to a franchise agreement but only to sales under the franchise agreement.[70]

Reasonable Duration/Recoupment

Some courts have adopted the position that an at-will agreement can only be terminated after a reasonable time has passed since its beginning so that the distributor has a chance to recoup its investment. It is important to note that the minority of courts that subscribe to this view do not usually consider whether the distributor has actually recouped its investment; it is the chance to recoup that matters. One such example is *Ernst v. Ford Motor Co.*,[71] in which a group of Versatile agricultural equipment dealers were terminated after Ford acquired ownership of Versatile. Their dealership agreements had been for an indefinite term and, pursuant to the agreements, terminable upon ninety days' notice. The termination was pursuant to the terms of the agreements. The Missouri Court of Appeals remanded the matter to the trial court to determine whether the agreement was terminable at will or if it had been modified to be terminable for good cause only; and it instructed the trial court that if it found the agreement to be terminable at will, the manufacturer should have given the dealers before termination the time that was reasonably necessary to recoup their investment and additionally should have given them a reasonable notice period.[72]

Another case discussing the recoupment doctrine is *Armstrong Business Services*, discussed above. The Missouri Court of Appeals held that the recoupment doctrine protects franchisees operating under indefinite term agreements from having their agreements terminated before they have had a reasonable chance to recoup their investment, plus it gives them a reasonable notice period before the termination.[73]

McGinnis Piano & Organ Co. v. Yamaha International Corp.[74] is a case that predates the introduction of the provision in the Minnesota franchise law requiring good cause for termination of a franchise agreement[75] but nonetheless is instructive of how the reasonable duration doctrine is applied by courts. In *McGinnis*, a Yamaha dealer brought suit against Yamaha after a five-year relationship had been terminated by Yamaha upon forty-five days' notice. McGinnis had followed the business advice of Yamaha, had attended dealer meetings, had instituted a warranty program, and had also developed a Yamaha music program for children. The court held that, under Minnesota law, a franchise agreement for an indefinite term has an implied provision of reasonable duration.[76] It measured reasonable duration by the length of time that would be reasonably necessary for the dealer to recoup its investment, plus a period of reasonable notice.[77] It held that reasonable notice is "that period of time necessary to close out the franchise and minimize losses."[78]

Implied Covenant of Good Faith and Fair Dealing

Many franchisees have argued that their indefinite term franchise agreements cannot be terminated at will because of the common law implied covenant of good faith and fair dealing. For example, in *Seegmiller v. Western Men, Inc.*,[79] a terminated employment agency franchisee brought suit, claiming that her franchise agreement could only be terminated for cause. The agreement in question had no fixed term but provided that it could be terminated upon sixty days' notice, but it failed to specify whether the termination required good cause.[80] Considering that franchise agreements are usually prepared by the franchisor and presented to the franchisee for signature and not negotiation, as well as that opening of a franchised business usually requires a substantial investment of time and money for the franchisee, the court, applying Utah law, found that it would be unfair for the franchisor to arbitrarily terminate the agreement.[81] The court held that when a franchise agreement is silent regarding termination without cause, it could be implied that the parties intended that termination would only be for cause.[82]

Likewise, in *Hannon v. Avis Rent-a-Car System, Inc.*,[83] Hannon argued that its agency operator agreement with Avis had been terminated in breach of the implied covenant of good faith and fair dealing. The agreement provided that it should "continue in effect . . . until terminated by either party by written notice . . . not less than thirty (30) days prior to the termination date set forth therein."[84] The federal district court in Montana, relying on *Seegmiller*, *Dayan v. McDonald's Corp.*[85] (discussed below), and *Atlantic Richfield Co. v. Razumic*[86] (discussed below), found that the implied covenant of good faith and fair dealing functions as a gap filler where a contract termination provision is silent regarding the right to terminate without cause and that due to the parties' commitment of time and money to the franchised business, it would be unfair to give the parties the right to terminate without cause.[87]

Some courts have used the implied covenant of good faith and fair dealing to reach an equitable outcome, even if it meant contradicting some of the explicit contract provisions. In *Razumic*,[88] based on the implied covenant of good faith and fair dealing, the Supreme Court of Pennsylvania looked to the contract as a whole when determining if a three-year lease was coterminous with the franchise relationship that had arisen between the parties or if the franchise agreement could continue beyond that term. Razumic had operated an Arco service station for seventeen years when Arco opened a new service station to replace his station. Razumic assumed operation of the new station under a dealer lease, which permitted Razumic to occupy the service station premises for a three-year term. In addition, the agreement contained provisions akin to those found in a franchise agreement: Razumic was not allowed to operate any other business on the premises; he had to provide Arco with specific accountings to enable Arco to calculate the rent, which was dependent on the amount of gas sold; he was not allowed to modify the look of the service station; and similar provisions. In the third year of the agreement, Arco gave Razumic one month's notice that it would not be renewing the agreement. Razumic brought suit, arguing that Arco could not terminate the agreement at will. Cross-claims were brought by Arco, and the trial court granted Arco's motion for a directed verdict of possession of the service station. The appellate court affirmed. The Pennsylvania Supreme Court disagreed with the lower courts and granted Razumic's request for a new trial.

Most courts are not as willing to stretch the language of franchise agreements as far as *Razumic*.

The Pennsylvania Supreme Court held that the agreement was a franchise agreement.[89] The court noted that in addition to the three-year lease term, the agreement contained a termination provision, which gave Arco the right to terminate the agreement for certain enumerated defaults, such as abandonment of the premises or causing damage to the premises. In the words of the court, "[t]he lone provision of the writing which could support Arco's termination . . . is that setting a three year term of occupancy. This provision does not, however, confer upon Arco the right to terminate the franchise agreement at its pleasure."[90] The court found that Razumic had a justified expectation that after his investment of time and effort, all of which benefited Arco, Arco would not arbitrarily terminate the franchise relationship.[91]

In most instances, however, courts are not willing to stretch the language of franchise agreements quite as far as in *Razumic*. Other courts usually find that the implied covenant of good faith and fair dealing will not modify unambiguous contract language allowing the franchisor to terminate at will. Thus, where a franchise agreement contains a clear provision allowing a franchisor to terminate the agreement at will, the courts will not modify the agreement. The covenant of good faith and fair dealing is only used to modify the franchisor's rights when those are not explicitly stated in the agreement.[92] In other words, contract provisions inconsistent with those that are expressly and clearly stated in the franchise agreement will not be implied through the implied covenant of good faith and fair dealing,[93] and the implied covenant functions more like a gap filler.

An often-cited example of the limits of the implied covenant of good faith and fair dealing is *Dayan*,[94] which stands for the proposition that when a terminated franchisee is in breach of the franchise agreement, the franchisor's motives behind the termination are not relevant. In *Dayan*, the Illinois Appellate Court reviewed the master franchise agreement between McDonald's and its subfranchisor for France, which it sought to terminate. Dayan had been operating McDonald's restaurants in the Paris market but had failed to comply with many of the system requirements. For example, the restaurants did not meet the cleanliness requirements, and food products were being purchased from unauthorized sources, thus giving McDonald's the right to terminate the agreement for material breach. In spite of the obvious breaches, Dayan argued, based on the implied covenant of good faith and fair dealing, that McDonald's was not entitled to terminate the agreement because the real reason for the termination was that McDonald's wanted to regain control over the lucrative Paris market.

The franchise agreement in question was for a definite term, but the court's holding is not restricted to such agreements. The court held that "[t]he doctrine of good faith performance imposes a limitation on the exercise of discretion vested in one of the parties to a contract"[95] and extended the doctrine to franchise cases.[96] Elaborating on what type of limitations the covenant imposes on a contracting party, the court found that a party "must exercise [its] discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties."[97] Reviewing case law, it found that the implied covenant of good faith and fair dealing was needed to stem abuse of power by franchisors and that under Illinois law franchise agreements could only be terminated where good cause exists.[98] The court found no support for Dayan's contention that a franchisor's discretion under a franchise agreement should be further restricted based on the franchisor's motive. The purpose of the implied covenant of good faith and fair dealing, the court held, was to protect the reasonable expectations of franchisees. Denying Dayan's appeal, the court found that where the franchisee had substantially breached a franchise agreement, there could be no expectation that the franchisor would be restricted in its right to terminate.[99]

Other Mitigation Theories

Other theories that have been used by terminated parties to mitigate the common law rule include promissory estoppel, equitable estoppel, unjust enrichment, recoupment,[100] waiver, and unconscionability. Although these theories are rarely successful, a few courts, under the right set of circumstances, have been sympathetic to franchisees and applied one of these theories. For example, when the *Kansas City Star* tried to terminate independent newspaper subscription carriers, the court found that the newspaper was equitably estopped from terminating the agreements at will upon four days' notice, as stated in the agreements, and could terminate only for cause when the relationships with the carriers went as far back as ninety years.[101]

Common Law Summary

One word summarizes the state of the common law today—*uncertainty*. The determination of whether an agreement can be terminated at will or for cause only may hinge on a single word or may differ greatly depending on what jurisdiction the parties happen to be in and what the expressed intent of the parties may have been.

Most of the agreements reviewed in the cases discussed in this article suffer from one common infirmity: poor drafting. Either the language in the termination provisions alone did not make much sense or was drafted in a convoluted way, or there were inconsistencies among different provisions in the agreement. The best protection against lengthy court disputes about perpetual agreement is careful drafting using plain and clear language. Words such as *may*, which can have different meanings, should be avoided. Although most franchisors are not willing to negotiate their franchise agreements, this does not mean that franchisees should not retain their own counsel and carefully review their agreements before they sign. There may be provisions that the particular franchisor is willing to negotiate, but independent of the potential for negotiation, franchisors and franchisees alike need to understand their rights under the agreements into which they enter and, in particular, must clearly understand how and when the relationship will end.

State Relationship Laws

Partially addressing this issue on a state-by-state level, but potentially creating even more uncertainty on a national level, are the state relationship laws. Today, twenty-four states, Puerto Rico, and the U.S. Virgin Islands have relationship laws of one type or another, and many states also have industry-specific relationship laws. Many of these statutes require notice before termination, and many also require good cause for termination.[102] For example, Hawaii and Puerto Rico do not require notice but require good cause for termination of a franchise agreement; and Maryland, Mississippi, Missouri, and South Dakota require notice, but not good cause, for termination. The Connecticut franchise statute contains an unusual provision that requires all franchise agreements entered into after October 1, 1973, to be for a term of not less than three years.[103] If the relationship between the franchisor and the franchisee fits the statutory coverage definition, in many of those states a franchisor cannot terminate a franchise agreement without a definite term without reasonable notice and/or good cause.

Even if there is a relationship law requiring good cause for termination in the home state of the franchisor or franchisee, this does not necessarily mean that an indefinite term franchise agreement between the parties can only be terminated for good cause. The territorial application of the relationship statutes is often not as broad as franchisees would wish. The statutes usually do not have extraterritorial effect and are limited to franchises located in the state or to franchisees domiciled there,[104] and the applicability of some statutes depends on meeting additional requirements, such as requiring that the franchisee purchase goods or services from the franchisor for a certain minimum amount.[105]

Most courts say that the public policy behind a state's relationship law will protect a franchisee in that state. Although some other courts dismiss the application of state franchise relationship statutes fairly summarily,[106] choice of law is an issue that has caused other courts a considerable amount of thought.

In *New England Surfaces v. E.I. DuPont de Nemours & Co.*,[107] the First Circuit reviewed a franchise agreement between DuPont, based in Delaware, and New England Surfaces, based in Maine. The franchise agreement provided that it was to be governed by Delaware law. New England Surfaces operated in Maine, Rhode Island, and Connecticut. Before the court was the issue of whether the Connecticut Franchise Act applied to the agreement. The statute, like many other franchise relationship statutes, applies exclusively to franchise agreements "the performance of which contemplates or requires the franchisee to establish or maintain a place of business in [Connecticut]."[108] The statute also voids any waiver of its applicability.[109] The court found that a choice of law clause can be abrogated in two situations: if there is a provision in the agreement between the parties that specifically does this, or if one state has a materially stronger interest in the agreement than the choice of law provision state.[110] The court concluded that Connecticut had a fundamental policy against terminating Connecticut franchisees at will and that it was not clear whether Delaware's policy in this respect was materially greater; it remanded the claim to the trial court.[111]

Retroactive Application

In determining whether a state relationship statute applies to some older franchise agreements, it may be worthwhile to look at the date that the relevant statute came into effect. However, franchisors should not assume, based on one theory or another, that the state relationship statutes will not apply retroactively.

One interesting theory applied by some courts is that indefinite term agreements are continuously renewed, and therefore

(continued on page 246)

Do Franchise Agreements Without Formal Expiration Dates Continue in Perpetuity?

(continued from page 213)

franchise relationship statutes that were enacted after the agreement was first entered into are applicable to indefinite term agreements, thereby requiring the terminating franchisor to show good cause. In the case of oral, as well as written, franchise agreements, some courts construe indefinite term contracts as being renewed every time a transaction is carried out, arguing that because the agreements are terminable at will, there is no expectation of continuation. Because the agreement is continuously renewed, it becomes subject to new or modified statutes.[112]

This was the case in *John Deere Construction & Forestry Co. v. Reliable Tractor.*[113] In 1984, Reliable had entered into a dealer agreement with John Deere to operate as an authorized dealer. The agreement provided that John Deere could terminate without cause upon 120 days' notice. In 2007, John Deere gave Reliable notice pursuant to the termination provision. The Maryland Court of Appeals was faced with the issue of whether the Maryland Equipment Dealer Contract Act, enacted in 1987 and requiring good cause for termination, applied to the case before it. The court found that because the contract provided that it could be terminated upon 120 days' notice, at no time could the parties expect the agreement to last for more than 120 days from any given date.[114] "By continuing to perform their obligations under the contracts without providing notice of termination, the parties effectively renewed their contracts consistent with the applicable law in effect at the time."[115] However, not all courts agree with this view and instead hold that indefinite term contracts continue in force until they are modified or terminated, and statutes that are enacted after the contract was entered into do not apply to the indefinite term agreement retroactively.[116]

Although some courts, like the court in *John Deere*, have chosen to avoid the question of retroactive application by way of contract interpretation, some courts have explored whether a relationship statute could apply retroactively to an agreement entered into before the enactment of the act in question. Unless the statute itself explicitly states that it should, or if there is legislative history indicating that it should, courts will usually refrain from retroactive application of the relationship statutes.[117] The reason for denying retroactive application is that applying a statute retroactively may impair the rights of the parties and impose duties that were not bargained for. However, at least for some industry-specific relationship statutes, courts have held that the constitutional prohibition against retroactive application of statutes does not apply where the state has an interest in regulating the particular industry.[118]

Such was the situation in *Paw Paw Wine Distributors, Inc. v. Joseph E. Seagram & Sons, Inc.*,[119] where the retroactive application of the Michigan Wine Act was at issue. The Michigan legislation made life easy for the court; the statute stated that it should apply to agreements already in existence at the time when the statute became effective, but the court also examined the constitutionality of the statutory provision itself. The court found that there had been a movement in Michigan as well as in other jurisdictions toward protecting distributors from sudden terminations and that neither the U.S. Constitution nor the Michigan Constitution contained an absolute prohibition of retroactive legislation.[120] The first step of the constitutional inquiry was to determine if retroactive application would substantially impair Seagram's contractual rights.[121] The court took into account that the liquor distribution industry is heavily regulated and that the parties were accustomed to statutes restricting their contractual rights. Therefore, any impairment of Seagram's contractual rights by the retroactive application of the Michigan Wine Act could not be deemed substantial, and Seagram could not have expected that the laws applicable to its relationship to its distributors would be static.[122]

Conclusion

Both the common law and state statutes add to the patchwork of laws that franchisors and franchisees have to take into consideration when trying to determine whether their agreements will be terminable at will or only for good cause. Whatever the reason a franchise system has ended up with indefinite term agreements, a franchisor that is looking to do away with older forms of agreements lacking a definitive term will have to conduct a state-by-state analysis of the law as well as an analysis of each franchise agreement to determine what state law may apply. The likely outcome of the analysis is that it will be able to terminate some, but not all, of the indefinite term franchise agreements, unless it can show good cause for termination.

The outlook for the franchisor and the franchisee that want to enter into an indefinite term franchise agreement remains equally uncertain. As the cases discussed in this article show, on occasion courts go out of their way to interpret the agreements before them as terminable only for good cause, though the opposite is true in other cases. In short, the best protection for all parties is a well-drafted agreement clearly outlining precisely how and/or when the relationship will come to an end.

Endnotes

1. E. Chi. v. E. Chi. Second Century, Inc., 878 N.E.2d 358, 371 (Ind. Ct. App. 2008) (citing House of Crane Inc. v. H. Fendrich, Inc., 256 N.E.2d 578, 579 (1970)).

2. Jespersen v. Minn. Mining & Mfg. Co., 700 N.E.2d 1014, 1017 (Ill. 1998).

3. Albers v. Cardinal Glennon Children's Hosp., 729 S.W.2d 519, 522 (Mo. Ct. App. 1987).

4. 700 N.E.2d at 1014.

5. *Id.* at 1015.

6. *Id.*

7. *Id.* at 1017.

8. *Id.*

9. *Id.* at 1016.

10. *See* Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc., 94 Cal. Rptr. 2d 829 (Ct. App. 2000) (finding that California law is different from the holding in *Jespersen* and *Baldwin Piano, Inc. v. Deutsche Wurlitzer*

GmbH, 392 F.3d 881 (7th Cir. 2004)).

11. *Jespersen,* 700 N.E.2d at 1016–17; *see also* Delta Serv. & Equip., Inc. v. Ryko Mfg. Co., 908 F.2d 7, 9 (5th Cir. 1990).

12. *Jespersen,* 700 N.E.2d at 1016 (citing R.J.N. Corp. v. Connelly Food Prods., Inc., 529 N.E.2d 1184 (1988); Dawson v. W. & H. Voortman, Ltd., 853 F. Supp. 1038, 1942 (N.D. Ill. 1994)).

13. 94 Cal. Rptr. 2d at 829.

14. *Id.* at 831.

15. *Id.*

16. *Id.* at 833.

17. *Id.* at 835.

18. *Id.*

19. *Id.* at 836.

20. *Id.*

21. *Id.*

22. Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 271 F.3d 8 (1st Cir. 2000).

23. *See, e.g.,* Bradner v. Vasquez, 227 P.2d 559, 562 (Cal. Ct. App. 1951).

24. 878 N.E.2d 358 (Ind. Ct. App. 2008).

25. 227 P.2d 559, 562.

26. *Id.* at 560.

27. *Id.*

28. *Id.* at 563.

29. *E. Chi.,* 878 N.E.2d at 372–73.

30. 428 N.E.2d 65 (Ind. Ct. App. 1981).

31. *Id.* at 67.

32. *Id.* at 69.

33. Lichnovsky v. Ziebart Int'l Corp., 324 N.W.2d 732 (Mich. 1982).

34. *Id.* at 736.

35. *Id.* at 737.

36. *Id.* at 737–38.

37. *Id.* at 738–40.

38. Trient Partners I Ltd. v. Blockbuster Entm't Corp., 83 F.3d 704, 709 (5th Cir. 1996).

39. Brownsboro Road Rest., Inc. v. Jerrico, Inc., 674 S.W.2d 40, 41 (Ky. Ct. App. 1984).

40. 83 F.3d at 704.

41. *Id.* at 708.

42. *Id.* at 709.

43. *Id.*

44. 392 F.3d 881 (7th Cir. 2004).

45. *Id.* at 882.

46. *Id.*

47. *Id.* at 883.

48. *Id.* at 883–84.

49. *Id.* at 885.

50. 96 S.W.3d 867 (Mo. Ct. App. 2002).

51. 249 F. Supp. 703 (D. Md. 2003).

52. *Armstrong Bus. Servs.,* 96 S.W.3d at 870.

53. *Id.* at 877.

54. *Id.* at 878.

55. *Id.*

56. *Sensormatic,* 249 F. Supp. at 713.

57. *Id.*

58. *Id.* at 714.

59. *Id.* at 715.

60. *See, e.g.,* Lake Erie Distribs., Inc. v. Martlet Imp. Co., 221 A.D.2d 954, 956 (N.Y. App. Div. 1995); Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc., 51 F. App'x 786, 792 (10th Cir. 2002) (franchise agreements are terminable at will when they do not specify whether good cause is required for termination).

61. 714 N.E.2d 1196 (Ind. Ct. App. 1999).

62. *Id.* at 1206 (citing Ind. Code § 26-1-1-204(2)).

63. *Id.* at 1207.

64. 908 F.2d 7 (5th Cir. 1990).

65. *Id.* at 8, 12.

66. 823 F.2d 1187 (7th Cir. 1987).

67. *Id.* at 1190.

68. *Id.*

69. 1994 WL 49932 (W.D. Mo. 1994).

70. *Id.* at *5.

71. 813 S.W.2d 910 (Mo. Ct. App. 1991).

72. *Id.* at 919.

73. Armstrong Bus. Serv., Inc. v. H & R Block, 96 S.W.3d 867, 878 (Mo. Ct. App. 2002).

74. 480 F.2d 474 (8th Cir. 1973).

75. Minn. Stat. § 80C.14(b) (1996).

76. *McGinnis,* 480 F.2d at 479.

77. *Id.* at 479, 480.

78. *Id.* at 479.

79. 437 P.2d 892 (Utah 1968).

80. *Id.* at 894.

81. *Id.*

82. *Id.*

83. 107 F. Supp. 2d 1256 (D. Mont. 2000).

84. *Id.* at 1261.

85. 466 N.E.2d 958 (Ill. App. Ct. 1984).

86. 390 A.2d 736 (Pa. 1978).

87. *Hannon,* 107 F. Supp. 2d at 1261–62.

88. *Razumic,* 390 A.2d 736.

89. *Id.* at 740.

90. *Id.* at 741.

91. *Id.* at 742.

92. Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 1983 WL 197624, at *4 (W.D. Pa. 1983); Amoco Oil Co. v. Burns, 437 A.2d 381, 384 (Pa. 1981).

93. D'Accord Fin. Servs., Inc. v. Metsa-Serla OY, 1999 WL 58916, at *2 (S.D.N.Y. 1999).

94. Dayan v. McDonald's Corp., 466 N.E.2d 958 (Ill. App. Ct. 1984).

95. *Id.* at 990–91.

96. *Id.* at 992.

97. *Id.* at 991.

98. *Id.* at 992.

99. *Id.* at 993.

100. Ernst v. Ford Motor Co., 813 S.W.2d 910, 915 (Mo. Ct. App. 1991).

101. Miskimen v. Kan. City Star Co., 684 S.W.2d 394 (Mo. Ct. App. 1984).

102. The following states require a specific notice period before termination becomes effective: Arkansas (Ark. Code Ann. §§ 4-72-201 to -210 (West 2004)); California (Cal. Bus. & Prof. Code §§ 20000–43 (West 2008)); Connecticut (Conn. Gen. Stat. §§ 42-133e to -133h (2007)); Delaware (Del. Code Ann. §§ 2551–56 (2006)); Illinois (815

ILL. COMP. STAT. ANN. 705/19–705/20 (West 2008)); Indiana (IND. CODE ANN. § 23-2-2.7-1-7 (West 2005 & Supp. 2008)); Iowa (IOWA CODE ANN. §§ 523H-1–.17 (for contracts entered into prior to July 1, 2000); IOWA CODE § 537A.10 (for contracts entered into on or after July 1, 2000)); Maryland (MD. CODE ANN. §§ 11-1301 to 11-1306); Michigan (MICH. COMP. LAWS § 445.1527 (2002)); Minnesota (MINN. STAT. § 80C-14 (1999 & Supp. 2009)); Mississippi (MISS. CODE ANN. §§ 75-24-51 to 75-24-61 (1999)); Missouri (MO. REV. STAT. §§ 407.400–.410, 407.420 (West 2001 & Supp. 2009)); Nebraska (NEB. REV. STAT. §§ 87-401 to -410 (2007)); New Jersey (N.J. REV. STAT. ANN. §§ 56:10-1–56:10-12 (West 2001 & Supp. 2008)); Rhode Island (R.I. GEN. LAWS §§ 6-50-2 to 6-50-9 (2007)); South Dakota (Admin. Memorandum); Washington (WASH. REV. CODE ANN. §§ 19.100.180, 19.100.190 (West 1999)); Wisconsin (WIS. STAT. ANN. §§ 135.01–.07 (West 2009)); Virgin Islands (V.I. CODE ANN. §§ 130–39).

The following states require good cause for termination of franchise agreements: Arkansas (ARK. CODE ANN. §§ 4-72-201–4-27-210 (West 2004)); California (CAL. BUS. & PROF. CODE §§ 20000–43 (West 2008)); Connecticut (CONN. GEN. STAT. §§ 42-133e to -133h (2007)); Delaware (DEL. CODE ANN. §§ 2551–2556 (2006)); Hawaii (HAW. REV. STAT. § 26-482E-6 (2007)); Illinois (815 ILL. COMP. STAT. ANN. 705/19–705/20 (West 2008)); Indiana (IND. CODE ANN. § 23-2-2.7-1-7 (West 2005 & Supp. 2008)); Iowa (IOWA CODE § 523H.1–.17 (for contracts entered into prior to July 1, 2000); IOWA CODE § 537A.10 (for contracts entered into on or after July 1, 2000)); Michigan (MICH. COMP. LAWS § 445.1527 (West 2002)); Minnesota (MINN. STAT. § 80C-14 (1999 & Supp. 2009)); Nebraska (NEB. REV. STAT. §§ 87-401 to -410 (2007)); New Jersey (N.J. REV. STAT. §§ 56:10-1–56:10-12 (West 2001 & Supp. 2008)); Rhode Island (R.I. GEN. LAWS §§ 6-50-2 to 6-50-9 (2007)); Virginia (VA. CODE ANN. § 13.1-564); Washington (WASH. REV. CODE ANN. §§ 19.100.180, 19.100.190 (West 1999)); Wisconsin (WIS. STAT. ANN. §§ 135.01–.07 (West 2009)); Puerto Rico (P.R. LAWS ANN. §§ 10-14-278 to -278d); Virgin Islands (V.I. CODE ANN. §§ 12A-130 to -139).

103. CONN. GEN. STAT. § 42-133f(d) (2007).

104. *See, e.g.*, California, CAL. BUS. & PROF. CODE § 20015 (West 2008); Illinois, 815 ILL. COMP. STAT. ANN. 705/19 (West 2008); Indiana, IND. CODE ANN. § 23-2-2.5-2 (West 2005 & Supp. 2008); Maryland, MD. CODE ANN. §§ 13-11-453 to -11-1302; Wisconsin, WIS. STAT. ANN. § 135.02 (2) (West 2009).

105. NEB. REV. STAT. §§ 87-403, 56:10-4 (West 2007).

106. Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc., 51 F. App'x 786, 793 (10th Cir. 2002).

107. 546 F.3d 1 (1st Cir. 2008).

108. CONN. GEN. STAT. § 42-133h (2007).

109. *Id.* § 42-133f (2007).

110. *New Eng. Surfaces*, 546 F.3d at 10.

111. *Id.*

112. John Deere Constr. & Forestry Co. v. Reliable Tractor, Inc., 957 A.2d 595, 600 (Md. 2008); Dayton Heidelberg Distrib. Co. v. Vintners Int'l Co. of N.Y., 1991 WL 1119912, at *5 (S.D. Ohio 1991).

113. 957 A.2d at 600.

114. *Id.*

115. *Id.*

116. Mech. Rubber & Supply Co. v. Am. Saw & Mfg. Co., 810 F. Supp. 986, 992–93 (C.D. Ill. 1990).

117. Am. Vineyards Co., Inc. v. Wine Group, 486 N.E.2d 854, 857 (Ohio Ct. App. 1984); *see also* Ctr. Beverage Co., Inc. v. Miller Brewing Co., 779 F.2d 168, 170 (3d Cir. 1985).

118. Paw Paw Wine Distrib. Inc. v. Joseph E. Seagram & Sons, Inc., 34 F. Supp. 2d 550, 558 (W.D. Mich. 1987).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*