

A State's Reach Cannot Exceed its Grasp: Territorial Limitations on State Franchise Statutes

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For a host of reasons, ranging from practical to political to constitutional, states are constrained in the exercise of their regulatory authority. In recognition of these limitations, state legislatures, when enacting franchise laws, crafted various express limitations on the reach of their state's laws. These laws have remained largely unchanged for nearly fifty years, in stark contrast to the vibrant and constantly evolving marketplace of the U.S. economy. Unfettered access to information on the Internet and reliable methods of instant communication serve to equalize potential information imbalances between franchisor and franchisee,¹ while simultaneously rendering the physical borders between states increasingly irrelevant. As a result, the limitations on the reach of cumbersome state franchise statutes are becoming more relevant by the day.

This Article examines the territorial and constitutional limits of state franchise laws. Part I provides a general history of how and why franchise regulations arose in the various states that enacted them. Part II analyzes the differences in territorial limiting lan-



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1. See generally William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for A More Balanced View of the Franchisor-Franchisee Relationship*, 28 FRANCHISE L.J. 23, 28 (2008) (noting that franchisees today have a wealth of information at their disposal when making purchasing decisions in the marketplace). Indeed, the new franchisee today is far more likely to be a sophisticated, multi-unit operator. *Id.*

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guage adopted by state legislatures and the application of that language by the courts. Part III considers the constitutional limits that prohibit broad extraterritorial reach of state franchise laws and addresses arguments for adopting uniform territorial limits between the states, particularly in the face of constitutional requirements.

I. A Brief History of Franchise Law in the United States

A. *The Franchise Industry Before Regulation*

Franchise businesses have existed since the early 1900s in the form of “product distribution franchising” or “traditional franchising.”² Yet franchising did not become a hallmark of the American economy until the 1950s.³ Before that point, fewer than 100 franchisors may have existed in the United States.⁴ With the rise of the business format franchise concept, franchise giants like McDonald’s and Domino’s Pizza developed successful business models that they licensed to independent business owners nationwide.⁵ The business format franchise model proved wildly successful and, as a result, quickly proliferated throughout various industries in the American market.⁶

The early era of the business format franchise was considered by some to be the “Wild West.”⁷ The model generated wealth for many Americans, but the unnaturally fast growth was also creating problems.⁸ On May 29, 1970, *The Wall Street Journal* headline read “Many Franchise Firms Fall on Hard Times After a 15-Year Boom.”⁹ As one might expect, the success of the model, and the absence of any regulatory oversight, drew the interest of less-than-savory entrepreneurs.¹⁰ These unscrupulous individuals sought to “make a quick buck at the expense of vulnerable would-be franchisees,” and their unethical practices led to a demand for regulation of franchising at both the state and federal level.¹¹ Harold Brown, a franchisee advocate, claimed (without evidentiary support) that franchisees typically “are in their middle years, come from a sheltered

2. William L. Killion, *The History of Franchising*, in *FRANCHISING: CASES, MATERIALS, AND PROBLEMS* 3 (Alexander Moore Meiklejohn ed., 2013).

3. David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 OKLA. CITY U. L. REV. 37, 42–47 (1999).

4. Killion, *supra* note 2, at 10.

5. Gurnick & Vieux, *supra* note 3, at 48.

6. Statement of Basis and Purpose, 43 Fed. Reg. 59614, 59623 (Dec. 21, 1978).

7. Killion, *supra* note 2, at 5.

8. Killion, *supra* note 2, at 13.

9. *Id.* (quoting James MacGregor, *Many Franchise Firms Fall on Hard Times After a 15-Year Boom*, WALL ST. J., May 29, 1970, at 1.

10. *Id.* at 14. One of the most famous examples of this issue was the Minnie Pearl’s Chicken System, which was started by two brothers who sold Minnie Pearl restaurant franchises. They sold franchises for 1,600 restaurants, using the practice of “going public on the strength of earnings based entirely on one-shot franchise fees in hand. . . .” *Id.* (quoting J. Richard Elliott, Jr., *Home to Roost: Excesses of the Fast Food Franchisers Are Catching up to Some*, BARRON’S NAT’L BUS. & FIN. WKLY., Sept. 22, 1969, at 5). Unsurprisingly, that franchise bubble burst by 1969, with only 263 of the franchise restaurants operational.

11. Killion, *supra* note 2, at 5.

existence, and appear to be totally unprepared for a violent change in their life pattern.”¹² Many Americans found franchisors distasteful and corrupt by 1970, but they also felt that franchises were critical to American industry.¹³ In an effort to address these problems, states began enacting laws to “protect[] franchisees from a lack of information about franchise opportunity” and curb unethical behavior by franchisors.¹⁴

B. Federal Regulation

Amidst the din of public outcry, the Federal Trade Commission (FTC) recognized a need to act on a national level. The proceedings, however, were slow and required public hearings and investigations of allegedly abusive franchise practices. In 1971, the FTC initiated the bureaucratic process of rulemaking, which lasted for seven years and resulted in a franchise regulation that became effective in 1979.¹⁵

The FTC rule required franchisors to disclose certain material information to franchisees in connection with the sale of a franchise.¹⁶ The express purpose of such disclosure was to correct the “serious informational imbalance” believed then to exist in favor of franchisors against franchisees.¹⁷ To a large degree, the FTC’s requirements were effective. In the years since the rule’s enactment, franchisees’ ability to conduct meaningful due diligence into, and comparison shop between, franchise offerings has been dramatically improved.¹⁸

II. The Territorial Limits of State Franchise Laws: Strict, Moderate, and Questionably Broad

While the FTC slowly turned the bureaucratic wheel on federal regulation, many states were too impatient to wait for a single national policy. As a result, a number of states, beginning with California in 1971, began enacting their own state franchise laws. Perhaps recognizing that the FTC was in the process of adopting a uniform standard for regulating franchise relationships, and further, that franchising was by that time already a nationwide phenomenon, state legislatures reined in the scope of their laws with territorial limitations so as not to overstep their bounds. Quickly, general trends began to emerge in the territorial limitations adopted in state franchise laws. These limitations can be classified as narrow, middle-of-the-road,

12. Harold Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650, 664 n.15 (1971). Brown went on to say that “franchisors have stated that their franchisees are like children, demanding constant discipline and control.” *Id.* Brown’s extreme views, although unsupported by evidence, resonated with citizens and lawmakers alike. Killion, *supra* note 2, at 17 n.73.

13. Killion, *supra* note 2, at 18.

14. *Id.* at 5.

15. See Statement of Basis and Purpose, 43 Fed. Reg. 59614 59,623 (Dec. 21, 1978).

16. *Id.*

17. *Id.*

18. Statement of Basis and Purposes, 72 Fed. Reg. 15444, 15447 (Mar. 30, 2007).

and broad. These categories and their implications are discussed in greater detail later.

A. *The Narrow States*

Approximately half of all franchising state statutes contain what can be construed as a narrow extraterritorial limitation.¹⁹ In general, these narrow limitations require that, for the franchise statute to apply, the franchisee must maintain a “place of business” that is physically located—or is contemplated to be physically located—within the geographic boundaries of the particular state.

The statutory language for these jurisdictions is very similar and, as a result, there is not much case law or discussion about the scope of the limitations, which is relatively straightforward based on the plain language of the statutes. To the extent there are any differences between the applications of these statutes, the differences arise out of alternative interpretations of what constitutes a “place of business.” Some states have adopted a broader interpretation, in which a place of business constitutes any significant nexus or business connection to the state. For example, the Virginia Supreme Court has held that the Virginia Retail Franchising Act applied to a newspaper distributor franchisee, despite the fact that the distributor did not maintain a fixed physical location in Virginia from which it conducted its business.²⁰ The court reasoned that the distributor’s connection to the state and its assigned territory within the state were sufficient to establish a “place of business” under the Act.²¹

Other states have adopted a more limited approach in determining what constitutes a “place of business.” In Arkansas, for example, courts require that the franchisee maintain a physical place of business within the state in order for the statute to apply. Under the Arkansas Franchise Practices Act, a place of business is defined as “a fixed geographical location at which the franchisee both displays for sale and sells the franchisor’s goods or offers for sale and sells the franchisor’s services.”²² Accordingly, the Act would not apply to a putative franchisee who is directed to sell the putative franchisor’s products door-to-door.²³ On the other hand, the Act could apply to a franchisee that maintains a warehouse in Arkansas, even if the primary operations center is located elsewhere. In such cases, the analysis turns on

19. The states with narrow extraterritorial provisions include Arkansas (ARK. CODE ANN. §§ 4-72-203, 4-72-202(6) (1991)); Connecticut (CONN. GEN. STAT. § 42-133h (1985)); Delaware (DEL. CODE ANN. tit. 6, § 2551 (1980)); Hawaii (HAW. REV. STAT. §§ 482E-3, 482-5(a), 482E-5(c) (2008)); Indiana (IND. CODE § 23-2-2.7-1(1987)); Iowa (IOWA CODE § 523H.2 (1995)); Nebraska (NEB. REV. STAT. § 87-403 (1978)); New Jersey (N.J. STAT. ANN. § 56:10-4 (West 1993)); and Virginia (VA. CODE ANN. § 13.1-559(B) (2009)).

20. *Crone v. Richmond Newspapers, Inc.*, 384 S.E.2d 77, 81 (Va. 1989).

21. *Id.*

22. ARK. CODE ANN. § 4-72-202(6).

23. *Mary Kay v. Isbell*, 999 S.W.2d 669, 671-72 (Ark. 1999) (holding that Act did not apply to relationship between the defendant cosmetics company and the plaintiff independent sales contractor because their contract explicitly provided that the plaintiff would not sell the defendant’s products from a fixed geographical location).

whether the parties contemplated the existence of a physical location within the state.²⁴ Key factors in this analysis include the franchisor's awareness of the franchisee's connections to Arkansas and whether the franchisor expressly prohibited establishing a place of business in the parties' contract.²⁵

In contrast to Arkansas, Delaware's Franchise Security Act does not expressly require a franchisee to maintain a physical presence in the state.²⁶ Nevertheless, the statute has been interpreted to include such a requirement. In *33 Flavors of Greater Delaware Valley v. Bresler's 33 Flavors*, the U.S. District Court for the District of Delaware held that the Delaware Act applied to the franchisee because it maintained a "place of business" within the state, based on the fact that it operated its business out of its Delaware home.²⁷ Conversely, in *KBQ v. E.I. du Pont de Nemours and Co.*, the franchisee was denied the benefit of the Delaware Act because it operated entirely out of state and its connection to Delaware was solely based on the fact that it was the location of the franchisor's warranty center.²⁸

Finally, in states that narrowly construe the meaning of a "place of business," the franchisee must maintain a particular type of location within the state in order for the statute to apply. For example, the Iowa Franchise Act expressly provides that a franchisee is deemed to operate in the state only when its "principal business office is physically located" in Iowa.²⁹ Accordingly, a franchisee that alleges only that it maintains a "business practice" in the state will not receive the benefit of the Act.³⁰

Other states impose even more onerous restrictions. Notably, Nebraska and New Jersey both require that the franchisee possess a sales office in the state in order to receive the benefit of the statute. Similar to Arkansas, a franchisee must maintain a "fixed geographical location at which [it] displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services" in order for their respective franchise acts to apply.³¹ But unlike Arkansas, these statutes expressly exclude offices, warehouses, storage facilities, residences, and vehicles from qualifying as "places

24. *South Beach Beverage Co., Inc. v. Harris Brands, Inc.*, 138 S.W.3d 102, 106 (Ark. 2003).

25. *Otto Dental Supply, Inc. v. Kerr Corp.*, No. 4:06CV01610-WRW, 2008 WL 410630, at *4 (E.D. Ark. Feb. 13, 2008).

26. See DEL. CODE ANN. tit. 6, §§ 2551–2556. In particular, section 2551 defines a franchise as "a contract or other arrangement governing the business relationship within this State between a franchised distributor and a franchisor. . . ." 'Franchised distributor' is defined as "an individual, partnership, corporation, or unincorporated association with a place of business within the State." DEL. CODE ANN. tit. 6, §§ 2551(1)–(2).

27. 475 F. Supp. 217, 228–29 (D. Del. 1979).

28. 6 F. Supp. 2d 94, 99–100 (D. Mass. 1998) (holding that the franchisor's warranty center could not constitute a place of business within Delaware for an otherwise out-of-state franchisee, even where the franchisee was assessed a proportionate fee for its operation).

29. IOWA CODE § 523H.2.

30. *G.P.P., Inc. v. Guardian Prot. Prods., Inc.*, No. 1:15-cv-00321-SKO, 2015 WL 3992878, at *11 (E.D. Cal. June 30, 2015) (granting motion to dismiss Iowa Franchise Act claims because franchisee failed to allege that its principal place of business was located in Iowa).

31. NEB. REV. STAT. § 87-402(7); N.J. STAT. ANN. § 56:10-3(f).

of business.”³² In addition, the franchise statutes in both Nebraska and New Jersey apply only to a franchise whose gross sales exceed \$35,000 in the twelve months preceding a lawsuit and where at least twenty percent of the franchised business’s gross sales are derived from the franchise.³³

Although these franchise regulations vary to some extent, their strict geographical restrictions reflect a common legislative intent to limit the reach of the statute to franchisees with business outlets located within their states.³⁴ As a result, it is extremely unlikely that the franchise statutes in any of the narrow jurisdictions will apply to franchises without an established physical location in the state, even if the franchise agreement contains a choice of law provision selecting the state’s law, because “[w]hen a law contains geographical limitations on its application . . . courts will not apply it to parties falling outside those limitations, even if the parties stipulate that the law should apply.”³⁵

B. *The Middle-of-the-Road States*

Most of the remaining franchising state statutes generally have a broader reach over the regulation of out-of-state franchises.³⁶ Unlike the narrow territorial provisions discussed earlier, the state statutes discussed in this section will apply not only to franchisees with some type of brick-and-mortar location in the state, but also to non-resident franchisees or out-of-state franchises, as long as some meaningful element of the franchise relationship took place in the state.³⁷

32. NEB. REV. STAT. § 87-402(7); N.J. STAT. ANN. § 56:10-3(f). *See also* Greco Steam Cleaning, Inc. v. Associated Dry Goods Corp., 608 A.2d 1010, 1012–13 (N.J. Super. Ct. App. Div. 1992) (granting franchisor’s motion for summary judgment because franchisee did not maintain a fixed geographic location at which it sold carpet cleaning services).

33. NEB. REV. STAT. § 87-403; N.J. STAT. ANN. § 56:10-4. These statutes are in essence a fractional franchise exemption, similar to the one included in the federal rule. The federal rule exempts “fractional franchises” from regulation as long as the prospective franchisees have existing industry experience and the sales from the fractional franchise will not exceed twenty percent of overall revenues for the business it supplements. 16 C.F.R. § 436.8.

34. Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124, 132–33 (N.J. 1992) (discussing the historical background of state franchise laws).

35. Taylor v. 1-800-GOT-JUNK? LLC, 387 F. App’x 727, 729 (9th Cir. 2010). The rule stated in Taylor is consistent with a long line of cases. *See* Gravquik A/S v. Trimble Navigation Int’l, Ltd., 323 F.3d 1219, 1223 (9th Cir. 2003); Peugeot Motors of Am., Inc. v. E. Auto Distrib., Inc., 892 F.2d 355, 358 (4th Cir. 1989); Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840, 842–43 (6th Cir. 1986); Baldwin Co. v. Tri-Clover, Inc., 606 N.W.2d 145, 153 (Wis. 2000).

36. Florida and New York are the two exceptions. Courts have interpreted the franchise statutes of these two states, although very similar in language to the statutes of the states in this section, to have an extraordinarily, and likely unconstitutionally, broad territorial application. These statutes and their corresponding case law will be discussed in detail in the next section.

37. CAL. CORP. CODE § 31013 (1971); R.I. GEN. LAWS § 19-28.1-4 (1993); OR. REV. STAT. § 650.015 (1973); MICH. COMP. LAWS § 445.1507a (1989); N.D. CENT. CODE § 51-19-02(14)(b) (1993); WASH. REV. CODE § 19.100.020 (2012); MINN. STAT. § 80C.03 (1986); WIS. STAT. § 553.21 (2017); 815 ILL. COMP. STAT. 705/3(20) (2009); S.D. CODIFIED LAWS § 37-5B-2 (2008); MD. CODE ANN., BUS. REG. § 14-203(a) (1992).

Generally, these middle-of-the-road states enacted their franchise laws within the first decade of the era of true franchise regulation.³⁸ The territorial provisions of the moderate statutes are all very similar and, in some cases identical, in language. Typically, each statute's territorial provision requires that the offer or sale of a franchise be "in this state," a phrase that is defined as including situations where (1) the offer originated from within the state or (2) the offer was directed to and accepted within the state.³⁹ Many of the moderate statutes discussed in this section also apply when the franchisee is a resident or the franchise is to be operated within the state. And critically, all moderate territorial provisions explicitly exempt offers or sales included as advertisements (1) in newspapers or publications that circulate largely outside of the state or (2) on radio or television programming originating outside the state.⁴⁰

The following subsections address the interpretative trends in states with middle-of-the-road statutes. It is clear from the judicial interpretation of the following statutes that the main concern prompting their enactment was the elimination of fraud actually occurring within each state's borders and the protection of their own residents both in-state and abroad.

1. California

In California, the offer and sale of franchises is governed by the California Franchise Investment Law (CFIL), while the franchise relationship post-sale is governed by the California Franchise Relations Act (CFRA). California was the first state to enact statutes regulating the franchise industry in 1970, which comes as no surprise, because California was the epicenter of the franchising boom in the 1960s.⁴¹ By the end of the 1960s, California had more franchises than any other state, with almost ten percent of the 600,000 franchises that existed in the United States at that time.⁴² In enacting the CFIL, California clearly outlined the harm it equated with unregulated franchising:

The Legislature hereby finds and declares that the widespread sale of franchises is a relatively new form of business which has created numerous problems both from an investment and a business point of view *in the State of California*. Prior to the enactment of this division, the sale of franchises was regulated only to the limited extent to which the Corporate Securities Law of 1968 applied to those transac-

38. See statutes cited, *supra* note 37.

39. See statutes cited, *supra* note 37.

40. CAL. CORP. CODE § 31013; R.I. GEN. LAWS § 19-28.1-4; OR. REV. STAT. § 650.015; MICH. COMP. LAWS § 445.1507a; N.D. CENT. CODE § 51-19-02(14)(b); WASH. REV. CODE § 19.100.020; WIS. STAT. § 553.21, 815; 815 ILL. COMP. STAT. 705/3(20); S.D. CODIFIED LAWS § 37-5B-2; MD. CODE ANN., BUS. REG. § 14-203(a). This limitation makes sense from a constitutional perspective. Restrictions or regulation on the content of advertising that takes place wholly outside a state's geographical boundaries poses significant potential constitutional problems because it may be considered an impingement on the franchisor's freedom of speech, as well as regulation of interstate commerce.

41. Killion, *supra* note 2, at 19.

42. *Id.*

tions. *California franchisees* have suffered substantial losses where the franchisor or its representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between franchisor and franchisee, and the prior business experience of the franchisor.⁴³

The California legislature also made no secret that one of the specific purposes of the CFIL was to “provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered.”⁴⁴ For these reasons, the CFIL applies only to the offer or sale of franchises made in the state of California.⁴⁵ For the purposes of determining when offers or sales occur “in the state,” there are two relevant provisions of the CFIL: Sections 31013 and 31105. Section 31013 specifically limits the jurisdiction of the CFIL as follows:

- (a) An offer or sale of a franchise is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or, if the franchisee is domiciled in this state, the franchised business is or will be operated in this state.
- (b) An offer to sell is made in this state when the offer either originates from this state or is directed by the offeror to this state and received at the place to which it is directed. An offer to sell is accepted in this state when acceptance is communicated to the offeror in this state; and acceptance is communicated to the offeror in this state when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed.
- (c) An offer to sell is not made in this state merely because (1) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which has had more than two-thirds of its circulation outside this state during the past 12 months, or (2) a radio or television program originating outside this state is received in this state.⁴⁶

The CFIL also contains an exemption at Section 31105, however, which excludes application of the CFIL if the offer, sale, or transfer is directed to a non-resident and the franchise will not operate any customer-serving locations within the state.⁴⁷ Although the exemption is titled “Operations Physically Located Outside of State,” the language of the statute is actually more complicated. It does not, as the title suggests, exempt all franchises that operate solely outside of California. Instead, by the plain language of the statute, if the franchise is offered or sold to a California resident, even if the franchise operates entirely outside of California’s borders, the CFIL should still apply. Similarly, if a franchise is sold to a non-resident that intends to operate it within California, the CFIL will apply.

43. CAL. CORP. CODE § 31001 (emphasis added).

44. Killion, *supra* note 2, at 19.

45. CAL. CORP. CODE § 31013.

46. CAL. CORP. CODE § 31013.

47. CAL. CORP. CODE § 31105.

Federal courts explored the bounds of the CFIL in connection with out-of-state franchisees in both *Stocco v. Gemological Institute of America, Inc.* and *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc.* In *Dollar Systems*, a decision issued in 1989, the court found that the CFIL applied to a non-resident franchisor that operated entirely outside of California.⁴⁸ Specifically, the franchisee was a Virginia corporation that operated in Maryland, Virginia, and Washington D.C., and was present within the state of California only at the time the franchise agreement was negotiated, executed, and paid for, but never had any other contact with the state.⁴⁹ The court nonetheless found that the CFIL applied because the negotiation and execution of the document within California's borders brought the franchise agreement and relationship within California's jurisdiction.⁵⁰

In reaction to the *Dollar Systems* decision, in 1996, the California legislature enacted Section 31105 and codified by statute that the CFIL did not apply to out-of-state franchisees. Thereafter, in *Stocco*, an Italian franchisee, GIA Italy, sued its California franchisor, GIA, for alleged violations of the CFIL.⁵¹ GIA was a resident of Italy and operated solely in Italy, although it had Italian students who worked in and visited California while earning gemologist degrees from GIA Italy.⁵² As a result, the court determined that Chapter 2 of the CFIL did not apply to the franchise agreement between GIA and GIA Italy pursuant to Section 31105. The court therefore dismissed the suit—the opposite result than the *Dollar Systems* case. The adoption of the revised statute in 1996 indicates a clear intent to undermine decisions like *Dollar Systems* and limit the applicability of the CFIL to California-owned or operated franchisees.

CFRA is even more limited in reach and is similar to narrow state statutes. The provisions of CFRA apply only to franchisees that are domiciled in the state and franchise businesses that are or have been operating within California.⁵³ Like the CFIL, CFRA was enacted to “protect California franchisees, typically small business owners and entrepreneurs, from abuses by franchisors” but specifically with regard to “nonrenewal and termination of franchises.”⁵⁴ The narrowed scope suggests recognition on the part of the California legislature that the requirements and obligations under the CFRA are more onerous than those of the CFIL. Nonetheless, the legislature was so concerned that such protections apply to all Californian franchises or franchisees that it also enacted an anti-waiver provision declaring that “[a]ny

48. 890 F.2d 165 (9th Cir. 1989).

49. *Id.* at 171.

50. *Id.* (quoting CAL. BUS. & PROF. CODE § 20010 (1981)).

51. 975 F. Supp. 2d 1170 (9th Cir. 2013).

52. *Id.* at 1183.

53. CAL. BUS. PROF. CODE § 20015 (1981).

54. Century 21 Real Estate LLC v. All Prof'l Realty, Inc., 889 F. Supp. 2d 1198, 1216–17 (E.D. Cal. 2012) (quoting 1-800 Got-Junk? LLC v. Super. Ct., 189 Cal. App. 4th 500, 516 (2010)).

condition, stipulation or provision to bind any person to waive compliance with any provision of this law is contrary to public policy and void.”⁵⁵

In an unpublished decision, the Ninth Circuit addressed the application of the statute in the context of a choice of law provision.⁵⁶ In that case, the plaintiff, a nonresident of the state, brought suit after the defendant terminated the plaintiff’s distribution agreement.⁵⁷ The plaintiff sought to invoke the protections of CFRA,⁵⁸ but the court rejected this argument, holding that the Act’s limitations “apply in the instant case and bar [the plaintiff] from seeking relief under the Franchise Act.”⁵⁹ In so holding, the court noted that CFRA’s domicile requirement was “an express geographic limitation on the applicability of the Franchise Act,” and therefore, the court was “bound by the limitations that a state legislature places on the scope of its laws.”⁶⁰

2. Rhode Island, Oregon, and North Dakota

The franchise statutes in Rhode Island,⁶¹ Oregon, and North Dakota all contain nearly identical territorial restrictions to those of the CFIL.⁶² The only significant difference is that none of these jurisdictions has the same explicit exemption for non-resident purchasers. Rhode Island does have a separate out-of-state exemption from registration requirements that applies if:

- (1) The franchise is offered or sold to a non-resident of Rhode Island;
- (2) The franchise business will not be operated wholly or partly in Rhode Island;
- (3) The offer or sale does not violate federal law or the law of the foreign jurisdiction; and
- (4) The offeree is not actually present in Rhode Island during any offer or sale.⁶³

It is likely that these statutes would be interpreted consistently with California’s statute, except that non-residents may be able to claim that the statutes apply in the absence of the explicit California exemption.⁶⁴

3. Michigan

The Michigan Franchise Investment Law (MFIL) appears to have a drafting mistake. Unlike California or the other middle-of-the-road states, there is no provision in the MFIL that limits the application of the statute to sales

55. CAL. BUS. & PROF. CODE § 20010 (1981).

56. *Fred Briggs Distrib., Inc. v. Cal. Cooler, Inc.*, No. 92-35016, 1993 WL 306157 (9th Cir. Aug. 11, 1993).

57. *Id.*

58. *Id.*

59. *Id.* at *3.

60. *Id.*

61. Or, more accurately, The State of Rhode Island and Providence Plantations.

62. Compare CAL. CORP. CODE § 31013 with R.I. GEN. LAWS § 19-28.1-4; OR. REV. STAT. § 650.015; MICH. COMP. LAWS § 445.1507a; N.D. CENT. CODE § 51-19-02(14)(b).

63. R.I. GEN. LAWS § 19-28.1-7.

64. Unless, in the case of Rhode Island, the separate statutory exemption applies.

(or offers to sell) franchises “in this state.”⁶⁵ To the contrary, the statute broadly states on its face that it applies to “all written or oral arrangements between a franchisor and a franchisee in connection with the offer or sale of a franchise. . . .”⁶⁶ Yet despite not being limited to conduct “in this state,” the statute goes on to define when a sale or offer to sell occurs “in this state” in the same manner as the CFIL.⁶⁷

It is unclear why these provisions define the circumstances under which an offer or sale is made “in this state” when the phrase “in this state” does not otherwise appear in the statute. The only rational explanation is that the omission of the phrase “in this state” was unintended. The accidental nature of the omission is supported by the fact that Michigan courts have applied the statute as though the phrase “in this state” is present. In *Hacienda Mexican Restaurants of Kalamazoo Corp. v. Hacienda Franchise Group, Inc.*, the court held that the MFIL did not apply to a franchise agreement negotiated in Indiana between an Indiana franchisor and an Indiana franchisee, even though the franchise was to be operated in Michigan.⁶⁸

4. Washington State

Washington was the second state to enact franchise regulation. Washington was hot on California’s heels as a result of local outrage from an unfortunate incident in which an out-of-state company fraudulently induced Washington residents to purchase worthless business opportunities.⁶⁹ The company’s principals were ultimately indicted for fraud after they failed to deliver any vending machines to the franchises, but the damage was already done.⁷⁰ The legislature concluded that an inherent power imbalance plagued franchise relationships due to the inability of inexperienced franchisees to access the information they needed to make reasonable choices.⁷¹ Washington

65. MICH. COMP. LAWS § 445.1504(1).

66. *Id.* This purportedly includes, but is not limited to, “the franchise offering, the franchise agreement, sales of goods or services, leases and mortgages of real or personal property, promises to pay, security interests, pledges, insurance, advertising, construction or installation contracts, servicing contracts, and all other arrangements in which the franchisor or subfranchisor has an interest.” *Id.*

67. MICH. COMP. LAWS § 445.1504(2)-(4).

68. 195 Mich. App. 35, 40 (1992). The court further noted that the Michigan attorney general, who investigated the parties’ activities in Michigan, agreed with the court’s analysis and recognized that the MFIL did not apply to a franchise to be operated in Michigan by an Indiana franchisee.

69. See James Fletcher, Franchise Investment Protection Act 14–15 (1971) (unpublished thesis, on file with University of Washington Gallagher Law Library). Although these business opportunities were the driving force behind Washington’s decision to adopt franchise regulation, the schemes do not even meet the definition of a franchise that the legislature ultimately adopted because they involved the sale or lease of equipment to allow a buyer to start a business. These schemes would therefore fall instead under the Business Opportunity Fraud Act. See generally WASH. REV. CODE § 19.110 (2008).

70. Fletcher, *supra* note 69, at 3.

71. *Id.* at 12–13; see also Donald S. Chisum, *State Regulation of Franchising: The Washington Experience*, 48 WASH. L. REV. 291, 297–98 at n.1 (1973) (“Franchisors have used [their unequal bargaining] power to terminate franchises arbitrarily, to coerce franchisees under threat of termi-

therefore enacted the Franchise Investment Protection Act (FIPA) in an effort to curb the perceived imbalance. Rather than reinvent the wheel, when the Washington legislature enacted FIPA in 1972, the bulk of the statute was lifted almost directly from the CFIL, including the jurisdictional limiting phrase “in this state.” Specifically, FIPA’s registration and anti-fraud provisions limit their applicability to conduct occurring “in this state.”⁷²

Unlike the CFIL, however, when FIPA was originally enacted, the legislature omitted a definition of what constituted conduct occurring “in this state.”⁷³ In a comprehensive article written one year after the statute was adopted, FIPA’s most frequently cited commentator, Professor Donald Chisum, noted this glaring omission, and recommended that FIPA be amended to conform to the CFIL, which Chisum noted “contains an adequate definition of the key phrase ‘in this state’ which carefully spells out the territorial coverage of the law. . . .”⁷⁴ Despite Professor Chisum’s commentary, the legislature made no effort to update the language in the statute for nearly twenty years. That changed in the late 1980s, however, when two national organizations began work on proposed uniform franchising acts.⁷⁵ Both proposed uniform acts included definitions for the phrase “in this state” that were substantially similar to California’s statute.⁷⁶ In response to these events, the Washington legislature amended FIPA in 1991⁷⁷ to include a definition for the phrase “in this state” that is substantially similar to California law.⁷⁸ Under the amended definition, FIPA applies to franchise sales or of-

nation, and to force franchisees to purchase supplies from the franchisor or approved suppliers at unreasonable prices, to carry excessive inventories, to operate long, unprofitable hours, and to employ other unprofitable practices.”).

72. See WASH. REV. CODE § 19.100.020(2) (making it unlawful for a franchisor to sell or offer to sell an unregistered franchise “in this state”); see also WASH. REV. CODE § 19.100.170 (making it unlawful for any person to commit fraud or misrepresentation in connection with the sale of a franchise “in this state”).

73. Franchise Investment Protection Act, ch. 252, § 2 1971, Wash. Sess. Laws, 1st Ex. Sess. This is exactly the reverse of what happened in Michigan, which has a definition for “in this state,” but which failed to include a provision limiting the MFIL’s applicability to transactions and parties located “in this state.”

74. Chisum, *supra* note 71, at 337–38 (emphasis added).

75. UNIF. FRANCHISE & BUS. OPPORTUNITIES ACT (1987); MODEL FRANCHISE INV. ACT (1990).

76. UNIF. FRANCHISE & BUS. OPPORTUNITIES ACT § 102 (1987); MODEL FRANCHISE INV. ACT § 4 (1990).

77. The WSBA Committee spent three years reviewing the two uniform acts and the federal franchise rules before submitting a draft of proposed amendments to FIPA to the legislature in 1990. See *An Act Relating to Franchise Investment Protection: Hearing on SB 5256-S Before the H. Comm. on Commerce & Labor*, 1991 Leg., 52nd Sess. (Wash. 1991) (statement of C. Kent Carlson, Chairman of the Washington State Bar Association Franchise Act Revision Committee). When the legislature failed to report a bill to the governor before the close of the session, the WSBA Committee spent another year making revisions to the proposed amendments and returned during the 1991 session with a final proposed bill. *Id.* The drafters of the bill gave significant weight to the terms of the proposed uniform acts. *Id.* For a complete discussion of the procedural background of the amendment process, see Doug C. Berry, David M. Byers & Daniel J. Oates, *State Regulation of Franchising: The Washington Experience Revisited*, 32 SEATTLE U. L. REV. 811, 826 (2009).

78. Compare WASH. REV. CODE § 19.100.020(2), (3) with CAL. CORP. CODE § 31013. The definitions are not identical. In some respects FIPA is broader than the CFIL, and in some respects

fers to sell a franchise:⁷⁹ (1) directed into, and received in, Washington; (2) originating in Washington that violate the law of the state into which they are directed; (3) directed to Washington residents; or (4) relating to businesses to be located or operated in Washington.⁸⁰ To date, two promi-

it is narrower. The legislature narrowed the scope from the CFIL, such that FIPA only applies to offers that originate in Washington if the offer violates the franchise or business opportunity laws of the state into which it was directed. This seems more constitutionally permissible than California's statute, which broadly includes any offer that originates in the state, without regard to the effect it has outside the state. At the same time, FIPA is broader than the CFIL in that it applies to offers that are made to Washington residents or offers that are made for franchises to be operated in Washington. Under the CFIL, the statute applies only if both conditions (residency and operation in the state) are satisfied.

79. Specifically, the statute provides in relevant part, as follows:

(2) For the purpose of this section, an offer to sell a franchise is made in this state when: (a) The offer is directed by the offeror into this state from within or outside this state and is received where it is directed, (b) the offer originates from this state and violates the franchise or business opportunity law of the state or foreign jurisdiction into which it is directed, (c) the prospective franchisee is a resident of this state, or (d) the franchise business that is the subject of the offer is to be located or operated, wholly or partly, in this state.

(3) For the purpose of this section, a sale of any franchise is made in this state when: (a) An offer to sell is accepted in this state, (b) an offer originating from this state is accepted and violates the franchise or business opportunity law of the state or foreign jurisdiction in which it is accepted, (c) the purchaser of the franchise is a resident of this state, or (d) the franchise business that is the subject of the sale is to be located or operated, wholly or partly, in this state.

(4) For the purpose of this section, an offer to sell is not made in this state solely because the offer appears: (a) In a newspaper or other publication of general and regular circulation if the publication has had more than two-thirds of its circulation outside this state during the twelve months before the offer is published, or (b) in a broadcast or transmission originating outside this state.

WASH. REV. CODE § 19.100.020.

80. WASH. REV. CODE §§ 19.100.020(2)–(3). As previously noted, WASH. REV. CODE § 19.100.020 is the section of the statute that applies to a franchisor's failure to register a franchise. The language of this section specifically defines the phrase "in this state" "for purposes of this section." Some have argued, based on a superficial reading of the provision, that the definition of "in this state" is limited to claims for failure to register and does not define the phrase "in this state" for purposes of anti-fraud claims under WASH. REV. CODE § 19.100.170. This argument is without merit, however, for a variety of reasons. First, it would mean that the phrase "in this state" means two different things in the same statute, which is a nonsensical result. *Henry Indus., Inc. v. Dep't of Labor & Indus.*, 381 P.3d 172, 185 (Wash. Ct. App. 2016) ("We must also avoid absurd results when interpreting statutes."). Second, it is belied by the legislative history of the amendments, which were specifically adopted with the intention of limiting the jurisdictional reach of the statute, consistent with the proposed uniform acts. *See, e.g., Franchise Investment Protection Act*, ch. 252, § 2 1971 Wash. Sess. Laws, 1st Ex. Sess.; *An Act Relating to Franchise Investment Protection: Hearing on SB 5256-S Before the H. Comm. on Commerce & Labor*, 1991 Leg., 52nd Sess. (Wash. 1991) (statement of C. Kent Carlson, Chairman of the Washington State Bar Association Franchise Act Revision Committee). Third, other states have similarly adopted jurisdictional limiting language, and courts have applied it as it was intended (consistent with other states), even in light of poor draftsmanship. *See, e.g., Hacienda Mexican Rests. of Kal-amazoo Corp. v. Hacienda Franchise Grp., Inc.*, 195 Mich. App. 35, 40 (1992) (limiting claims under MFIL to those occurring "in this state," a defined term under the Michigan statute, even though the statute does not limit its applicability to actions occurring "in this state"). And finally, it would mean that the phrase "in this state" in WASH. REV. CODE § 19.100.170 would need to be read for its plain meaning. The plain meaning of the phrase "in this state" is precisely that: the actual conduct giving rise to the fraud would need to occur in Washington, i.e., the fraudulent statement must be made and received. This is a much narrower definition than the

ment cases interpret Washington's revised definition: *Taylor v. 1-800-GOT JUNK?, LLC* and *Red Lion Hotels Franchising Inc. v. MAK LLC*.

In *Taylor*, an Oregon-based franchisee brought pre-sale anti-fraud claims against a Vancouver, Canada-based franchisor under FIPA.⁸¹ The court held that although the parties had expressly elected to apply Washington law, FIPA's express geographical limitations precluded application of the Act.⁸² Because both of the parties were located outside of Washington (in Oregon and Canada, respectively) and no negotiations or executions of the franchise agreement had taken place in Washington, nothing occurred "in this state" as that term is defined under WASH. REV. CODE § 19.100.020(2)–(3), and FIPA did not apply.⁸³

The *Red Lion* case involved a different provision in the FIPA statute.⁸⁴ Specifically, in that case, a franchisor with its principal place of business located in Washington terminated the franchise agreement and sued a California-based franchisee for breach of contract when the franchisee failed to make repairs and upgrades to its hotel as required by the franchise agreement.⁸⁵ The franchisee responded by bring a counterclaim against the franchisor under the Washington Consumer Protection Act (CPA),⁸⁶ alleging that the franchisor had wrongfully terminated the franchise agreement in violation of FIPA's post-sale relationship provisions.⁸⁷ Unlike FIPA's registration and anti-fraud provisions, the post-sale relationship provision (commonly referred to as the "franchisee bill of rights") does not contain the qualifying jurisdictional lan-

broader language adopted by the legislature in WASH. REV. CODE § 19.100.020. Because FIPA was intended to be interpreted broadly for the protection of franchisees, the only logical interpretation of the phrase "in this state" under WASH. REV. CODE § 19.100.170, is the same as the interpretation expressly given under WASH. REV. CODE § 19.100.020. For this reason, the Ninth Circuit has twice held that it was appropriate for the court in *Taylor* to apply the language in WASH. REV. CODE § 19.100.020 when interpreting the phrase "in this state" in WASH. REV. CODE § 19.100.170. *Taylor v. 1-800-Got-Junk?, LLC*, 387 F. App'x 727, 729 (9th Cir. 2010); *Red Lion Hotels Franchising Inc. v. MAK LLC*, 663 F.3d 1080 (9th Cir. 2011) ("[I]t is clear that the *Taylor* court reached the right result on the facts of the case. Plaintiffs' underlying FIPA claim [in *Taylor*] was for fraud in the sale of the franchise, and FIPA's fraud provision contains an explicit territorial limitation.").

81. 632 F. Supp. 2d 1048, 1049 (W.D. Wash. 2009).

82. *Id.* at 1052 ("[A] specific territorial limitation on the application of a state law [FIPA] must be given effect even where the parties contractually agree that the law of that state applies.").

83. *Id.* at 1052–54; *see also Taylor*, 387 F. App'x at 729 (affirming the district court opinion and noting that "FIPA applies only to conduct occurring in Washington."). *Id.* The court also maintained that it did not matter that the franchise agreement selected Washington law for the choice of law provision because FIPA has express territorial limitations excluding out-of-state conduct from its application. *Id.* This is consistent with the Restatement (Second) of Conflict of Laws, which expressly provides that a territorial restriction is not a choice of law provision. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, cmt. c (1989) (stating that a court should disregard a choice of law provision if the law of the chosen state would not apply to the parties or the transaction on its face).

84. 663 F.3d 1080 (9th Cir. 2011).

85. *Id.*

86. A violation of FIPA's Franchisee Bill of Rights provisions, WASH. REV. CODE § 19.100.180(2), is actionable only as a violation of the Consumer Protection Act. *See, e.g., BP W. Coast Prods. LLC v. Shalabi*, 2012 WL 2277843 (W.D. Wash. June 14, 2012).

87. *Red Lion*, 663 F.3d at 1086.

guage limiting claims to conduct occurring “in this state.”⁸⁸ Noting this difference from the earlier *Taylor* case, the Ninth Circuit concluded that the legislature may not have wanted to limit claims under the post-sale relationship provision to the same extent as the anti-fraud and registration provisions.⁸⁹ Moreover, unlike in *Taylor*, the franchisor in *Red Lion* had its principal place of business located in Washington, and all of the interactions between the franchisor and franchisee took place between Washington and California.⁹⁰ As a result, the court concluded that there were factual questions that precluded summary judgment on the CPA claim, particularly given that the CPA contains its own jurisdictional limiting language, which the district court had never addressed.⁹¹ The court therefore remanded the case to the district court for the purposes of determining whether the CPA’s own territorial limitations applied under the circumstances.⁹² The court did note, however, that FIPA’s other sections contain express geographic limitations and that the *Taylor* case was rightly decided because FIPA’s anti-fraud provision contains a jurisdictional limitation.⁹³ According to the court, FIPA’s territorial limitations simply did not apply to preclude a claim under the statute’s post-sale relationship sections.⁹⁴

5. Wisconsin

Wisconsin has enacted both a franchise registration law and a franchise relationship law, but the relationship law, officially titled the Wisconsin Fair Dealership Law, actually applies to dealerships, not franchises.⁹⁵ The Wisconsin Franchise Investment Law (WFIL) governs franchise disclosures and registration. It is subject to the following territorial limitations:

- (1) The provisions of this chapter concerning sales and offers to sell apply when a sale is made in this state or when an offer to sell is made or accepted in this state, except that s. 553.21 does not apply to an offer to sell that is not directed to, or received by, the offeree in this state.

88. Compare WASH. REV. CODE § 19.100.020 and WASH. REV. CODE § 19.100.170 with WASH. REV. CODE § 19.100.180.

89. *Red Lion*, 663 F.3d at 1090. In reaching this conclusion, the court completely ignored the extensive legislative history of the statute. Instead, the court invented a hypothetical rationale that the legislature might have intended that was wholly unsupported by the record. *Id.* at 1091 (“[T]he Washington legislature *might* have wanted to apply FIPA’s bill of rights to all franchises and franchisees of Washington franchisors . . .”) (emphasis added). In light of the fact that there is no actual legislative history to support this supposition, and, in fact, the evidence was to the contrary, the decision in the *Red Lion* case is suspect, if not simply incorrect.

90. *Id.* at 1082.

91. *Id.* at 1091.

92. *Id.* (“The territorial reach of the CPA is thus an open question. We agree with *Red Lion* that the CPA provides the remedy for violation of FIPA’s bill of rights. We remand to the district court to consider the merits of Karimi’s FIPA counterclaim under FIPA’s bill of rights and to determine whether Karimi is entitled to a remedy under the CPA.”).

93. *Id.* at 1090 (“[T]he district court in *Taylor* was clearly correct in concluding that the Washington legislature did not intend FIPA to apply [to an anti-fraud claim under WASH. REV. CODE § 19.100.170] . . .”).

94. *Id.* at 1091.

95. 1 W. MICHAEL GARNER, FRANCHISE & DISTRIBUTION LAW & PRACTICE § 5.39 (1990).

- (2) For the purpose of this section, an offer to sell is made in this state if the offer either originates in this state or is directed by the offeror to this state and received by the offeree in this state.
- (3) For the purpose of this section, an offer to sell is accepted in this state if acceptance is communicated to the offeror from this state.
- (4) An offer to sell is not made in this state if the publisher circulates or there is circulated on the publisher's behalf in this state any bona fide newspaper or other publication of general, regular and paid circulation that is not published in this state or if a radio or television program that originates outside this state is received in this state.⁹⁶

This provision was interpreted in *Maryland Staffing Services, Inc. v. Manpower, Inc.*, a case in which a Maryland franchisee, Maryland Staffing Services, Inc. sued its Wisconsin-based franchisor, Manpower, Inc. for alleged violations of the WFIL.⁹⁷ Manpower moved to dismiss the claim on the basis that the WFIL did not apply to an out-of-state franchisee like Maryland Staffing.⁹⁸ The court interpreted Section 553.59 to require that “(1) either the offer to sell or purchase the franchise (a) originates in Wisconsin or (b) is directed to Wisconsin and (2) the offer to sell or purchase is received in Wisconsin.”⁹⁹ Because it found no facts in the record to support a finding that “the offer was received by Maryland Staffing in Wisconsin,” the court concluded that Maryland Staffing had failed to state a claim.¹⁰⁰

The court's interpretation of Section 553.59(1) in *Maryland Staffing* seems to ignore the actual language of the statute, which provides that the WFIL applies when, *inter alia*, “an offer to sell is made or accepted in this state.”¹⁰¹ In *Cousin Subs System Inc. v. Better Subs Development Inc.*, a later court seemed to recognize this problem, holding that the plain meaning of the statute allows for application of the WFIL where “(1) an offer originates in Wisconsin; or (2) an offer is directed by the offeror to Wisconsin and the offer is received by the offeree in Wisconsin.”¹⁰² Although the court quoted *Maryland Staffing*, it made no apparent effort to reconcile its own ruling with the prior case.¹⁰³ Perhaps for that reason, the *Cousin Subs* court never published its decision.

Although the *Maryland Staffing* decision is inconsistent with the plain language of the WFIL, it is consistent with the legislative history of the statute, which expressed a clear intent to protect only Wisconsin franchisees.¹⁰⁴ Al-

96. WIS. STAT. § 553.59 (2017); Section 553.21 prohibits selling of a franchise in Wisconsin unless the franchise has been registered pursuant to the chapter or is otherwise exempted.

97. *Maryland Staffing Servs., Inc. v. Manpower, Inc.*, 936 F. Supp. 1494 (E.D. Wis. 1996).

98. *Id.* at 1506.

99. *Id.*

100. *Id.*

101. WIS. STAT. § 553.59(1) (2017) (emphasis added).

102. 2011 WL 4585541, at *11 (E.D. Wis. Sept. 30, 2011).

103. *Id.*

104. *Maryland Staffing Servs., Inc.*, 936 F. Supp. at 1506 (“This reading is supported by the legislative history of the WFIL, which makes it clear that the legislature was concerned with

though the court did not state it explicitly, the decision suggested that the court was interested only in the protection of Wisconsin-based franchisees, not those of other states.¹⁰⁵ In other words, the WFIL was not intended to protect out-of-state franchisees, even from predatory Wisconsin-based franchisors.

6. Minnesota

The Minnesota Franchise Act (MFA) is very similar to the CFIL: it applies when an offer or sale is made or accepted in the state or when the franchise is to be operated in Minnesota.¹⁰⁶ The MFA also creates a specific exemption to the application of the statute for, among other things:

the offer or sale of a franchise to a resident of a foreign state, territory, or country who is neither domiciled in this state nor actually present in this state, if the franchise business is not to be operated wholly or partly in this state, and if the sale of this franchise is not in violation of any law of the foreign state, territory, or county concerned.¹⁰⁷

The language of the MFA differs from others in a number of interesting ways. First, in defining when an offer is made or accepted “in this state,” the statute specifically notes that neither party actually has to be present within the state for an offer to originate in the state or be received in the state.¹⁰⁸ This language is a dramatic departure from the language of other state statutes, and Section 80C.19 does nothing to explain how an offer could originate from or be received in a state by parties that are not present in the state. Second, although Section 80C.19 has the standard exemption for offers made in publications or on radio or television outside the state, the exemption is not based on the timing or proportion of the circulation that occurs outside the state; rather, Section 80C.19 exempts publications only if they are “not published in this state.”¹⁰⁹ The term “published” is not defined in this context, but it is possible that even a publication that was entirely circulated within Minnesota might be exempt as long as it was published in another state.

Several cases have explored the territorial reach of the MFA, and where the franchisee is a Minnesota resident, generally any amount of contact

protecting “Wisconsin franchisees,” which the state legislature believed to have suffered substantial losses as a result of unscrupulous franchisors.”).

105. *Id.*

106. MINN. STAT. § 80C.19 (2017).

107. MINN. STAT. § 80C.03(h). This language is virtually identical to language employed by California regulators before the adoption of CAL. CORP. CODE § 31105. *See* CAL. CODE REGS. tit. 10, § 310.100.1 (1989). The California regulation was repealed in 2002, presumably because it was obsolete after the enactment of Section 31105. Minnesota continues to use this alternative formulation.

108. MINN. STAT. § 80C.19(2) (“[A]n offer to sell or purchase is made in this state, whether or not either party is then present in this state. . . .”).

109. MINN. STAT. § 80C.19(4).

while the franchisee is in Minnesota constitutes an offer in the state.¹¹⁰ In *Martin Investors, Inc. v. Vander Bie*, the court determined that the franchisor had made offers in Minnesota under Section 80C.19 in several ways: (1) it published advertisements for consultants in two Minnesota newspapers; (2) it discussed the arrangement with the franchisee on a phone call while the franchisee was in Minnesota; and (3) it mailed a sample agreement to the franchisee in Minnesota.¹¹¹ According to the court, these three activities¹¹² constituted “precisely the kind of activity that our act was designed to regulate. . . .”¹¹³ The MFA was drafted broadly, and the Minnesota courts are therefore likely to interpret it broadly as well.

7. Illinois

Franchises in Illinois are governed by the Illinois Franchise Disclosure Act (IFDA). The IFDA regulates registration and disclosure of franchises; pre-sale misrepresentations and fraud; and post-sale relationship issues, such as discrimination, termination, and non-renewal of the franchise relationship.¹¹⁴ Like California, the legislature of Illinois found that the sale of franchises was widespread in Illinois and had caused residents to suffer substantial losses as a result of incomplete information about the franchise offerings.¹¹⁵ The stated intent of the IFDA was therefore to “provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered.”¹¹⁶

Unlike California, or most other states, Illinois’ various franchise sections are subject to different territorial limitations. The territorial limits for the post-sale relationship provisions of the IFDA are the strictest. They apply only to franchised businesses physically located in the state.¹¹⁷ The registration/disclosure requirements apply only to franchise businesses that are (1) domiciled in the state or (2) operated in the state, as long as the franchise offer was made or accepted in the state.¹¹⁸ Section 705/3(20) delineates when an offer is made or accepted in the state for the purposes of the registration and disclosure section of the statute:

110. See *Martin Investors, Inc. v. Vander Bie*, 269 N.W.2d 868, 873 (1978); *Chase Manhattan Bank, N.A. New York, N.Y. v. Clusiau Sales & Rental, Inc.*, 308 N.W.2d 490, 493 (1981).

111. *Martin Investors*, 269 N.W.2d at 873.

112. Particularly the mailing of the sample agreement.

113. *Martin Investors*, 269 N.W.2d at 873.

114. 815 ILL. COMP. STAT. 705/3.

115. 815 ILL. COMP. STAT. 705/2(1).

116. 815 ILL. COMP. STAT. 705/2(1).

117. 815 ILL. COMP. STAT. 705/18 (“It shall be an unfair franchise practice and a violation of this Act for any franchisor to unreasonably and materially discriminate between franchisees operating a franchised business located in this State . . .”); 815 ILL. COMP. STAT. 705/19 (“It shall be a violation of this Act for a franchisor to terminate a franchise of a franchised business located in this State . . .”); 815 ILL. COMP. STAT. 705/20 (“It shall be a violation of this Act for a franchisor to refuse to renew a franchise of a franchised business located in this State. . .”).

118. 815 ILL. COMP. STAT. 705/2(2). The IFDA also expressly sought to protect both franchisee and franchisor by providing a greater understanding of the relationship between the two.

- (a) An offer to sell a franchise is made in this State when the offer either originates from this State or is directed by the offeror to this State and received at the place to which it is directed. An offer to sell is accepted in this State when acceptance is communicated to the offeror in this State; and acceptance is communicated to the offeror in this State when the offeree directs it to the offeror in this State reasonably believing the offeror to be in this State and it is received at the place to which it is directed.
- (b) An offer to sell a franchise is not made in this State merely because the franchisor circulates or there is circulated in this State an advertisement in (i) a bona fide newspaper or other publication of general, regular and paid circulation which has had more than 2/3 of its circulation outside this State during the past 12 months, or (ii) a radio or television program originating outside this State which is received in this State.¹¹⁹

The anti-fraud provision of the statute has the broadest reach. It prohibits fraud, misrepresentations, or omissions in connection with the offer or sale of any franchise made in Illinois.¹²⁰ For this section, a sale is made in Illinois when “(i) an offer to sell or buy a franchise is made in this State and accepted within or outside of this State, or (ii) an offer to sell or buy a franchise is made outside of this State and accepted in this State, or (iii) the offeree is domiciled in this State, or (iv) the franchised business is or will be located in this State.”

Although there are no cases interpreting the IFDA’s scope as it applies to anti-fraud, or registration and disclosure, there is substantial case law addressing the reach of the statute in the post-sale relationship sections of the statute. For example, in *McDonald’s Corp. v. C.B. Co., Inc.*, the court examined the then-existing case law in both Illinois and elsewhere regarding the applicability of the IFDA to the termination of franchise locations in Ohio where the franchise agreement had an Illinois choice of law provision.¹²¹ The court noted that there was significant case law for both the proposition that state franchise laws should apply outside of state borders and that they should not.¹²² However, the court sided with the weight of legal authority on the issue, finding that the IFDA does not apply to non-Illinois franchises.¹²³

In making its determination, the court explained that after the franchise legislation originally passed in 1973, the Illinois Supreme Court explicitly stated “it would not give extraterritorial effect to Illinois statutes unless

119. 815 ILL. COMP. STAT. 705/3(20) (2009).

120. 815 ILL. COMP. STAT. 705/6 (1988).

121. 13 F. Supp. 2d 705, 713 (N.D. Ill. 1998).

122. *Id.* at 713–14 (citing *Highway Equip. Co. v. Caterpillar Inc.*, 908 F.2d 60, 62–64 (6th Cir. 1990) (finding that IFDA did not apply to Ohio franchisee despite contractual choice-of-law provision specifying that Illinois law governed); *Budget Rent-A-Car Corp. v. Shaffer, Inc.*, 1992 WL 137596, at *7–8 (N.D. Ill. June 2, 1992) (finding that IFDA did not apply to Alabama franchisee); *In re Montgomery Ward Catalog Sales Litig.*, 680 F. Supp. 182, 186 (E.D. Pa. 1987) (finding IFDA not applicable to non-Illinois franchisee).

123. *McDonald’s Corp.*, 13 F. Supp. 2d at 714.

the legislature expressly directed it to do so.”¹²⁴ Accordingly, the court felt that the reach of the IFDA could not extend beyond Illinois borders, specifically where, as here, the legislature added language to the original statute in 1988 to limit its applicability to businesses located in the State of Illinois.¹²⁵ In fact, the legislative history for the IFDA indicated that the statute was enacted because “the widespread sale of franchises . . . has created numerous problems in Illinois” and the legislature wanted to protect Illinois residents from situations where a franchisor “has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract. . . , the prior business experience of the franchisor, and other factors relevant to the franchise offered for sale.”¹²⁶

The *McDonald's* court recognized that its ruling, in reality if not on its face, directly contradicted prior case law.¹²⁷ Specifically, in *Infomax Office Systems, Inc. v. MBO Binder & Co. of America*, the court rejected the proposition that the IFDA should not apply to an out-of-state franchisee if the parties agreed to apply Illinois law, but ultimately found the IFDA did not apply for other reasons.¹²⁸ The *McDonald's* court explained that because *Infomax* was decided based upon that court's determination that applying the IFDA would give effect to the parties' contract rather than Illinois law, *Infomax* would not require a different outcome under the *McDonald's* set of facts.¹²⁹ The court nonetheless elaborated that even if did, the *Infomax* decision was wrong; applying the IFDA to the franchisees in that case gave extraterritorial effect to the laws of Illinois against legislative intent.¹³⁰ The proper way to give effect to the parties' choice of law provision was to apply the IFDA as it was written, meaning that the parties would be excluded under its terms.¹³¹

Similarly, In *Cromeens, Holloman, Sibert, Inc., v. AB Volvo*, the Seventh Circuit took the *McDonald's* decision one step further.¹³² In that case, the plaintiffs were franchisee-dealers of Samsung products located in Texas, Maine, Montana, New York, and two Canadian provinces.¹³³ After Samsung terminated their dealer agreements, the franchisees sued in Illinois, claiming that the substantive portions of the IFDA applied to prohibit termination of the franchise agreements because the choice of law provision stated that the contracts would be “construed and interpreted in accordance with the law of the State of Illinois.”¹³⁴ But the IFDA, by its own terms, applied only to fran-

124. *Id.* See also *Graham v. General U.S. Grant Post No. 2665, V.F.W.*, 248 N.E.2d 657, 660 (Ill. 1969).

125. *McDonald's Corp.*, 13 F. Supp. at 714.

126. *In re Montgomery Ward Catalog Sales Litig.*, 680 F. Supp. at 186–87.

127. *McDonald's Corp.*, 13 F. Supp. at 714.

128. 976 F. Supp. 1247 (S.D. Iowa 1997).

129. *McDonald's Corp.*, 13 F. Supp. at 714.

130. *Id.*

131. *Id.*

132. 349 F.3d 376, 385 (7th Cir. 2003).

133. *Id.*

134. *Id.*

chises located within the State of Illinois.¹³⁵ The plaintiffs argued that the territorial limitation did not apply, because under the Restatement of Conflict of Laws, a choice of law provision only incorporates the “local law” of the chosen state and excludes the chosen state’s choice of law rules.¹³⁶ The court rejected that argument, noting that a statute’s territorial limitations are not choice of law rules.¹³⁷ Instead, the court looked to the IDFA to see if it applied on its face, concluding:

The plain language of the Illinois law that the Samsung Dealers seek to apply excludes those same dealers from its coverage because they are located outside of Illinois. Nothing in the Restatement suggests a contrary result. The Restatement excludes from “local law” only the choice-of-law rules of the state, not any territorial limitations contained in the statute.¹³⁸

Despite the narrow application of the post-sale relationship provisions of the statute, a court is likely to adopt a broader interpretation of the pre-sale disclosure, anti-fraud, and registration provisions, consistent with other jurisdictions.

8. South Dakota

The South Dakota Franchise Investment Act (SDFIA)¹³⁹ is purely a notice filing statute and very little case law has developed around it. Although stated in plainer language, the statute appears to be similar to the CFIL, in that it applies only to sales occurring “in this state,” which includes instances where the offer is made within the state, originates from within the state, or is directed into South Dakota from outside the state, and is received where it is directed.¹⁴⁰ And like California, the statute applies if the franchisee is a resident or domiciliary of the state and the franchise is to be operated in the state.¹⁴¹ Section 37-5B-3 specifically exempts from the statute’s requirements offers that were made in newspapers that had more than two-thirds of their circulation outside the state for the past twelve months or for radio and television broadcasts originating outside of the state.¹⁴²

Like the CFIL, the SDFIA also has an exemption for out-of-state franchisees, albeit a narrower one than in California. Specifically, franchises are not subject to the statute’s requirements if the franchisee is not a resident of South Dakota, the franchise location will not be in South Dakota, and if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful attempt to evade the SDFIA.¹⁴³

135. *Id.*

136. *Id.*; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) cmt. h (1989).

137. *Cromeens*, 349 F.3d at 385.

138. *Id.* at 386.

139. Previously known as the South Dakota Franchise Act.

140. S.D. CODIFIED LAWS § 37-5B-2.

141. S.D. CODIFIED LAWS § 37-5B-2.

142. S.D. CODIFIED LAWS § 37-5B-3.

143. S.D. CODIFIED LAWS § 37-5B-3.

Finally, the SDFIA appears to be the only state territorial restriction that has been updated to decree explicitly that an offer is not made in the state if it is made over the Internet or some other common electronic carrier, provided:

- (1) The internet offer indicates that the franchise is not being offered to residents of South Dakota;
- (2) The internet offer is not directed to any person in South Dakota by or on behalf of the franchisor or anyone acting with the franchisor's knowledge; and
- (3) No franchise is sold in South Dakota by or on behalf of the franchisor until the offering has been filed by notice and the franchise disclosure document has been delivered to the purchaser prior to the sale and in compliance with this chapter.¹⁴⁴

Presumably, if regulators in states other than South Dakota attempt to assert jurisdiction over a putative franchisor using Internet advertising, that assertion would be constitutionally overbroad in the same way that claims to nationwide television and print advertising would be. As such, adoption of similar exceptions for Internet advertising is probably warranted.

The only South Dakota case to touch on the issue of the SDFIA's territorial reach was *Pinnacle Pizza Co, Inc. v. Little Caesar Enterprises, Inc.*, which dealt with a forum selection clause in a franchise agreement.¹⁴⁵ Because the franchisees operated franchise business locations in Sioux Falls, South Dakota, the court determined that the forum choice of Michigan violated the public policy underlying the SDFIA and therefore applied the SDFIA.¹⁴⁶

9. Maryland

The Maryland Franchise Registration and Disclosure Law (MFRDL) was originally enacted in 1979 with language to the effect that its requirements applied only if "(1) the offeree is a Maryland resident; (2) the contemplated franchise will be or is operated in the state; (3) an offer to sell is made in the state; or (4) an offer to buy is accepted in the state."¹⁴⁷ Like Washington, the MFRDL's jurisdiction included not only transactions that occurred within Maryland's borders, but also transactions that occurred outside of it as long as they involved a Maryland resident. And also similar to Washington before it amended its statute, the MFRDL did not explain under what circumstances an offer would be considered to have been made or accept "in the state."¹⁴⁸ Maryland quickly corrected this ambiguity, passing an amendment in 1980 that clarified the circumstances under which an offer is deemed

144. S.D. CODIFIED LAWS § 37-5B-2.

145. 395 F. Supp. 2d 891 (D.S.D. 2005). Although this case dealt with the application of the state's franchise law at that time, the statute was subsequently repealed.

146. *Id.*

147. Ronald Shapiro & Howard T. Carolan Jr., *Franchise Law Compliance: Before the Logo Hits the Streets*, 10 U. BALT. L. REV. 2, 11-12 (1980).

148. *Id.* at 12.

made or accepted in Maryland.¹⁴⁹ With the amendment, Maryland's original franchise statute was substantially similar to its current one, which mirrors much of the language in the similar provisions of the CFIL, except that, like Washington, the statute applies to state residents who purchase a franchise, even if the franchise is to be operated outside of Maryland.¹⁵⁰

Like the CFIL, an offer to sell is made if it "(i) originates from the State; or (ii) is directed by the offeror to the State and is received at the place to which it is directed."¹⁵¹ An offer is accepted in Maryland when "(i) the offeree directs acceptance to the offeror in the State reasonably believing the offeror to be in the State; and (ii) the acceptance is received at the place to which it is directed."¹⁵² And similar to most other jurisdictions, an offer is not deemed to have been made in Maryland if it is circulated in Maryland in a publication that has two-thirds of its circulation outside of Maryland in the prior twelve months or if it is an advertisement on the radio or television that originated outside the state.¹⁵³

The jurisdictional provision of the MFRDL was tested in *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.* *A Love of Food* involved a New York franchisor, a Washington D.C.-based franchise, and a franchisee that was incorporated in Delaware with its principal place of business in Maryland.¹⁵⁴ Despite the geographic dissonance, the court determined that Maryland franchise law applied to the franchise relationship between the parties. The court reasoned that the franchisee was a Maryland resident because its principal place of business was in Maryland and, where a resident signs a franchise agreement, that state's franchise act generally applies.¹⁵⁵

149. *Id.*

150. MD. CODE BUS. REG. § 14-203(a).

151. MD. CODE BUS. REG. § 14-203(b)(1).

152. MD. CODE BUS. REG. § 14-203(b)(3)-(4).

153. MD. CODE BUS. REG. § 14-203(b)(2).

154. *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 70 F. Supp. 3d 376, 388 (D.D.C. 2014).

155. *Id.* at 392. This creates a potential conflict of law problem. As set forth in detail later, New York's statute is interpreted very broadly. If the parties' contract had contained a New York choice of law provision, the franchisor could arguably have been required to comply with *both* New York and Maryland law, an absurd result. See discussion *infra* Part II.C.2. It is likely that under this scenario (i.e., a franchisee that enters into a contract to open multiple franchised outlets in multiple jurisdictions), the court would first need to evaluate which law could apply to each franchised outlet. In many cases, only the law of one jurisdiction could possibly apply due to the territorial restrictions imposed by the statute. In instances where more than one statute could theoretically apply (such as the Maryland/New York example above), the court would likely evaluate which law is the most protective of the franchisee and then apply that law. Accordingly, where a multi-unit franchisee is embroiled in a dispute with a franchisor, the parties should carefully evaluate their preferred venue to try to determine which jurisdiction is most likely to apply the law the filing party deems most favorable. Moreover, to avoid this problem, franchisors should refrain from entering into broad contracts that allow franchisees to operate multiple franchised outlets in different jurisdictions. Instead, franchisors should seek to carve out franchise territories and agreements by jurisdiction to avoid potential application of multiple franchise regulatory schemes. This may even include requiring a master franchisee to create subsidiary businesses to own and operate the franchised businesses that are located in the state in which the franchised business is intended to operate.

C. *The Broad States*

Of the territorial limitations in state franchise statutes, two stand apart as particularly broad in their application: Florida and New York. Florida's statute is not, on its face, any broader than any of the other statutes, but it is so vague as to invite expansive interpretations. New York's statute, conversely, contains a territorial provision similar to the middle of the road states, but the courts have construed it to be far broader. The reach of these statutes, as they have been interpreted, raises serious constitutional concerns addressed further in the next section.

1. Florida

The Florida Franchise Misrepresentation Act (FFMA) prevents any "person" from misrepresenting information relating to a franchise sale. For the purposes of the Act, a "person" is defined as an "individual, partnership, corporation, association, or other entity doing business in Florida."¹⁵⁶ No definition is given for what constitutes "doing business in Florida," and there appears to be no legislative history interpreting the phrase. A number of courts have addressed the territorial limits of Florida's statute anyway, with somewhat startling results.

In *Burger King v. Austin*, a franchisee alleged that Burger King violated the FFMA by intentionally misrepresenting pertinent facts related to the sale of a franchise.¹⁵⁷ Burger King moved to dismiss the claim, asserting that the FFMA did not apply because the franchise was located out of state and the parties did not do business in Florida.¹⁵⁸ The court denied Burger King's motion and held that because the parties' contract contained a Florida choice of law provision, the parties demonstrated their intent to be regarded as doing business in Florida.¹⁵⁹ In essence, the court held that no contacts were actually needed with the state at all, as long as the parties agreed that Florida law should apply.

Similarly, in *Burger King Corp. v. Holder*, a franchisee brought an action against Burger King for violations of the FFMA in relation to the sale of franchises located in Kansas.¹⁶⁰ Burger King again argued that the FFMA did not apply because the claim related to out-of-state franchises.¹⁶¹ The court denied its motion to dismiss because the franchisee alleged that Burger King did business in Florida and that some of the portions of the transaction occurred there.¹⁶² Accordingly, Burger King was considered a "person" under the Act "doing business in Florida."¹⁶³

156. FLA. STAT. § 817.416(1)(a) (1971).

157. 805 F. Supp. 1007, 1022–23 (S.D. Fla. 1992).

158. *Id.*

159. *Id.*

160. 844 F. Supp. 1528, 1530–31 (S.D. Fla. 1993).

161. *Id.*

162. *Id.*

163. *Id.*

Conversely, in *Lady of America Franchise Corp. v. Malone*, the court interpreted the FFMA to apply only when both the franchisor and the franchisee did business in Florida.¹⁶⁴ Despite this more restrictive interpretation, the court inexplicably held that the FFMA applied between a Florida franchisor and an out-of-state franchisee solely because of the Florida choice of law provision in the parties' contract.¹⁶⁵ According to the court, the addition of a Florida choice of law provision in the agreement was sufficient to satisfy the residency requirement limiting the FFMA's applicability.¹⁶⁶

Barnes v. Burger King Corp., however, breaks with this line of cases. In *Barnes*, the court granted the franchisor's motion to dismiss and held that the franchisee lacked standing to assert a FFMA claim because it did not do business in Florida and its franchise was located out-of-state.¹⁶⁷ The court granted the motion despite the fact that the parties' contract contained a Florida choice of law provision.¹⁶⁸ The court did not believe that an injustice would result against the franchisee because it possessed other legal remedies against the franchisor even without the benefit of the Act.¹⁶⁹

In light of the conflicting case law, and the vagueness of the statute, it is unclear what the true scope of the FFMA would be, if challenged on appeal.

2. New York

The legislative history of the New York Franchise Sales Act (NYFSA) provides unique insight into the development of the country's most restrictive and far reaching franchise legislation.¹⁷⁰ The NYFSA is a fascinating case study in overbreadth, particularly because all legal challenges to it have failed. New York enacted the NYFSA in 1980, with an effective date of January 1, 1981. Its passage followed two years after the promulgation of the FTC Franchise Rule, although the NYFSA is far more onerous. A

164. 2006 WL 7354110, at *3 (S.D. Fla. Feb. 13, 2006).

165. *Id.*

166. *Id.* There is ample case law in other jurisdictions standing for the proposition that a territorial limitation in a statute must be strictly construed and cannot be overridden by the contractual agreement of the parties. See *Peugeot Motors of Am., Inc. v. E. Auto Distrib., Inc.*, 892 F.2d 355, 358 (4th Cir. 1990) (holding that New York Franchise Motor Vehicle Act did not apply to non-New York distributor despite New York choice of law); *Highway Equip. Co. v. Caterpillar, Inc.*, 908 F.2d 60 (6th Cir. 1990) (holding that Illinois Franchise Dealer Act did not apply to Ohio-based franchisee despite Illinois choice of law); *Cromeens, Holloman, Sibert, Inc., v. AB Volvo*, 349 F.3d 376, 385 (7th Cir. 2003) ("The plain language of the Illinois law that the Samsung Dealers seek to apply excludes those same dealers from its coverage because they are located outside of Illinois."); *Taylor v. 1-800-GOT-JUNK? LLC*, 632 F. Supp. 2d 1048 (W.D. Wash. 2009) ("[T]he relevant state law contains an 'express geographic limitation as to its application,' and therefore, 'courts will *not* apply it to parties falling outside those limitations, even if the parties stipulate that the law should apply."); *Fred Briggs Distrib., Inc. v. Cal. Cooler, Inc.*, No. 92-35016, 1993 WL 306157 (9th Cir. Aug. 11, 1993).

167. 932 F. Supp. 1441, 1443 (S.D. Fla. 1996).

168. *Id.*

169. *Id.*

170. 4D N.Y. PRACTICE SERIES, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 100:3 (4th ed.) ("The Act has been interpreted to have the widest geographical scope of any franchise regulation in the nation.")

number of critics commented on this during the legislative process, arguing that the FTC Rule should be given time to take effect.¹⁷¹ Nonetheless, the legislature passed the NYFSA, seemingly on the strength of the New York Attorney General's findings regarding franchise abuse.¹⁷²

On its face, the NYFSA applies only if any of the following is true: (1) an offer to sell is made in New York, (2) an offer to buy is accepted in New York, or (3) the franchisee is domiciled in New York, or the franchise will be operated in New York.¹⁷³ This language makes it facially similar to Washington, albeit slightly narrower, because it does not contain a section on offers originating in New York. And New York defines what constitutes an "offer or sale" in the same way as California and other middle-of-the-road states.¹⁷⁴

The NYFSA territorial provision has been interpreted in a number of cases. In only one instance has the court held that a franchise regulation did not apply to a non-New York franchisee where the parties had agreed to apply New York law to the contract. In a number of others, the New York courts were not so restrained.

For example, in *Mon-Shore Management v. Family Media*, the franchisor argued that the NYFSA was unconstitutional as a violation of the Commerce Clause.¹⁷⁵ In particular, the franchisor argued that the NYFSA was a burden on interstate commerce to the extent that it governed the offer and sale of franchises to out-of-state parties.¹⁷⁶ The court rejected this argument on the basis that the NYFSA applies only to those parties or transactions that demonstrate a strong connection to New York; accordingly, it would not apply to commerce that takes place "wholly outside" of New York.¹⁷⁷

Similarly, in *A Love of Food I, LLC v. Maoz Vegetarian USA*, the court also held that the NYFSA applied to a transaction between the parties despite the fact that the franchisee and the franchise were located out of state.¹⁷⁸ It reached this conclusion because "important aspects" of the franchise transaction occurred in New York, including the initial in-person discussions.¹⁷⁹

171. Letter from International Franchise Association to Governor Hugh Carey (June 30, 1980).

172. Memorandum from David Clurman to Attorney General Lefkowitz (Jan. 7, 1970) (reproduced in *Hearings Before the S. Subcomm. on Urban and Rural Economic Development of the Select Comm. on Small Business*, 91st Cong. 526-38 (1970)).

173. N.Y. GEN. BUS. LAW § 681(12) (McKinney).

174. Compare N.Y. GEN. BUS. LAW § 681(12)(a) (McKinney 1981) with CAL. CORP. CODE § 31013; R.I. GEN. LAWS § 19-28.1-4; OR. REV. STAT. § 650.015(1); MICH. COMP. LAWS § 445.1507a; N.D. CENT. CODE § 51-19-02(14)(b); WASH. REV. CODE § 19.100.020; MINN. STAT. ANN. § 80C.03; WIS. STAT. § 553.21; 815 ILL. COMP. STAT. 705/3(20); S.D. CODIFIED LAWS § 37-5B-2, and MD. CODE, BUS. REG. § 14-203(a).

175. 584 F. Supp. 186, 190 (S.D.N.Y. 1984).

176. *Id.*

177. *Id.*

178. 795 F. Supp. 2d 365, 372 (D. Md. 2011).

179. *Id.*

Moreover, the franchisor's principal place of business was located in New York.¹⁸⁰

And in *Schwartz v. Pillsbury*, the Ninth Circuit held that the NYFSA applied to a transaction between a California franchisee and a New York franchisor, even though the franchise was located in California and the transaction did not occur in New York.¹⁸¹ The court reasoned that the parties explicitly agreed to a New York choice of law provision, and it was a "fundamental premise of contract law that contracts should be enforced according to their terms."¹⁸²

The limits of the NYFSA were finally reached in *Century Pacific, Inc. v. Hilton Hotels Corp.*, where a franchisee brought causes of action under the NYFSA against a franchisor for failing to include a proper prospectus during the franchise sale.¹⁸³ The franchisees were all based outside of New York, and the franchisor was a Delaware corporation, with its principal place of business in Washington.¹⁸⁴ The franchisor argued that the NYFSA did not apply because the parties had no connection to New York, except for a choice of law provision in the franchise agreement that called for the application of New York law.¹⁸⁵ The court agreed and held that despite the provision, the NYFSA did not apply because the contract included a carve out clause noting that "nothing in this section is intended to invoke the application of any franchise . . . doctrine of law of the State of New York. . ."¹⁸⁶ The case is notable in that, but for the carve out, the court was ready, willing, and able to apply the NYFSA, even if it would not otherwise apply by its terms, operating under the assumption that the parties' selection of New York law in the contract would constitute a "constructive offer and/or sale in New York."¹⁸⁷ This would appear to be precisely the type of conduct occurring "wholly outside" the state, that even the *Mon-Shore* court would acknowledge crosses constitutional bounds.

The NYFSA is unusual for both its breadth and its history. Its rules are surprisingly restrictive, despite the fact that it was enacted after the federal rule came into effect. More surprisingly, despite the relatively modest jurisdictional reach of the language employed by the statute, courts have applied

180. *Id.*

181. 969 F.2d 840, 847 (9th Cir. 1992).

182. *Id.*

183. No. 03 Civ. 8258(SAS), 2004 WL 868211, at *4 (S.D.N.Y. Apr. 21, 2004).

184. *Id.* at *1.

185. *Id.*

186. *Id.* The court further rejected the franchisee's argument that the carve out provision was void as against public policy and explained that for the NYFSA to apply to commerce taking place wholly outside of the state, the parties must expressly demonstrate their intent for New York law to apply.

187. *Id.* at *5. Other New York dealership laws have not been construed so broadly. See *Peugeot Motors of Am., Inc. v. E. Auto Distrib., Inc.*, 892 F.2d 355, 358 (4th Cir. 1990) (holding that New York Franchise Motor Vehicle Act did not apply to non-New York distributor despite New York choice of law).

the law even where there appears to be no effect on New York or its residents and no valid connection to the state.

III. The Constitutional Limits of State Franchise Laws

A. A Constitutional Analysis of Extraterritorial Reach in State Franchise Law

The extraterritorial reach that has been applied to the FFMA and the NYFSA and, to some extent, even the middle-of-the-road statutes, raises constitutional issues. The Commerce Clause of the U.S. Constitution provides that “Congress shall have Power . . . [t]o regulate commerce . . . among the several states.”¹⁸⁸ For the purposes of the Commerce Clause, commerce is “economic activity.”¹⁸⁹ Furthermore, the Commerce Clause limits state action even in areas, unlike franchising, where the federal government does not implement its own legislation.¹⁹⁰ Any state law that has an impact on interstate commerce will be upheld only if it “regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁹¹ Direct regulation of interstate commerce is strictly prohibited, regardless of local benefit or need, because it exceeds a state’s authority.¹⁹²

In the context of state regulation, a state law can burden interstate commerce if it “has the practical effect of requiring the out-of-state commerce to be conducted at the regulating state’s direction.”¹⁹³ In such cases, “there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach.”¹⁹⁴ Courts have generally invalidated statutes that reach into other states by requiring non-residents to obtain the approval of the regulating state before they can implement specific business practices elsewhere.¹⁹⁵ Although the territorial provisions in the

188. U.S. CONST., art. 1, § 8, cl. 3.

189. *United States v. Morrison*, 529 U.S. 598, 610–13 (2000).

190. *Cooley v. Board of Wardens*, 12 How. 299, 13 L.Ed. 996 (1852).

191. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

192. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

193. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003) (internal quotation marks omitted); *see also Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001).

194. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). The *Pike* balancing approach requires the court to weigh the local benefits of the purportedly infringing statute against any incidental burdens the statute may impose on interstate commerce. *Pike*, 397 U.S. at 142 (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

195. *See Brown-Forman Distillers Corp.*, 476 U.S. at 573 (holding that New York’s regulation of liquor pricing had been “projected” into other states because it required distillers to seek the approval of New York State Liquor Authority before lowering the prices elsewhere); *see also Healy*, 491 U.S. at 336 (holding that Connecticut violated the Commerce Clause because it “require[d] out-of-state shippers to forgo the implementation of competitive-pricing schemes in

New York and Florida statutes certainly appear to fall into this category, challenges to them have been judicially rebuffed. Even when a franchisor specifically argued that the NYFSA violated the Commerce Clause because it governs out-of-state franchises sold to out-of-state parties that will not be operated within New York, the court held that New York had a valid interest in maintaining the integrity of franchise transactions and that in all the situations the statute regulates “either the offeror or offeree will presumably be engaged or intending to engage in business in New York. . . .”¹⁹⁶

This line of reasoning seems to contradict the more sound reasoning of the U.S. Supreme Court in *Edgar v. MITE Corp.* In *Edgar*, the Court invalidated an Illinois statute requiring review of tender offers of security for any corporation seeking a takeover of an corporation that had (1) principal executive office in Illinois and (2) “at least 10% of its stated capital and paid in surplus represented in Illinois.”¹⁹⁷ The Court determined that the Illinois law was a direct restraint on interstate commerce because, among other reasons, tender offers are usually communicated interstate and the regulation could easily be employed where none of the parties involved were residents of Illinois.¹⁹⁸

Furthermore, courts have not properly addressed what interest, if any, states have in regulating franchises that are not owned by residents and will not be operated within that state. Most of the middle-of-the-road and broad states require application of their franchise regulations to franchisees as long as an offer was made or accepted within the state. With today’s portable methods of communication, that in essence means that if a Washington resident were to send an offer while on vacation in New York to an Oregon resident for a franchise to be operated in Oregon, arguably New York franchise law applies.¹⁹⁹ The result is absurd and would allow New York to regulate franchises that never have any meaningful impact on New York or connection with it. Although a few state statutes include exemptions to guard against such a situation, not all do. Even more troubling is the fact that courts in New York and Florida are willing to impose their state’s franchise statutes even when there have been no contacts with the state other than a choice of law provision. In light of changes in the economy, and more recent case law from the Supreme Court, the few older cases that have addressed

out-of-state markets because those pricing decisions are imported by statute into the Connecticut market regardless of local competitive conditions.”); see also *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) (holding that “any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.”).

196. *Mon-Shore Mgmt. v. Family Media*, 584 F. Supp. 186, 190 (S.D.N.Y. 1984).

197. 457 U.S. 624, 642 (1982).

198. *Id.*

199. Or Washington law, if the offer violated Oregon’s franchise disclosure requirements. Or Oregon law!

the constitutionality of state franchise statutes may no longer withstand close scrutiny.²⁰⁰

B. *The Balance of Information in the Age of the Internet*

Even if extraterritorial provisions do not directly regulate out-of-state commerce, they continue to do so indirectly. For any state to regulate interstate commerce indirectly, a legitimate local public interest is necessary and the effects on interstate commerce still must only be incidental. The history of franchise regulation demonstrates that states enacted these laws with the intention of protecting their citizens and residents from perceived abuses by franchisors, abuses driven largely by lack of knowledge and experience. There is no question that protecting citizens against fraud is a legitimate state interest.

But these statutes were hastily enacted²⁰¹ in response to the unregulated franchise world that existed circa 1970. The world is not now what it was then. Not only are there now federal regulations to protect franchisees from potential fraudulent conduct, but there has also been a dramatic change in the access individuals have to information about businesses, finances, and the law. The Internet, which did not exist in the 1970s, is integral to modern business, so much so that franchisors rate it “as the top way to recruit franchisee prospects.”²⁰² Accordingly, the states’ legitimate interest in regulating franchise sales has diminished over time.

Many of the state franchise statutes are overbroad and overreaching in that they purport to regulate franchise activity that does not involve state residents and occurs entirely outside the state. Although there are statutes that properly limit their reach, most notably California, to the extent states continue to regulate franchises free from rational limitations (either directly by regulators or indirectly by allowing civil suits to enforce their laws), those laws may exceed the proper constitutional bounds of state authority.

IV. Conclusion

The rush to enact state franchise laws reflected an understandable (albeit a heavy-handed and paternalistic) concern for the franchisee and an impa-

200. A full discussion of the constitutional limits on state exercise of jurisdiction over interstate commerce is beyond the scope of this article and merits its own lengthy discussion.

201. For example, Washington, one of the first states to enact a franchise law, notably omitted any definition of the key term “in this state” in its territorial provision. As a result, the legislature had to amend the statute in 1991. The exact same thing happened in Maryland, although that state’s legislature acted much more quickly to address the problem. Similarly, Michigan has a definition for the phrase “in this state” and no corresponding limitation in the statute that would purport to limit its reach to activity occurring “in this state.” Many of the narrow states have failed to define the key phrase “place of business.” As a result of the consistently poor draftsmanship across these jurisdictions, the meaning of these phrases is still being litigated to this day.

202. Gary Duvall, *Using the Web More Effectively*, 24 FRANCHISE L.J. 173 (2005).

tience among the states for federal intervention. The current statutes are outdated and underdeveloped with territorial provisions that are generally overbroad and do not protect the interests for which they were enacted. Practitioners should carefully evaluate the reach of a given franchise statute to determine whether it in fact applies to the parties' relationship, or whether its reach is limited by legislative intent or constitutional considerations.

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