

Mobility, the Home, and the Scope and Application of State Franchise Relationship and Termination Laws

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With the recent increase in popularity and the growing number of industries that offer franchises to operate home-based businesses, it is more important now than ever for franchise attorneys to understand the breadth and limitations of the applicability of state franchise relationship laws. With franchise territories stretching across multiple states and with franchisees having offices that are not located in their designated trading territories, the applicability of these laws is much less clear-cut than in the case of the traditional storefront retail franchise. All three traditional elements of the definition of a franchise may be present, but the state law may nevertheless not apply due to the failure to meet other state-specific threshold requirements.¹ This article will analyze the state franchise relationship and termination laws with consideration given to this development, expanding on the analysis of these laws previously provided in the *Franchise Law Journal*.²

This article begins with an examination of the self-imposed limitations on the applicability of state relationship and termination laws and judicial interpretations of them. The two major limitations that will be discussed are the “place of business” requirement and the minimum financial investment requirement.

The article next reviews and discusses cases applying state relationship and termination laws that do not contain territorial limitations to their applicability, or that contain limitations less restrictive than the place of business requirement. Following this examination, the article analyzes two additional issues relating to the applicability and scope of state franchise relationship and termination laws: contractual choice of law provisions and dormant Commerce Clause



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implications for enforcement of state laws across sovereign borders. The article concludes with a state-by-state reference table outlining the statutes and case law discussed in the body of the article.

LIMITS ON APPLICABILITY

The express purpose of many state franchise relationship and termination laws is to protect “vulnerable” franchisees from the overreaching and improper business activities of their franchisors.³ However, many state franchise relationship and termination laws include restrictions on their applicability that seem contrary to this very intent. Although this may not have been the case at the time these statutes were enacted, with the burgeoning popularity of stay-at-home, traveling, mobile, and part-time franchise offerings, the shortcomings of the statutory language are beginning to surface. The most significant of these statutory limitations is the place of business requirement that appeared in one form or another in the relationship and termination laws of ten states as of the end of 2009.⁴ The other jurisdictional limitation common among the franchise relationship and termination laws of certain states is a minimum economic investment by the franchisee in the franchised business.

The legislative findings leading to the recent amendment to the New Jersey Franchise Practices Act suggest that one policy rationale behind the place of business limitation is to subject only those franchisors that benefit from their franchisees’ in-state operations to regulation by the particular state.⁵ The place of business requirement thus is intended to provide protection to franchisees that reap the benefits of in-state operations while providing at least some level of certainty to national and regional franchisors attempting to navigate the regulatory landscape. In addition, as discussed later, state legislators may feel that these geographic applicability restrictions are necessary in order to tailor their franchise relationship laws to legitimate state interests and therefore avoid constitutional challenges under the dormant Commerce Clause doctrine.⁶

ACTUAL OR CONTEMPLATED BUSINESS LOCATION

As indicated earlier, ten states’ franchise relationship and termination laws contain provisions limiting their applicability based on the physical location of the franchised business: Arkansas, Connecticut, Delaware, Illinois, Iowa, Minnesota,

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The scope of these limitations varies from state to state. For example, although the Delaware Franchise Security Law applies exclusively to franchisees “with a place of business within the State,”⁸ the relationship laws of Arkansas, Connecticut, Missouri, Nebraska, and New Jersey apply to any franchise “the performance of which contemplates or requires” the franchisee having a place of business in the state.⁹ The laws in Iowa and Minnesota follow the Delaware approach,¹⁰ and the Illinois statute’s relationship provisions apply “when . . . the franchised business is or will be located in this State.”¹¹

Even in states employing the “contemplates or requires” language, a specific contractual provision designating the franchisee’s business location is not required for the statute to apply.¹² A franchise agreement may “either explicitly or implicitly require performance” from a particular location.¹³ For example, in *South Beach Beverage Co., Inc. v. Harris Brands, Inc.*,¹⁴ the Arkansas Supreme Court held that the parties’ written correspondence was sufficient to demonstrate that the parties contemplated the franchisee having a satellite place of business in Arkansas. The court did so despite the fact that the parties’ distributorship agreement was oral and that the principal office and warehouse of the distributor, Harris Brands, was located in Oklahoma.¹⁵ Likewise, in *Dr. Pepper Bottling Co. of Paragould v. Frantz*,¹⁶ the court held that the parties’ failure to specify a geographic location for the distributorship business in their agreement did not in and of itself preclude application of the Arkansas Franchise Practices Act.¹⁷ In so holding, the court relied on the statute’s incorporation of the word *contemplates*.¹⁸ The court stated that this statutory language “connotes greater latitude in how duties might be interpreted under the agreement,” and it went on to analyze the specific facts surrounding the parties’ relationship and the distributor’s obligations under their agreement.¹⁹ The court found that the nature and scope of the distributor’s obligations within the state of Arkansas could reasonably lead a jury to find that the parties’ agreement contemplated the distributor having a place of business in the state, and it therefore affirmed the intermediate court’s denial of Dr. Pepper’s motion for a judgment notwithstanding the verdict.²⁰

During 2010, a federal court in Arkansas took a new step in the liberal interpretation of the scope of the Arkansas law in *S&S Sales, Inc. v. Pancho’s Mexican Foods, Inc.*²¹ In 1981, defendant manufacturer Pancho’s entered into an oral exclusive distribution agreement with a distributor to distribute Pancho’s food products in the eastern half of Arkansas. In 1993, plaintiff S&S purchased the distributor and continued operating under the same agreement with Pancho’s. In 2008, Pancho’s appointed a different company as its distributor for Arkansas and ceased sales to S&S.

S&S sued Pancho’s and the new distributor and included a claim that its replacement operated as a termination of its franchise in violation of the Arkansas act. In denying Pancho’s its motion for summary judgment on that claim, the court found that because the original distributor had always

maintained a central distributorship location in Arkansas and S&S maintained a similar facility since purchasing the distributorship, the performance of the franchise contemplated maintenance of a place of business in that state. As discussed later in this article, the court also rejected the Pancho’s argument that S&S’s warehouse was not a place of business as defined by the Arkansas act.

In 2008, the U.S. Court of Appeals for the First Circuit vacated a district court decision that had granted summary judgment dismissing the claim of New England Services, Inc. (NES) that manufacturer E.I. DuPont de Nemours and Co. had wrongfully terminated its solid surface materials distributorship in violation of the Connecticut Franchise Act.²² NES, which maintained its principal place of business in Maine, had been a DuPont distributor for many years before signing a new franchise agreement in 2000 that designated Delaware as the governing law. In 2002, at DuPont’s urging, NES purchased Kilstrom, a company that owned the DuPont franchise for most of Connecticut and western Massachusetts. NES also acquired the 70,000-square-foot office and warehouse owned by Kilstrom located in Wallingford, Connecticut. Fifteen NES employees (most of whom had been Kilstrom employees) thereafter worked primarily from that Connecticut facility.²³

The district court granted summary judgment to DuPont on the Connecticut Franchise Act claim because the parties’ franchise agreement did not require that NES maintain a place of business in Connecticut. The First Circuit reversed, holding that the mere fact that the parties’ agreement did not explicitly contemplate franchise operations in Connecticut did not end the inquiry under the “contemplates or requires” analysis. Indeed, the First Circuit opined that subjective intent at the time of contracting may not even be required: “It well might be enough if a reasonable party in DuPont’s position would foresee that NES would likely maintain Kilstrom’s existing place of business [in Connecticut].”²⁴ The court, having also found that sufficient evidence existed for a jury to find that DuPont subjectively expected NES to maintain Kilstrom’s facility, reversed the grant of summary judgment and remanded for further proceedings.²⁵

IN-STATE RETAIL LOCATIONS

In cases involving distributors that maintain physical retail locations, there is little question that the parties’ agreement is governed by the relationship and termination laws in the state where the distributor’s business is located.

For example, in 2008, the U.S. District Court for the Eastern District of Arkansas applied the Arkansas Franchise Practices Act to a distributor of dental products that operated out of a storefront retail location.²⁶ The court determined that the parties’ agreement contemplated a place of business in Arkansas because (1) the manufacturer was aware of the distributor’s existing retail location in Arkansas before the parties entered into their relationship, and (2) the parties’ agreement did not prohibit the distributor from maintaining a retail location in the state.²⁷

STATE-BY-STATE SUMMARY OF LEGAL AUTHORITY *
Franchise Relationship Laws Apply Only to Franchisees with an In-State Place of Business

State	Statute	Case Law
Arkansas	Arkansas Franchise Practices Act, ARK. CODE ANN. §§ 4-72-201 to -210, Bus. Franchise Guide (CCH) ¶ 4040.	<ul style="list-style-type: none"> • JRT, Inc. v. TCBY Sys., Inc., 52 F.3d 734 (8th Cir. 1995). • Bridgman v. Cornwell Quality Tools Co., 831 F.2d 174 (8th Cir. 1987). • S&S Sales, Inc. v. Pancho's Mexican Foods, Inc., Bus. Franchise Guide (CCH) ¶ 14,328 (E.D. Ark. Mar. 3, 2010). • Otto Dental Supply, Inc. v. Kerr Corp., 2008 WL 410630 (E.D. Ark. 2008) (unreported decision). • Jack Tyler Eng'g Co., Inc. v. TLV Corp., Bus. Franchise Guide (CCH) ¶ 13,939 (W.D. Tenn. 2008). • Lodging Dev. & Mgmt., Inc. v. Days Inn Worldwide, Inc., Bus. Franchise Guide (CCH) ¶ 12,180 (E.D. Ark. Oct. 7, 2001). • Cromeens, Holloman, Sibert, Inc. v. AB Volvo, Corp., Bus. Franchise Guide (CCH) ¶ 12,183 (N.D. Ill. Sept. 26, 2001). • S. Beach Beverage Co., Inc. v. Harris Brands, Inc., 355 Ark. 347, 138 S.W.3d 102 (Ark. 2003). • Dr. Pepper Bottling Co. of Paragould v. Frantz, 842 S.W.2d 37 (Ark. 1992).
Connecticut	Connecticut Franchise Law, CONN. GEN. STAT. §§ 42-133e to -133h, Bus. Franchise Guide (CCH) ¶ 4070.	<ul style="list-style-type: none"> • New Eng. Surfaces v. E.I. DuPont de Nemours & Co., Bus. Franchise Guide (CCH) ¶ 13,989 (1st Cir. Sept. 23, 2008), <i>vacating</i> 517 F. Supp. 2d 466 (D. Me. 2007). • Forbes v. Joint Med. Prods. Corp., 976 F. Supp. 124 (D. Conn. 1997). • Chem-Tek, Inc. v. Gen. Motors Corp., 816 F. Supp. 123 (D. Conn. 1993). • Carlos v. Philips Bus. Sys., Inc., 556 F. Supp. 769 (E.D.N.Y. 1983). • Diesel Injection Serv. Co, Inc. v. Jacobs Vehicle Equip. Co., Bus. Franchise Guide (CCH) ¶ 12,388 (Conn. Apr. 16, 2002).
Delaware	Delaware Franchise Security Law, DEL. CODE ANN. tit 6, subtit. II, §§ 2551–2556, Bus. Franchise Guide (CCH) ¶ 4080.	<ul style="list-style-type: none"> • KBQ, Inc. v. E.I. DuPont de Nemours & Co., 6 F. Supp. 2d 94 (D. Mass. 1998). • Flavors of Greater Del. Valley, Inc. v. Bresler's 33 Flavors, Inc., 475 F. Supp. 217 (D. Del. 1979).
Illinois	Illinois Franchise Disclosure Act, 815 ILL. COMP. STAT. 705/18–705/20, Bus. Franchise Guide (CCH) ¶ 3130.	<ul style="list-style-type: none"> • Cromeens, Holloman, Sibert, Inc. v. AB Volvo, Corp., 349 F.3d 376 (7th Cir. 2003). • Highway Equip. Co. v. Caterpillar, Inc., 908 F.2d 60 (6th Cir. 1990). • Cromeens, Holloman, Sibert, Inc. v. AB Volvo, Corp., Bus. Franchise Guide (CCH) ¶ 12,183 (N.D. Ill. Sept. 26, 2001). • McDonald's Corp. v. C.B. Mgmt. Co., Inc., 13 F. Supp. 2d 705 (N.D. Ill. 1998). • Budget Rent A Car Corp. v. C. Shaffer, Inc., 1992 WL 137596 (N.D. Ill. 1992). • <i>In re</i> Montgomery Ward Catalog Sales Litig., 680 F. Supp. 182 (E.D. Pa. 1987).

STATE-BY-STATE SUMMARY OF LEGAL AUTHORITY *

Franchise Relationship Laws Apply Only to Franchisees with an In-State Place of Business

State	Statute	Case Law
Iowa	Iowa Franchise Law, IOWA CODE tit. XIII, §§ 523H.1–523H.17, Bus. Franchise Guide (CCH) ¶ 4150; Iowa Franchise Agreements Law, IOWA CODE tit. XIII, § 537A, Bus. Franchise Guide (CCH) ¶ 4152.	<ul style="list-style-type: none"> • Holiday Inns Franchising, Inc. v. Branstad, 537 N.W.2d 724 (Iowa 1995).
Minnesota	Minnesota Franchise Law, MINN. STAT. § 80C.14, Bus. Franchise Guide (CCH) ¶ 3230.14.	<ul style="list-style-type: none"> • Sound of Music Co. v. Minn. Mining & Mfg. Co., Bus. Franchise Guide (CCH) ¶ 13,165 (N.D. Ill. Sept. 27, 2005).
Missouri	Missouri Franchise Law, MO. STAT. REV. tit. 26, §§ 407.400–.410, 407.413, 407.410, Bus. Franchise Guide (CCH) ¶ 4250.	<ul style="list-style-type: none"> • C & J Delivery, Inc. v. Emery Air Freight Corp., 647 F. Supp. 867 (E.D. Mo. 1986).
Nebraska	Nebraska Franchise Practices Act, NEB. STAT. REV. §§ 87-401 to -410, Bus. Franchise Guide (CCH) ¶ 4270.	
New Jersey	New Jersey Franchise Practices Act, N.J. REV. STAT. §§ 56:10-1 to -29, Bus. Franchise Guide (CCH) ¶ 4300.	<ul style="list-style-type: none"> • Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc., 63 F.3d 262 (3d Cir. 1995). • Cassidy Podell Lynch, Inc. v. Snydergeneral Corp., 944 F.2d 1131 (3d Cir. 1991). • Goldwell of N.J., Inc. v. KPSS, Inc., Bus. Franchise Guide (CCH) ¶ 14,111 (D.N.J. Mar. 31, 2009). • Fischer Thompson Beverages, Inc. v. Energy Brands, Inc., 2007 U.S. Dist. LEXIS 83334, Bus. Franchise Guide (CCH) ¶ 13,757 (D.N.J. Nov. 9, 2007). • Mathews v. Rescuecom Corp., 2006 WL 414096 (D.N.J. 2006). • Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery, 23 F. Supp. 2d 509 (D.N.J. 1998). • Liberty Sales Assocs., Inc. v. Dow Corning Corp., 816 F. Supp. 1004 (D.N.J. 1993). • Carlos v. Philips Bus. Sys., Inc., 556 F. Supp. 769 (E.D.N.Y. 1983). • Bus. Incentives Co., Inc. v. Sony Corp. of Am., 397 F. Supp. 63 (S.D.N.Y. 1975). • Instructional Sys., Inc. v. Computer Curriculum Corp., 130 N.J. 324, 614 A.2d 124 (N.J. 1992). • Greco Steam Cleaning, Inc. v. Assoc. Dry Goods Corp., 257 N.J. Super. 594, 608 A.2d 1010 (N.J. Super. 1992).
Rhode Island	Rhode Island Fair Dealership Act, R.I. GEN. LAWS §§ 6-50-1 et. seq., Bus. Franchise Guide (CCH) ¶ 4390.	

* This chart should not be a substitute for a thorough review of the statute, applicable law, and state regulations.

The U.S. District Court for the District of Connecticut reached a similar result in *Chem-Tek, Inc. v. General Motors Corp.*²⁸ In that case, General Motors challenged the application of the Connecticut Franchise Act to Chem-Tek, a manufacturer and distributor of GM Goodwrench and AC Delco products.²⁹ Although it acknowledged that the distributor's retail location was in Connecticut, GM argued that this was merely "fortuitous" because Chem-Tek's "marketing focus" extended outside of the state. Accordingly, GM reasoned that Chem-Tek's mere physical presence should be insufficient to satisfy the place of business requirement.³⁰ The court disagreed and denied GM's motion to dismiss Chem-Tek's Connecticut Franchise Act claims, citing the legislature's intent to protect franchisees from the "unfair advantage" of unequal economic positioning between franchisees and franchisors.³¹ Likewise, in *Carlos v. Philips Business Systems, Inc.*, the U.S. District Court for the Eastern District of New York held that the Connecticut Franchise Law and the New Jersey Franchise Practices Act both were likely to apply to a multistate Norelco distributor that had places of business in each state.³² The distributor's physical locations were undisputed, and the court determined that the other elements of the franchise definition in each state were likely to be satisfied based on the facts of the case.³³

In *Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.*,³⁴ Amana attempted to avoid application of the New Jersey Franchise Practices Act by arguing for two distinct requirements under the law's place of business definition. At the time the case was tried, the act required "a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or . . . services," and Amana argued that *and sells* creates a conjunctive requirement that the franchisee actually sell its goods from the place of business.³⁵ The factual record in the case showed that although the distributor conducted product demonstrations and open houses at its New Jersey showroom, it did not actually consummate sales at that location.³⁶ Applying New Jersey precedent, the U.S. Court of Appeals for the Third Circuit held that this distinction was immaterial and that the distributor's marketing activities at its showroom were sufficient to constitute "sales" for purposes of the act.³⁷ The court also held that the fact that Amana knew the distributor was "a New Jersey-based firm" and had its existing showroom in New Jersey was sufficient to establish that the parties' agreement contemplated a place of business in New Jersey.³⁸

In a 1986 termination case, the U.S. District Court for the Eastern District of Missouri held that the Missouri Franchise Law applies if the franchisee or the franchisor has a place of business in Missouri.³⁹ In *C&J Delivery, Inc. v. Emery Air Freight Corp.*,⁴⁰ Emery, the franchisor, maintained a package facility near the St. Louis international airport, and the facility's services included selling express package delivery services to retail customers who "dropped off" packages (as required to establish a place of business under the Missouri law). C&J, the franchisee, provided pick-up and delivery services to and from Emery's Missouri facility from time to time throughout the St. Louis metropolitan

area but did not itself maintain a place of business of the nature defined in the statute.⁴¹ Nonetheless, the court held that the Missouri Franchise Law governed the parties' relationship, citing Emery's in-state package facility.⁴²

In reaching its decision, the court relied heavily on principles of statutory and judicial construction.⁴³ The court cited and adhered to a literal interpretation of the relevant provision of the Missouri statute, which reads ". . . nor shall the term 'franchise' apply to a commercial relationship that does not contemplate the establishment or maintenance of a place of business within the State of Missouri"⁴⁴; it then contrasted the New Jersey Franchise Practices Act, which at the time read "[t]his act applies only to a franchise . . . the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey."⁴⁵ The court held that the broader language of the Missouri statute should be interpreted as written and consequently not limited to apply only where the franchisee's place of business is located in the state.⁴⁶ The court undoubtedly was influenced by the facts of the case because Emery's St. Louis facility in effect served as C&J's base of business in that region, and thus C&J's business was no stranger to Missouri.

NO CONTEMPLATION OR REQUIREMENT

In contrast, courts have refused to afford distributors the protections of state relationship and termination laws where the parties never contemplated the distributor having a place of business in the state. For example, in *Jack Tyler Engineering Co., Inc. v. TLV Corp.*,⁴⁷ the U.S. District Court for the Western District of Tennessee granted *TLV Corp.*'s motion to dismiss Jack Tyler Engineering Co.'s Arkansas Franchise Practices Act claim on this ground.⁴⁸ The court distinguished the *South Beach Beverage* and *Dr. Pepper Bottling Co.* cases discussed earlier,⁴⁹ citing the distributor's failure to allege either that the parties contemplated the distributor having a place of business in Arkansas or that the manufacturer suggested that the distributor establish an Arkansas retail location.⁵⁰ Indeed, although the distributor's territory was located partially in Arkansas, the distributor did not maintain its place of business in the state.⁵¹

Likewise, in *JRT, Inc. v. TCBY Systems, Inc.*,⁵² the U.S. Court of Appeals for the Eighth Circuit affirmed the lower court's finding that the Arkansas Franchise Practices Act did not apply where the parties' franchise agreements only contemplated JRT having yogurt shops in Michigan, even though the parties' written agreement stipulated that it was governed by Arkansas law. The choice of law clause, the court held, was alone insufficient to extend application of the Franchise Practices Act to relationships existing outside of the act's jurisdictional bounds.⁵³ Similarly, in *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*,⁵⁴ the Third Circuit reversed a trial court's denial of a manufacturer's motion for judgment notwithstanding the verdict on grounds that the jury improperly determined that a distributor agreement's "permission" for the distributor to conduct business

in New Jersey was sufficient to satisfy the New Jersey Franchise Practices Act's "contemplates a place of business in the State" requirement.⁵⁵

LACK OF IN-STATE RETAIL LOCATION

More common than cases finding lack of contemplation are those where the absence of an in-state location is held to preclude application of a state's relationship or termination law. Although contemplation may still come into play in such cases in the form of arguments advanced by counsel for the out-of-state distributor, courts have routinely held that state relationship and termination laws do not protect franchisees whose retail locations are in other states.

In *Cromeens, Holloman, Sibert, Inc. v. AB Volvo, Corp.*,⁵⁶ the U.S. Court of Appeals for the Seventh Circuit plainly stated that "[t]he [Illinois Franchise Disclosure Act] limits its scope to franchises located within the state" of Illinois.⁵⁷ *Cromeens* includes a lengthy discussion of the applicability of the laws of several states to franchisees' claims against Volvo, but concerning the Illinois franchise statute the court rested its decision on the fact that none of plaintiff franchisees had a place of business in Illinois.⁵⁸ Likewise, the court in *Diesel Injection Service Co., Inc. v. Jacobs Vehicle Equipment Co.*⁵⁹ held that the Connecticut Franchise Law did not protect a distributor whose place of business was in another state. The distributor sought the statute's protection based on the inclusion of a Connecticut choice of law clause in the parties' distributor agreement, but the court denied this claim on the ground that the franchise law's jurisdictional requirements were not satisfied due to the distributor's out-of-state place of business.⁶⁰

The U.S. District Court for the District of Massachusetts reached a similar result concerning the applicability of the Delaware Franchise Security Law in *KBQ, Inc. v. E.I. DuPont de Nemours & Co.*⁶¹ KBQ was an authorized distributor of DuPont's Corian brand products with business operations located in Massachusetts and New York. KBQ's only contacts with Delaware were its payments to, and occasional interactions with, a DuPont warranty center located in the state. In seeking protection under the Franchise Security Law, KBQ argued that the warranty center constituted a "place of business within the State" for purposes of satisfying the statute's jurisdictional limits.⁶² The court disagreed, holding that the Franchise Security Law applies only to franchised distributors having a place of business in Delaware.⁶³ Similarly, the court in *Sound of Music Co. v. Minnesota Mining & Manufacturing Co.*⁶⁴ held that an Illinois-based 3M distributor's de minimus sales in Minnesota were insufficient to afford the distributor the protections of the Minnesota Franchise Law.⁶⁵

DENIAL BASED ON NATURE OF FRANCHISEE'S BUSINESS OPERATIONS

Another interesting set of cases involves decisions where application of state franchise relationship and termination

laws has been denied based upon the nature of the business operated by the franchisee. In these cases, it is not the fact that the distributor's place of business is in a foreign jurisdiction that precludes the statute's application; rather, it is the court's determination that the distributor's operations do not involve a place of business at all for purposes of the relationship and termination statutes. As discussed earlier, although franchise relationship and termination statutes are typically enacted based on the perception that franchisees need to be protected from more experienced and perhaps unscrupulous franchisors, many courts have interpreted these statutes narrowly, thereby excluding from the statutes' protections licensed business owners who otherwise meet the franchise definitions under the state statutes.

In a 1987 decision,⁶⁶ the Eighth Circuit held that a van-based tool distributor without an "established site from which to conduct business" did not have a place of business as required by the Arkansas Franchise Practices Act.⁶⁷ The court rested its decision on the requirement that a place of business be "a fixed geographical location," a requirement that still exists in the Arkansas and other state statutes today.⁶⁸ The court also stated that the distributor's use of his home for administrative matters and occasional product demonstrations did not qualify as a place of business under the act.⁶⁹

The place of business provision of the New Jersey Franchise Practices Act used to mirror that in the Arkansas act. However, as discussed later, the New Jersey act has recently been amended to broaden the types of franchise operations that will satisfy the statute's place of business requirement. Although this amendment did not strike the former statutory language, it is possible that cases interpreting the former version of the statute will become irrelevant as new judicial interpretations emerge. Nonetheless, the cases under the former statute remain binding and serve to inform the current state of the law in New Jersey. It is unclear from the legislative history and the statutory language whether the amendment will be given retroactive effect.⁷⁰ However, the broad legislative intent supporting the amendment's enactment seems arguably to suggest that such application is warranted. Thus, New Jersey courts will ultimately decide the issue.⁷¹

With regard to the former scope of the New Jersey act's definition of a place of business, one court has said that "the latter portion of this definition ['Place of business shall not mean . . .'] is 'the more significant aspect of the "place of business" requirement because it ensures that only those businesses that operate as genuine franchises will obtain the protection of the Act.'"⁷² In today's franchise marketplace and in light of the recent amendment to the act's place of business definition, this emphasis appears misguided. The following cases involve business relationships in which distributors were deemed not to have a place of business and therefore were not protected by the relevant states' relationship and termination laws.

Prior to the act's amendment in 2010, the New Jersey Supreme Court stated that the act "required a sales location in New Jersey. Mere distribution through an office or warehouse would not qualify."⁷³ However, New Jersey courts

FRANCHISE RELATIONSHIP LAWS ARE NOT RESTRICTED TO IN-STATE LOCATIONS

State	Statute	Case Law
California	California Franchise Relations Act, CAL. CORP. CODE §§ 20000–20043, Bus. Franchise Guide (CCH) ¶ 4050.	<ul style="list-style-type: none"> Gabana Gulf Distrib., Ltd. v. Gap Int'l Sales, Inc., Bus. Franchise Guide (CCH) ¶ 13,420 (N.D. Cal. Aug. 14, 2006).
District of Columbia	D.C. Consumer Protection Procedures Act, D.C. CODE §§ 28-3901 to -3908, Bus. Franchise Guide (CCH) ¶ 3517 (the Washington, D.C., Little FTC Act includes franchises within its definition of goods and services and prohibits enforcement of unconscionable terms in sales contracts).	
Hawaii	Hawaii Franchise Rights and Prohibitions Law, HAW. REV. STAT. tit. 26, § 482E-6, Bus. Franchise Guide (CCH) ¶ 4110.	
Idaho	Idaho Limitations on Right to Sue Law, IDAHO CODE ANN. § 29-110, Bus. Franchise Guide (CCH) ¶ 4120.	
Indiana	Indiana Deceptive Franchise Practices Law, IND. CODE tit. 23, art. 2, ch. 2.7, §§ 1–7, Bus. Franchise Guide (CCH) ¶ 4140.	
Michigan	Michigan Franchise Investment Law, MICH. COMP. LAWS § 445.1527, Bus. Franchise Guide (CCH) ¶ 3220.27.	
Mississippi	Mississippi Franchise Law, MISS. CODE ANN. §§ 75-24-51 to -63, Bus. Franchise Guide (CCH) ¶ 4240.	
South Dakota	South Dakota Franchises for Brand-Name Goods and Services Law, S.D. CODIFIED LAWS §§ 37-5A-1, 37-5A-51, Bus. Franchise Guide (CCH) ¶ 3410.	
Tennessee	TENN. CODE ANN. §§ 47-18-101 to -117 (the Tennessee Little FTC Act includes franchises within its definition of goods and outlaws “unfair or deceptive acts or practices affecting the conduct of any trade or commerce”).	
Virginia	Virginia Retail Franchising Act, VA. CODE ANN. §§ 13.1-557 to -574, Bus. Franchise Guide (CCH) ¶ 3460.08.	
Washington	Washington Franchise Investment Protection Act, WASH. REV. CODE §§ 19.100.180, 19.100.190, Bus. Franchise Guide (CCH) ¶ 4470.	
Wisconsin	Wisconsin Fair Dealership Law, WIS. STAT. §§ 135.01–135.07, Bus. Franchise Guide (CCH) ¶ 4490.	

have clarified that the statute does not actually “require that any sales actually be consummated at the place of business.”⁷⁴ Nonetheless, home-based businesses have frequently been held not to have a place of business for purposes of state relationship and termination statutes.

In *Liberty Sales Associates, Inc. v. Dow Corning Corp.*,⁷⁵ the U.S. District Court for the District of New Jersey held that although Liberty “[c]learly . . . had a business location in New Jersey,” its home-based office did not qualify as a place of business under the preamendment New Jersey act.⁷⁶ In addition to noting the act’s exclusion of “residence[s]” from the place of business definition, the court also observed that the types of business activities conducted at the residence—namely, sales calls, storage, administration, and occasional product demonstrations—did not establish Liberty’s home office as a place of business under the act.⁷⁷

The same district court reached a similar determination concerning another home-based business in *Mathews v. Rescucocom Corp.*,⁷⁸ again relying on the residence exclusion.⁷⁹ In *Mathews*, the court distinguished between a “principal place of business” and a “sales location,” indicating that the latter was required for the preamendment act to apply.⁸⁰ Despite the fact that the distributor in *Mathews* maintained a separate dedicated office in his home and regularly met customers there, the court held that the place of business element was not satisfied because the distributor’s actual sales took place at the customers’ locations.⁸¹ The court expressly relied on its holding in *Liberty Sales* in reaching this conclusion.⁸²

In an unreported 2007 decision, a federal court in New Jersey held that a distributor’s commercial warehouse facility did not satisfy the preamendment act’s place of business requirement.⁸³ On reasoning mirroring that in *Liberty Sales*⁸⁴ and *Mathews*,⁸⁵ the court held that the distributor’s use of the warehouse predominantly for storage and administrative purposes failed to meet the act’s requirements.⁸⁶ Although the distributor engaged in minimal sales and occasional product demonstrations at the warehouse location, the vast majority of its sales occurred on the road at retailers’ locations. Accordingly, the court concluded that the activities at the warehouse were insufficient to establish it as a sales location.⁸⁷

As noted earlier, the New Jersey Franchise Practices Act was amended on January 16, 2010. As amended, the act’s place of business definition now includes

persons who do not make a majority of their sales directly to consumers[,] . . . a fixed geographical location at which the franchisee displays for sale and sells the franchisor’s goods or offers for sale and sells the franchisor’s services, or an office or a warehouse from which franchisee personnel visit or call upon customers or from which the franchisor’s goods are delivered to customers.⁸⁸

The act previously defined a place of business as “a fixed geographical location at which the franchisee displays for sale and sells the franchisor’s goods or offers for sale and sells the franchisor’s services. Place of business shall not

mean an office, warehouse, a place of storage, a residence or a vehicle.”⁸⁹ As the statutory language in the New Jersey act now more closely mirrors that of other state statutes with less restrictive applicability standards, the recent amendment to the act will likely significantly expand the number and nature of franchises that fall under its veil of protection. Yet the new law still would not apply to mobile franchised businesses that do not have a fixed location. Though the scope of the amendment’s protections was ultimately reduced from its initial proposal, the “fixed geographical location” element of the definition was never in question.⁹⁰

HOME- AND WAREHOUSE-BASED BUSINESSES

Other courts have found that home-based and warehouse-based businesses satisfy the place of business requirement. In 2010, a federal court in Arkansas held that a wholesale distributor’s warehouse could meet the definition of a place of business under the Arkansas Franchise Protection Act in the sense of a “fixed geographical location at which the franchisee displays for sale and sells the franchisor’s goods or offers for sale and sells the franchisor’s services.”⁹¹ The court denied the manufacturer summary judgment on that claim based on the distributor’s evidence that it had displayed the manufacturer’s products at the warehouse and on the manufacturer’s admission that some sales were made directly from the warehouse and not just by the distributor’s route drivers. Although a positive result for the distributor, this analysis highlights the lack of coverage in the Arkansas law for mobile franchises in sectors such as home services and tool distribution.

In a 1979 decision, the U.S. District Court for the District of Delaware held that a home-based business satisfied Delaware’s place of business definition.⁹² Although the Delaware statute does not contain the residence exclusion present in the Arkansas and New Jersey acts,⁹³ as noted earlier, the courts’ decisions denying application of these statutes to home-based businesses have not rested on this exclusion alone.⁹⁴ In *Flavors of Greater Delaware Valley v. Bresler’s 33 Flavors, Inc.*,⁹⁵ another federal court in Delaware held that the fact that the distributor “operated his business at his own home” was sufficient to satisfy the Delaware statute’s place of business requirement.⁹⁶ In a footnote, the court contrasted the New Jersey Franchise Practices Act’s residence exclusion.⁹⁷

Similarly, in *Instructional Systems, Inc. v. Computer Curriculum Corp.*,⁹⁸ the New Jersey Supreme Court applied the preamendment act to a distributor that operated out of a 6,000-square-foot facility at which it conducted sales demonstrations on the operation of a complex product in a simulated classroom laboratory, even though it was not specifically alleged that sales were conducted at this location or elsewhere in the state.⁹⁹ Given the unique nature of the facility, the court stated that it was “much more than a mere sales office or warehouse” and therefore was able to satisfy the act’s former limited place of business requirement despite the absence of actual sales.¹⁰⁰

MINIMUM ECONOMIC THRESHOLD

The franchise relationship and termination statutes in Nebraska and New Jersey contain minimum economic investment amounts that must be met in order for franchisees to receive protection under these state relationship and termination laws in addition to place of business requirements.¹⁰¹

For a franchisee to receive protection under the Nebraska and New Jersey acts, “gross sales of products or services between the franchisor and franchisee covered by such franchise [must] have exceeded [\$35,000] for the twelve months next preceding the institution of suit.”¹⁰² Although a few courts have identified this issue in evaluating the applicability of relationship and termination statutes,¹⁰³ the issue has not been meaningfully discussed in detail. Questions of whether payments constitute a franchise fee are more common in the disclosure context, which is beyond the scope of this article. One notable exception, however, is the 1998 case *To-Am Equipment Co., Inc. v. Mitsubishi Caterpillar Forklift America, Inc.*,¹⁰⁴ in which the franchise fee issue was analyzed in the context of a dealer’s claim for wrongful termination under the relationship provisions of the Illinois Franchise Disclosure Act.¹⁰⁵ In that case, the Seventh Circuit affirmed denial of a manufacturer’s motion for judgment on the dealer’s statutory wrongful termination claim, holding that the dealer’s payment of more than \$1,600 for required sales and service manuals constituted an indirect franchise fee and entitled the dealer to the statute’s protections.¹⁰⁶

EXTRATERRITORIAL APPLICATION

LAWS WITH NO PLACE OF BUSINESS REQUIREMENT

The following state franchise relationship and termination statutes do not contain a place of business requirement: California, Hawaii, Idaho, Indiana, Michigan, Mississippi, South Dakota, Virginia, Washington, and Wisconsin.¹⁰⁷ The California Franchise Relations Act is illustrative of the typical relationship statute not having a place of business limitation. It applies to “any franchise where either the franchisee is domiciled in the state or the franchised business is or has been operated in the state.”¹⁰⁸ The U.S. District Court for the Northern District of California has stated that “it is evident that this provision is not intended to protect in-state franchises only.”¹⁰⁹

*Gabana Gulf Distribution, Ltd. v. Gap International Sales, Inc.*¹¹⁰ involved a distributor agreement between Gap and a distributor, Gabana, for the right to distribute Gap first-line products in Arabic-speaking nations. In accordance with the distributor agreement, Gabana established relationships with several retailers in the Middle East. Seven months into the term of the agreement, Gap attempted to terminate the distributor agreement with 180 days’ notice and began transacting directly with Gabana’s Middle Eastern retail contacts. The distributor agreement provided for application of California law, and Gabana sued under the California Franchise Relations Act alleging improper termination.¹¹¹

Although noting that inclusion of a California choice of law clause in and of itself is insufficient to afford a distributor the act’s protections, the court held that its jurisdictional requirements were met because the distributor agreement stipulated that Gabana was a resident of California.¹¹² The court added that it could find no authority preventing the parties from making such a stipulation, thereby invoking the act’s protections. Thus, Gap’s motion to dismiss Gabana’s claims was denied even though Gabana was a U.K. entity with its principal office in Switzerland and conducted no business in California.¹¹³

FRANCHISEE’S BUSINESS ACTIVITIES EXTEND ACROSS STATE LINES

For franchisees with principal offices in states where the statute includes a place of business requirement and whose operations extend across state borders, an additional question arises as to whether the franchisee’s home state’s relationship or termination law applies to the franchisee’s entire business operations and the entire relationship between franchisee and franchisor. Several courts have suggested that their state’s franchise relationship law may not apply to a franchisee’s extraterritorial operations.¹¹⁴

In *Instructional Systems, Inc. v. Computer Curriculum Corp.*,¹¹⁵ the Third Circuit held that where a franchisor and franchisee have multiple agreements, one or more of which are governed by the New Jersey Franchise Practices Act, those agreements that do not contemplate activities or a place of business within the state of New Jersey will not necessarily be governed by the act.¹¹⁶ Likewise, *Goldwell of New Jersey, Inc. v. KPSS, Inc.*¹¹⁷ involved a franchise relationship with numerous agreements between the parties. In that case, although certain of the parties’ agreements were clearly governed by the act, a federal court in New Jersey held that the parties’ agreements not contemplating a place of business in New Jersey “did not ‘project the New Jersey law outside of New Jersey borders.’”¹¹⁸ However, factual arguments that the parties treated their agreements as a single unified agreement precluded pretrial judgment that the New Jersey law did not apply to the parties’ entire relationship in that case.¹¹⁹

The parties to the *Goldwell* case, a manufacturer of hair care products and its New Jersey-based regional distributor, entered into a written “regional buying agreement” in 2003 for New Jersey only and then in 2005 signed two additional agreements for North Carolina and a multistate territory in the area between New Jersey and North Carolina. Although the first agreement required the distributor to maintain a place of business in New Jersey, neither of the latter agreements required or mentioned that the distributor would maintain a place of business in the assigned territories. At expiration of the agreements, the manufacturer refused to renew or extend the distributorships.

In analyzing the issue, the court noted that “the New Jersey Supreme Court has approved of extra-territorial application of the [Franchise Practices Act] in some circumstances.”¹²⁰ The court acknowledged that neither the North Carolina nor the multistate agreement squarely established

the relationship as governed by the New Jersey act. Ultimately, the court rested its decision to deny the manufacturer's motion for summary judgment on the distributor's claim that the parties treated the agreements as "one unified multi-state distributorship agreement." Although the manufacturer presented evidence to the contrary, the distributor's evidence that it placed cross-territorial orders, received ordered products at its New Jersey facility for all three territories, and reported sales figures for all three territories as a single sum was sufficient to survive the motion for summary judgment.¹²¹

In *American Top English, Inc. v. Lexicon Marketing USA, Inc.*,¹²² the U.S. District Court for the Northern District of Illinois held that a distributor could not assert claims under the termination provisions of the Illinois Franchise Disclosure Act for losses accruing from lost sales to out-of-state consumers.¹²³ The court cited *HRR Zimmerman Co. v. Tecumseh Products Co.*¹²⁴ for the proposition that the coverage of the Franchise Disclosure Act does not extend to franchise agreements governing out-of-state sales, and it extended this limitation to apply to out-of-state customers of franchisees under domestic franchise agreements.¹²⁵

CONTRACTUAL CHOICE OF LAW PROVISIONS

A contractual choice of law provision will not afford the franchisee the protection of the chosen state's franchise relationship or termination law absent independent satisfaction of the statute's jurisdictional limitations. However, as noted earlier, a stipulation as to the franchisee's state of residence may be sufficient to extend the reach of a state statute to a relationship to which it otherwise would not apply.¹²⁶ Courts in several jurisdictions have reached the same conclusion on this issue.¹²⁷

DORMANT

The dormant Commerce Clause has occasionally been cited as a constitutional bar to the extraterritorial application of state franchise relationship and termination statutes. The dormant Commerce Clause doctrine prevents states from enacting laws that unduly burden interstate commerce.¹²⁸ A state enactment will be held to violate the dormant Commerce Clause if it "unjustifiably discriminate[s] on [its] face against out-of-state entities . . . or [imposes] burdens on interstate trade that are 'clearly excessive in relation to the putative local benefits.'"¹²⁹ Where a putative franchisor or other entity challenges a state statute as violating the dormant Commerce Clause, the court will evaluate the direct and practical burdens on interstate commerce, the state-level benefits of the law, whether the law discriminates against interstate commerce or foreign parties, and whether less burdensome means are available to meet the state's objectives.¹³⁰

In *HRR Zimmerman*,¹³¹ the Northern District of Illinois interpreted the termination provisions of the Illinois Franchise Disclosure Law to have no extraterritorial effect, citing the statute's silence on the issue. As a result, the court held the manufacturer's affirmative defense under the dormant

Commerce Clause to be moot.¹³² However, in *Pepsi Co., Inc. v. Marion Pepsi-Cola Bottling Co., Inc.*,¹³³ the U.S. District Court for the Southern District of Illinois held portions of the Illinois Soft Drink Industry Fair Dealing Act to be unconstitutional under the dormant Commerce Clause doctrine due to the fact that they had the "practical effect" of controlling commerce outside of the borders of Illinois by "requir[ing] Pepsico to tailor its commercial activity outside of Illinois to the Illinois regulatory scheme."¹³⁴

In *Morley-Murphy Co. v. Zenith Electronics Corp.*,¹³⁵ the Seventh Circuit interpreted the Wisconsin Fair Dealership Law not to have extraterritorial application, recognizing the potential constitutional problems under the dormant Commerce Clause¹³⁶; in *Baldwin Co. v. Tri-Clover, Inc.*,¹³⁷ the Wisconsin Supreme Court acknowledged but did not address the issue.¹³⁸ In *S.K.I. Beer Corp. v. Baltika Brewery*,¹³⁹ the Eastern District of New York ruled that the New York beer law did not apply to out-of-state transactions, citing the implications of the dormant Commerce Clause.¹⁴⁰

CONCLUSION

In summary, the varying language and scope of state franchise relationship and termination laws present several interesting issues for practitioners faced with evaluating their applicability. Although the jurisdictional limitations of statutes with place of business and economic threshold provisions will be clearly met or clearly absent in many situations, in others the applicability of these statutes will be far from clear. For franchisees with multistate territories, these issues may become even more complex.

With the proliferation of home-based and mobile franchise opportunities, courts are likely to see an increase in the number of relationship and termination law claims involving such franchises. Although these claims have traditionally been met with disfavor based on the express language of certain states' relationship and termination laws, it is difficult to imagine home-based and other businesses that clearly qualify as franchises under the FTC Rule¹⁴¹ and state disclosure laws being denied the protection of state franchise relationship and termination laws on an ongoing basis. Broad statutory reform may be necessary to fulfill the oft-cited legislative intent of protecting modern franchisees from termination without good cause. As discussed earlier, New Jersey has recently taken action to broaden the application of its Franchise Practices Act, although not as far as first proposed.¹⁴² Until a broader uniform change in the law prevails, it appears that many franchisees will be left without the protections that state franchise relationship and termination laws were enacted to provide.¹⁴³

ENDNOTES

1. See, e.g., Bruce Napell, *State Relationship Laws Are Not Uniform*, 26 FRANCHISE L.J. 3 (2006); Jonathan Solish, *What Is a Franchise? Unrecoverable Investments Define Franchise Relationship*, 26 FRANCHISE L.J. 3 (2006).

2. See Joseph Fittante Jr. & Meredith Bauer, *Defaults and Terminations: An Unfortunate Reality of a Challenging Economy*, 28 FRANCHISE L.J. 214 (2009); Napell, *supra* note 1, at 3; Jason J. Stover, *No Cure, No Problem: State Franchise Laws and Termination for Incurable Defaults*, 23 FRANCHISE L.J. 217 (2004).

3. See, e.g., 815 ILL. COMP. STAT. 705/2, Bus. Franchise Guide (CCH) ¶ 3130; see also *Budget Rent A Car Corp. v. C. Shaffer, Inc.*, 1992 WL 137596, at *88 (N.D. Ill. 1992) (discussing legislative intent behind the Illinois Franchise Disclosure Act); *Otto Dental Supply, Inc. v. Kerr Corp.*, 2008 WL 410630, at *3, Bus. Franchise Guide (CCH) ¶ 13,825 (E.D. Ark. Feb. 13, 2008) (unreported decision) (“The [Arkansas Franchise Practices Act] was designed to remedy abuses in the franchise relationship, and is to be liberally construed to carry out its legislative goal.”); *Chem-Tek, Inc. v. Gen. Motors Corp.*, 816 F. Supp. 123, 129 (D. Conn 1993) (“The purpose of the [Connecticut Franchise] Act is to prevent a franchisor from taking unfair advantage of the relative economic weakness of the franchisee.” (internal quotations omitted)).

4. ARK. CODE ANN. §§ 4-72-201 to -210, Bus. Franchise Guide (CCH) ¶ 4040; CONN. GEN. STAT. §§ 42-133e to -133h, Bus. Franchise Guide (CCH) ¶ 4070; DEL. CODE ANN. tit. 6, §§ 2551–2556, Bus. Franchise Guide (CCH) ¶ 4080; 815 ILL. COMP. STAT. 705/18–705/20, Bus. Franchise Guide (CCH) ¶ 3030; IOWA CODE tit. XIII, §§ 523H.1–523H.17, Bus. Franchise Guide (CCH) ¶ 4150; IOWA CODE tit. XIII, § 537A, Bus. Franchise Guide (CCH) ¶ 4152; MINN. STAT. § 80C.14, Bus. Franchise Guide (CCH) ¶ 3230.14; MO. REV. STAT. tit. 26, §§ 407.400–410, 407.413, 407.410, Bus. Franchise Guide (CCH) ¶ 4250; NEB. REV. STAT. §§ 87-401 to -410, Bus. Franchise Guide (CCH) ¶ 4270; N.J. REV. STAT. §§ 56:10-1 to -29, Bus. Franchise Guide (CCH) ¶ 4300; R.I. GEN. LAWS §§ 6-50-1 et. seq., Bus. Franchise Guide (CCH) ¶ 4390.

5. See N.J. REV. STAT. § 56:10-2 (2010), Bus. Franchise Guide (CCH) ¶ 4300. The language, “The Legislature finds that these protections are necessary to protect not only retail businesses, but also wholesale distribution franchisees that, through their efforts, enhance the reputation and goodwill of franchisors in this State,” was added through the 2010 amendment. *Id.*; see N.J. Bill No. A2491 (2009) (as introduced Mar. 10, 2008).

6. See discussion at *infra* notes 128–40.

7. See *supra* note 4.

8. DEL. CODE ANN. tit. 6, § 2551(1), Bus. Franchise Guide (CCH) ¶ 4080. *But see* *C&J Delivery, Inc. v. Emery Air Freight Corp.*, 647 F. Supp. 867, 873 (E.D. Mo. 1986) (Missouri Franchise Law applies if the franchisee or the franchisor maintains a place of business in the state).

9. E.g., ARK. CODE ANN. § 4-72-203, Bus. Franchise Guide (CCH) ¶ 4040. *But see* MO. REV. STAT. tit. 26, § 407.400(1), Bus. Franchise Guide (CCH) ¶ 4250.

10. IOWA CODE tit. XIII, § 537A.10-2, Bus. Franchise Guide (CCH) ¶ 4152; MINN. STAT. § 80C.21, Bus. Franchise Guide (CCH) ¶ 3230.21; MO. REV. STAT. tit. 26, § 407.400, Bus. Franchise Guide (CCH) ¶ 4250.

11. 815 ILL. COMP. STAT. 705/6, Bus. Franchise Guide (CCH) ¶ 3130.

12. See *Otto Dental Supply, Inc. v. Kerr Corp.*, 2008 WL 410630, Bus. Franchise Guide (CCH) ¶ 13,825 (E.D. Ark. Feb. 13, 2008) (unreported decision).

13. *Id.* at *4.

14. 138 S.W.3d 102, Bus. Franchise Guide (CCH) ¶ 12,729 (Ark. 2003).

15. *Id.* at 103, 106. However, throughout most of the parties’

business relationship, Harris Brands did distribute the manufacturer’s SoBe beverages in Arkansas. *Id.* at 103.

16. 842 S.W.2d 37, Bus. Franchise Guide (CCH) ¶ 10,155 (Ark. 1992).

17. *Id.* at 40.

18. *Id.*

19. *Id.*

20. *Id.* at 41. Although the parties’ agreement did not designate a location for the distributor’s operations, its warehouse and primary base were located in Arkansas, and its sales territory included eleven Arkansas counties. *Id.* at 38.

21. Bus. Franchise Guide (CCH) ¶ 14,328 (E.D. Ark. Mar. 3, 2010).

22. *New Eng. Surfaces v. E.I. DuPont de Nemours & Co.*, Bus. Franchise Guide (CCH) ¶ 13,989 (1st Cir. Sept. 23, 2008), *vacating* 517 F. Supp. 2d 466, Bus. Franchise Guide (CCH) ¶ 13,713 (D. Me. Sept. 14, 2007).

23. *Id.* at 2–3.

24. *Id.* at 6.

25. *Id.* at 6–7. The court did note that the Delaware choice of law clause in the franchise agreement might bar NES from asserting a claim under the Connecticut Franchise Act, but because the parties had not been briefed on that issue, the circuit court declined to decide it until following remand.

26. *Otto Dental Supply, Inc. v. Kerr Corp.*, 2008 WL 410630, Bus. Franchise Guide (CCH) ¶ 13,825 (E.D. Ark. Feb. 13, 2008) (unreported decision).

27. *Id.* at *4.

28. 816 F. Supp. 123 (D. Conn 1993).

29. *Id.* at 125.

30. *Id.* at 127, 129.

31. *Id.* at 129.

32. 556 F. Supp. 769, 775–77, Bus. Franchise Guide (CCH) ¶ 7,949 (E.D.N.Y. Feb. 17, 1983).

33. *Id.*

34. 63 F.3d 262, Bus. Franchise Guide (CCH) ¶ 10,743 (3d Cir. Aug. 22, 1995).

35. N.J. REV. STAT. § 56:10-3(f), Bus. Franchise Guide (CCH) ¶ 4300.

36. *Cooper*, 63 F.3d at 266–67, 274.

37. *Id.* at 274–75.

38. *Id.* at 275.

39. *C&J Delivery, Inc. v. Emery Air Freight Corp.*, 647 F. Supp. 867 (E.D. Mo. 1986).

40. *Id.*

41. *Id.* at 873.

42. *Id.* at 874.

43. *Id.*

44. MO. REV. STAT. tit. 26, § 407.400(1), Bus. Franchise Guide (CCH) ¶ 4250.

45. *C&J Delivery*, 647 F. Supp. at 873 (internal quotations omitted) (emphasis in original).

46. *Id.* (“On its face, the statute does not require that the franchisee contemplate or establish a place of business in Missouri. The Court will not add such a requirement unless it is necessarily implied from the context.” (internal citations omitted)).

47. Bus. Franchise Guide (CCH) ¶ 13,939 (W.D. Tenn. July 31, 2008).

48. *Id.*

49. See *supra* notes 12–20.

50. Bus. Franchise Guide (CCH) ¶ 13,939 (W.D. Tenn. July 31, 2008).
51. *Id.*
52. 52 F.3d 734, Bus. Franchise Guide (CCH) ¶ 10,652 (8th Cir. Apr. 10, 1995).
53. *Id.* at 736, 739.
54. 944 F.2d 1131, Bus. Franchise Guide (CCH) ¶ 9,885 (3d Cir. Sept. 18, 1991).
55. *Id.* at 1145–46.
56. 349 F.3d 376, Bus. Franchise Guide (CCH) ¶ 12,746 (7th Cir. Nov. 7, 2003).
57. *Id.* at 386.
58. *Id.* at 391; *see also* McDonald's Corp. v. C.B. Mgmt. Co., Inc., 13 F. Supp. 2d 705, 714 (N.D. Ill. 1998) (“We follow the weight of authority in finding that the [Illinois Franchise Disclosure Act] does not apply to non-Illinois franchisees.”); *In re* Montgomery Ward Catalog Sales Litig., 680 F. Supp 182, 186, Bus. Franchise Guide (CCH) ¶ 8,995 (E.D. Pa. Oct. 26, 1987) (stating that Illinois courts would not likely apply the Illinois Franchise Disclosure Act to franchisees not located in Illinois).
59. 2002 WL 959894, at *2–3, Bus. Franchise Guide (CCH) ¶ 12,388 (Conn. Apr. 16, 2002) (unpublished opinion) (citing *Forbes v. Joint Med. Prods. Corp.*, 976 F. Supp. 124 (D. Conn. 1997) for the proposition that the Connecticut Franchise Law does not apply to franchisees that do not maintain a place of business in Connecticut).
60. *Id.* at *3. The effects of contractual choice of law provisions are discussed later in this article.
61. 6 F. Supp. 2d 94, Bus. Franchise Guide (CCH) ¶ 11,451 (D. Mass. May 21, 1998).
62. *Id.* at 99–100 (quoting DEL. CODE ANN. tit. 6, § 2551(1), Bus. Franchise Guide (CCH) ¶ 4080).
63. *Id.* at 99; *cf.* C&J Delivery, Inc. v. Emery Air Freight Corp., 647 F. Supp. 867, 873 (E.D. Mo. 1986).
64. Bus. Franchise Guide (CCH) ¶ 13,165 (N.D. Ill. 2005).
65. *Id.*
66. *Bridgman v. Cornwell Quality Tools Co.*, 831 F.2d 174, Bus. Franchise Guide (CCH) ¶ 8,976 (8th Cir. Oct. 19, 1987).
67. *Id.* at 175.
68. *Id.*; ARK. CODE ANN. § 4-72-202(6), Bus. Franchise Guide (CCH) ¶ 4040; *see also* MO. CODE REGS. ANN. § 407.400(1), Bus. Franchise Guide (CCH) ¶ 4,250.
69. *Bridgeman*, 831 F.2d at 175.
70. *See* *Gibbons v. Gibbons*, 432 A.2d 80, 86 N.J. 515, 522 (N.J. 1981); *Hand v. Phila. Ins. Co.*, 973 A.2d 973, 408 N.J. Super. 124, 136–40 (N.J. Super. 2009) (analyzing legislative intent concerning retroactivity under New Jersey law).
71. *See Hand*, 408 N.J. Super. at 137–38; N.J. Bill No. A2491 (2009) (“The Legislature finds that these protections are necessary to protect not only retail businesses, but also wholesale distribution franchisees that, through their efforts, enhance the reputation and goodwill of franchisors in this State. Further, the Legislature declares that the courts have in some cases more narrowly construed the Franchise Practices Act than was intended by the Legislature.”).
72. *Liberty Sales Assocs., Inc. v. Dow Corning Corp.*, 816 F. Supp. 1004, 1008, Bus. Franchise Guide (CCH) ¶ 10,233 (D.N.J. Mar. 17, 1993) (citing *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 614 A.2d 124, 137, Bus. Franchise Guide (CCH) ¶ 10,119 (N.J. Oct. 19, 1992)).
73. *Instructional Sys.*, 614 A.2d at 137–38.
74. *Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery*, 23 F. Supp. 2d 509, 519, Bus. Franchise Guide (CCH) ¶ 11,460 (D.N.J. June 29, 1998) (citing *Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 274–75, Bus. Franchise Guide (CCH) ¶ 10,743 (3d Cir. Aug. 22, 1995) (applying New Jersey law)).
75. 816 F. Supp. 1004, Bus. Franchise Guide (CCH) ¶ 10,233 (D.N.J. Mar. 17, 1993).
76. *Id.* at 1008–09.
77. *Id.* at 1009 (“[T]he Act’s definition contemplates a location where selling is a major activity—a particular kind of selling involving the interplay of goods on display, the physical presence of the customer and the selling efforts of the vendor. It does not contemplate a personal residence in which goods are primarily present in the garage for storage, and in which sales efforts are basically limited to telephoning potential buyers.”).
78. 2006 WL 414096, at *4–5, Bus. Franchise Guide (CCH) ¶ 13,292 (D.N.J. Feb. 16, 2006).
79. *Id.* at *5.
80. *Id.* at *4.
81. *Id.* at *5.
82. *Id.*
83. *Fischer Thompson Beverages, Inc. v. Energy Brands, Inc.*, 2007 U.S. Dist. LEXIS 83334, Bus. Franchise Guide (CCH) ¶ 13,757 (D.N.J. 2007).
84. *Liberty Sales Assocs., Inc. v. Dow Corning Corp.*, 816 F. Supp. 1004, Bus. Franchise Guide (CCH) ¶ 10,233 (D.N.J. Mar. 17, 1993).
85. *Mathews v. Rescuecom Corp.*, 2006 WL 414096, Bus. Franchise Guide (CCH) 13,292 (D.N.J. Feb. 16, 2006).
86. *Id.* at *3–4.
87. *Id.* at *1, *3–4.
88. N.J. REV. STAT. § 56:10-3(f), Bus. Franchise Guide (CCH) ¶ 4300 (2010).
89. N.J. REV. STAT. § 56:10-3(f) (1971).
90. *Compare* N.J. Bill No. A2491 (2009) (as introduced Mar. 10, 2008); N.J. REV. STAT. § 56:10-3(f), Bus. Franchise Guide (CCH) ¶ 4300 (2010). The bill that introduced the amendment would have deleted the office and warehouse exceptions from the statute in their entirety, but the final amendment only provides carve-outs for offices and warehouses where customers are met and from which goods are delivered to customers for businesses that do not make the majority of their sales directly to consumers. *Id.* The bill as introduced would have provided exceptions only for “a place of storage, a residence or a vehicle” and would have expanded the statute’s scope to cover all other fixed geographical locations “from which the franchisee sells the franchisor’s goods or offers for sale and sells the franchisor’s services.” N.J. Bill No. A2491.
91. *S&S Sales, Inc. v. Pancho’s Mexican Foods, Inc.*, Bus. Franchise Guide (CCH) ¶ 14,328 (E.D. Ark. 2010) (citing ARK. CODE ANN. § 4-72-202).
92. *Flavors of Greater Del. Valley, Inc. v. Bresler’s 33 Flavors, Inc.*, 475 F. Supp. 217, 227–28 (D. Del. 1979).
93. DEL. CODE ANN. tit. 6, § 2551(1), Bus. Franchise Guide (CCH) ¶ 4080.
94. *See supra* notes 70–87.
95. 475 F. Supp. 217 (D. Del. 1979).
96. *Id.* at 227–28.
97. *Id.* at 228, n.34.

98. 130 N.J. 324, 614 A.2d 124, Bus. Franchise Guide (CCH) ¶ 10,119 (N.J. Oct. 19, 1992).

99. *Id.* at 137–38.

100. *Id.* at 138.

101. NEB. REV. STAT. § 87-403, Bus. Franchise Guide (CCH) ¶ 4270; N.J. REV. STAT. § 56:10-4, Bus. Franchise Guide (CCH) ¶ 4300.

102. NEB. REV. STAT. § 87-403, Bus. Franchise Guide (CCH) ¶ 4270; N.J. REV. STAT. § 56:10-4, Bus. Franchise Guide (CCH) ¶ 4300; *see, e.g., Carlos v. Philips Bus. Sys., Inc.*, 556 F. Supp. 769, 775 (E.D.N.Y. 1983).

103. *See, e.g., Carlos*, 556 F. Supp. 769.

104. Bus. Franchise Guide (CCH) ¶ 11,456 (7th Cir. Aug. 6, 1998).

105. *Id.*

106. *Id.* The minimum threshold for payments to constitute a franchise fee under the Illinois Franchise Disclosure Act was \$500. *Id.*

107. CAL. CORP. CODE div. 8, ch. 5.5, §§ 20000–20043, Bus. Franchise Guide (CCH) ¶ 4050; HAW. REV. STAT. tit. 26, § 482E-6, Bus. Franchise Guide (CCH) ¶ 4110; IDAHO CODE ANN. § 29-110, Bus. Franchise Guide (CCH) ¶ 4120; IND. CODE tit. 23, art. 2, ch. 2.7, §§ 1–7, Bus. Franchise Guide (CCH) ¶ 4140; MICH. COMP. LAWS § 445.1527, Bus. Franchise Guide (CCH) ¶ 3220.27; MISS. CODE ANN. §§ 75-24-51 to -63, Bus. Franchise Guide (CCH) ¶ 4240; S.D. CODIFIED LAWS §§ 37-5A-1, 37-5A-51, Bus. Franchise Guide (CCH) ¶ 3410; VA. CODE ANN. §§ 13.1-557 to -574, Bus. Franchise Guide (CCH) ¶ 3460.08; WASH. REV. CODE §§ 19.100.180, 19.100.190, Bus. Franchise Guide (CCH) ¶ 4470; WIS. STAT. §§ 135.01–135.07, Bus. Franchise Guide (CCH) ¶ 4490.

108. CAL. CORP. CODE div. 8, ch. 5.5, § 20015, Bus. Franchise Guide (CCH) ¶ 4050.

109. *Gabana Gulf Distrib., Ltd. v. Gap Int’l Sales, Inc.*, Bus. Franchise Guide (CCH) ¶ 13,420 (N.D. Cal. Aug. 14, 2006).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See, e.g., New Eng. Surfaces v. E.I. DuPont de Nemours & Co.*, Bus. Franchise Guide (CCH) ¶ 13,989 (1st Cir. Sept. 23, 2008) (“The [Connecticut Franchise Law]’s place of business language also makes clear that a franchisee can qualify—at least to the extent of its Connecticut operations—wherever its headquarters [sic].”).

115. 35 F.3d 813, Bus. Franchise Guide (CCH) ¶ 10,527 (3d Cir. Sept. 16, 1994).

116. *Id.* at 825.

117. Bus. Franchise Guide (CCH) ¶ 14,111 (D.N.J. Mar. 31, 2009).

118. *Id.* (quoting *Instructional Sys.*, 35 F.3d at 825).

119. *Id.* The court also summarily addressed the “community of interest” issue, finding that, drawing all reasonable interests in the distributor’s favor, a community of interest was likely to exist because the parties’ “agreements reflect the ‘symbiotic character of a true franchise agreement and the consequent vulnerability of [Mid-Atlantic] to an unconscionable loss of [its] tangible and intangible equities.’” *Id.* (quoting *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 341, Bus. Franchise Guide (CCH) ¶ 10,119 (N.J. Oct. 19, 1992) (modifications in original)).

120. *Id.*

121. *See id.* The court held thus: “[T]he New Jersey Legislature likely would have intended the NJFPA to apply to franchises which disclaimed connection to New Jersey franchises in the contract, but where the parties nevertheless acted as if the multiple franchises

constituted one umbrella agreement. This Court declines to rule as a matter of law on the [Agreements]’ independence provisions when a reasonable observer could conclude that the parties disregarded them in fact. Because the New Jersey [Agreement] required Mid-Atlantic to establish a place of business in this state and the evidence heretofore adduced permits the inference that a single multi-state agreement existed, the Court will not grant KPSS’s motion as to NJFPA applicability to the non-New Jersey [Agreements].” *Id.*

122. Bus. Franchise Guide (CCH) ¶ 12,856 (N.D. Ill. June 21, 2004).

123. *Id.*

124. Bus. Franchise Guide (CCH) ¶ 12,446 (N.D. Ill. Sept. 9, 2002); *see discussion at infra* notes 131–33.

125. *Am. Top English*, Bus. Franchise Guide (CCH) ¶ 12,856 (N.D. Ill. June 21, 2004).

126. *See supra* notes 114–25.

127. *See, e.g., Diesel Injection Serv. Co., Inc. v. Jacobs Vehicle Equip. Co.*, Bus. Franchise Guide (CCH) ¶ 12,388 (Conn. Apr. 16, 2002) (the parties’ contractual Connecticut choice of law provision did not afford franchisee with the protections of the Connecticut Franchise Act where the franchisee’s place of business was not in Connecticut); *Forbes v. Joint Med. Prods. Corp.*, 976 F. Supp. 124, 126 (D. Conn. 1997) (franchisee whose territory was located in Texas was not protected by the Connecticut Franchise Law); *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 730, Bus. Franchise Guide (CCH) ¶ 10,764 (Iowa Sept. 20, 1995) (a choice of law provision “may never mandate the application of [the Iowa franchise law] to franchises being operated outside of the state of Iowa”); *Highway Equip. Co. v. Caterpillar, Inc.*, 908 F.2d 60, 62–64 (6th Cir. July 11, 1990) (denying extraterritorial application of the Illinois Franchise Disclosure Act’s termination provisions).

128. *See City of Phila. v. New Jersey*, 437 U.S. 617, 623–24 (1978).

129. *Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 440 (2005) (citing *Phila. v. New Jersey*, 437 U.S. 617 (1978), and quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

130. *See id.* (holding that a per-vehicle flat fee charged to all carriers in purely intrastate routes was constitutional because the fee was not facially discriminatory or shown to be discriminatorily applied, and because the fee only applied to purely intrastate commerce). *Compare Camps Nefound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997) (exemption from state-imposed property tax was unconstitutional because it excluded organizations operated principally for the benefit of nonresidents).

131. Bus. Franchise Guide (CCH) ¶ 12,446 (N.D. Ill. Sept. 9, 2002).

132. *Id.*

133. Bus. Franchise Guide (CCH) ¶ 12,696 (S.D. Ill. July 18, 2003).

134. *Id.*

135. 142 F.3d 373, Bus. Franchise Guide (CCH) ¶ 11,378 (7th Cir. Apr. 10, 1998).

136. *Id.* at 379 (“We agree with Zenith that the extraterritorial application of the [Wisconsin Fair Dealership Law] would, at the very least, raise significant questions under the Commerce Clause.”).

137. 606 N.W.2d 145 (Wis. 2000).

138. *See id.* n.6.

139. Bus. Franchise Guide (CCH) ¶ 13,393 (E.D.N.Y. July 13, 2006).

140. *Id.*

141. 16 C.F.R. § 436.

142. *See supra* notes 88–90 and accompanying text.

143. *See supra* notes 3, 5–6.