Franchise Law Jury Instructions

David Gurnick

I. Introduction

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There currently is no widely available set of published jury instructions specifically for franchise law cases.[1] The author hopes these instructions may have both practical value in cases and academic value in the field of franchise law. The hoped-for practical value is as a form that litigators and courts may use as a starting point for tailoring more specific instructions in jury trials. They may also be useful in evaluating a potential claim, preparing a case for trial, and assessing merits of a case with a client. The hoped-for academic value is as a reference for scholars and practitioners to aid in understanding rules that courts and juries apply in franchise law cases.

These instructions are for many of the most common franchise law claims and defenses. Each instruction is accompanied by an explanatory note. Each instruction includes citations to statutory and decisional authorities from various jurisdictions.

The instructions are generalized with the idea that they are widely applicable and convenient to edit to incorporate more specific definitional elements, differences, and nuances of a particular state's law. In using these instructions, it is imperative to review and compare them to the specific statutory, regulatory, and case law definitions that apply in the particular state(s) whose laws are at issue. The instructions will need editing for each particular case. They are intended as a starting point to advance the practitioner's work in this regard.

1. Only Arkansas and Michigan have published jury instructions that concern franchising. *See* Ark. Model Jury Instr. (published by Arkansas Supreme Court Committee on Jury Instructions), Civil AMI §§ 2800–2807 (Claim for Damages Based on Termination, Cancellation, or Failure to Renew Franchise); Mich. Model Civ. Jury Instr. (published by Michigan Supreme Court Committee on Model Civil Jury Instructions), ch. 112 (Franchise Investment Law). One treatise includes a chapter with civil jury instructions having applicability to franchise cases, such as for breach of the covenant of good faith, antitrust, misrepresentation, wrongful termination, and the like, and includes some franchise-specific instructions, such as the definition of a franchise. 12 Bus. & Com. Litig. Fed. Cts. (4th ed.) (ch. 129).

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Franchising encompasses a broad range of business activities. These instructions concern the laws of about thirteen states that require presale registration to lawfully offer and sell a franchise,[2] or presale disclosure[3] of material information in a Franchise Disclosure Document (FDD). In those states that require it, the FDD typically must meet requirements stated in the Federal Trade Commission Franchise Rule[4] as well as requirements of state laws. The state laws typically track the FTC Rule[5] in their disclosure requirements. These instructions also address laws in about twenty-four states and territories that restrict franchisors from terminating or not renewing a franchise without having good cause to do so, commonly known as Franchise relationship laws.[6]

Other areas, wherein these instructions may have some use, or be adapted for use, include cases involving franchises in specific industries, such as sales of motor vehicles, petroleum products, beer and wine, and farm and construction equipment, laws concerning so-called "Business Opportunities"[7] or "Seller

2. Cal. Corp. Code § 31110; Haw. Rev. Stat. § 482E-3(c); 815 Ill. Comp. Stat. §§ 705/5; 705/10; Ind. Code § 23-2-2.5-9; Md. Code Ann. Bus. Reg. § 14-214; Minn. Stat. § 80C.02; N.Y. Gen. Bus. Law § 683.1(l); N.D. Cent. Code § 51-19-03; 19 R.I. Gen Laws § 19-28.1-5; S.D. Codified Laws § 37-5B-4; Va. Code Ann. § 13.1-560; Wash. Rev. Code § 19.100.020(1); Wis. Stat. § 553.21.

3. Cal. Corp. Code § 31119; Haw. Rev. Stat. § 482E-3(a); 815 Ill. Comp. Stat. § 705/5(2); Ind. Code § 23-2-2.5-9; Md. Code Ann. Bus. Reg. § 14-223; Minn. Stat. § 80C.06(5); N.Y. Gen. Bus. Law § 683.1(8); N.D. Cent. Code § 51-19-08(6); Or. Admin. R. 441-325-0200; 19 R.I. Gen Laws § 19-28.1-8; S.D. Codified Laws § 37-5B-17(1); Va. Code Ann. §§ 13.1-563(4), 13.1-565(3); Wash. Rev. Code § 19.100.080; Wis. Stat. § 553.27(4).

4. 16 C.F.R. § 436.1 *et seq.*

5. Cal. Code Regs. tit. 10, § 310.114.1; Fla. Stat. § 559.802(1)(a); Haw. Rev. Stat. § 482E-3; 815 Ill. Comp. Stat. § 705/16; Ind. Secs. Comm'r, Admin. Order, Bus. Franchise Guide (CCH) ¶ 5140.02 (Feb. 28, 1986); Md. Code Ann. Bus. Reg. § 14-216; Mich. Comp. Laws § 445.1508(2); Minn. Stat. § 80C.04; N.Y. Gen. Bus. Law § 683.1; N.D. Statement of Policy, Bus. Fran. Guide (CCH) § 5340.01; 19 R.I. Gen Laws § 19-28.1-3(f); S.D. Codified Laws § 37-25A-15; 21 Va. Admin. Code §§ 5-110-30, 5-110-95; Wash. Rev. Code § 19.100.040(1)(a); Wis. Stat. § 553.27(4).

6. Ark. Code Ann. § 4-72-201 *et seq.*; Cal. Bus. & Prof. Code § 20000 *et seq.*, Conn. Gen. Stat. § 42-133e *et seq.*; Del. Code Ann. tit. 6, § 2551 *et seq.*; Haw. Rev. Stat. § 482E-6; Idaho Code § 29-110; 815 Ill. Comp. Stat. §§ 705/18–705/20; Ind. Code § 23-2-2.7-1 *et seq.*; Iowa Code § 523H.1 *et seq.*; La. Stat. Ann. § 1042, 921; Mich. Comp. Laws § 445.1527; Minn. Stat. § 80C.14; Miss. Code Ann. § 75-24-51 *et seq.*; Mo. Rev. Stat. § 407.400 *et seq.*; Neb. Rev. Stat. § 87-401 *et seq.*; N.J. Stat. Ann. § 56:10-1 *et seq.*; N.D. Cent. Code § 51-20.2-01 *et seq.*; 6 R.I. Gen. Laws § 6-50-1 *et seq.*; §§ 6-54-1 *et seq.*; Va. Code Ann. § 13.1-564; Wash. Rev. Code § 19.100.180 *et seq.*; Wis. Stat. § 135.01 *et seq.*; P.R. Laws Ann. § 278 *et seq.*; V.I. Code Ann. § 130 *et seq.*

7. *See, e.g.*, Alaska Stat. § 45.66.010 *et seq.*; Az. Rev. Stat. Ann. § 44-1271 *et seq.*; Conn. Gen. Stat. § 36b.60 *et seq.*; Fla. Stat. § 559.80 *et seq.*; Ga. Code Ann. § 10-1-410 *et seq.*; 815 Ill. Comp. Stat. § 602/5-1 *et seq.*; Ind. Code § 24-5-8-1 *et seq.*; Iowa Code § 551A.1 *et seq.*; Ky. Rev. Stat. Ann. § 367.801 *et seq.*; La. Stat. Ann.§ 51:1821 *et seq.*; Me. Stat. tit. 32, § 4691; Md. Code Ann. Bus. Reg. § 14-101 *et seq.*; Mo. Rev. Stat. § 409.1000 *et seq.*; N.C. Gen. Stat. § 66-94 *et seq.*, Ohio Rev. Code Ann. § 1334.01 *et seq.*; Okla. Stat. tit. 71, § 801 *et seq.*; S.C. Code Ann. § 39-57-10 et seq; S.D. Codified Laws § 37-25A-1 *et seq.*, Tex. Bus. & Com. Code Ann. § 51.001 *et seq.*; Utah Code Ann. § 13-15-1 *et seq.*; Va. Code Ann. § 59.1-262 *et seq.*; Wash. Rev. Code § 19.100.010 *et seq.*

Assisted Marketing Plans,"[8] and laws providing protections generally to sales representatives, wholesalers, and distributors of products and services.[9]

Many issues arise in cases involving franchise companies, for which this article does not present instructions. Franchisors and franchisees may allege, and juries may decide, claims of breach of contract (breach of the franchise agreement), breach of the covenant of good faith and fair dealing, a wide range of other business claims (common-law misrepresentation, trademark infringement, interference with contract, as examples) and defenses, for example, waiver, estoppel, and sufficiency of the plaintiff's efforts to mitigate damages. None of these kinds of instructions is provided in this article. The instructions provided here are limited to instructions that arise almost exclusively in franchise law cases.

II. The Challenge of Statutory Circularity in Franchise Law Jury Instructions

A particular challenge for practitioners preparing jury instructions in franchising cases comes from the circularity of many of the definitions contained in the various applicable statutes. A circular definition uses the term being defined as a part of the definition[10] or assumes a prior understanding of the term being defined.[11] Typically, such definitions define a franchise and elements of a franchise by using the term "franchise."

The statutes repeatedly use the words "franchise," "franchisor," and "franchisee" in the definitions of "franchise" and other terms that use the word "franchise," such as "franchise fee." For example, California's definition of a "franchise," includes as one element an agreement in which a "franchisee" has a right to operate under a marketing plan prescribed in substantial part by a "franchisor."[12] A "franchisee" is a person to whom a "franchise"

8. Cal. Civ. Code § 1812.200 *et seq.*; Neb. Rev. Stat. § 59-1701 *et seq.*

9. Ala. Code § 8-24-1 *et seq.*; Alaska Stat. § 45.45.700 *et seq.*; Az. Rev. Stat. Ann. § 44-1798 *et seq.*; Ark. Code Ann. § 4-70-301 *et seq.*; Cal. Civ. Code § 80 *et seq.*; Cal. Civ. Code § 1738.10 *et seq.*; Conn. Gen. Stat. § 42-481 *et seq.*; Ga. Code Ann. § 10-1-700 *et seq.*; 820 Ill. Comp. Stat. § 120/1 *et seq.*; Kan. Stat. Ann. § 44-341 *et seq.*; La. Stat. Ann. § 51:441 *et seq.*; Md. Code Ann. Com. Law § 11-1301 *et seq.*; Md. Code Ann. Corps. & Ass'ns § 3-601 *et seq.*; Mich. Comp. Laws § 600.2961; Minn. Stat. § 325E.37; Minn. Stat. § 181.145; Miss. Code Ann. § 75-87-1 *et seq.*; Mo. Rev. Stat. § 407.911 *et seq.*; Neb. Rev. Stat. § 48-1228 *et seq.*; N.H. Rev. Stat. Ann. §§ 339-E:1 *et seq.*, 358-E:1 *et seq.*; N.Y. Lab. Law § 191a *et seq.*; N.C. Gen. Stat. § 66-190 *et seq.*; Ohio Rev. Code Ann. § 1335.11; Okla. Stat. tit. 15 § 675 *et seq.*; Or. Rev. Stat. § 646A.097; 43 Pa. Cons. Stat. § 1471; S.C. Code Ann. § 39-65-10 *et seq.*; Tenn. Code Ann. §§ 47-18-47 *et seq.*, § 47-50-114; Tex. Bus. & Com. Code Ann. § 54.002 *et seq.*; Utah Code Ann. § 34-44-101 *et seq.*; Va. Code Ann. § 50.1-455 *et seq.*; Wash. Rev. Code § 49.48.150; Wis. Stat. § 134.93.

10. *See, e.g.*, Sparton Corp. v. United States, 68 Fed. Cl. 34, 47 (2005) (noting a circular definition is "one that uses the word that it attempts to define in the definition itself); Arty's, LLC v. Wis. Dep't of Rev., 919 N.W.2d 590, 599 (Wis. App. 2018) (noting "circular definition problem" of using a term "to define itself").

11. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (criticizing statute's definition of "employee" as "any individual employed by an employer;" noting that it "is completely circular and explains nothing").

12. Cal. Corp. Code § 31005.

is granted.[13] A "franchisor" is a person who grants a "franchise."[14] Another element in the definition of a "franchise" is the requirement that the "franchisee" pay a "franchise fee."[15] A "franchise fee" is defined as a fee or charge that a "franchisee" pays for the right to enter into a business under a "franchise agreement."[16] The same circular style infects definitions under many state franchise registration and disclosure laws and franchise relations acts.

A problem of circular definitions is that they do not accomplish the purpose of definitions.[17] They may, in the words of several courts, "explain nothing."[18] Or, as one commentator put simply, "circular reasoning, after all, is inherently suspect."[19] Yet, courts are often asked to construe meanings of words where the statute containing the word term does not help to define it.[20] And in a jury trial the jury must be instructed based on the statute.

Jury instructions typically follow statutory language. But the circular definitions in the franchise context place an additional burden on practitioners and courts in preparing jury instructions. To make instructions understandable to jurors, care must be used to avoid circularity. This means changing words to avoid circularity, while retaining the intended meaning of the statute.

III. Usages

Several things to note about these proposed jury instructions.

Bracketed language indicates information to be filled in. In many cases, the type of information to be filled in is apparent from the context, and then there is no bracketed instruction.

Many of the instructions include alternatives that depend on circumstances. Where alternatives are presented, they are bracketed. In some cases, particular instructions are followed by the name of one or more states in brackets. This format indicates that the law of the particular state(s) has that instruction or an instruction of similar wording or import.

13. *Id.* § 31006.
14. *Id.* § 31007.
15. *Id.* § 31005(a)(3).
16. *Id.* § 31011.
17. *See*, *e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (noting ERISA statutory definition of "employee" as "any individual employed by an employer" is "completely circular and explains nothing").
18. *Id.*; *see also* Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986) ("With magnificent circularity, Title VII defines an employee as 'an individual employed by an employer.'"); Simpson v. Ernst & Young, 850 F. Supp. 648, 654 (S.D. Ohio 1994) (noting circular definitions "explain nothing"), *aff'd*, 100 F.3d 436 (6th Cir. 1996).
19. Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. Rev. 1, 8 (2001).
20. *Darden*, 503 U.S. at 302 ("We have often been asked to construe the meaning of "employee" where the statute containing the term does not helpfully define it."). For broader discussions of circularity, *see*, *e.g.*, Wendy Gerwick Couture, *Materiality and a Theory of Legal Circularity*, 17 U. Pa. J. Bus. L. 453 (2015).

Each instruction largely, though often not exactly, tracks statutory language with an effort made to reduce the use of unnecessary statutory formalities and anachronistic language and provide some simplification of the language. Each instruction then includes an example making greater use of plain English. For the practitioner, the process of tailoring instructions to a specific case will often make it possible to eliminate words that are unnecessary given the facts of that case.

By removing excess words, the proponent of the instruction has in effect narrowed the instruction, thus providing a smaller range of activity that the jury could find to be a franchise or constitute wrongdoing. For this reason, the opponent may not object to the revised instruction. The proponent's trade-off for making the proposed instruction more attractive to the proponent is that the revised language is simpler and easier for the jury to follow and understand, because it avoids extraneous words that are not helpful to the jury's analysis.

For example, a standard instruction on the definition of a franchise might appear as follows:

> That in the agreement [name of Defendant] granted [name of Plaintiff] the right to engage in business offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by [name of Defendant].

It is possible that a specific case in which it is claimed a relationship was a franchise involves a business dealing only in goods, not services, and selling from a fixed location, such as a quick service restaurant. The alleged franchisor might have prepared a document called a "marketing plan." The proponent of this instruction might therefore choose to omit the words "offering," "distributing," "services," "system," and "substantial part," thereby simplifying the instruction to read as follows:

> That in the agreement [name of Defendant] granted [name of Plaintiff] the right to engage in business selling goods under a marketing plan prescribed by [name of Defendant].

Many of the instructions are lengthy, far lengthier than would be used at trial. Practitioners should remove paragraphs and other portions that address facts or issues that are not applicable. For example, several state franchise laws exclude the following from the definition of a franchise: Payments to a trading stamp company by a person issuing trading stamps in connection with retail sales of goods or services are not a franchise fee.[21] This exclusion appears in several franchise registration and disclosure laws, presumably to avoid treating issuers of trading stamps as franchisors.[22] Today it is

21. This exclusion is in the franchise laws of California, Illinois, Indiana, Maryland, Michigan, New York, North Dakota, Rhode Island, Washington, and Wisconsin.

22. Issuers of trading stamps, such as "Blue Chip Stamps" and "S & H Green Stamps," sold trading stamps to merchants. Merchants distributed the stamps to retail customers at a specified ratio of stamps to amount of money spent. (e.g., one stamp for each 10 cents of purchase). Customers collected the trading stamps and could then redeem collected stamps for

anachronistic, since few retailers make use of trading stamps. It is not necessary to consume time and energy or to confuse the jury with such instructions. Therefore, this portion of the instruction regarding the definition of a franchise could be excluded.

These instructions are based on statutes that are similar in some ways. But many of the statutes also have significant variations. Different states use different words to express concepts that are seemingly the same or similar. Some states omit elements of a claim that appear in the laws of other states; some states add elements. These instructions are intended to be an aid, but they are not a substitute for careful reference to the franchise statute, applicable case law, and regulations of the particular state(s) whose law applies in the case.

Authorities are provided for each instruction. The practitioner can make use of the authorities that are pertinent to the jurisdiction where a case is pending, and remove other authorities.

IV. Franchise Law Jury Instructions

A. *Definitions*

1. Instruction on Definition of Franchise—Marketing Plan Definition

Instruction:

[Name of Plaintiff] claims the relationship between [name of Plaintiff] and [name of Defendant] [is] [was] a "franchise." To prove the relationship was a franchise, [name of Plaintiff] must prove all the following:

(1) That [name of Plaintiff] and [name of Defendant] entered into a contract or agreement with each other, either orally or in writing, either expressed or implied.

(2) That, in the agreement, [name of Defendant] granted [name of Plaintiff] the right to engage in business offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by [name of Defendant].

(3) That the operation of [name of Plaintiff]'s business under the plan or system [is] [was] substantially associated with [name of Defendant]'s trademark, service mark, trade name, logo, advertising or other commercial symbol designating [name of Defendant] or its affiliate.

(4) That [name of Plaintiff] [is] [was] required to pay, directly or indirectly, a franchise fee.

Only if all these components are present may a franchise be found to exist.

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merchandise stocked by the trading stamp issuer. *See, e.g.*, Blue Chip Stamps v. Sup. Court, 18 Cal.3d 381, 383, 556 P.2d 755 (1976); *see also* Blue Chip Stamps, https://en.wikipedia.org/wiki/Blue_Chip_Stamps (last visited Dec. 9, 2019); S&H Green Stamps, https://en.wikipedia.org/wiki/S%26H_Green_Stamps (last visited Dec. 9, 2019); Trading Stamp, https://en.wikipedia.org/wiki/Trading_stamp (last visited Dec. 9, 2019).

Sample of the Instruction in Plain English:

[Name of Plaintiff] claims the relationship with [name of Defendant] [is] [was] a "franchise." To prove this, [name of Plaintiff] must prove all the following:

(5) [Name of Plaintiff] and [name of Defendant] entered into an agreement with each other, oral or written, expressed or implied.

(6) In the agreement, [name of Defendant] granted [name of Plaintiff] the right to do business offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by [name of Defendant].

(7) Operation of [name of Plaintiff]'s business under the plan or system [is] [was] substantially associated with [name of Defendant]'s trademark.

(8) [Name of Plaintiff] [is] [was] required to pay, directly or indirectly, a franchise fee.

All of these must be present for a franchise to exist.

Comment:

This instruction is for cases under state laws that define a franchise to include a *marketing plan or system.* This contrasts with state laws that define a franchise to include a community of interest in the business of offering, selling or distributing goods or services.

Circumstances obviously vary in which a party may claim the business relationship was a franchise. The claim might be that a now-terminated franchise was originally offered and sold in violation of the state's franchise registration and disclosure law or that the party's relationship was wrongfully terminated by the franchisor. Or a claim might be that a present, ongoing relationship is a franchise that was sold unlawfully, or that misrepresentations were made in establishing the relationship, or that injunctive relief is needed to prevent wrongful termination.

Almost always, the party claiming that the relationship was or is a franchise, will be the party claiming to be or to have been the franchisee. This is because franchise laws grant rights to franchisees, but offer little in the way of rights or benefits to franchisors. Therefore, it is rare that a franchisor has a reason in court to claim that a relationship was a franchise.

Authorities:

Cal. Bus. & Prof. Code § 20001; Cal. Corp. Code § 31005 (definition of franchise); 815 Ill. Comp. Stat. § 705/3(1); Ind. Code § 23.3.3.5.1(a); Iowa Code § 523H.1(3); Md. Code Ann. Bus. Reg. § 14-201(e); Mich. Comp. Laws § 445.1502(2)(3); N.D. Cent. Code § 51-19-02.5(a); 19 R.I. Gen. Laws § 19-28.1-3(g); Va. Code Ann. § 13.1-559; Wash. Rev. Code § 19.100.010(6); Wis. Stat. § 553.03(4); *Thueson v. U-Haul Int'l, Inc.*, 50 Cal. Rptr. 3d 669, 144 Cal. App. 4th 664, 670 (2006); Paul R. Fransway, *Traversing the Minefield: Recent*

Developments Relating to Accidental Franchises, 37 Franchise L.J. 217 (2017); Stephen C. Root, *The Meaning of "Franchise" Under the California Franchise Investment Law: A Definition in Search of a Concept*, 30 McGeorge L. Rev. 1163, 1185 (1999); James R. Sims III & Mary Beth Trice, *The Inadvertent Franchise and How to Safeguard Against It*, 18 Franchise L.J. 54 (Fall 1998).

Comment on Some State Variances:

The statutory definitions vary among the states. As examples, Connecticut's definition does not require payment of a fee. Conn. Gen. Stat. § 42-133e. Illinois's and Rhode Island's definitions add the element that the franchise fee must be $500 or more. 815 Ill. Comp. Stat. § 705/3(1)(c); 19 R.I. Gen. Laws § 19-28.1-3(g). Under the structure of New York's definition, in addition to the franchise fee element, *either* (1) the right to distribute goods or service under a marketing plan, *or* (2) the right to distribute goods or services substantially associated with the franchisor's trademark, needs to be established, but not both. N.Y. Gen. Bus. Law § 681.3. Oregon replaces the franchise fee element with the requirement for "valuable consideration." Or. Rev. Stat. § 650.005(4). Virginia limits the scope of the definition by requiring that the right granted to engage in business be for offering, selling, or distributing goods or services at retail. Va. Code Ann. § 13.1-559.

2. Instruction on Definition of Franchise—Community of Interest Definition

Instruction:

[Name of Plaintiff] claims the relationship between [name of Plaintiff] and [name of Defendant] [is] [was] a "franchise." To prove the relationship was a franchise, [name of Plaintiff] must prove all the following:

(1) That [name of Plaintiff] and [name of Defendant] entered into a contract or agreement with each other, either orally or in writing, either expressed or implied.

(2) That in the agreement [name of Defendant] granted [name of Plaintiff] a license to use a trade name, service mark, trademark, logo, or related characteristic.

(3) There is a community of interest in the business of offering, selling, or distributing goods or services at wholesale or retail, leasing, or otherwise.

(4) That [name of Plaintiff] [is] [was] required to pay, directly or indirectly, a franchise fee.

Only when all these components are present may a franchise be found to exist.

Sample of the Instruction in Plain English:

[Name of Plaintiff] claims the relationship with [name of Defendant] [is] [was] a "franchise." To prove this, [name of Plaintiff] must prove all the following:

(5) [Name of Plaintiff] and [name of Defendant] entered into an agreement, oral or written, expressed or implied.

(6) The agreement granted [name of Plaintiff] a license to use a trademark.

(7) They have/had a community of interest in the business of offering, selling or distributing goods or services, at wholesale or retail, leasing, or otherwise.

(8) [Name of Plaintiff] [is] [was] required to pay, directly or indirectly, a franchise fee.

All these components must be present for a franchise to exist.

Comment:

This instruction is for cases under state law definitions that include a *community of interest* in the business of offering, selling, or distributing goods or services. This contrasts with state laws that define a franchise to include a marketing plan or system.

Authorities:

Haw. Rev. Stat. § 482E-2; Minn. Stat. § 80C.01(4); Miss. Code Ann. § 72-24-51(6); Mo. Rev. Stat. § 407.400(1); Neb. Rev. Stat. § 87-402(1); N.J. Stat. Ann. § 56:10-3(a).

3. Instruction on Definition of Franchise—Significant Control Definition

Instruction:

[Name of Plaintiff] claims the relationship between [name of Plaintiff] and [name of Defendant] [is] [was] a "franchise." To prove the relationship was a franchise, [name of Plaintiff] must prove all the following:

(1) That [name of Plaintiff] and [name of Defendant] [are] [were] in a continuing commercial relationship or arrangement.

(2) That the offer or the contract specifies or that [name of Defendant] promised or represented, orally or in writing, that:

  (a) [Name of Plaintiff] will obtain the right to operate a business identified or associated with [name of Defendant]'s trademark or to offer, sell or distribute goods or services or commodities identified or associated with [name of Defendant]'s trademark; and

  (b) [Name of Defendant] will exert or had authority to exert a significant degree of control over [name of Plaintiff]'s method of operation or provide significant assistance in [name of Plaintiff]'s method of operation.

(3) As a condition of obtaining or starting operation, [name of Plaintiff] makes a required payment or commits to make a required payment to [name of Defendant] or [name of Defendant]'s affiliate.

Only when all these components are present may a franchise be found to exist.

Sample of the Instruction in Plain English:

[Name of Plaintiff] claims the relation with [name of Defendant] [is] [was] a "franchise." To prove this, [name of Plaintiff] must prove all the following:

(4) [Name of Plaintiff] and [name of Defendant] [are] [were] in a continuing commercial relationship or arrangement.

(5) The offer or the contract says, or [name of Defendant] promised or represented, orally or in writing, that:

  (a) [Name of Plaintiff] will get the right to operate a business associated with [name of Defendant]'s trademark or offer, sell or distribute goods or services associated with [name of Defendant]'s trademark.

  (b) [Name of Defendant] will exert or had authority to exert significant control over [name of Plaintiff]'s operation or provide significant help in [name of Plaintiff]'s operation.

(6) As a requirement, [name of Plaintiff] made a required payment or committed to make a required payment to [name of Defendant] or [name of Defendant]'s affiliate.

All these components must be present for a franchise to exist.

Comment:

This instruction is for cases under South Dakota law.

Authorities:

S.D. Codified Laws § 37-5B-1(11).

4. Instruction on Definition of a Franchise Fee

Instruction:

One of the elements [name of Plaintiff] must prove is that the relationship with [name of Defendant] required the payment to [name of Defendant] of a franchise fee. I will now instruct you on what is and what is not a "franchise fee."

A franchise fee is any fee or charge that [name of Plaintiff] is or was required to pay or agreed to pay for the right to enter the business relationship with [name of Defendant] including any payment for goods or services.

- A franchise fee may be payable in a lump sum or installments. Installment amounts may depend on gross receipts or net profits in the form of a royalty, or may be charged on units of merchandise ordered or sold by [name of Defendant]. A franchise fee may be in the price charged by [name of Defendant] or its affiliate for goods or services supplied to [name of Plaintiff] or in a rental fee payable by [name of Plaintiff] for business premises or equipment rented from by [name of Defendant] or its affiliate. [Cal.]

- A franchise fee may be an initial capital investment fee, any fee or charges based on a percent of gross or net sales, whether or not called a royalty, any payment for goods or services, or any training fees or training school fees or charges. [Minn.; Wash.]
- A franchise fee is a direct or indirect payment to purchase or operate a business that is a franchise. [R.I.]
- A franchise fee may be present regardless of the name given to it or its form, whether it is payable in a lump sum or installments, definite or indefinite in amount or partly or wholly contingent on future sales, profits or purchase for the franchise business or the sale or transfer of the franchisee's business. [Ill.]
- To be a "franchise fee," [name of Plaintiff] must have been required or agreed to pay [name of Defendant] a fee for the right to enter into business under the agreement; there must have been a transfer of wealth from [name of party claiming to be franchisee] to [name of Defendant]. [Mich.]

Sample of the Instruction in Plain English:

For a franchise to exist, [name of Plaintiff] must prove [he] [she] [it] was required to pay [name of Defendant] a franchise fee. I will now tell you rules on what is and what is not a "franchise fee."

A franchise fee is any fee or charge [name of Plaintiff] is or was required to pay or agreed to pay for the right to enter into the business relationship with [name of Defendant] including any payment for goods or services.

- A franchise fee may be payable in a lump sum or installments. Installment amounts may depend on gross receipts or net profits in the form of a royalty, or may be charged on units of merchandise ordered or sold by [name of Defendant]. A franchise fee may be in the price charged by [name of Defendant] or its affiliate for goods or services supplied to [name of Plaintiff] or in a rental fee payable by [name of Plaintiff] for business premises or equipment rented from by [name of Defendant] or its affiliate. [Cal.]
- A franchise fee is a direct or indirect payment to buy or operate a business that has the other elements of a franchise. [R.I.]
- A franchise fee may exist no matter what name it is given or its form, whether it is a lump sum or installments, whether the amount is set specifically or is indefinite, even if it is all or partly contingent on future sales, profits or purchases or on the franchisee's business being sold or transferred. [Ill.; Wis.]
- To be a "franchise fee," [name of Plaintiff] must have been required or agreed to pay [name of Defendant] a fee for the right to enter into business under the agreement; there must have been a transfer of wealth from [name of Plaintiff] to [name of Defendant]. [Mich.]

Comment:

This instruction identifies the payments that constitute a franchise fee.

The statutory definition of a "franchise fee" varies from state to state, sometimes in subtle, nuanced ways. For example, Hawaii and Minnesota define a franchise fee as a payment "for the right to enter into a business *or to continue a business* under a franchise agreement." Haw. Rev. Stat. § 482E-2 (emphasis added); Minn. Stat. § 80C.01(9) (emphasis added). Illinois defines a franchise fee as payment "for the right to enter into a business *or sell, resell, or distribute goods or services or franchises* under an agreement." 815 Ill. Comp. Stat. § 705/3 (emphasis added). By regulation, in Illinois, the amount must exceed $500 to be a franchise fee. Ill. Admin. Code tit. 14, § 200.105. Indiana defines a franchise fee as payment "for the right to conduct a business *to* sell, resell, or distribute goods, services or franchises. . . ." Ind. Code § 23-3-2-2.5-1 (emphasis added).

South Dakota does not use the term "franchise fee," but instead uses the phrase "required payment," defined as "any consideration that the franchisee must pay to the franchisor or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the franchise." S.D. Codified Laws § 37-5B-1(26).

Authorities:

Cal. Corp. Code § 31011; Cal. Dep't of Corps., Release 3-F, *When Does an Agreement Constitute a "Franchise"* (rev. June 22, 1994), Bus. Franchise Guide (CCH) ¶^s5,050.45;[23] Haw. Rev. Stat. § 482E-2; Haw. Code R. § 16-37-1; 815 Ill. Comp. Stat. § 705/3(14); Ill. Admin. Code tit. 14, § 200.104; Ind. Code § 23-3-2-2.5-1(l); Md. Code Ann. Bus. Reg. § 14-201(f); Mich. Comp. Laws § 445.1503; *Hamade v. Sunoco*, 721 N.W.2d 233, 244 (Mich. 2006); Minn. Stat. § 80C.01(9); N.Y. Gen. Bus. Law § 681(7); N.Y. Comp. Codes R. & Regs. tit. 13, § 200.1(a); N.D. Cent. Code § 51-19-02(6); R.I. Gen. Laws § 19-28-1.3(h); S.D. Codified Laws § 37-5B-1(26); Va. Code Ann. § 13.1-559(3); Wash. Rev. Code § 19.100.010(8); Wis. Stat. § 553.03; Wis. Admin. Code DFI § 31.01(1)(a).

5. Instruction on Payments That Are Not a Franchise Fee

Instruction:

Some payments are deemed to not be a franchise fee. The following [is] [are] not a franchise fee:

The purchase or agreement to purchase goods at a bona fide wholesale price is not a franchise fee, so long as no obligation was imposed on the

23. The regulations, releases, guidelines, and interpretive opinions of the California Commissioner of Business Oversight (formerly the Commissioner of Corporations) under the California Franchise Investment Law regarding whether an agreement constitutes a "franchise" within the meaning of the law are prima facie evidence of the scope and extent of coverage of the definition of "franchise." Cal. Bus. & Prof. Code § 20009; Thueson v. U-Haul Int'l, Inc., 50 Cal. Rptr. 3d 669, 144 Cal. App. 4th 664, 672 (2006).

purchaser to purchase or pay for more goods than a reasonable businessperson normally would buy as a starting inventory or supply or to maintain an ongoing inventory or supply. [Cal.; Haw.; N.D., S.D.; Va.]

"Bona fide wholesale price" means the price at which goods are purchased and sold by a manufacturer or wholesaler to a wholesaler or dealer where there is an open and public market where sales of the goods are made to consumers of the goods. "Bona fide wholesale price" does not apply to goods which have no open and public market. [Cal.]

The purchase or agreement to purchase at a bona fide wholesale price, goods purchased for resale, for which there is an established market if the price charged is a fair payment for goods purchased at a comparable level of distribution and no part of the price is for the right to enter into the business. [Ill.]

The purchase or agreement to purchase goods at a bona fide wholesale price. [Ind; Md.; Mich.; Minn.; N.Y.; Wash.; Wis.]

An agreement to purchase at a bona fide wholesale price, a reasonable quantity of tangible goods for resale. [R.I.]

The purchase or agreement to purchase goods by consignment; if the proceeds turned over by [name of Plaintiff] from any such sale reflect only the bona fide wholesale price of such goods. [Haw.; Md.; Minn.; Wash.; Wis.]

A bona fide loan to [name of Plaintiff] from [name of Defendant]. [Haw.; Wis.]

Repayment of a bona fide loan that [name of Defendant] made to [name of Plaintiff]. [Md.; Minn.; Wash.]

The purchase or agreement to purchase goods at a bona fide retail price subject to a bona fide commission or compensation plan that reflects only a bona fide wholesale transaction. [Haw.; Md.; Minn.; Wash.; Wis.]

The purchase or agreement to purchase goods for which there is an established market at a bona fide retail price subject to a bona fide commission or compensation plan. [Ill.]

Payment for fixtures necessary to operate the business. [Ill.]

The purchase or agreement to purchase [Wash. and Wis. add: "or lease"] at fair market value, supplies or fixtures necessary to enter into the business or to continue the business. [Haw.; Md.; Minn.; Va.; Wash.; Wis.]

The purchase or lease or agreement to purchase or lease, at fair market value, real property necessary to enter into the business or continue the business under the agreement. [Haw.; Md.; N.Y.; Va.; Wash.; Wis.]

Payment of rent that reflects payment for the economic value of the property. [Ill.]

Payment made to [name of Defendant] or its affiliate for equipment, materials, real estate services or other items, if the purchase was not required by [name of Defendant] or if [name of Plaintiff] was permitted to purchase the items from sources other than [name of Defendant] or its affiliates and the item was available from such other sources. [Ill.]

The amount paid by [name of Plaintiff] for sales demonstration material and equipment, sold at no profit by [name of Defendant] for use in making sales and not for resale. [Md.]

Payments made for the lease or agreement to lease a business operated by [name of Plaintiff] on the premises of [name of Defendant], so long as the business is incidental to the business conducted by [name of Defendant] at such premises. [Mich.; N.Y.]

Payment of a fee not more than $500 annually; for sales materials having a value at least equal to the amount of the payment. [N.Y.]

Purchase of sales demonstration equipment and materials furnished at cost for use in making sales and not for resale. [N.Y.]

Payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring that credit card is not a franchise fee. [Cal.; Ill; Ind.; Md.; Mich.; N.Y.; N.D.; R.I.; Wis.]

Payments to a trading stamp company by a person issuing trading stamps in connection with retail sales of goods or services are not a franchise fee. [Cal.; Ill.; Ind.; Md.; Mich.; N.Y.; N.D.; R.I.; Wash.; Wis.]

If the total franchise fee is $500 or less on an annual basis, then it is not a franchise fee. [Cal.]

Up to $1,000 annually for the purchase or rental of fixtures, equipment or other tangible property to be used in and necessary for the operation of the business, so long as the price does not exceed the cost that would be incurred by the franchisee acquiring the item or items from someone else or in the open market. [Cal.]

A transfer fee is not a franchise fee if it represents reasonable expenses incurred in connection with the transfer. [Ill.]

Sample of the Instruction in Plain English:

Some payments are not a franchise fee. The following [is] [are] not a franchise fee:

Buying or agreeing to buy goods at a true wholesale price is not a franchise fee, if the buyer had no obligation to buy or pay for more goods than a reasonable businessperson normally would buy as a starting or ongoing inventory or supply. [Cal.; Haw.; N.D.; S.D.; Va.]

The true wholesale price means the price at which goods are bought and sold by a manufacturer or wholesaler to a wholesaler or dealer where there is an open, public market for the goods. True wholesale price does not include the price of goods that have no open and public market, and where the goods are sold mainly to someone engaged in redistribution. [Cal.]

Buying or agreeing to buy at a true wholesale price, goods for resale, if there is an established market for the goods and the price is fair compared to goods bought at a similar level of distribution and none of the price is for the right to enter into the business. [Ill.]

Buying or agreeing to buy goods at a true wholesale price. [Ind.; Md.; Mich.; Minn.; N.Y.; Wash.; Wis.]

Agreeing to buy at a true wholesale price, a reasonable amount of goods for resale. [R.I.]

Buying or agreeing to buy goods by consignment; if the money paid by [name of Plaintiff] from the sale reflects only a true wholesale price of the goods. [Haw.; Md.; Minn.; Wash.; Wis.]

A true loan to [name of Plaintiff] from [name of Defendant]. [Haw.; Wis.]

Repayment of a true loan that [name of Defendant] made to [name of Plaintiff]. [Md.; Minn.; Wash.]

Buying or agreeing to buy goods at a true retail price subject to a true commission or compensation plan that reflects only a true wholesale transaction. [Haw.; Md.; Minn.; Wash.; Wis.]

Buying or agreeing to buy goods for which an established market exists, at a true retail price, subject to true commission or compensation plan. [Ill.]

Payment for fixtures needed for the business. [Ill.]

Buying or agreeing to buy [Wash. and Wis. add: or lease] at fair market value, supplies or fixtures needed to enter into or continue the business. [Haw.; Md.; Minn.; Va.; Wash.; Wis.]

Buying or leasing or agreeing to buy or lease, at fair market value, real property needed to enter into the business or continue the business under the agreement. [Haw.; Md.; N.Y.; Va.; Wash.; Wis.]

Paying rent that reflects paying for the economic value of the property. [Ill.]

Paying [name of Defendant] or its affiliate for equipment, materials, real estate services or other items, if the purchase was not required by [name of Defendant] or if [name of Plaintiff] was permitted to buy the items

from someone other than [name of Defendant] or its affiliates and the item was available from the other sources. [Ill.]

Payment(s) from [name of Plaintiff] for sales demonstration material and equipment, sold at no profit by [name of Defendant] for use in making sales and not for resale. [Md.]

Payments to lease or agreeing to lease a business operated by [name of Plaintiff] on the premises of [name of Defendant], if the business is incidental to the business conducted by [name of Defendant] at such premises. [Mich.; N.Y.]

Paying up to $500 annually; for sales materials having a value equal or more than the payment. [N.Y.]

Buying sales demonstration equipment and materials sold at cost for use in making sales and not for resale. [N.Y.]

[Name of Plaintiff] paying a reasonable service charge to the issuer of a credit card. [Cal.; Ill.; Ind.; Md.; Mich.; N.Y.; N.D.; R.I.; Wis.]

[Name of Plaintiff] paying a trading stamp company for trading stamps used in [name of Plaintiff]'s business. [Cal.; Ill.; Ind.; Md.; Mich.; N.Y.; N.D.; R.I.; Wash.; Wis.]

If the total franchise fee is $500 or less annually, it is not a franchise fee. [Cal.]

Up to $1,000 annually to buy or rent fixtures, equipment, or other tangible property to be used in and needed to operate the business, so long as the price does not exceed the cost that would be incurred by [name of Plaintiff] to get the item or items from someone else or in the open market. [Cal.]

A transfer fee is not a franchise fee if it represents reasonable expenses incurred in connection with the transfer. [Ill.]

Comment:

Not every payment that may be made by a claimed franchisee to a claimed franchisor is a "franchise fee." *See*, *e.g.*, *Thueson v. U-Haul Int'l*, *Inc.*, 50 Cal. Rptr. 3d 669, 144 Cal. App. 4th 664, 675 (2006) (noting that ordinary business expenses are not a franchise fee). This instruction identifies types of payments that are deemed not to be a franchise fee. The instruction would be tailored to identify those items that are at issue in the particular case.

Authorities:

Cal. Corp. Code § 31011; Cal. Code Regs. tit. 10, §§ 310.011, 310.011.1; Cal. Dep't of Corps., Release 3-F, *When Does an Agreement Constitute a*

"*Franchise*" (rev. June 22, 1994), Bus. Franchise Guide (CCH) ¶ 5,050.45;[24] Haw. Rev. Stat. § 482E-2; 815 Ill. Comp. Stat. § 705/3(14); Ill. Admin. Code tit. 14, §§ 200.104, 200.105, 200.106; Ind. Code § 23-3-2-2.5-1(l); Md. Code Ann. Bus. Reg. § 14-201(f); Md. Code Regs. § 02.02.08.03; Mich. Comp. Laws § 445.1503; Minn. Stat. § 80C.01(9); N.Y. Gen. Bus. Law § 681(7); N.D. Cent. Code § 51-19-02(6); 19 R.I. Gen Laws § 19-28-1.3(h); S.D. Codified Laws § 37-5B-1(26); Va. Code Ann. § 13.1-559(3); Wash. Rev. Code § 19.100.010(8); Wis. Stat. § 553.03(5m); Wis. Admin. Code DFI § 31.01(1)(a).

6. Instruction on Definition of a Marketing Plan

Instruction:

To prove the parties' relationship was a franchise, one of the elements [name of Plaintiff] must prove is that there was a "marketing plan." That is, [name of Plaintiff] must prove that [name of Defendant] granted [name of Plaintiff] the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by [name of Defendant].

Now I will instruct you on what is and what is not a "marketing plan."

A "marketing plan" is a plan or system concerning an aspect or aspects of conducting business. A marketing plan may include one or more of the following:

Price specifications, special pricing systems, or discount plans;

Designating or providing sales or display equipment or merchandising devices;

Providing selling techniques;

Providing advertising or promotion materials or cooperative advertising;

Providing training regarding promotion, operation, or management of the business;

Providing operational, managerial, technical, or financial guidelines or assistance;

Making a promise of support;

Providing assistance in advertising;

Supplying food and supplies and menu planning;

Supplying manuals;

Actions by [name of Defendant] to present multiple businesses to the public as a unit or marketing concept with the appearance of centralized

24. *See* authorities cited *supra* note 23.

management, and uniform standards regarding quality, prices of goods, price of services, and other material aspects of the business;

Establishing an area-wide or nationwide distribution grid;

Multiple levels of oversight, such as regional and local distributorships;

Control reserved by the supplier or licensor over terms of payment by customers;

Control reserved by the supplier or licensor over credit practices, warranties, and representations in dealings between the party claiming to be a franchisee, and that party's customers;

Suggestion or claim of having a uniform marketing plan;

Provisions about collateral services, that may or may not be provided, or prohibiting or limiting sales of competing or non-competing goods are consistent, though not necessarily decisive, about a prescribed marketing plan;

Requirements to follow directions from [name of Defendant] or obtaining [name of Defendant]'s approval of location, use of trade names, advertising, signs, sales pitches, and sources of supply, or concerning the appearance of [name of Plaintiff]'s premises and fixtures and equipment, employee uniforms, hours of operation, housekeeping, and similar decorations may be indicative of a marketing plan;

Procedures for inspection by [name of Defendant] or reporting to [name of Defendant] about conduct of the business, and the right of [name of Defendant] to take corrective measures, possibly at [name of Plaintiff]'s expense, are indicative of [name of Defendant]'s control over [name of Plaintiff]'s operations and, thus of a marketing plan;

A comprehensive advertising or other promotion program by [name of Defendant], with or without an obligation by [name of Plaintiff] to bear part of the expense of the program, is indicative of a marketing plan prescribed by the franchisor, especially if the advertising or promotion identifies locations of franchisees, and more so if individual advertising or promotion activities are prohibited or require prior approval of [name of Defendant];

Any ability of [name of Defendant] to control essential decision making of [name of Plaintiff], such as through majority ownership interest in the business or by appointing a majority of the members of a committee that makes important decisions on sales, marketing, merchandising, personnel, etc., indicates a marketing plan;

Advertising by [name of Defendant] that claimed to have available a successful marketing plan, establishes a presumption that a marketing plan was present. [Name of Defendant] could overcome that presumption by establishing that no marketing plan was present;

A marketing plan may exist even though not fully developed when the franchise was sold. If [name of Defendant] represented that the relationship would be a franchise with a marketing plan or system, then this element is satisfied.

Sample of the Instruction in Plain English:

To prove there was a franchise, one element that [name of Plaintiff] must prove is that there was a "marketing plan." That is, [name of Plaintiff] must prove that [name of Defendant] granted [name of Plaintiff] the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by [name of Defendant]. I will tell you what is and what is not a "marketing plan."

A "marketing plan" is a plan or system concerning an aspect or aspects of doing business. A marketing plan may include one or more of the following:

Price specifications, special pricing systems or discount plans;

Designating or providing sales or display equipment or merchandising devices;

Providing selling techniques;

Providing advertising or promotion materials or cooperative advertising;

Providing training on promotion, operation, or management of the business;

Providing operational, managerial, technical, or financial guidelines or assistance;

Making a promise of support;

Providing help in advertising;

Supplying food and supplies and menu planning;

Supplying manuals;

Actions by [name of Defendant] to present multiple businesses to the public as a unit or marketing concept with the appearance of central management, and uniform standards of quality, prices of goods, price of services, and other material aspects of the business;

Establishing an area-wide or nationwide distribution grid;

Multiple levels of oversight, like regional and local distributorships;

Control by the supplier or licensor over customer payment terms;

Control by the supplier or licensor over credit practices, warranties, and representations in dealings between [name of Plaintiff] and [name of Plaintiff]'s customers;

Suggestion or claim of having a uniform marketing plan;

Provisions about collateral services, which may or may not be provided, or [name of Defendant] prohibiting or limiting [name of Plaintiff] from making sales of competing or non-competing goods, are consistent, though not necessarily decisive, about a prescribed marketing plan;

Requirements to follow directions from [name of Defendant] or obtaining [name of Defendant]'s approval of location, use of trade names, advertising, signs, sales pitches, and sources of supply, or concerning the appearance of [name of Plaintiff]'s premises and fixtures and equipment, employee uniforms, hours of operation, housekeeping, and similar decorations may indicate a marketing plan;

Procedures for inspection by [name of Defendant] or reporting to [name of Defendant] about conduct of the business, and the right of [name of Defendant] to take corrective measures, possibly at [name of Plaintiff]'s expense, indicate [name of Defendant]'s control over [name of Plaintiff]'s operations and, thus a marketing plan;

Comprehensive advertising or promotion by [name of Defendant] with or without an obligation by [name of Plaintiff] to pay some of the expense, indicates a marketing plan prescribed by [name of Defendant], especially if the advertising or promotion identifies franchisee locations, and more if individual advertising or promotion activities are prohibited or require prior approval of [name of Defendant];

Any ability of [name of Defendant] to control key decision making of [name of Plaintiff], like having majority ownership in the business or appointing a majority of the members of a committee that makes important decisions on sales, marketing, merchandising, personnel, etc., indicates a marketing plan;

Advertising by [name of Defendant] that claimed to have a successful marketing plan, establishes a presumption that a marketing plan was present. [Name of Defendant] could overcome that presumption by establishing that no marketing plan was present;

A marketing plan may exist even though not fully developed when the franchise was sold. If [name of Defendant] represented that the relationship would be a franchise with a marketing plan or system, then this element is satisfied.

Comment:

Many kinds of assistance, support, guidance, instruction, supervision, or control may constitute or indicate a marketing plan.

Authorities:

People v. Kline, 168 Cal. Rptr. 185, 110 Cal. App. 3d 587, 594 (1980) (advertising of a marketing plan creating a presumption that a marketing

plan is present); Cal. Dep't of Corps., Release 3-F, *When Does an Agreement Constitute a "Franchise"* (rev. June 22, 1994), Bus. Franchise Guide (CCH) ¶ 5,050.45;[25] 815 Ill. Comp. Stat. § 705/3 (18); Iowa Code § 523H.1(7); 19 R.I. Gen Laws § 19-28.1-3(12); Wash. Rev. Code § 19.100.010(11); *Boat & Motor Mart v. Sea Ray Boats*, 825 F.2d 1285 (9th Cir. 1987) (marketing plan established where supplier of boats provided distributor with sales directions and sales requirements); *Chem-Tek, Inc. v. Gen. Motors Corp*., 816 F. Supp. 123, 129 (D. Conn. 1993) (control over hours and days of operation, advertising, financial support, auditing of books, inspection of premises, control over lighting, employee uniforms, prices, trading stamps, hiring, sales quotas, and management training being factors for consideration in determining existence of a marketing plan); *Crone v. Richmond Newspapers, Inc.*, 384 S.E.2d 77 (Va. 1989) (distribution plan provided by alleged franchisor being a marketing plan); *Aristacar Corp. v. Attorney Gen.*, 541 N.Y.S.2d 165 (N.Y. Sup. Ct. 1989) (supplying radio equipment, customers, and billing services, and dictating dress code and type of car to be driven, were a marketing plan in a car service business); *Master Abrasives Corp. v. Williams*, 469 N.E.2d 1196 (Ind. Ct. App. 1984) (exclusive marketing areas, right to approve hiring of sales employees, mandatory sales training, sales quotas, and policies for attracting customers was a marketing plan). The statutes differ from state to state. For example, in Iowa and Rhode Island, the phrase "material aspect" is included with regard to conducting business.

7. Instruction on Elements That Are Not a Marketing Plan

Instruction:

Some elements or aspects are not a marketing plan. I will describe some examples:

> A marketing plan is not present just because an agreement imposes procedures or techniques that are customary in business in the particular trade or industry, even though the operator's freedom of action or discretion may be restricted.
>
> An obligation imposed on a distributor to use best efforts to make or increase sales of a licensor's or supplier's product is not by itself a marketing plan.
>
> A requirement to maintain liability insurance in a certain amount is not by itself a marketing plan.
>
> Where a royalty is paid, a requirement to keep records and accounts for verification of the royalty due is not a marketing plan.

These requirements in and of themselves are not a marketing plan.

25. *See* authorities cited *supra* note 23.

Sample of the Instruction in Plain English:

> Some things are not a marketing plan. Here are some examples:
>
> A marketing plan is not present just because an agreement imposes procedures or techniques that are customary in the business or particular trade or industry, even though the operator's freedom may be restricted.
>
> An obligation of best efforts to make or grow sales of a licensor's or supplier's product is not by itself a marketing plan.
>
> A requirement to maintain insurance in a certain amount is not by itself a marketing plan.
>
> Where a royalty is paid, a requirement to keep records and accounts for verification of the royalty due is not a marketing plan.

These requirements in and of themselves are not a marketing plan.

Comment:

Requirements or procedures that are customarily followed in an industry or in business generally do not indicate a plan offered, provided, or imposed by one party and therefore are not considered a marketing plan for purposes of the franchise laws.

Authorities:

Cal. Dep't of Corps., Release 3-F, *When Does an Agreement Constitute a "Franchise"* (rev. June 22, 1994), Bus. Franchise Guide (CCH) ¶ 5,050.45;[26] *James v. Whirlpool Corp.*, 806 F. Supp. 835, 842–43 (E.D. Mo. 1992) (though supplier provided products for resale and supplied policies and procedures, no marketing plan existed because distributor was expected to create its own marketing processes, train employees how it preferred and control its daily operations); *Sorisio v. Lenox*, 701 F. Supp. 952, 960 (D. Conn. 1988) (instructions regarding training, display of products and product promotion were not a marketing plan when alleged franchisee carried brands other than alleged franchisor's brands); *Lads Trucking Co. v. Sears, Roebuck & Co.*, 666 F. Supp. 1418, 1420 (C.D. Cal. 1987) (delivery of merchandise to retailer's customers according to method of operation determined by retailer, in trucks bearing retailer's brand, was not a marketing plan because packages were delivered for the retailer, not sold under a marketing plan dictated by the retailer); *Richard I. Spiece Sales Co., Inc. v. Levi Strauss N. Am.*, 19 N.E.3d 345, 357 (Ind. Ct. App. 2014) (no marketing plan where defendant had no control over products sold by plaintiff; defendant suggested, but did not require, particular advertising methods; defendant lacked control over advertising, pricing, and products); *East Wind Exp., Inc. v. Airborne Freight Corp.*, 974 P.2d 369, 373 (Wash. Ct. App. 1999) (transporting goods for another company did

26. *See* authorities cited *supra* note 23.

not establish marketing activities amounting to a marketing plan); *Kennedy v. Lomei*, 570 N.Y.S.2d 338, 339 (N.Y. App. Div. 1991) (no marketing plan existing between bakery and baked goods wholesaler because wholesaler did not regulate or control bakery's sales activities, and only fifty percent of products sold by bakery were provided by wholesaler).

8. Instruction on Substantial Association with Trademark

Instruction:

To prove the parties' relationship was a franchise, one of the elements [name of Plaintiff] must prove is that the operation of [name of Plaintiff]'s business was substantially associated with [name of Defendant]'s trademark, service mark, trade name, logo, advertising, or other commercial symbol designating [name of Defendant] or its affiliate.

Substantial association requires more than use of the trademark, service mark, trade name, logo, advertising, or other commercial symbol. The association must be substantial.

If [name of Plaintiff] was granted an unrestricted right to use [name of Defendant]'s trademark, service mark, trade name, logo, advertising, or other commercial symbol, this requirement is satisfied, even if [name of Plaintiff] was not obligated to display it.

Use of a commercial symbol by [name of Defendant] only on invoices or in advertising to resellers such as [name of Plaintiff], but which [name of Defendant] did not or does not permit [name of Plaintiff] to show in dealing with customers, is not substantial association with the operation of [name of Plaintiff]'s business.

You may consider if the commercial symbol was or is brought to the attention of [name of Plaintiff]'s customers to such an extent that the customers regard [name of Plaintiff]'s business as one in a chain identified with [name of Defendant].

Sample of the Instruction in Plain English:

To prove a franchise, [name of Plaintiff] must prove is that operation of [name of Plaintiff]'s business was substantially associated with [name of Defendant]'s trademark, service mark, trade name, logo, advertising, or other commercial symbol of [name of Defendant] or its affiliate.

Substantial association means more than use of the trademark, service mark, trade name, logo, advertising, or other commercial symbol. The association must be substantial.

This trademark element is proven if you find that [name of Plaintiff] was granted an unrestricted right to use [name of Defendant]'s trademark, service mark, trade name, logo, advertising, or other commercial symbol, even if [name of Plaintiff] was not obligated to display it.

Use of a commercial symbol by [name of Defendant] only on invoices or in advertising to resellers such as [name of Plaintiff], but which [name of Defendant] did not or does not permit [name of Plaintiff] to show in dealing

with customers, is not substantial association with the operation of [name of Plaintiff]'s business.

You may consider if the commercial symbol was or is brought to the attention of [name of Plaintiff]'s customers so much that customers regard [name of Plaintiff]'s business as part of a chain identified with [name of Defendant].

Comment:

Approximately fifteen states include in their definition of a franchise a requirement that the operation of franchisee's business must be "substantially associated" with the franchisor's trademark or other symbol designating the franchisor.[27]

Authorities:

Cal. Corp. Code § 31005(A)(2); Cal. Dep't of Corps., Release 3-F, *When Does an Agreement Constitute a "Franchise"* (rev. June 22, 1994), Bus. Franchise Guide (CCH) ¶ 5,050.45;[28] Conn. Gen. Stat. § 42-133e(b)(2); 815 Ill. Comp. Stat. § 705/3(1); Ind. Code § 23-2-2.5-1(1)(a); Iowa Code § 523h.1(3)(a)(1)(c); Mich. Comp. Laws § 445.1502(2)(b); Md. Code Ann. Bus. Reg. § 14-201(e)(2); N.Y. Gen. Bus. Law § 681(3)(b); N.D. Cent. Code § 51-19-02(5)(a)(2); Okla. Stat. tit. 71, § 802(5)(b); Or. Rev. Stat. § 650.005(4)(b); 19 R.I. Gen Laws § 19-28.1-3(g)(1)(C); Va. Code Ann. § 13.1-559; Wash. Rev. Code § 19.100.010(6)(A)(ii); Wis. Stat. § 553.03(4)(a)(2); *Carlos v. Philips Bus. Sys., Inc.*, 556 F. Supp. 769, 776 (E.D.N.Y. 1983) (noting that substantial association with franchisor's trademark was satisfied where distributor was encouraged to associate the business with manufacturer's trademark, made extensive use of the trademark, business phone was answered by using the trademark, and the business stationary prominently featured the franchisor's name), *aff'd*, 742 F.2d 1432 (2d Cir. 1983); *Kim v. Servosnax, Inc.*, 13 Cal. Rptr. 2d 422, 10 Cal. App. 4th 1346, 1356 (1992) (licensee's business operating office building cafeteria was "substantially associated" with licensor's trademark, even though licensee was prohibited from using the name in relation to customers, but had used the name in obtaining an agreement with the property owner to place cafeteria in the building).

9. Instruction on Effect of Parties' Label of Relationship

Instruction:

The parties may have given a name or label to their relationship or stated that the relationship is or is not a certain type of relationship. You the jury

27. Cal. Corp. Code § 31005(A)(2); Conn. Gen. Stat. § 42-133e(b)(2); 815 815 Ill. Comp. Stat. § 705/3; Ind. Code § 23-2-2.5-1(1)(a); Iowa Code § 523h.1(3)(a)(1)(c); Mich. Comp. Laws § 445.1502(2)(b); Md. Code Ann. Bus. Reg. § 14-201(e)(2); N.Y. Gen. Bus. Law § 681(3)(b); N.D. Cent. Code § 51-19-02(5)(a)(2); Okla. Stat. tit. 71, § 802(5)(b); Or. Rev. Stat. § 650.005(4)(b); 19 R.I. Gen Laws § 19-28.1-3(g)(1)(C); Va. Code Ann. § 13.1-559; Wash. Rev. Code § 19.100.010(6)(A)(ii); Wis. Stat. § 553.03(4)(a)(2).

28. *See* authorities cited *supra* note 23.

may consider what the parties said or agreed about their relationship as evidence of what they intended. But you are not bound by any statement the parties made about the nature of their relationship. The nature of the relationship is for you to determine from the evidence.

Sample of the Instructions in Plain English:

The parties may have called their relationship something or said they were or were not in a certain kind of relationship. You the jury may consider what the parties said about their relationship as evidence of their intent. But you are not bound by any statement the parties made about the nature of their relationship. The nature of the relationship is for you to determine from the evidence.

Comment:

The parties' label for a relationship does not bind the court, or prevent the court from finding the relationship to be a franchise. Though the parties' characterization of the relationship does not bind the court, it can have some relevance. A federal district court noted that the word "franchise" did not appear in the parties' agreement. While this was not dispositive, it was "probative of what type of agreement was reached."[29]

Authorities:

Jerome-Duncan, Inc. v. Auto-By-Tel, LLC, 989 F. Supp. 838, 842 (E.D. Mich. 1997) (absence of word "franchise" from agreement was probative of parties' intent), *aff'd*, 176 F.3d 904 (6th Cir. 1999); *Contractors Home Appliance, Inc. v. Clarke Distrib. Corp.*, 196 F. Supp. 2d 174, 177 (D. Conn. 2002) (noting that "label given to the relationship by the parties, while relevant, is not determinative of the existence of a franchise relationship"). *But see Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 562, 575 (6th Cir. 2003) (Where parties called their relationship a lease, and stated in the agreement that it was not a franchise, contract language did not bar judicial determination that a franchise existed; how the parties described relationship was irrelevant. It would defeat the purpose of the statutes if parties could opt out by declaring that the law would not apply to their transaction. If the relationship between Plaintiffs and Defendant qualifies as a "franchise relationship," how the parties describe their relationship is irrelevant.).

B. *Prohibitions*

1. Instructions on Offer or Sale of a Franchise Without Registration

Instruction:

On/in [relevant date or time] it was unlawful to offer or sell a franchise in this state unless the offer was registered with [name of state agency

29. Jerome-Duncan, Inc. v. Auto-By-Tel, LLC, 989 F. Supp. 838, 842 (E.D. Mich. 1997), *aff'd*, 176 F.3d 904 (6th Cir. 1999).

which registers franchises; see list below*] [if Defendant asserts that Defendant was exempt from registration, add the following] or was exempt from registration.

[Name of Plaintiff] claims that [name of Defendant] offered or sold a franchise to [name of Plaintiff] in this state on/in [relevant date or time period] without being registered with [name of state agency which registers franchises; see list below*].

To prove this claim, [name of Plaintiff] must prove that [name of Defendant] offered or sold a franchise to [name of Plaintiff] in this state on/in [relevant date or time period] and must prove that at the time [name of Defendant] offered or sold a franchise that [name of Defendant] was not registered with [name of state agency which registers franchises; see list below*].

*California Department of Business Oversight

Hawaii Department of Commerce and Consumer Affairs

Illinois Attorney General

Indiana Securities Commissioner

(Maryland) Securities Commissioner in the Office of the Maryland Attorney General

Minnesota Department of Commerce

New York Department of Law

North Dakota Securities Commissioner

Rhode Island Department of Business Regulation

South Dakota Division of Insurance, Securities Regulation

Virginia State Corporation Commission

Washington State Department of Financial Institutions

Wisconsin Department of Financial Institutions

Sample of the Instruction in Plain English:

On/in [relevant date or time] it was unlawful to offer or sell a franchise in this state unless the offer was registered with [name of state agency which registers franchises; see list above*] [if Defendant asserts that Defendant was exempt from registration, add the following] or was exempt from registration.

[Name of Plaintiff] claims that [name of Defendant] offered or sold a franchise to [name of Plaintiff] in this state on / in [relevant date or time period] without being registered with [name of state agency which registers franchises; see list above*].

To prove this claim, [name of Plaintiff] must prove that [name of Defendant] offered or sold a franchise to [name of Plaintiff] in this state on/in [relevant date or time period] and that that [name of Defendant] was not registered at the time with [name of state agency which registers franchises; see list above*].

Comment:

In states that have a franchise registration and disclosure law, it is unlawful to offer or sell a franchise without being registered, at the time of the offer or sale, with the agency designated to administer the state's franchise law, unless the franchisor or the transaction is exempt. Plaintiff has the burden of proving Defendant offered or sold a franchise in the state and was not registered at the time of offering or selling the franchise. This instruction mentions the possibility of an exemption. Exemption is an affirmative defense that Defendant has the burden of pleading and proving.[30]

Depending on the facts of the transaction or claimed transaction, it is possible that the laws of multiple states may be involved and that instructions under multiple states may be necessary.[31] The parties' agreed choice of law does not supersede the state's franchise law. *Sheldon v. Munford, Inc.*, 950 F.2d 403, 407 (7th Cir. 1991).

Authorities:

Cal. Corp. Code § 31110; Haw. Rev. Stat. § 482E-3(c); 815 Ill. Comp. Stat. §§ 705/5; 705/10; Ind. Code § 23-2-2.5-9; Md. Code Ann. Bus. Reg. § 14-214; Minn. Stat. § 80C.02; N.Y. Gen. Bus. Law § 683.1(1); N.D. Cent. Code § 51-19-03; Or. Rev. Stat. § 650.005 et seq.; 19 R.I. Gen Laws § 19-28.1-5; S.D. Codified Laws § 37-5B-4; Va. Code Ann. § 13.1-560; Wash. Rev. Code § 19.100.020(1); Wis. Stat. § 553.21.

2. Offer or Sale Made "in This State"

Instruction:

To prove its/his/her claim, [name of Plaintiff] must prove that a franchise was offered or sold by [name of Defendant] to [name of Plaintiff] in this state.

30. Cal. Corp. Code § 31153; Haw. Rev. Stat. § 482E-5(d); 815 Ill. Comp. Stat. § 705/42; Ind. Code § 23-2-2.5-39; Mich. Comp. Laws § 445.1503(10); Minn. Stat. § 80C.12(4); N.Y. Gen. Bus. Law. § 681.18; N.D. Cent. Code § 51-19-16(4); 19 R.I. Gen Laws § 19-28.1-24; S.D. Codified Laws § 37-5B-20; Wash. Rev. Code § 19.100.220(1); Wis. Stat. § 553.24(5); *see, e.g.*, Neptune Soc'y Corp. v. Longanecker, 240 Cal.Rptr. 117, 194 Cal. App. 3d 1233, 1248 (Cal. App. 1987) (defendant had burden to invoke and prove exemption under state franchise law); Spahn v. Guild Indus. Corp., 156 Cal. Rptr. 375, 94 Cal. App. 3d 143, 158 (1979) (same).

31. *See, e.g.*, Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 673 F. Supp. 1493, 1501 (C.D. Cal. 1987) ("[F]ranchise laws of California, Maryland, Virginia, and the United States each applied" to unlawful sale of a franchise.), *aff'd in part, rev'd in part on other grounds*, Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165 (9th Cir. 1989).

[Name of Defendant] made an offer in this state if [name of Defendant] made an offer to sell in this state.

[Name of Defendant] made a sale in this state if [name of Plaintiff] accepted an offer to buy in this state.

[Name of Defendant] made an offer or sale in this state if [name of Plaintiff] was domiciled in this state and the business was operated in this state or was going to be operated in this state.

[Name of Defendant] made an offer to sell in this state if [name of Defendant] made an offer that originated from this state.

[Name of Defendant] made an offer to sell in this state if [name of Defendant] directed an offer to this state and the offer was received by [name of Plaintiff] at the place where [name of Defendant] directed it.

[Name of Plaintiff] accepted an offer in this state if [name of Plaintiff] communicated acceptance to [name of Defendant] in this state.

[Name of Plaintiff] communicated acceptance to [name of Defendant] in this state if [name of Plaintiff] directed a communication of acceptance to [name of Defendant] in this state reasonably believing [name of Defendant] to be in this state and [name of Defendant] received the communication at the place where [name of Plaintiff] directed it.

In considering if there was an offer or sale in this state, you may consider advertising in a newspaper, or on radio, or on television [or Internet].

But an offer is not made in this state merely because [name of Defendant] circulates or someone circulated on [name of Defendant]'s behalf in this state a true newspaper or other publication of general, regular, and paid circulation which had more than two-thirds of its circulation outside this state in the prior 12 months, or a radio or television program originating outside this state is received in this state.

Sample of the Instruction in Plain English:

[Name of Plaintiff] has the burden to prove that a franchise was offered or sold by [name of Defendant] to [name of Plaintiff] in this state.

An offer was made in this state if [name of Defendant] made an offer to sell in this state.

A sale was made in this state if [name of Plaintiff] accepted an offer to buy in this state.

An offer or sale was made in this state if [name of Plaintiff] [resided/lived] in this state and the business was operated in this state or was going to be operated in this state.

An offer to sell was made in this state if [name of Defendant] made an offer that came from this state.

An offer to sell was made in this state if [name of Defendant] directed an offer to this state and it was received by [name of Plaintiff] where [name of Defendant] directed it.

An offer was accepted in this state if [name of Plaintiff] communicated acceptance to [name of Defendant] in this state.

[Name of Plaintiff] communicated acceptance to [name of Defendant] in this state if [name of Plaintiff] directed acceptance to [name of Defendant] in this state reasonably believing [name of Defendant] to be in this state and [name of Defendant] received the communication where [name of Plaintiff] directed it.

In considering if there was an offer or sale in this state, you may consider advertising in a newspaper, or on the radio, or on television [or Internet].

But an offer is not made in this state just because [name of Defendant] or someone else circulated in this state a newspaper or other publication of general, regular, and paid circulation that had over two-thirds of its circulation outside this state in the prior 12 months, or a radio or television program originating outside this state was received in this state.

Comment:

A state can of course regulate activity in or affecting the state. A state does not, however, have authority to regulate activity occurring outside the state.[32] Each state's franchise registration and disclosure laws apply to offers and sales of franchises that take place in the state. Several state franchise registration and disclosure laws have provisions describing when an offer or sale is deemed to have occurred in the state.

The statutes provide that an offer is not made in this state merely because of specified newspaper, radio, or television advertising originating outside the state. The Internet reference is in brackets because the statutes, having originally been enacted before the advent of the Internet, do not mention the Internet, but Internet communication could be considered an example of a publication of general, regular, and possibly paid circulation.

Authorities:

Cal. Corp. Code § 31013; 815 Ill. Comp. Stat. § 705/3(20); Ind. Code § 23-2-2.5-2; Md. Code Ann. Bus. Reg. § 14-203; Mich. Comp. Laws § 445.1504(2)–(4); Minn. Stat. § 80C.19; N.Y. Gen. Bus. Law. § 681.12; N.D. Cent. Code § 51-19-02(14); Or. Rev. Stat. § 650.015; 19 R.I. Gen Laws § 19-28.1-4; S.D. Codified Laws § 37-5B-3; Va. Code Ann. § 13.1-559(B); Wash. Rev. Code § 19.100.020.

3. Offer or Sale of Franchise Without Providing FDD

Instruction:

A party who sells a franchise must provide the franchise buyer a copy of the franchise disclosure document (FDD) with a copy of all proposed

32. *See*, *e.g.*, Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (holding that Commerce Clause precludes application of a state statute to commerce that occurs outside the State's borders); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) (noting that a state may regulate within its borders but may not project its legislation into other states). *But see* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133 (2010) (discussing some forms of extraterritorial regulation).

agreements. The franchise seller must provide this copy at least [state applicable number of days*] before the buyer signs any agreement, or at least [state applicable number of days*] before the seller receives any payment, whichever is first.

This copy may be provided in paper, or by electronic means.

[Name of Plaintiff] claims that [name of Defendant] sold [name of Plaintiff] a franchise without providing [name of Plaintiff] the franchise disclosure document with a copy of all agreements, at least [state applicable number of days*] days before [name of Plaintiff] signed an agreement/paid money to [name of Defendant].

*California—14 days

Hawaii—7 days

Illinois—14 days

Indiana—10 days

Maryland—14 days or when prospective franchisee makes a reasonable request

Michigan—10 business days

Minnesota—7 days

New York—10 business days or first face-to-face meeting held for the purpose of discussing the sale or possible sale of a franchise);

North Dakota—7 days

Rhode Island—14 days

South Dakota—14 days

Virginia—number of days not specified

Washington—14 days

Wisconsin—14 days

To prove this claim [name of Plaintiff] must prove that at the time when [name of Plaintiff] signed an agreement or paid money to [name of Defendant], [name of Plaintiff] had not had the franchise disclosure document with all agreements for at least [state applicable number of days*].

Sample of the Instruction in Plain English:

A franchise seller must provide the buyer the franchise disclosure document and a copy of all proposed agreements. The franchise seller must provide these at least [state applicable number of days*] before the buyer signs any agreement, or at least [state applicable number of days*] before the seller receives any payment, whichever is first.

This may be provided in paper, or electronically.

[Name of Plaintiff] claims [name of Defendant] sold [name of Plaintiff] a franchise without providing [name of Plaintiff] the franchise disclosure document and all agreements, at least [state applicable number of days*] before [name of Plaintiff] signed an agreement/paid money to [name of Defendant].

*California—14 days

Hawaii—7 days

Illinois—14 days

Indiana—10 days

Maryland—14 days or when prospective franchisee makes a reasonable request

Michigan—10 business days

Minnesota—7 days

New York—10 business days or first face-to-face meeting held for the purpose of discussing the sale or possible sale of a franchise);

North Dakota—7 days

Rhode Island—14 days

South Dakota—14 days

Virginia—number of days not specified

Washington—14 days

Wisconsin—14 days

To prove this claim [name of Plaintiff] must prove that when [name of Plaintiff] signed an agreement or paid money to [name of Defendant], [name of Plaintiff] had not had the franchise disclosure document with all agreements for at least [state applicable number of days*].

Comment:

There may be different ways to formulate the last paragraph, depending on the nature of the factual dispute. For example, in one scenario, the plaintiff may claim to have never received an FDD, but the franchisor claims it was delivered long before the franchise agreement was signed. That dispute is not so much whether the specified number of days was satisfied, but whether an FDD was delivered at all. In another scenario, both parties agree the FDD was delivered, and agree when the franchise agreement was signed, but dispute when the FDD was delivered. Then the issue is whether delivery occurred more than or less than the required number of days before signing of an agreement. In another scenario, there is no dispute about when the

FDD was delivered, but the parties dispute when the agreement was signed, or when money was paid to the franchisor. Each scenario may call for a formulation of the instruction that focuses on the particular issue in dispute.

A typical franchise relationship may involve a variety of agreements. The principal agreement might be a Franchise Agreement, Master Franchise Agreement, Area Development Agreement, or Area Representative Agreement. A variety of ancillary agreements are possible. Examples include a Confidentiality Agreement, Deposit Agreement (if the prospective franchisee will pay a monetary deposit), Non-Competition Agreement, Personal Guaranty, Site Selection Agreement, Lease or Sublease for premises, Collateral Assignment of Lease (sometimes called a Conditional Assignment of Lease), Software License, Promissory Note, or Asset Purchase Agreement.[33] Another factual scenario may concern whether one of these agreements was entered into before the franchisee was in possession of an FDD for the specified number of days. Then a jury instruction might simply address the issue of what agreement was signed and when.

The Federal Trade Commission Franchise Rule requires delivery of the FDD at least 14 days before signing a binding agreement or payment of any consideration. 16 C.F.R. § 436.2(a). *See*, *e.g.*, *Caudill v. Keller Williams Realty, Inc.*, 828 F.3d 575, 576 (7th Cir. 2016) (noting FTC requires FDD to be sent to prospective franchisee 14 days before the prospective franchisee signs a binding agreement with, or makes any payment to, the franchisor or an affiliate connected with the sale of a franchise); *Presidential Hospitality, LLC v. Wyndham Hotel Grp., LLC*, 333 F. Supp. 3d 1179, 1191 n.2 (D.N.M. 2018) ("The FDD is a document that the franchisor must disclose to the franchisee at least 14 calendar days before the franchisee signs a binding agreement with the franchisor."). However, only the FTC can pursue an action in court to remedy a violation; no private cause of action may be asserted for violation of the FTC Rule. *See*, *e.g.*, *Yumilicious Franchise, LLC v. Barrie*, 819 F.3d 170, 176 (5th Cir. 2016); *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184, 1187 (8th Cir. 1996); *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 70 F. Supp. 3d 376, 382 (D.D.C. 2014); *Senior Ride Connection v. ITNAmerica*, 225 F. Supp. 3d 528, 531 (D.S.C. 2016).

Authorities:

Cal. Corp. Code § 31119 (14 days); Haw. Rev. Stat. § 482E-3(a) (7 days); 815 Ill. Comp. Stat. § 705/5(1) (14 days); Ind. Code § 23-2-2.5-9(2) (ten days); Md. Code Ann. Bus. Reg. § 14-223 (14 days or when requested by the prospective franchisee); Mich. Comp. Laws § 445.1508(1) (10 business days); Minn. Stat. § 80C.05(5) (7 days); N.Y. Gen. Bus. Law § 683.8 (10 business days or first face-to-face meeting held for the purpose of discussing

33. *See* Suzie Trigg & Chris Wallace, *Beyond the Franchise Agreement: A Look at the "Other" Agreements Between Franchisor and Franchisee*, ABA 41st Ann. Forum on Franchising, W-13, at 10–12 (2018).

the sale or possible sale of a franchise); N.D. Cent. Code § 51-19.04(c) (7 days); 19 R.I. Gen Laws § 19-28-1.8(a)(2) (14 days); S.D. Codified Laws § 37-5B-17(1) (14 days); Va. Code Ann. § 13.1-563(4) (number of days not specified); Wash. Rev. Code § 19.100.080(1) (14 days); Wis. Stat. § 553.27(4) (14 days); *Long John Silver's Inc. v. Nickleson*, 923 F. Supp. 2d 1004, 1014 (W.D. Ky. 2013) (noting that failure to deliver most current FDD more than 7 days in advance of payment potentially violated delivery requirement of Minnesota Franchise Law).

4. Offer or Sale of Franchise Based on Material False Information (Misrepresentation) in FDD

Instruction:

It is unlawful to make any untrue statement of a material fact in a statement required to be disclosed in writing to the prospective franchisee.

[Name of Plaintiff] claims that [name of Defendant] made an untrue statement of material fact in a statement required to be disclosed in writing to [name of Plaintiff] and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] made an untrue statement.

The statement was or concerned a material fact.

The statement was required to be in the Disclosure Document given to [name of Plaintiff].

[Name of Plaintiff] received that statement

[Name of Plaintiff] relied on that statement.

[Name of Plaintiff]'s reliance on the statement was reasonable.

[Name of Plaintiff] suffered damages as a result.

Sample of the Instruction in Plain English:

It is unlawful to make a false statement of something important in a statement required to be given in writing to the prospective franchisee.

[Name of Plaintiff] claims [name of Defendant] made a false statement about something important in a statement required to be given in writing to [name of Plaintiff] and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] made a false statement.

The statement was about an important fact.

The statement was required to be in the Disclosure Document given to [name of Plaintiff].

[Name of Plaintiff] received the statement.

[Name of Plaintiff] relied on the statement.

[Name of Plaintiff]'s reliance on the statement was reasonable.

[Name of Plaintiff] suffered damages as a result.

Comment:

The franchise statutes are intended to prohibit misrepresentations more broadly than common law fraud. *See*, *e.g.*, Cal. Corp. Code § 31302 (noting that fraud and deceit are not limited to common law fraud or deceit.). For a discussion comparing the scope of state franchise laws to common law fraud, see Peter C. Lagarias & Bruce J. Napell, *Lessons from Thucydides on Distinguishing Statutory from Common Law Fraud in Franchise Disclosure Actions*, 35 Franchise L.J. 601 (2016).

Unlike in fraud claims, there may be no scienter requirement for misrepresentation under at least some state franchise laws. That is, there is no requirement to prove that a franchisor that made a misrepresentation knew or should have known the information was incorrect. *See*, *e.g.*, *Enservco*, *Inc. v. Ind. Secs. Div.*, 623 N.E.2d 416, 423 (Ind. 1993) ("[C]ulpability is not an element of a violation.").

There is sometimes a question whether reliance is an element of a claim for damages arising from false disclosure under state franchise laws. Where reliance is an element, there is sometimes a question whether reliance must be reasonable or justifiable.

Reliance is generally an element of such claim. *See*, *e.g.*, *Cook v. Little Caesar Enters.*, *Inc.*, 210 F.3d 653, 659 (6th Cir. 2000) ("[R]easonable or justifiable reliance was necessary for a Michigan Franchise Investment Law claim."); *A Love of Food I*, *LLC v. Maoz Vegetarian USA*, *Inc.*, 70 F. Supp. 3d 376, 413 (D.D.C. 2014) (same, under New York law); *JM Vidal*, *Inc. v. Texdis USA*, *Inc.*, 764 F. Supp. 2d 599, 613 (S.D.N.Y. 2011) (same, under Washington Franchise Investment Protection Act, and noting that courts interpreting Indiana, Michigan, and Illinois franchise statutes required proof of reasonable reliance); *Motor City Bagels v. Am. Bagel Co.*, 50 F. Supp. 2d 460, 489 (D. Md. 1999) (indicating that reasonable reliance is an element of a misrepresentation claim under Indiana franchise law).

But not all jurisdictions require that reliance be reasonable or justifiable. *See*, *e.g.*, *Randall v. Lady of Am Franchise Corp.*, 532 F. Supp. 2d 1071, 1086 (D. Minn. 2007) (holding that "justifiable reliance—like scienter—is not an element of a claim under the statute"; also noting that while, a number of federal courts "have interpreted other states' franchise statutes to implicitly require the franchisee to demonstrate reliance that is justifiable or reasonable," but adding that "no Minnesota court has read such a requirement into the Minnesota Franchise Act's prohibition on misrepresentations by franchisors").

Regarding materiality, an item of information is material if "there is a substantial likelihood that a reasonable investor would have viewed the information as having significantly altered the total mix of available information." *Enservco, Inc. v. Ind. Secs. Div.*, 623 N.E.2d 416, 423 (Ind. 1993) (internal punctuation omitted).

Authorities:

Cal. Corp. Code § 31202; Haw. Rev. Stat. § 482E-5(b)(1); 815 Ill. Comp. Stat. § 705/6; Ind. Code § 23-2-2.5-27; Md. Code Ann. Bus. Reg. § 14-229; Mich. Comp. Laws § 445.1505; Minn. Stat. § 80C.13 N.Y. Gen. Bus. Laws § 687; N.D. Cent. Code § 51-19-11; Or. Rev. Stat. § 650.020; 19 R.I. Gen Laws § 19-28.1-17; S.D. Codified Laws § 37-5B-25; Va. Code Ann. § 13.1-563; Wash. Rev. Code § 19.100.170; Wis. Stat. § 553.41; *Enservco, Inc. v. Ind. Secs. Div.*, 623 N.E.2d 416, 423 (Ind. 1993) (noting "core elements" of franchise law misrepresentation claim are" a statement or omission, materiality, and falsity").

5. Offer or Sale of Franchise Based on Material Omission in FDD

Instruction:

It is unlawful to omit from the Franchise Disclosure Document (or FDD) any material fact which is required to be stated therein.

[Name of Plaintiff] claims that [name of Defendant] omitted to state a material fact in the FDD and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] omitted to state a fact in the FDD.

The omission was or concerned a material fact.

The omitted fact or statement was required to be in the FDD given to [name of Plaintiff].*

[Name of Plaintiff] received the FDD.

[Name of Plaintiff] relied on the omission of that statement.

[Name of Plaintiff]'s reliance on the omission was reasonable.**

[Name of Plaintiff] suffered damages as a result.

Sample of the Instruction in Plain English:

It is unlawful to leave out of the Franchise Disclosure Document (or FDD) any important fact that is required to be stated therein.

[Name of Plaintiff] claims [name of Defendant] left out an important fact from the FDD and that caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] left a fact out of the FDD.

The omission was or concerned an important fact.

The omitted fact or statement was required to be in the FDD given to [name of Plaintiff].*

[Name of Plaintiff] received the FDD.

[Name of Plaintiff] relied on the omission of that statement.

[Name of Plaintiff]'s reliance on the omission was reasonable.**

[Name of Plaintiff] suffered damages as a result.

Comment:

*When a plaintiff claims that a material fact or statement that was required to be disclosed was omitted from the FDD, an issue may be whether the statement was required to be disclosed. Therefore, this instruction may need to be paired with an instruction concerning the particular FDD disclosure requirement. The Federal Trade Commission Trade Regulation Rule on Franchising sets forth twenty-three categories of information that the FTC requires to be disclosed. The regulation contains detailed instructions and subparts setting forth requirements for disclosure of numerous kinds of information, as set forth in 16 C.F.R. §§ 436.5 to 436.7. Additional sources of disclosure requirements may be in a state's franchise registration and disclosure law, or regulations of the state agency that administers the law. The court may need to instruct the jury on the particular disclosure requirement at issue. Instruction 15 is an example for illustration of a further instruction concerning a disclosure requirement.

**In an action alleging material omission, proof of nondisclosure of a material fact may establish a presumption of reliance. The defendant may rebut the presumption by proving the plaintiff would have purchased the franchise even if the material omitted fact had been disclosed. *See, e.g.*, *Morris v. Int'l Yogurt Co.*, 729 P.2d 33, 42 (Wash. 1986) (proof of nondisclosure of a material fact establishes presumption of reliance which the defendant may rebut by proving that the plaintiff would still have purchased the franchise even if the material fact had been disclosed).

Authorities:

Cal. Corp. Code § 31202; Haw. Rev. Stat. § 482E-5(b)(1); 815 Ill. Comp. Stat. § 705/6; Ind. Code § 23-2-2.5-27; Md. Code Ann. Bus. Reg. § 14-229; Mich. Comp. Laws § 445.1505; Minn. Stat. § 80C.13 N.Y. Gen. Bus. Laws § 687; N.D. Cent. Code § 51-19-11; Or. Rev. Stat. § 650.020; 19 R.I. Gen Laws § 19-28.1-17; S.D. Codified Laws § 37-5B-25; Va. Code Ann. § 13.1-563; Wash. Rev. Code § 19.100.170; Wis. Stat. § 553.41; *JM Vidal, Inc. v. Texdis USA, Inc.*, 764 F. Supp. 2d 599, 613 (S.D.N.Y. 2011) (proof of nondisclosure of a material fact establishing presumption of reliance that defendant may rebut by proving the plaintiff would still have purchased the franchise even if the material fact had been disclosed).

6. Example, for Illustration, of an Instruction Concerning an FDD Disclosure Requirement

In this example, the plaintiff, after entering into a franchise agreement, leasing real estate, and paying for buildout of the location, learned from a government inspector that a law of the state would mean substantial additional difficulties and costs to complete the buildout, open for business, and operate. The franchisee claims that information about the law was material and that the franchisor failed to disclose information about this law in Item 1 of the FDD. The franchisor claims that information about the law was described generally and that the general description was sufficient to satisfy the FDD disclosure requirement. The court has given the preceding instruction on the offer and sale of a franchise based on material omission in the FDD. The court will also give this instruction.

Instruction:

[Name of Defendant] was required to disclose, in general terms, any laws or regulations specific to the industry in which the franchise business operates.

Comment:

In this example, the statement of the required disclosure consists of the portion of the FTC Franchise Rule that states the disclosure requirement. In this instance, this portion is 16 C.F.R. § 436.5(a)(6)(v), which states that the franchisor must disclose "[i]n general terms, any laws or regulations specific to the industry in which the franchise business operates." A similar approach may be used to state other disclosure requirements.

Authorities:

For this example, 16 C.F.R. § 436.5(a)(6)(v). For disclosure requirements generally, see 16 C.F.R. §§ 436.5–436.7.

7. Offer or Sale of Franchise Based on Material False Information Outside FDD

Instruction:

It is unlawful to offer or sell a franchise by means of a communication, written or oral, that includes an untrue material fact.

[Name of Plaintiff] claims that [name of Defendant] made an untrue statement of material fact in [offering] [selling] a franchise to [name of Plaintiff] and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] offered or sold a franchise to [name of Plaintiff].

In offering or selling the franchise to [name of Plaintiff], [name of Defendant] made an untrue statement whether orally or in writing.

The statement was or concerned a material fact.

[Name of Plaintiff] received that statement.

[Name of Plaintiff] relied on that statement.

[Name of Plaintiff]'s reliance on the statement was reasonable.

[Name of Plaintiff] suffered damages as a result.

Sample of the Instruction in Plain English:

It is unlawful to offer or sell a franchise by saying something, written or oral, that is false.

[Name of Plaintiff] claims [name of Defendant] made a false statement of something important in [offering] [selling] a franchise to [name of Plaintiff] and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] offered or sold a franchise to [name of Plaintiff].

In offering or selling the franchise, [name of Defendant] said something false whether orally or in writing.

The statement was or concerned a material fact.

[Name of Plaintiff] received the statement.

[Name of Plaintiff] relied on the statement.

[Name of Plaintiff]'s reliance on the statement was reasonable.

[Name of Plaintiff] suffered damages as a result.

Comment:

Reliance is generally an element of such claim. *See*, *e.g.*, *Cook v. Little Caesar Enters., Inc.*, 210 F.3d 653, 659 (6th Cir. 2000) ("[R]easonable or justifiable reliance was necessary for a Michigan Franchise Investment Law claim."); *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 70 F. Supp. 3d 376, 413 (D.D.C. 2014) (same, under New York law); *JM Vidal, Inc. v. Texdis USA, Inc.*, 764 F. Supp. 2d 599, 613 (S.D.N.Y. 2011) (same, under Washington Franchise Investment Protection Act, and noting that courts interpreting Indiana, Michigan, and Illinois franchise statutes require proof of reasonable reliance); *Motor City Bagels v. Am. Bagel Co.*, 50 F. Supp. 2d 460, 489 (D. Md. 1999) (noting that reasonable reliance is an element of a misrepresentation claim under Indiana franchise law).

But not all jurisdictions require that reliance be reasonable or justifiable. *See*, *e.g.*, *Randall v. Lady of Am. Franchise Corp.*, 532 F. Supp. 2d 1071, 1086 (D. Minn. 2007) (holding that "justifiable reliance—like scienter—is not an element of a claim under the statute"; also noting that while, a number of federal courts "have interpreted other states' franchise statutes to implicitly

require the franchisee to demonstrate reliance that is justifiable or reasonable," but that "no Minnesota court has read such a requirement into the Minnesota Franchise Act's prohibition on misrepresentations by franchisors").

Regarding materiality, an item of information is material if "there is a substantial likelihood that a reasonable investor would have viewed the information as having significantly altered the total mix of available information." *Enservco, Inc. v. Ind Secs. Div.*, 623 N.E.2d 416, 423 (Ind. 1993) (internal punctuation omitted).

Authorities:

Cal. Corp. Code § 31201; Haw. Rev. Stat. § 482E-5(b)(2); 815 Ill. Comp. Stat. § 705/6; Ind. Code § 23-2-2.5-27; Md. Code Ann. Bus. Reg. § 14-229; Mich. Comp. Laws § 445.1505; Minn. Stat. § 80C.13; N.Y. Gen. Bus. Laws § 687; N.D. Cent. Code § 51-19-11; Or. Rev. Stat. § 650.020; 19 R.I. Gen Laws § 19-28.1-17; S.D. Codified Laws § 37-5B-25; Va. Code Ann. § 13.1-563; Wash. Rev. Code § 19.100.170; Wis. Stat. § 553.41.

8. Offer or Sale of Franchise Based on Material Omission Outside FDD

Instruction:

It is unlawful in offering or selling a franchise to omit to state a material fact that is necessary to make the statements made, in the circumstances, not misleading.

[Name of Plaintiff] claims that [name of Defendant] in [offering] [selling] a franchise, omitted to state a material fact that was necessary in the circumstances, to state, to make the statements made not misleading and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] offered or sold a franchise to [name of Plaintiff].

In offering or selling the franchise to [name of Plaintiff], [name of Defendant] omitted to state a material fact.

It was necessary for [name of Defendant] to make that omitted statement for the statements that were made not to be misleading.

The omission was or concerned a material fact.

[Name of Plaintiff] relied on the omission of that statement.

[Name of Plaintiff]'s reliance on the omission was reasonable.

[Name of Plaintiff] suffered damages as a result.

Sample of the Instruction in Plain English:

It is unlawful in offering or selling a franchise to leave out an important fact that is necessary to make the statements made, in the circumstances, not misleading.

[Name of Plaintiff] claims [name of Defendant] in [offering] [selling] the franchise, left out an important fact that was necessary, in the circumstances, to state to make the statements made not misleading and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] offered or sold a franchise to [name of Plaintiff].

In offering or selling the franchise, [name of Defendant] left out an important fact.

It was necessary for [name of Defendant] to make that omitted statement for the statements that were made not to be misleading.

The omission was or concerned an important fact.

[Name of Plaintiff] relied on the omission of that statement.

[Name of Plaintiff]'s reliance was reasonable.

[Name of Plaintiff] suffered damages as a result.

Comment:

In an action alleging material omission, proof of nondisclosure of a material fact may establish a presumption of reliance. The defendant may rebut the presumption by proving the plaintiff would have purchased the franchise even if the material omitted fact had been disclosed. *See*, *e.g.*, *Morris v. Int'l Yogurt Co.*, 729 P.2d 33, 42 (Wash. 1986) (proof of nondisclosure of a material fact establishing presumption of reliance which the defendant may rebut by proving that the plaintiff would still have purchased the franchise even if the material fact had been disclosed).

Authorities:

Cal. Corp. Code § 31201; Haw. Rev. Stat. § 482E-5(b)(2); 815 Ill. Comp. Stat. § 705/6; Ind. Code § 23-2-2.5-27; Md. Code Ann. Bus. Reg. § 14-229; Mich. Comp. Laws § 445.1505; Minn. Stat. § 80C.13; N.Y. Gen. Bus. Laws § 687; N.D. Cent. Code § 51-19-11; Or. Rev. Stat. § 650.020; 19 R.I. Gen Laws § 19-28.1-17; S.D. Codified Laws § 37-5B-25; Va. Code Ann. § 13.1-563; Wash. Rev. Code § 19.100.170; Wis. Stat. § 553.41; *JM Vidal*, *Inc. v. Texdis USA*, *Inc.*, 764 F. Supp. 2d 599, 613 (S.D.N.Y. 2011) (proof of nondisclosure of a material fact establishing presumption of reliance that defendant may rebut by proving the plaintiff would still have purchased the franchise even if the material fact had been disclosed).

9. Offer or Sale of Franchise Based on Use of Device, Scheme or Artifice to Defraud

Instruction:

It is unlawful in the offer, sale or purchase of a franchise, to employ* any device, scheme, or artifice to defraud.

[Name of Plaintiff] claims that [name of Defendant] used a device, scheme or artifice to defraud [name of Plaintiff] in [offering] [selling] a franchise to [name of Plaintiff] and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] offered or sold a franchise to [name of Plaintiff].

In offering or selling the franchise to [name of Plaintiff], [name of Defendant] used a device, scheme, or artifice to defraud [name of Plaintiff].

[Name of Plaintiff] suffered damages as a result.

Sample of the Instruction in Plain English:

It is unlawful in the offer, sale, or purchase of a franchise, to use any device, scheme, or artifice to defraud.

[Name of Plaintiff] claims [name of Defendant] used a device, scheme or artifice to defraud [name of Plaintiff] in [offering] [selling] a franchise to [name of Plaintiff] and that this caused damage to [name of Plaintiff].

To prove this claim, [name of Plaintiff] must prove all the following:

[Name of Defendant] offered or sold a franchise to [name of Plaintiff].

In offering or selling the franchise to [name of Plaintiff], [name of Defendant] used a device, scheme or artifice to defraud [Plaintiff].

[Name of Plaintiff] suffered damages as a result.

Comment:

*Some states add the phrase directly or indirectly, thus making the statute prohibit directly or indirectly employing a device, scheme, or artifice to defraud.

Authorities:

Haw. Rev. Stat. § 482E-5(b)(2); 815 Ill. Comp. Stat. § 705/6; Ind. Code § 23-2-2.5-27; Md. Code Ann. Bus. Reg. § 14-229; Mich. Comp. Laws § 445.1505; N.Y. Gen. Bus. Laws § 687; N.D. Cent. Code § 51-19-11; Or. Rev. Stat. § 650.020; 19 R.I. Gen Laws § 19-28.1-17; Va. Code Ann. § 13.1-563; Wash. Rev. Code § 19.100.170. *See Aaron v. SEC*, 446 U.S. 680, 696 n.13 (1980) (securities law decision, defining terms "device," "scheme" and "artifice," by noting that "Webster's International Dictionary (2d ed. 1934) defines (1) "device" as "[t]hat which is devised, or formed by design; a contrivance; an invention; project; scheme; often, a scheme to deceive; a stratagem; an artifice," (2) "scheme" as "[a] plan or program of something to be done; an enterprise; a project; as, a business *scheme*[, or] [a] crafty, unethical project," and (3) "artifice" as a "[c]rafty device; trickery; also, an artful stratagem or trick; artfulness; ingeniousness.""); *Virden v. Graphics One*, 623 F. Supp. 1417, 1423 (C.D. Cal. 1985) (franchisor that entered into license to sell graphics center franchises and led potential franchisees to believe

they would turn a profit soon after opening, despite knowing that franchises would fail financially may have engaged in a "scheme" to defraud).

C. *Liability of Directors, Officers, and Employees*

1. Individual Liability of Director, Officer, or Employee of Franchisor

Instruction:

An individual who directly or indirectly controls an entity that is liable, or a partner in a firm that is liable, or a principal executive officer or director of an entity that is liable, or an employee who materially aided in the act or transaction that violated the law, is also liable with and to the same extent as the entity or firm.

[Name of Plaintiff] claims that [name(s) of individual director(s), officer(s), partner(s), employee(s) of Defendant entity] is/are liable along with [name of Defendant entity]. If you find that [name of Defendant entity] is liable to [name of Plaintiff], you must decide if [name(s) of individual director(s), officer(s), partner(s), employee(s) of Defendant entity] is/are also liable. Each individual is liable if that individual either directly or indirectly controlled [name of Defendant] or if that individual was a partner of [name of Defendant] or if that individual was a principal executive officer of [name of Defendant] or if that individual was an employee of [name of Defendant] and if an employee, that individually materially aided in the act or transaction that violated the law.

Sample of the Instruction in Plain English:

Someone who directly or indirectly controls an entity that is liable, or a partner in a firm that is liable, or a principal executive officer or director of an entity that is liable, or an employee who materially aided the act or transaction that violated the law, is liable the same as the entity or firm. [Name of Plaintiff] claims [name(s) of individual director(s), officer(s), partner(s), employee(s) of Defendant entity] is/are liable along with [name of Defendant entity]. If you find that [name of Defendant entity] is liable to [name of Plaintiff] you must decide if [name(s) of individual director(s), officer(s), partner(s), employee(s) of Defendant entity] is/are liable. Each individual is liable who directly or indirectly controlled [name of Defendant] or was a partner of [name of Defendant] or was a principal executive officer of [name of Defendant] or was an employee of [name of Defendant] and if an employee, he or she materially aided in the act or transaction that violated the law.

Comment:

Several state franchise laws make individual directors, officers, partners, and employees jointly and severally liable with the entity for franchise law violations. *See*, *e.g.*, *Coraud LLC v. Kidville Franchise Co., LLC*, 109 F. Supp. 3d 615 (S.D.N.Y. 2015); *A.J. Temple Marble & Tile v. Union Carbide Marble*

Care, *No. 11*, 87 N.Y.2d 574 (N.Y. 1996). Individuals may be liable even if the franchisor entity is not a defendant. *See*, *e.g.*, *Courtney v. Waring*, 237 Cal. Rptr. 233, 191 Cal. App. 3d 1434, 1442 (1987) (noting that imposition of secondary liability does not require the plaintiff to successfully sue the franchise seller but only that the plaintiff establish in the action against the secondary defendant that liability could have been imposed on the seller).

The instruction can be shortened to address just the applicable position(s) of the particular individual defendant(s). An affirmative defense may be available for such individuals who lacked knowledge of the violation. *See infra* Sec. D, Instruction 14 (Defense by Individual Director, Officer or Employee of Lack of Knowledge). For a discussion of individual liability, see Cynthia M. Klaus, *Personal Liability of Franchisor Executives and Employees Under State Franchise Laws*, 29 Franchise L.J. 99 (2009), and Edward Wood Dunham, *Liability of Shareholders*, *Officers*, *Directors*, *and Employees for Franchise Law Violations*, 13 Franchise L.J. 101 (1994).

Authorities:

Cal. Corp. Code § 31302; 815 Ill. Comp. Stat. § 705/26; Ind. Code § 23-2-2.5-29; Md. Code Ann. Bus. Reg. § 14-227(d); Mich. Comp. Laws § 445.1532; Minn. Stat. § 80C.17; N.Y. Gen. Bus. Law § 691(3); N.D. Cent. Code § 51-19-12(2); Or. Rev. Stat. § 650.020(5); 19 R.I. Gen Laws § 19-28.1-21(b); S.D. Codified Laws § 37-5B49; Wash. Rev. Code §§ 19.100.010(13), 19.100.190; Wis. Stat. § 553.51(3).

D. *Defenses*

1. Defense of Statute of Limitations—Specified Number of Years from Act or Transaction Constituting the Violation

Instruction:

[Name of Defendant] contends that [name of Plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of Defendant] must prove that the act or transaction constituting the violation occurred before [insert date from applicable statute of limitation].

Sample of the Instruction in Plain English:

[Name of Defendant] claims [name of Plaintiff]'s lawsuit was not filed in the time set by law. To succeed on this defense, [name of Defendant] must prove the act or transaction that violated the law occurred before [insert date from applicable statute of limitation].

Comment:

The statute of limitations is an affirmative defense that normally must be pled by the defendant or it is waived. *See*, *e.g.*, *Neptune Soc'y Corp. v. Longanecker*, 240 Cal. Rptr. 117, 194 Cal. App. 3d 1233, 1243–44 (1987) (statute of limitations defense is a personal privilege that must be affirmatively pled;

if it appears on face of complaint, it must be raised by demurrer; otherwise, it must be pleaded in the answer, or it is waived; defendant waived statute of limitations defense by failing to plead the defense in its answer and failing to raise it by demurer). *But see Gre-Ter Enters., Inc. v. Mmgt. Recruiters Int'l, Inc.*, 329 F. Supp. 3d 667, 681 n.10 (S.D. Ind. 2018) (statute of limitations defense may be entertained if its predicates are established by the complaint).

This instruction concerns time limits often referred to as statutes of limitations. But because the statutes in this instruction run for fixed periods of time, not affected by discovery, they are more accurately referred to as statutes of repose. A statute of limitations governs the time in which lawsuits may be brought after a cause of action accrues. A statute of repose extinguishes an action after a fixed period of time, regardless of the plaintiff's knowledge of the claim. *Putzier v. Ace Hardware Corp.*, 50 F. Supp. 3d 964, 977 (N.D. Ill. 2014) (holding that Illinois three-year period is a statute of repose because it commences upon the actions that constitute the franchise law violation and does not incorporate the discovery rule as a basis for tolling the time when a claim can be brought). But, in some cases, whether by statute or common law rule, tolling may apply even with regard to statutes of repose, where the defendant concealed the claim. *See, e.g., Toyz, Inc. v. Wireless Toyz, Inc.*, 799 F. Supp. 2d 737, 743–44 (E.D. Mich. 2011) (applying tolling to claim otherwise barred by Michigan's franchise law statute of repose where plaintiff alleged defendant wrongfully concealed actions, plaintiff did not discover the facts within the statute of limitations, and plaintiff exercised due diligence until discovery of the facts). A cause of action accrues, and the applicable statute of limitations begins to run, when a party has a right to apply to a court for relief. *U.S. Oil Ref. Co. v. Dep't of Ecology*, 633 P.2d 1329 (Wash. 1981).

Authorities:

Cal. Corp. Code § 31300 (four years from act or transaction constituting the violation); Cal. Corp. Code § 31301 (two years from violation); Haw. Rev. Stat. § 482E-10.5 (five/seven years from date of violation); 815 Ill. Comp. Stat. § 705/27 (three years from act or transaction constituting the violation); Md. Code Ann. Bus. Reg. § 14-227(c) (three years from the grant of the franchise); Mich. Comp. Laws § 445.1533 (four years from act or transaction constituting the violation); Minn. Stat. § 80C.17(5) (three years from when cause of action accrues); N.Y. Gen. Bus. Law § 691.4 (three years from act or transaction constituting the violation); 19 R.I. Gen Laws § 19-28.1-22 (four years from act or transaction constituting the violation); S.D. Codified Laws § 37-5B-50 (in an action for rescission, within one year; in an action for damages, costs, attorney and expert fees, within three years, after the violation occurred); Va. Code Ann. § 13.1-571 (four years after the cause of action arose upon which the claim suit is based); Wash. Rev. Code § 4.16.130 (an action must be commenced within two years after the cause

of action has accrued); Wis. Stat. § 553.51(4) (three years after the act or transaction constituting the violation); *see also JM Vidal, Inc. v. Texdis USA, Inc.*, 764 F. Supp. 2d 599, 611 (S.D.N.Y. 2011) (Washington's "catch-all" statute of limitations of two years applies to Washington Franchise Investment Protection Act claims); *People ex rel. Dep't of Corps. v. Speedee Oil Change Sys., Inc.*, 116 Cal. Rptr. 2d 497, 95 Cal. App. 4th 709, 727 (2002) ("Once the four-year . . . period expires, a plaintiff's belated discovery of the fact constituting the violation cannot serve to extend the statute of limitations. In other words, the four-year ban in section 31303 . . . [is] absolute.").

2. Defense of Statute of Limitations—Specified Number of Years from Discovery of Facts Constituting the Violation

Instruction:

[Name of Defendant] contends that [name of Plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of Defendant] must prove that [name of Plaintiff] discovered the act or transaction constituting the violation before [insert date from applicable statute of limitation].

Sample of the Instruction in Plain English:

[Name of Defendant] claims [name of Plaintiff]'s lawsuit was not filed in the time set by law. To succeed on this defense, [name of Defendant] must prove [name of Plaintiff] discovered the facts of the violation before [insert date from applicable statute of limitation].

Comment:

The statute of limitations is an affirmative defense that normally must be pled by the defendant or is waived. *See, e.g., Neptune Soc'y Corp. v. Longanecker*, 240 Cal. Rptr. 117, 194 Cal. App. 3d 1233, 1243–44 (1987) (statute of limitations defense is a personal privilege that must be affirmatively pled; if it appears on face of complaint, it must be raised by demurrer; otherwise, it must be pleaded in the answer or is waived; defendant waived statute of limitations defense by failing to plead the defense in its answer and failing to raise it by demurer). *But see Gre-Ter Enters., Inc. v. Mgmt. Recruiters Int'l, Inc.*, 329 F. Supp. 3d 667, 681 n.10 (S.D. Ind. 2018) (statute of limitations defense may be entertained if its predicates are established by the complaint).

A discovery-based statute of limitation may start to run when the plaintiff knew the facts constituting the violation, even if not aware of the legal significance of the facts. *See, e.g., Powell v. Coffee Beanery, Ltd.*, 932 F. Supp. 985, 987 (E.D. Mich. 1996) (The one-year limitation began to run when claimant discovered fact constituting the violation even though claimant was not aware that the facts constituted a violation. The legislature chose to start the limitations period when the claimant became aware of facts constituting the violation, regardless of whether claimant knew the facts constituted a violation.).

Authorities:

Cal. Corp. Code §§ 31300, 31301 (one year from discovery by the plaintiff of the act or transaction constituting the violation); Haw. Rev. Stat. § 482E-10.5 (two years from discovery of facts constituting the violation); 815 Ill. Comp. Stat. § 705/27 (one year from becoming aware of the facts or circumstances reasonably indicating the plaintiff may have a claim); Ind. Code § 23-2-2.5-30 (three years after discovery by the plaintiff of the facts constituting the violation); N.D. Cent. Code § 51-19-12(5) (five years from date that plaintiff knew or reasonably should have known about the facts that are the basis for the alleged violation); S.D. Codified Laws § 37-5B-50 (in an action for damages, costs, attorney and expert fees, within two years after discovery of the facts constituting the violation).

3. Instruction Regarding Time of Discovery [California]

Instruction:

By law, a person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact is deemed to have notice of the fact itself that, by such inquiry, he or she might have learned that fact.

Sample of the Instruction in Plain English:

By law, a person, who has notice of things that would cause a prudent person to investigate, is deemed to know the facts he or she would have learned from investigating.

Comment:

This instruction is for use in California. It advances the time when a plaintiff is deemed to be on notice of facts constituting a violation to earlier in time when the plaintiff had notice of circumstances sufficient to cause a prudent person to make inquiry about a particular fact. In such circumstances, the plaintiff is deemed to know everything that the plaintiff would have learned by investigating the fact. In *Ellering v. Sellstate Realty System Network, Inc.*, 801 F. Supp. 2d 834, 841–42 (D. Minn. 2011), a court indicated that a plaintiff may even be deemed to be on notice of facts in the public record, noting that a franchisor's registration status was a public record, ascertainable at the state regulatory agency's website.

Authorities:

Cal. Civ. Code § 19; Cal. Corp. Code §§ 31300, 31301 (one year from discovery by the plaintiff of the act or transaction constituting the violation).

4. Defense of Statute of Limitations—Specified Number of Days from Notice Disclosing Violation

Instruction:

[Name of Defendant] contends that [name of Plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of

Defendant] must prove that [name of Defendant] delivered to [name of Plaintiff] a written notice disclosing the violation before [insert date from applicable statute of limitation].

Sample of the Instruction in Plain English:

[Name of Defendant] claims [name of Plaintiff]'s lawsuit was not filed in the time set by law. To succeed on this defense, [name of Defendant] must prove [name of Defendant] delivered to [name of Plaintiff] a written notice disclosing the violation before [insert date from applicable statute of limitation].

Comment:

This instruction applies for states that set a shorter statute of limitations following a franchisor's delivery of notice to the franchisee that the franchisor violated the state's franchise law.

Authorities:

Cal. Corp. Code § 31303 (90 days from delivery to the plaintiff of written notice, approved as to form by the Commissioner of Business Oversight, disclosing the violation); 815 Ill. Comp. Stat. § 705/27 (90 days from delivery to Plaintiff of written notice disclosing the violation); S.D. Codified Laws § 37-5B-50 (within 90 days after receipt by plaintiff of a rescission offer in a form approved by the director of the Division of Insurance); Wis. Stat. § 553.51(4) (within 90 days after delivery to plaintiff of written notice disclosing discloses any violation and is filed with the Wisconsin Division of Securities).

5. Defense of Statute of Limitations—Specified Number of Days from Making Rescission Offer

Instruction:

[Name of Defendant] contends that [name of Plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of Defendant] must prove that [name of Defendant] delivered to [name of Plaintiff] an offer of rescission before [insert date from applicable statute of limitation].

Sample of the Instruction in Plain English:

[Name of Defendant] claims [name of Plaintiff]'s lawsuit was not filed in the time set by law. To succeed on this defense, [name of Defendant] must prove [name of Defendant] delivered to [name of Plaintiff] a rescission offer before [insert date from applicable statute of limitation].

Comment:

The statute of limitations is an affirmative defense that normally must be pled by the defendant or is waived. *See*, *e.g.*, *Neptune Soc'y Corp. v. Longanecker*, 240 Cal. Rptr. 117, 194 Cal. App. 3d 1233, 1243–44 (1987) (statute

of limitations defense is a personal privilege that must be affirmatively pled; if it appears on face of complaint, it must be raised by demurrer; otherwise, it must be pled in the answer or is waived; defendant waived statute of limitations defense by failing to plead the defense in its answer and failing to raise it by demurer). *But see Gre-Ter Enters., Inc. v. Mgmt. Recruiters Int'l, Inc.*, 329 F. Supp. 3d 667, 681 n.10 (S.D. Ind. 2018) (noting that statute of limitations defense may be entertained if its predicates are established by the complaint).

The Rhode Island statute requires that the rescission notice be approved by the Director of Business Regulation. This element is omitted from the instruction on the basis that it is not likely to be disputed. The North Dakota statute is more detailed, and thus the instruction may need editing to address such detail.

Authorities:

N.D. Cent. Code § 51-19-12(4) (after plaintiff received a written offer, submitted to the Securities Commissioner at least 15 days prior to submission to the plaintiff, provided to the plaintiff before the action was commenced, at a time when plaintiff owned the franchises, to refund the consideration paid and interest at seven percent per annum from the date of purchase, less the amount of income received on the franchise, conditioned only on tender by the plaintiff of all items received for the consideration and not sold, and reciting the provisions of North Dakota Centennial Code § 51-19-12(4), and plaintiff did not accept the offer within 30 days, and meeting other terms of the statute); 19 R.I. Gen. Laws § 19-28.1-22 (90 days after receipt by plaintiff of a rescission offer in a form approved by the Director of Business Regulation).

6. Defense of Exemption from Registration Requirement—
Preliminary Instruction; Burden of Proof of Exemption

Instruction:

[Name of Defendant] claims it was exempt from the requirement to be registered. Once [name of Plaintiff] proves that [name of Defendant] sold a franchise that was not registered, then [name of Defendant] has the burden to prove that he/she/it qualified for an exemption.

Sample of the Instruction in Plain English:

[Name of Defendant] claims that it was exempt from being required to register. If [name of Plaintiff] proves [name of Defendant] sold a franchise that was not registered, then [name of Defendant] has the burden to prove he/she/it met the requirements to be exempt.

Comment:

The franchisor has the burden to plead and prove the facts establishing an exemption. Cal. Corp. Code § 31153; Haw. Rev. Stat. § 482E-5(d); 815 Ill.

Comp. Stat. § 705/42; Ind. Code § 23-2-2.5-4; Minn. Stat. § 80C.12(4); N.D. Cent. Code § 51-19-16(4); 19 R.I. Gen Laws § 19-28.1-24; S.D. Codified Laws § 37-5B-20; Wash. Rev. Code § 19.100.220(1); Wis. Stat. § 553.24(5). Exemptions are normally construed narrowly and require strict compliance. *Morris v. Int'l Yogurt Co.*, 729 P.2d 33, 35–36 (Wash. 1986). For a discussion of exemptions, see Exemptions and Exclusions Under Federal and State Franchise Registration and Disclosure Laws (Leslie D. Curran & Beata Krakus eds., 2017); *see also* Karen B. Satterlee & Leslie D. Curran, *Exemption-Based Franchising: Are You Playing in a Minefield?*, 28 Franchise L.J. 191 (2009).

Authorities:

Cal. Corp. Code § 31153; Haw. Rev. Stat. § 482E-5(d); 815 Ill. Comp. Stat. § 705/42; Ind. Code § 23-2-2.5-4; Minn. Stat. § 80C.12(4); N.D. Cent. Code § 51-19-16(4); 19 R.I. Gen Laws § 19-28.1-24; S.D. Codified Laws § 37-5B-20; Wash. Rev. Code § 19.100.220(1); Wis. Stat. § 553.24(5).

7. Defense of Exemption for Sale of Franchise by Franchisee for Own Account

Instruction:

Earlier, I instructed you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale of a franchise by a franchisee for his or her or its own account is exempt from the requirement to be registered, if the offer and sale is not effected by or through a franchisor. [Name of Defendant] claims he/she/it was a franchisee who/that offered and sold the franchise to [name of Plaintiff] for [name of Defendant]'s own account. To prove this defense, [name of Defendant] must prove (1) that [name of Defendant] was a franchisee of the [name of the franchise] franchise that was offered and sold; (2) [name of Defendant] offered and sold the [name of the franchise] franchise to [name of Plaintiff] for [name of Defendant]'s own account; and (3) the offer and sale were not effected by or through [a franchisor] or [the franchisor, [name of franchisor]].

A sale is not effected by or through [a franchisor or name of particular franchisor in the case] merely because [a franchisor or name of particular franchisor in the case]: [Cal.; Ill; Ind.; Md.; Minn.; R.I.; Va.; Wash.; Wis.—has a right to approve or disapprove a different franchisee] [Ill.; Or.; R.I.; Va.; Wash.—requires payment of a reasonable transfer fee] [Wis.: has the right to impose a fee or charge to reimburse [the franchisor or name of particular franchisor in the case] for reasonable and actual expenses incurred with the sale [Ill.; R.I.—requires the new franchisee to execute a franchise agreement on terms not materially different from the existing franchise agreement] [Or.—requires execution of appropriate documentation].

Sample of the Instruction in Plain English:

Earlier, I told you the offer or sale of a franchise must be registered with [name of agency]. But a franchisee's offer or sale of [his/her/its] own

franchise is exempt from having to be registered, if the offer and sale does not go through a franchisor. [Name of Defendant] claims he/she/it was a franchisee who/that offered and sold the franchise to [name of Plaintiff] for [name of Defendant]'s own account. To prove this defense, [name of Defendant] must prove (1) [name of Defendant] was a franchisee of the [name of the franchise] franchise that was offered and sold; (2) [name of Defendant] offered and sold the [name of the franchise] franchise to [name of Plaintiff] for [name of Defendant]'s own account; and (3) the offer and sale was not done by or through [a franchisor] or [the franchisor, [name of franchisor]].

A sale is not done by or through [a franchisor or name of particular franchisor in the case] just because [a franchisor or name of particular franchisor in the case]: [Cal.; Ill.; Ind.; Md.; Minn.; R.I.; Va.; Wash.; Wis.—has a right to approve or disapprove a different franchisee] [Ill.; Or.; R.I.; Va.; Wash—requires payment of a reasonable transfer fee] [Wis.: has the right to impose a fee or charge to reimburse [the franchisor or name of particular franchisor in the case] for reasonable and actual expenses incurred with the sale [Ill.; R.I.—requires the new franchisee to execute a franchise agreement on terms not materially different from the existing franchise agreement] [Or.—requires execution of appropriate documentation].

Comment:

The sale of an existing franchise by a franchisee for his or her or its own account is exempt from registration in several states. The exemption permits a franchisee to sell his or her or its existing franchised business to a third-party purchaser. Typically, a franchisor reserves the right to approve the proposed buyer. In several states, the franchisor's exercise of this right does not result in the sale being effected by the franchisor. *See*, *e.g.*, *Fox v. Ehrmantraut*, 28 Cal. 3d 127, 141–42 (Cal. 1980) ("Mere franchisor participation in the sale by furnishing information, referring prospective purchasers of the franchise, or approving purchasers does not deprive a franchisee of his exemption.").

Authorities:

Cal. Corp. Code 31102; Haw. Rev. Stat. § 482E-4(7) (requiring that the sale be isolated and not part of a plan of distribution of franchises); 815 Ill. Comp. Stat. § 705/7; Ind. Code § 23-2-2.5-4; Md. Code Ann. Bus. Reg. § 14-214(c); Mich. Comp. Laws § 445.1506(1)(f) (requiring that the sale be isolated and not part of a plan of distribution of franchises and that the franchisee provides the prospective buyer full access to the books and records related to the franchise in the selling franchisee's possession; additionally, under Michigan's exemption, Mich. Comp. Laws § 445.1506(2), if defendant had a disclosure document, a condition of the exemption is to have provided that to the plaintiff at least 10 business days before signing of any agreement or receipt of any consideration); Minn. Stat. § 80C.03 (limit of one such sale during any 12 consecutive months); N.Y. Gen. Bus. Law § 684.5

(requires that the sale be isolated and not part of a plan of distribution and the franchisee must furnish the franchisor's offering prospectus at least one week before receipt of any consideration); N.D. Cent. Code § 51-19-04(2); Or. Admin. R. § 441-325-0030(4) (requiring that the sale be isolated and not part of a plan of distribution and franchisor does not aid in the sale: 19 R.I. Gen Laws § 19-28.1-6(2) (franchisee cannot be an affiliate of the franchisor); S.D. Codified Laws § 37-5B-1(28); 21 Va. Admin. Code § 5-110-75 (franchisee cannot be an affiliate of the franchisor; must sell the entire franchise); Wash. Rev. Code § 19.100.030(1) (franchisee cannot be an affiliate of the franchisor and must sell the entire franchise); Wis. Stat. § 553.23; *see also Godfrey v. Schroeckenthaler*, 501 N.W.2d 812, 815 (Wis. Ct. App. 1993) (proof established defense based on claim that franchisee's offer to sell a Dairy Queen franchise was exempt from registration as an offer of sale for its own account); *Uncle John's of Hawaii v. Mid-Pacific Rests.*, 794 P.2d 614, 616 (Haw. 1990) (noting the exemption, but finding it inapplicable).

8. Defense of Exemption for Offer or Sale by Experienced/High Net Worth Franchisor

Instruction:

Earlier, I instructed you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale of a franchise is exempt from the requirement to be registered if [name of Defendant] satisfied certain requirements regarding its worth, experience, providing certain information, and notifying the state. [Name of Defendant] claims it met these requirements. Now I will instruct you on the requirements [name of Defendant] must prove it met to qualify for this exemption.

First, I will instruct you on the requirement about its worth. For [name of Defendant] to have been exempt from being required to register its franchise [name of Defendant] must prove that it met one or more of the following requirements regarding its worth:

> [Name of Defendant] had net worth on a consolidated basis of at least five million dollars according to its audited financial statement for the year [year at issue].
>
> or
>
> [Name of Defendant] had net worth of at least one million dollars and a parent entity—that is, an entity that owned at least eighty percent of [name of Defendant]—had a net worth of at least five million dollars, according to the audited financial statement(s) of [name of Defendant] and of the parent for the year [year at issue].
>
> or
>
> [Name of Defendant] had net worth of at least one million dollars according to an audited or unaudited financial statement and a parent

entity—that is, a corporation that owned at least eighty percent of [name of Defendant]—had a net worth of at least five million dollars, according to the parent's audited financial statement for the year [year at issue], and the parent absolutely and unconditionally guaranteed to assume the duties and obligations of [name of Defendant] under the franchise agreement if [name of Defendant] became unable to perform its duties and obligations.

Next, I will instruct you on the experience requirement. For [name of Defendant] to have been exempt from being required to register its franchise, [name of Defendant] must prove, in addition to the worth requirement that I just described, that it met any one or more of the following experience conditions:

[Name of Defendant] must prove it met one or more of the following experience conditions at all times during the five-year period before the offer and sale of the franchise. [Name of Defendant] did not have to meet the same condition during the entire five years, but could meet one of the following conditions some of the time, and one or more other of these conditions during the rest of the time.

That [name of Defendant] had at least twenty-five franchisees conducting business that was the subject of the franchise.

or

That [name of Defendant] conducted business that was the subject of the franchise.

or

[Name of Defendant]'s parent—that is, an entity that owned at least eighty percent of [name of Defendant]—had at least twenty-five franchisees conducting business that was the subject of the franchise.

or

That [name of Defendant]'s parent—that is, an entity that owned at least eighty percent of [name of Defendant]—conducted business that was the subject of the franchise.

Now I will instruct you on the requirement to have provided the franchisee certain information. For [name of Defendant] to have been exempt from being required to register its franchise [name of Defendant] must prove, in addition to the worth and experience requirement that I just described, that it disclosed in writing to each prospective franchisee, at least 14 days before the signing by the prospective franchisee of any binding agreement or at least 14 days before receiving any consideration, all the following information:

(1) [Name of Defendant]'s name, the name under which it was doing or intended to do business, and the name of any parent or affiliated company that would engage in business transactions with franchisees.

(2) [Name of Defendant]'s principal business address and the name and address of its agent in California authorized to receive service of process.

(3) The business form of [name of Defendant], whether corporate, partnership, or otherwise.

(4) The business experience of [name of Defendant], including how long [name of Defendant] conducted a business of the type to be operated by [name of Plaintiff]; how long [name of Defendant] granted franchises for such business; and how long [name of Defendant] granted franchises in other lines of business.

(5) A copy of the typical franchise contract or agreement proposed for use or in use in this state.

(6) A statement of the franchise fee charged, the proposed use of the proceeds of such fee by [name of Defendant], and, if the fee was not the same in all cases, the formula for how the amount of the fee was determined.

(7) A statement describing any payments or fees other than franchise fees that [name of Plaintiff] was required to pay to [name of Defendant], including royalties and payments or fees which [name of Defendant] collected in whole or in part on behalf of a third party or parties.

(8) A statement of the conditions under which the franchise agreement could be terminated or renewal refused, or repurchased at the option of [name of Defendant].

(9) A statement whether, by the terms of the franchise agreement or by other device or practice, [name of Plaintiff] was required to buy from [name of Defendant] or [name of Defendant]'s designee, any services, supplies, products, fixtures, or other goods relating to the establishment or operation of the franchise business, together with a description thereof.

(10) A statement whether, by the terms of the franchise agreement or other device or practice, [name of Plaintiff] was limited in the goods or services offered by [name of Plaintiff] to [name of Plaintiff]'s customers.

(11) A statement of the terms and conditions of any financing arrangements when offered directly or indirectly by [name of Defendant] or [name of Defendant]'s agent or affiliate.

(12) A statement of any past or present practice or of any intent of [name of Defendant] to sell, assign, or discount to a third party any note, contract, or other obligation of [name of Plaintiff] in whole or in part.

(13) If any statement of estimated or projected franchisee earnings was used, a statement of such estimation or projection and the data on which it was based.

(14) A statement whether franchisees or subfranchisors received an exclusive area or territory.

(15) A copy of the financial statement or statements that established [name of Defendant's] worth.

(16) If [name of Defendant] relied on the guaranty to meet the worth requirement, a copy of the guaranty.

Now I will instruct you on the notice requirement.

> For [name of Defendant] to have been exempt from being required to register its franchise, [name of Defendant] must prove, in addition to the worth and experience and disclosure of information requirements that I just described, that it filed a Notice of Exemption with the California Commissioner of Business Oversight and paid the required fee, before any offer or sale of a franchise in this state in the calendar year when one or more franchises were sold.

Sample of the Instruction in Plain English:

Earlier, I told you the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale of a franchise is exempt from having to be registered if [name of Defendant] met requirements about its worth, experience, providing certain information, and notifying the state. [Name of Defendant] claims it met these requirements. Now I will tell you the requirements [name of Defendant] must prove it met to qualify for this exemption.

First, I will tell you the requirement about its worth. For [name of Defendant] to have been exempt from having to register its franchise, [name of Defendant] must prove it met one or more of the following requirements regarding its worth:

> [Name of Defendant]'s net worth on a consolidated basis was at least five million dollars according to its audited financial statement for the year [year at issue].
>
> or
>
> [Name of Defendant]'s net worth was at least one million dollars and its parent—that is, an entity that owned at least eighty percent of [name of Defendant]—had net worth of at least five million dollars, according to the audited financial statement(s) of [name of Defendant] and of the parent for the year [year at issue].
>
> or
>
> [Name of Defendant] had net worth of at least one million dollars according to an audited or unaudited financial statement and its parent—that is, an entity that owned at least eighty percent of [name of Defendant]—had net worth of at least five million dollars, according to the parent's audited

financial statement for the year [year at issue] and the parent absolutely and unconditionally guaranteed to assume the duties and obligations of [name of Defendant] under the franchise agreement if [name of Defendant] became unable to perform its duties and obligations.

Next, I will tell you the experience requirement. For [name of Defendant] to have been exempt from having to register its franchise, [name of Defendant] must prove, in addition to the worth requirement that I just described, that it met any one or more of the following experience conditions:

[Name of Defendant] must prove that it met one or more of the following experience conditions at all times during the five years before offering and selling the franchise. [Name of Defendant] did not have to meet the same condition for the whole five years, but could meet one of the conditions some of the time, and one or more other conditions during other times.

That [name of Defendant] had at least twenty-five franchisees in the business that was the subject of the franchise.

or

That [name of Defendant] was in the business that was the subject of the franchise.

or

[Name of Defendant]'s parent—an entity that owned at least eighty percent of [name of Defendant]—had at least twenty-five franchisees in the business that was the subject of the franchise.

or

That [name of Defendant]'s parent—an entity that owned at least eighty percent of [name of Defendant]—did the business that was the subject of the franchise.

Now I will tell you the requirement to have provided the franchisee information. For [name of Defendant] to have been exempt from having to register its franchise, [name of Defendant] must prove, in addition to the worth and experience requirements that I just described, that it told each prospective franchisee in writing, at least 14 days before the prospective franchisee signed any binding agreement or at least 14 days before [name of Defendant] received anything of value, all the following information:

(1) [Name of Defendant]'s name, the name that it used or intended to use to do business, and the name of any parent or affiliated company that would engage in business with franchisees.

(2) [Name of Defendant]'s principal address and the name and address of its agent in California authorized to receive service of process.

(3) [Name of Defendant]'s business form, whether corporate, partnership, or otherwise.

(4) How long [name of Defendant] conducted business of the type to be done by [name of Plaintiff]; how long [name of Defendant] granted franchises for that business, and how long [name of Defendant] granted franchises in other businesses.

(5) Copy of the typical franchise contract or agreement proposed for use or in use in this state.

(6) The fee charged and proposed use of the fee by [name of Defendant], and, if the fee was not the same for everyone, the formula how the amount of the fee was determined.

(7) Description of payments or fees other than franchise fees [name of Plaintiff] had to pay to [name of Defendant], including royalties and payments or fees that [name of Defendant] collected in whole or in part for others.

(8) A statement of conditions in which [name of Defendant] could decide to terminate the franchise agreement or refuse to renew it or buy back the franchise.

(9) A statement whether [name of Plaintiff] was required to buy from [name of Defendant] or [name of Defendant]'s designee, services, supplies, products, fixtures, or other things relating to the franchise, and a description.

(10) A statement whether there was some restriction on goods or services [name of Plaintiff] could offer to customers.

(11) A statement of the terms of any financing offered directly or indirectly by [name of Defendant] or [name of Defendant]'s agent or affiliate.

(12) A statement of any past or present practice or intent of [name of Defendant] to sell, assign, or discount to a third party any note, contract, or other obligation of [name of Plaintiff] in whole or in part.

(13) If any estimate or projection of franchisee earnings was used, a statement of the estimate or projection and data it was based on.

(14) A statement whether franchisees or subfranchisors got an exclusive area or territory.

(15) A copy of the financial statement or statements that established [name of Defendant's] worth.

(16) If [name of Defendant] relied on the guaranty to meet the worth requirement, a copy of the guaranty.

Now I will tell you the notice requirement. For [name of Defendant] to have been exempt from having to register its franchise [name of Defendant] must prove, in addition to the worth and experience and disclosure of

information requirements I just described, that it filed a Notice of Exemption with the California Commissioner of Business Oversight and paid the required fee, before any offer or sale of a franchise in this state in the calendar year when one or more franchises was sold.

Comment:

This instruction is based on California's exemption for large, experienced franchisors. Cal. Corp. Code § 31101. Similar exemptions, often with fewer requirements, appear in statutes or regulations in Illinois, Indiana, New York, North Dakota, Rhode Island, Virginia, and Washington. The instruction would need to be revised to align with the statute or regulation of the applicable state and for several such states the revision will be shorter.

The California statute uses the term "corporation" in describing the parent. The statute was originally enacted in 1970 before limited liability companies existed. As a statute creating an exemption, it possibly would be interpreted narrowly and strictly to exclude other kinds of entities. *See*, *e.g.*, *Morris v. Int'l Yogurt Co.*, 729 P.2d 33, 35–36 (Wash. 1986) (noting that exemptions are normally construed narrowly and require strict compliance); *City of Hesperia v. Lake Arrowhead Cmty. Servs. Dist.*, 250 Cal. Rptr. 3d 82, 37 Cal. App. 5th 734, 750 (2019) (statutory exemptions must be narrowly construed); *Board of Med. Quality Assurance v. Andrews*, 260 Cal. Rptr. 113, 211 Cal. App. 3d 1346, 1355 (1989) ("[S]tatutes conferring exemptions from regulatory schemes are narrowly construed."). However, a treatise on exemptions suggests the policy behind the provision should apply to other entities such as limited liability companies. Susan Grueneberg & Josh Piper, Exemptions and Exclusions Under Federal and State Franchise Registration and Disclosure Laws 25 (Leslie D. Curran & Beata Krakus eds., 2017). Also, under the rule, one of the categories of information to be given to a prospective franchisee is the defendant's business form "whether corporate, partnership, or otherwise," Cal. Corp. Code § 31101(c)(1)(C), which indicates that other types of entities are possible.

In *Dollar System, Inc. v. Avcar Leasing System, Inc.*, 673 F. Supp. 1493, 1501–02 (C.D. Cal. 1987), the district court ruled that a franchisor did not qualify for an exemption under the laws of California, and Maryland, because, prior to selling the franchise, the franchisor failed to file required exemption notices required by each state. The decision was affirmed in part and reversed in part on other grounds. *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165 (9th Cir.1989).

The instruction lists multiple conditions that might need to be satisfied and sixteen categories of information required to be disclosed. The instruction could be shortened by omitting portions of the instruction that concern issues not in dispute.

Authorities:

Cal. Corp. Code § 31101; 815 Ill. Comp. Stat. § 705/8(a)(1); Ill. Admin. Code tit. 14, § 200.202(e); Ind. Code § 23-2-2.5-3; N.Y. Gen. Bus. Law

§§ 684(2) & 684(3); N.D. Cent. Code § 51-19-04; 19 R.I. Gen Laws § 19-28.1-6(1); 21 Va. Admin. Code § 5-110-75(4); Wash. Rev. Code § 19.100.030(4).

9. Defense of Exemption for Offer or Sale to High Net Worth Franchisee Instruction:

Earlier, I instructed you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale of a franchise was exempt from registration if certain conditions were present concerning the franchisee. [Name of Defendant] claims the conditions for the offer or sale to be exempt were present. To prove this defense, [name of Defendant] must prove that:

> Every purchaser of the franchise was in one of the following categories. It need not have been the same category for all purchasers:
>
> > One category is a partner, executive officer, or director of [name of Defendant], or an executive officer of [name of Defendant]'s corporate general partner if [name of Defendant] is a partnership, or a manager, if [name of Defendant] is a limited liability company.

Another category is an entity with assets over five million dollars according to its financial statements. For this category, [name of Defendant] must prove that the entity was not formed for the purpose of acquiring the franchise. For this category, [name of Defendant] must prove that the financial statements were prepared according to rules and requirements of the United States Securities and Exchange Commission or according to generally accepted accounting principles and, if [name of Defendant] had consolidated subsidiaries, that the financial statements were prepared on a consolidated basis. For this category, [name of Defendant] must prove that the financial statements were dated within 90 days of the earlier of the date the first purchaser signed a binding agreement or the date [name of Defendant] received any money or other consideration from the first purchaser.

Another category is a natural person whose net worth, or joint net worth with that person's spouse, was more than one million dollars at the time the person purchased the franchise, not counting that person's personal residence, retirement, or pension plan accounts or benefits, home furnishings, and cars.

Another category is a natural person whose gross income exceeded three hundred thousand dollars per year in each of the two most recent years before buying the franchise, or whose joint gross income with that person's spouse exceeded five hundred thousand dollars per year in each of the two most recent years before buying the franchise, and who reasonably expected to reach the same income level or more in the year of the purchase of the franchise.

Another category is an entity in which all the equity owners were persons or entities who met the conditions in one or more of the prior categories.

Apart from each person being in at least one of the categories that I just described, to prove the defense of this exemption, [name of Defendant] must prove that each and every purchaser had knowledge and experience in financial and business matters, either alone or with professional advisers who were not affiliated with, and not directly or indirectly compensated by, [name of Defendant] or by an affiliate or selling agent of [name of Defendant], so that [name of Defendant] reasonably believed, based on reasonable inquiry before the sale, that each and every purchaser had the capacity to evaluate the merits and risks of, and protect their own interests in, the franchise investment.

For this exemption to apply, [name of Defendant] must also prove that each and every purchaser purchased the franchise for the purchaser's own account, or a trust account if the purchaser was a trustee, for the purpose of conducting the business as a franchise and not with a view to, or for a sale in connection with, any resale or distribution of the franchise or any interest in the franchise.

If the purchaser was a natural person, then for this exemption to apply [name of Defendant] must also prove that the immediate cash payment required from the purchaser was not more than ten percent of that person's net worth or joint net worth with that person's spouse, not counting the person's personal residence, retirement, or pension accounts or benefits, home furnishings, and cars.

There is also a notice requirement. For [name of Defendant] to have been exempt from being required to register its franchise, [name of Defendant] must prove, in addition to the other requirements that I have described, that [name of Defendant] filed a Notice of Exemption with the California Commissioner of Business Oversight and paid the required fee, before any offer or sale of a franchise in this state for which this exemption was claimed in the calendar year when one or more franchises was sold.

[Name of Defendant] must also prove that [name of Defendant] and its officers, directors, employees, or agents did not form, organize, engage, or assist [name of Plaintiff] to buy a franchise for resale or distribution in order for [name of Defendant] to avoid the registration requirements.

Sample of the Instruction in Plain English:

Earlier, I told you the offer or sale of a franchise must be registered with [name of agency]. But it was exempt if certain conditions were present. [Name of Defendant] claims these conditions were present. To prove this defense, [name of Defendant] must prove that:

> Every buyer of the franchise was in one of the following categories. It does not have to be the same category for everyone:
>
> > One category is a partner, executive officer, or director of [name of Defendant], or an executive officer of [name of Defendant]'s corporate general partner if [name of Defendant] is a partnership, or a manager if [name of Defendant] is a limited liability company.

> Another category is an entity with assets over five million dollars according to its financial statements. For this category, [name of Defendant] must prove that the entity was not formed to buy the franchise. For this category, [name of Defendant] must prove that the financial statements were prepared according to rules of the United States Securities and Exchange Commission or according generally accepted accounting principles, and if [name of Defendant] had consolidated subsidiaries, that the financial statements were on a consolidated basis. For this category, [name of Defendant] must prove the financial statements were dated within 90 days of when the first purchaser signed a binding agreement or [name of Defendant] received any money or other consideration.
>
> Another category is a natural person whose net worth, or joint net worth with that person's spouse, was over one million dollars when the person bought the franchise, not counting any personal residence, retirement or pension plan, home furnishings, and cars.
>
> Another category is a natural person whose gross income exceeded three hundred thousand dollars per year in each of the two years before buying the franchise, or whose joint gross income with the person's spouse exceeded five hundred thousand dollars per year each of the two years before buying the franchise, and who reasonably expected to reach the same income level or more in the year of buying the franchise.
>
> Another category is an entity, in which all the owners were persons or entities who met the conditions in one or more of the prior categories.

Apart from each person being in at least one of the categories that I just described, to prove this defense, [name of Defendant] must prove that each and every buyer had knowledge and experience in financial and business matters, alone or with professional advisers who were not affiliated with, and not directly or indirectly compensated by, [name of Defendant] or by an affiliate or selling agent of [name of Defendant], so that [name of Defendant] reasonably believed, based on reasonable inquiry before the sale, that each and every buyer had the ability to evaluate the merits and risks and protect their interests.

For this exemption to apply, [name of Defendant] must also prove that each and every buyer purchased the franchise for the buyer's own account, or a trust account if the buyer was a trustee, to run the business as a franchise and not to resell it or sell ownership interests in it.

If the buyer was a natural person, then [name of Defendant] must also prove the payment required from the buyer was not more than ten percent of the buyer's net worth or joint net worth with that person's spouse, not counting personal residence, retirement plan, home furnishings, and cars.

For [name of Defendant] to be exempt, [name of Defendant] must also prove that [name of Defendant] filed a Notice of Exemption with [name of agency] and paid the required fee, before offering or selling any franchise in this state for which this exemption was claimed that year.

[Name of Defendant] must also prove that [name of Defendant] and its officers, directors, employees, or agents did not help [name of Plaintiff] buy the franchise for resale or to sell ownership interests in it.

Comment:

This instruction is based on California's exemption for large franchisees. Cal. Corp. Code § 31109. Similar exemptions appear in statutes or regulations in Illinois, Rhode Island, South Dakota, and Washington. The instruction would need to be revised to align with the statute or regulation of the applicable state and for several states will be much shorter.

The California statute provides: "No franchisor or any of its officers, directors, employees, or agents shall form, organize, engage, or assist any person to purchase a franchise for resale or distribution to avoid the registration requirements." Cal. Corp. Code § 31108(f). It is not clear if this states a prohibition or element of proof to establish the franchise. The language suggests it may be a prohibition, rather than an element of proof. If so, then the last paragraph of the instruction could be omitted. If it is an element of proof, then consistent with the burden of proof (see instruction 6, above) the burden of proof is assigned to the Defendant.

Authorities:

Cal. Corp. Code § 31109; 815 Ill. Comp. Stat. § 705/8(a)(2); 19 R.I. Gen Laws § 19-28.1-6(4); S.D. Codified Laws § 37-5B-13(2); Wash. Rev. Code § 19.100.030(5); Wash. Admin. Code § 460-80-108.

10. Defense of Exemption for Offer or Sale of Franchise to Existing Franchisee

Instruction:

Earlier, I instructed you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale of a franchise was exempt from registration if the offer or sale was of an additional franchise made to an already existing franchisee of [name of Defendant]. [Name of Defendant] claims the offer and sale of the franchise was made to an already existing franchisee. To prove this defense, [name of Defendant] must prove that:

At the time [name of Defendant] offered and sold the franchise to [name of Plaintiff], [name of Plaintiff] was already an existing franchisee of [name of Defendant].

[Name of Defendant] could alternatively prove this defense by proving that [name of Defendant]'s offer or sale of the franchise was made to an

entity and one or more of the entity's officers, directors, managing agents, or owners of at least twenty-five percent of the entity, was an existing franchisee of [name of Defendant].

[Name of Defendant] must prove that for 24 months or more, the existing franchisee or the qualifying person was engaged in a business that offered products or services substantially similar to those offered by [name of Defendant].

There is also a notice requirement. For [name of Defendant] to have been exempt from being required to register its franchise, [name of Defendant] must prove that it filed a Notice of Exemption with the California Commissioner of Business Oversight and paid the required fee, all no later than 15 days after the sale of the franchise.

Sample of the Instruction in Plain English:

Earlier, I told you the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale was exempt if it was an additional franchise sold to an already existing franchisee of [name of Defendant]. [Name of Defendant] claims this exemption applies. To prove this defense, [name of Defendant] must prove that:

> When [name of Defendant] offered and sold the franchise to [name of Plaintiff], [name of Plaintiff] was already a franchisee of [name of Defendant].
>
> Or, [name of Defendant] could prove this defense by proving that [name of Defendant] offered and sold the franchise to an entity and one or more of the entity's officers, directors, managing agents or owners of twenty five percent or more of the entity, was a franchisee of [name of Defendant].
>
> [Name of Defendant] must prove that for two years or more, the franchisee or qualifying person was in a business that offered products or services substantially similar to those offered by [name of Defendant].
>
> For [name of Defendant] to have been exempt [name of Defendant] must prove it filed a Notice of Exemption with [name of state agency] and paid the required fee, all no later than 15 days after the sale of the franchise.

Comment:

This instruction is based on California's exemption for the sale of a franchise to an existing franchisee. Similar exemptions appear in statutes or regulations in Hawaii, Maryland, Minnesota, Michigan, New York, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. The instruction would need to be revised to align with the statute or regulation of the applicable state and for several such states the instruction will be shorter.

In Minnesota, for example, the exemption does not apply if the additional franchise varies substantially from the franchise that is already possessed by the franchisee. Minn. R. § 2860.1100(4). Substantial variation refers to different products, services, fees, duties, obligations, or required investment.

Variations of terms or provisions in an agreement to recognize individual differences in time, geography, market, volume, size, or costs for goods, materials, and supplies incurred by the franchisor are not considered substantial variations. Minn. R. § 2860.1100(2). In Michigan and New York, the existing franchisee must have actively operated the franchise for the prior 18 months, and the additional franchise must be for investment (Michigan); to operate the business (New York) and not for resale. Mich. Comp. Laws § 445.1506(1)(g); N.Y. Gen. Bus. Laws § 684(3)(d). Under Michigan's exemption, if the franchisor had a disclosure document, a condition of the exemption is to have provided that to the plaintiff at least 10 business days before the signing of any agreement or receipt of any consideration. Mich. Comp. Laws § 445.1506(2). New York also requires a specified report to the New York Department of Law within 15 days of the sale. N.Y. Gen Bus. Laws § 684(3)(d)(iii). Rhode Island and South Dakota require that the franchisee operated the existing franchise for at least two years. 19 R.I. Gen. Laws § 19-28.1-6(5); S.D. Codified Laws § 37-5B-14(1). Virginia and Washington require that the franchise be sold on the franchisee's own account, two years of operation of the existing franchise, and that the prior franchise was sold pursuant to a franchise offering that was registered or exempt in the state. 21 Va. Admin. Code § 5-110-75(3); Wash. Rev. Code § 19.100.030(6).

Authorities:

Cal. Corp. Code § 31106(a)(3); 31106(b); Haw. Rev. Stat. § 482E-4(a)(6); Md. Code Ann. Bus. Reg. § 14-214(b)(2); Minn. R. § 2860.1100(4); Mich. Comp. Laws § 445.1506(1)(g); N.Y. Gen. Bus. Laws § 684(3)(d); 19 R.I. Gen Laws § 19-28.1-6(5); S.D. Codified Laws § 37-5B-14(1); 21 Va. Admin. Code § 5-110-75(3); Wash. Code § 19.100.030(6); Wis. Stat. § 553.25; Wis. Admin. Code DFI § 32.05(1)(e).

11. Defense of Exemption for Offer or Sale of Franchise to Person Affiliated with Franchisor

Instruction:

Earlier, I instructed you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale of a franchise was exempt from registration if the offer or sale was made to someone who had certain kinds of affiliation with the franchisor. [Name of Defendant] claims that [name of Defendant] qualifies for this exemption on the ground that [name of Plaintiff] had the required affiliation with [name of Defendant].

To prove this defense, [name of Defendant] must prove that when [name of Defendant] offered and sold the franchise, someone who owned at least fifty percent of [name of Plaintiff] was, within 60 days before the sale, an officer, director, managing agent, or owner of at least a twenty-five percent interest in [name of Defendant] for at least two years.

To prove this defense, [name of Defendant] must also prove that such person was not controlled by [name of Defendant].

There is also a notice requirement. For [name of Defendant] to have been exempt from being required to register its franchise, [name of Defendant] must prove, in addition to the other requirements that I have described, that [name of Defendant] filed a Notice of Exemption with [name of agency] and paid the required fee, no later than 15 days after the sale of the franchise.

Sample of the Instruction in Plain English:

Earlier, I told you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale was exempt from registration if it was made to someone who had certain kinds of affiliation with [name of Defendant]. [Name of Defendant] claims [name of Defendant] qualifies for this exemption.

To prove this defense, [name of Defendant] must prove that when [name of Defendant] offered and sold the franchise, someone who owned at least fifty percent of [name of Plaintiff] was, within 60 days before the sale, an officer, director managing agent or owner of at least a twenty-five percent interest in [name of Defendant] for at least two years.

To prove this defense, [name of Defendant] must also prove that such person was not controlled by [name of Defendant].

To prove this defense, [name of Defendant] must also prove that it filed a Notice of Exemption with [name of agency] and paid the required fee, no later than 15 days after the sale of the franchise.

Comment:

This instruction can likely be shortened to eliminate text on matters that are not in dispute and to fill in the name of the relevant person. Thus, the instruction's first three paragraphs might be revised to read:

> Earlier, I instructed you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale of a franchise was exempt from registration if the offer or sale was made to someone who had certain kinds of affiliation with the franchisor. [Name of Defendant] claims that [name of Defendant] qualifies for this exemption on the ground that [name of Plaintiff] had the required affiliation with [name of Defendant].
>
> To prove this defense, [name of Defendant] must prove that, when [name of Defendant] offered and sold the franchise, [name of Defendant]. owned at least fifty percent of [name of Plaintiff] and that [name of Defendant]. was, within 60 days before the sale, an officer, director, managing agent, or owner of at least a twenty-five percent interest in [name of Defendant] for at least 24 months.
>
> To prove this defense, [name of Defendant] must also prove that [name of Defendant]. was not controlled by [name of Defendant].

The states other than California do not require filing a notice with the state.

Authorities:

Cal. Corp. Code § 31106; 815 Ill. Comp. Stat. § 705/8(a)(3); 19 R.I. Gen. Laws § 19-28.1-6(3); S.D. Codified Laws § 37-5B-13(4).

12. Defense of Exemption for Offer or Sale of Fractional Franchise

Instruction:

Earlier, I instructed you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale of a franchise was exempt from registration if certain conditions were present that the law calls a "fractional franchise." [Name of Defendant] claims that the conditions were present for the offer and sale to be exempt as a "fractional franchise." To prove this defense, [name of Defendant] must prove all the following:

For at least the 24 months before the date of sale of the franchise, [if Plaintiff is an individual, [name of Plaintiff]] [if Plaintiff is an entity, an officer, director, or managing agent of [name of Plaintiff] who held that position with [name of Plaintiff]] for at least the 24 months before the sale] was engaged in a business offering products or services substantially similar or related to those [to be] offered by the franchised business.

The new product or service added by the franchise was substantially similar or related to the product or service already being offered by the previously existing business.

[Name of Plaintiff]'s business under the franchise [was to be] operated from the same business location as [name of Plaintiff]'s previously existing business.

[Name of Plaintiff] and [name of Defendant] anticipated, in good faith, at the time the agreement establishing the franchise relationship was reached, that sales resulting from the franchised business would not represent more than twenty percent of the total dollar volume of sales of [Plaintiff] annually.

[Name of Plaintiff] was not controlled by [name of Defendant].

[Name of Defendant] filed a Notice of Exemption with the California Commissioner of Business Oversight and paid the required fee, in or for the calendar year, but before the offer and sale of any franchise that year, in which this exemption was claimed.

Sample of the Instruction in Plain English:

Earlier, I told you the offer or sale of a franchise must be registered with [name of agency]. But it was exempt if certain conditions were present called a "fractional franchise." [Name of Defendant] claims this was a "fractional franchise." To prove this defense, [name of Defendant] must prove all the following:

For at least two years before the sale of the franchise, [if Plaintiff is an individual, [name of Plaintiff]] [if Plaintiff is an entity, an officer, director, or managing agent of [name of Plaintiff]] who held that position with

[name of Plaintiff] for at least two years months before the sale] was in a business offering products or services substantially similar or related to those [to be] offered by the franchised business.

The new product or service added by [name of Plaintiff] was substantially similar or related to the product or service already being offered by the previously existing business.

[Name of Plaintiff]'s business under the franchise [was to be] operated from the same business location as [name of Plaintiff]'s previously existing business.

[Name of Plaintiff] and [name of Defendant] anticipated, in good faith, when they made their agreement, that sales from the franchised business would not be more than 20 percent of the total dollar volume of sales of [Plaintiff] annually.

[Name of Plaintiff] was not controlled by [name of Defendant].

[Name of Defendant] filed a Notice of Exemption with [name of agency] and paid the required fee, in or for the calendar year, but before the offer and sale of any franchise that year.

Comment:

In Illinois, Indiana, Virginia, and Wisconsin, the fractional franchise is an exception from the definition of a franchise, rather than an exemption. Under Michigan's exemption, if the franchisor had a disclosure document, a condition of the exemption is to have provided that to the Plaintiff at least 10 business days before signing of any agreement or receipt of any consideration. Mich. Comp. Laws § 445.1506(2).

Authorities:

Cal. Corp. Code § 31018; 815 Ill. Comp. Stat. § 705/3(1)(ii); Ind. Code § 23-2-2.5(1)(a); Mich. Comp. Laws § 445.1506(1)(h); Minn. Stat. §§ 80C.01(18); 80C.03(f); N.Y. Comp. Codes R. & Regs. tit. § 200.10(2); 230 R.I. Code R. § 50-10-1(1.5); S.D. Codified Laws §§ 37-5B-1(10), 37-5B-12(3); Va. Code Ann. § 13.1-559; Wis. Stat. § 553.22(1).

13. Defense of Exemption for Isolated Sale; Offer or Sale of a Single Franchise

Instruction:

Earlier, I instructed you that the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale is exempt from the requirement to be registered if the franchisor sells no more than one franchise in any 24-month period. [Name of Defendant] claims that this exemption applies. To prove this defense, [name of Defendant] must prove that [name of Defendant] has not sold more than one franchise in any 24-month period.

Sample of the Instruction in Plain English:

Earlier, I told you the offer or sale of a franchise must be registered with [name of agency]. But the offer or sale is exempt if the franchisor sells no more than one franchise in any 24- month period. [Name of Defendant] claims this exemption applies. To prove this defense, [name of Defendant] must prove that [name of Defendant] has not sold more than one franchise in any 24-month period.

Comment:

In Minnesota, the exemption is limited to no more than one sale of a franchise pursuant to the exemption in any period of 12 consecutive months; the franchisor must not have advertised the franchise for sale, fees paid by the franchisee must be escrowed, and the franchisor must provide to the Commissioner of Commerce, at least 10 days before the sale, a written notice of intention to offer or sell a franchise pursuant to the exemption. Minn. Stat. § 80C.03(e). New York's exemption permits an offer to not more than two persons, the franchisee is not granted a right to subfranchise, no commission is paid for soliciting the prospective franchisee in the state, and the franchisor is domiciled in the state or filed with the New York Department of Law a consent to service of process. N.Y. Gen. Bus. Laws § 684(3)(c). The Washington exemption permits granting up to three franchises in Washington, if the franchisor provides the prospective franchisee the franchise disclosure document at least 14 days before signing of any agreement or receipt of any consideration; has not granted any franchises outside Washington; does not publicly advertise or engage in general solicitation of the franchise offering; the franchisee is advised or represented by independent legal counsel or a certified public accountant; and the franchisor has not been found by a court having jurisdiction to have violated Washington's franchise law or Consumer Protection Act or similar federal statutes within seven years prior to the offer or sale of franchises in Washington. Wash. Rev. Code §§ 19.100.030(4)(b)(ii), 19.100.030(4)(c).

In Illinois, the regulation providing the exemption permits the sale of one or two franchises in the ensuing 12 months.

Authorities:

Ill. Admin. Code tit. 14, § 200.201(b); Ind. Code § 23-2-2.5(3); Minn. Stat. § 80C.03(e); N.Y. Gen. Bus. Laws § 684(3)(c); Wash. Rev. Code §§ 19.100.030(4)(b)(ii), 19.100.030(4)(c).

14. Defense by Individual Director, Officer, or Employee of Lack of Knowledge

Instruction:

Earlier, I instructed you that an individual who directly or indirectly controls an entity that is liable, or a partner in a firm that is liable, or a principal executive officer or director of an entity that is liable, or an employee who materially aids in the act or transaction that violates the law, is also liable with

and to the same extent as the entity or firm. This is true unless the individual who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist. [Name of individual Defendant(s)] each claim(s) that he/she had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist. [You must consider this defense individually as to each individual]. If you find that [name of individual Defendant] had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist, then you must find that individual is not liable along with [name of Defendant entity].

Sample of the Instruction in Plain English:

Earlier, I told you an individual who directly or indirectly controls an entity that is liable, or a partner in a firm that is liable, or a principal executive officer or director of an entity that is liable, or an employee who materially aids the act or transaction that violates the law, is also liable just like the entity or firm. This is true, unless the individual did not know and had no grounds to suspect the facts that are the basis of the entity's liability. [Name of individual Defendant(s)] each claim(s) he/she had no knowledge or reason to suspect the facts that are the basis for the claim against [name of entity Defendant]. [You must consider this defense individually as to each individual]. If you find that [name of individual Defendant] had no knowledge or reason to suspect these facts, then you must find that individual is not liable along with [name of Defendant entity].

Comment:

Under some statutes, lack of knowledge of the violation may sometimes be an affirmative defense. California imposes liability on directors, officers, controlling persons, and employees of an entity that is liable under the state's franchise registration and disclosure law unless the individual "had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist." Cal. Corp. Code § 31302. Lack of knowledge is an affirmative defense that the individual must plead and prove. *Spahn v. Guild Indus. Corp.*, 156 Cal. Rptr. 375, 94 Cal. App. 3d 143, 157 n.4 (1979); *Eastwood v. Froehlich*, 131 Cal. Rptr. 577, 60 Cal. App. 3d 523, 531 (1976). For a discussion of the lack of reasonable knowledge defense, see Cynthia M. Klaus, *Personal Liability of Franchisor Executives and Employees Under State Franchise Laws*, 29 Franchise L.J. 99, 103 (2009).

Authorities:

Cal. Corp. Code § 31302; 815 Ill. Comp. Stat. § 705/26; Ind. Code § 23-2-2.5-29; Md. Code Ann. Bus. Reg. § 14-227(d)(2); Mich. Comp. Laws § 445.1532; Minn. Stat. § 80C.17; N.Y. Gen. Bus. Law § 691(3); N.D. Cent. Code §§ 51-19-12(2); Or. Rev. Stat. § 650.020(5); 19 R.I. Gen

Laws § 19-28.1-21(b); S.D. Codified Laws § 37-5B49; Wash. Rev. Code §§ 19.100.010(13), 19.100.190; Wis. Stat. § 553.51(3).

15. Defense of Integration Clause or Disclaimers

Instruction:

As I instructed you earlier, [name of Plaintiff] claims [name of Defendant] made misrepresentations outside the documents, and [name of Plaintiff] claims to have reasonably relied on those statements. [Name of Defendant] claims that there could be no reasonable reliance because, according to [name of Defendant]'s claim, [the parties agreed in their written agreement that no representations were made, or relied on, outside the written words of the contract, sometimes called an "integration" clause] [the claimed misrepresentations were disclaimed in the written documents].

The existence of [an integration clause] [disclaimers of representations] in a franchise agreement makes claimed reliance on [contradictory statements] [statements outside the agreement] unreasonable. To succeed in this defense, [name of Defendant] has the burden to prove that the agreement contained a [disclaimer] [provision that said there were no representations made, or relied on, outside the written words of the contract]. If [name of Defendant] proves that such a clause was part of the agreement, then you must find there was no reasonable reliance by [name of Plaintiff] on claimed representations outside the documents.

Sample of the Instruction in Plain English:

As I said earlier, [name of Plaintiff] claims [name of Defendant] made misrepresentations outside the documents and [name of Plaintiff] claims [he/she/it] reasonably relied on the statements. [Name of Defendant] claims there could be no reasonable reliance because, according to [name of Defendant]'s claim, [the parties' agreement said no representations were made, or relied on, outside the written contract] [the claimed misrepresentations were disclaimed in the written documents].

Words in an agreement [saying that it is the entire agreement] [disclaiming representations] makes claimed reliance on [contradictory statements] [statements outside the agreement] unreasonable. To succeed in this defense, [name of Defendant] must prove that the agreement contained a [disclaimer] [provision saying there were no representations made or relied on, outside the written contract]. If [name of Defendant] proves this, then you must find there was no reasonable reliance by [name of Plaintiff] on claimed representations outside the documents.

Comment:

This instruction applies if the there is a question whether such clause was included as part of the agreement, so that the court allows the issue of an integration clause and its effect on reliance to be tried to the jury.

Authorities:

Andy Mohr Truck Ctr., Inc. v. Volvo Trucks N. Am., 869 F.3d 598, 608 (7th Cir. 2017) (where parties reduced their agreement to a written document and included an integration clause that the written document embodies the complete agreement, the parol evidence rule prohibits parol or extrinsic evidence to vary or add to the terms of the written contract); *Cook v. Little Caesar Enters., Inc.*, 210 F.3d 653, 659 (6th Cir. 2000) ("The existence of an integration clause in the franchise agreements made [plaintiff's] alleged reliance unreasonable."); *Motor City Bagels, LLC v. Am. Bagel Co.*, 50 F. Supp. 2d 460, 472 (D. Md. 1999) (considering plaintiffs' experience and sophistication, their representation by counsel in negotiating the franchise agreements, and unambiguous language of the integration clause in the franchise agreements and disclaimer in the disclosure document, reliance on statements about level of sales was unreasonable); *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1153 (S.D.N.Y. 1989) (where a disclaimer or integration clause is specific and clear, communications outside the four corners of the contract may not provide the basis for a fraud claim). *But see Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assn.*, 151 Cal. Rptr. 3d 93, 55 Cal. 4th 1169, 1183 (2013) (parol evidence rule did not preclude evidence of misrepresentation contradicting terms of written agreement).

16. Defense of Reliance on Regulatory Opinion

Instruction:

A defense to a violation of the Franchise Investment Law is that the franchisor acted [or omitted to act] in good faith following a rule, form, order, or written interpretive opinion of the Commissioner of Business Oversight or opinion of the Attorney General [even if the rule, form, order, or opinion later turned out to be incorrect or invalid or was later changed or withdrawn]. [Name of Defendant] claims that it acted in good faith [omitted to act] in reliance on [specify Commissioner of Business Oversight rule, form, order, or written interpretive opinion or Attorney General opinion that Defendant claims to have acted in reliance on]. To succeed in this Defense, [name of Defendant] must prove that it acted in good faith, that in good faith it followed what was said in that [rule, form, order, or opinion].

Sample of the Instruction in Plain English:

[Name of Defendant] claims the action [omission] that it is accused of, that is [specify the act or omission Defendant is accused of] was done in good-faith reliance on [specify Commissioner of Business Oversight rule, form, order, or written interpretive opinion or Attorney General opinion that Defendant claims to have acted in reliance on]. If you find that [name of Defendant] acted in good faith, relying on and following that [rule, form, order or opinion], then [name of Defendant] is not liable for the action it is accused of.

Comment:

In California, the statute permits the defense of good-faith reliance on any written interpretive opinion of the commissioner or Attorney General, but "it does not create a defense for good faith reliance on private counsel." *People v. Gonda*, 188 Cal. Rptr. 295, 138 Cal. App. 3d 774, 780 (1982).

Authorities:

Cal. Corp. Code § 31511; *Gentis v. Safeguard Bus. Sys., Inc.*, 71 Cal. Rptr. 2d 122, 60 Cal. App. 4th 1294, 1307 n.3 (1998) (quoting the statute and noting that pursuant to Cal. Corp. Code § 31510, defendants could have sought an interpretive opinion from the Commissioner or Attorney General).

E. *Relations Act Instructions—Wrongful Termination, Nonrenewal, Interference with Succession or Sale*

1. Instruction on Wrongful Termination of a Franchise—Termination without Good Cause

Instruction:

A franchisor may not terminate a franchise before the expiration of its term, except for good cause. [Name of Plaintiff] claims that [name of Defendant] terminated the franchise [without having good cause]. To succeed on this claim, [name of Plaintiff] must prove that [name of Defendant] terminated the franchise before the end of its term, without having good cause to do so. Next, I will instruct you on what is good cause.

Sample of the Instruction in Plain English:

[Name of Defendant] was not allowed to terminate the franchise before its term ended, unless it had good cause. [Name of Plaintiff] claims [name of Defendant] terminated the franchise before the end of its term, without having good cause. To succeed on this claim, [name of Plaintiff] must prove that [name of Defendant] terminated the franchise before the end of its term, without having good cause. Next, I will instruct you on what is good cause.

Comment:

Ordinarily, the allegation of facts allocates the burden of proof to the party pleading them. Though the terminated franchisee, as plaintiff, normally has the burden to prove the elements of the claim, some statutes and courts require the franchisor to affirmatively prove good cause for termination. *See, e.g.*, *Kealey Pharmacy v. Walgreen Co.*, 761 F.2d 345, 350, 362 (7th Cir. 1985) (applying Wisconsin statute); *Hartford Elec. Supply Co. v. Allen-Bradley Co., Inc.*, 736 A.2d 824, 839 (Conn. 1999) (franchisor having burden of proving good cause to terminate franchise, even if franchisee is the plaintiff).

The structure of the Indiana and Michigan statutes does not precisely prohibit termination without good cause, but makes it unlawful for a franchise agreement to permit unilateral termination or nonrenewal without

good cause or in bad faith. Ind. Code § 23-2-2.7-1(7); Mich. Comp. Laws § 445.1527(c).

Good cause for termination is an objective standard in the sense that it looks to whether cause, as defined by statute or agreement existed, and whether such cause was the reason for the termination; not at whether the termination meets an objective standard of reasonableness that goes beyond the provisions of the statute or agreement. *Sheldon v. Munford, Inc.*, 950 F.2d 403, 407 (7th Cir. 1991).

Authorities:

Ark. Code Ann. § 4-72-204; Cal. Bus. & Prof. Code § 20020; Conn. Gen. Stat. § 42-133f; Del. Code Ann. tit. 6, §§ 2552(a), (g); Haw. Rev. Stat. § 482E-6(2)(H); 815 Ill. Comp. Stat. § 705/19; Ind. Code § 23-2-2.7-1(7); Iowa Code § 523H.7; Mich. Comp. Laws § 445.1527(c); Minn. Stat. § 80C.14(3); Mo. Rev. Stat. § 407.405; Neb. Rev. Stat. § 87-404(1); N.J. Stat. Ann. § 56:10-5; Va. Code Ann. § 13.1-564; Wash. Rev. Code § 19.100.180(2)(j); P.R. Laws Ann. §§ 278a and 278a-1; V.I. Code Ann. § 131-2.

2. Instruction on Wrongful Refusal to Renew a Franchise—Nonrenewal without Good Cause

Instruction:

A franchisor may not refuse to renew a franchise at the end of its term, except for good cause. [Name of Plaintiff] claims that [name of Defendant] refused to renew the franchise without having good cause. To succeed on this claim, [name of Plaintiff] must prove that [name of Plaintiff] wanted to renew, [told [name of Defendant] that [name of Plaintiff] wanted to renew], but that [name of Defendant] refused to renew the franchise at the end of its term, without having good cause. Next, I will instruct you on what is good cause.

Sample of the Instruction in Plain English:

[Name of Defendant] was not allowed to refuse to renew the franchise when it ended, unless it had good cause. [Name of Plaintiff] claims [name of Defendant] refused to renew the franchise when it ended, without having good cause. To succeed on this claim, [name of Plaintiff] must prove that [name of Plaintiff] told [name of Defendant] that he/she/it wanted to renew but that [name of Defendant] refused to renew the franchise when its term ended, without having good cause. Next, I will instruct you on what is good cause.

Comment:

If additional conditions to renew need to be satisfied, they will need to be stated in the instruction. For example, possible additional conditions could be that the plaintiff had the financial or other capability to renew, such as retaining a lease for premises and sufficient financial condition.

The structure of the Indiana and Michigan statutes does not precisely prohibit nonrenewal without good cause, but makes it unlawful for a franchise agreement to permit nonrenewal without good cause or in bad faith. Ind. Code §§ 23-2-2.7-1(8); Mich. Comp. Laws §§ 445.1527(d)–(e). The Washington statute does not prohibit nonrenewal without good cause, but rather prohibits nonrenewal without compensating the franchisee for the fair market value of the franchise, inventory, supplies, equipment, and furnishings and goodwill. Wash. Rev. Code § 19.100.180(2)(i).

Authorities:

Ark. Code Ann. § 4-72-204; Cal. Bus. & Prof. Code § 20025; Conn. Gen. Stat. § 42-133f; Del. Code Ann. tit. 6, § 2552(b), (h); Haw. Rev. Stat. § 482E-6(2)(H); 815 Ill. Comp. Stat. § 705/20; Ind. Code §§ 23-2-2.7-1(8); Iowa Code § 523H.8; Mich. Comp. Laws § 445.1527(d)–(e); Minn. Stat. § 80C.14(4); Neb. Rev. Stat. § 87-404(1); N.J. Stat. Ann. § 56:10-5; Wash. Rev. Code § 19.100.180(2)(i); P.R. Laws Ann. § 278a; V.I. Code Ann. §§ 131–132.

3. Notice and Opportunity to Cure

Instruction:

[Name of Defendant] was not permitted to [terminate/nonrenew] the franchise unless [name of Defendant] provided [name of Plaintiff] with written notice of the claimed [breach/default] and at least ___ days to cure the [breach/default] [at least __ days' notice of the nonrenewal]. [Name of Plaintiff] claims he/she/it was not provided written notice of the claimed [breach/default] and at least ___ days to cure the claimed [breach/default] [at least ___ days' notice of the nonrenewal]. If you find that [name of Defendant] did not provide [name of Plaintiff] with written notice of the claimed [breach/default] and at least ___ days to cure the claimed [breach/default] [at least __ days' notice of nonrenewal], then you must find that the franchise was not lawfully [terminated/nonrenewed].

Sample of the Instruction in Plain English:

To [terminate/nonrenew] the franchise, [name of Defendant] was required to provide [name of Plaintiff] at least ___ days' written notice and opportunity to cure the claimed [breach/default]. If [name of Defendant] did not provide this amount of written notice [and opportunity to cure], then you must find that [name of Defendant] did not lawfully [terminate/nonrenew] the franchise.

Comment:

The statutes of many states also include as a condition to termination that the franchisor provide the franchisee notice and an opportunity to cure the breach or default and may specify a minimum length of time that must be provided. Some states require a reasonable opportunity to cure and may

state that the opportunity need not be more than a specified number of days. *See*, *e.g.*, Mich. Comp. Laws § 445.1527(c) (requiring reasonable opportunity to cure "which in no event need be more than 30 days"). The parties' agreement may also require notice and an opportunity to cure. The franchisor may need to satisfy both the contractual and statutory requirements to avoid the termination or nonrenewal being found to be wrongful.

California's statute states details of the form, content, and manner of delivery of notice of termination or nonrenewal. Cal. Bus. & Prof. Code § 20030. Some statutes state grounds that are good cause for immediate termination without providing the franchisee an opportunity to cure. *See*, *e.g.*, Cal. Bus. & Prof. Code § 20021 (stating grounds for which immediate notice of termination without an opportunity to cure is deemed to be reasonable). Many state franchise relationship laws also provide franchisees other rights and protections in addition to protection from unjust termination or nonrenewal.

In *Seahorse Marine Supplies*, *Inc. v. Puerto Rico Sun Oil Co.*, 295 F.3d 68, 79 (1st Cir. 2002), the First Circuit ruled that it was not error for the trial court to refuse to instruct a jury on whether a petroleum franchisor gave proper notice "under the circumstances," when the evidence plainly showed, and the trial court correctly determined as a matter of law, that the franchisor failed to comply with the Petroleum Marketing Practices Act's notice requirement (15 U.S.C. § 2804) for termination of a petroleum franchise. For an instruction concerning the notice of termination in the context of an automobile dealership governed by a state motor vehicle franchise law, see *Powerhouse Motorsports Group*, *Inc. v. Yamaha Motor Corp.*, *U.S.A.*, 16 Cal. Rptr. 3d 811, 221 Cal. App. 4th 867, 882 (2013).

Authorities:

Ark. Code Ann. § 4-72-204(b); Cal. Bus. & Prof. Code §§ 20020, 20030; Conn. Gen. Stat. § 42-133f; 815 Ill. Comp. Stat. § 705/20(b); Ind. Code § 23-2-2.7-3; Iowa Code §§ 523H.7(2), § 532H.8(1)(a); Mich. Comp. Laws § 445.1527(c); Minn. Stat. §§ 80C.14(3), 80C.14(4); Neb. Rev. Stat. § 87-404(1); N.J. Stat. Ann. § 56:10-5; Wash. Rev. Code § 19.100.180(2)(j); V.I. Code Ann. § 131.

4. Definitions Relevant to Good Cause

Instruction:

[Name of Defendant] claims it had good cause to [terminate/nonrenew] the franchise. To succeed in this defense, [name of Defendant] must prove that it had good cause to terminate or nonrenew the franchise. The following are good cause for termination of the franchise before expiration of its term.

[Insert applicable statutory statement of good cause from the state's statute. Here are some examples:]

- [Name of Plaintiff] abandoned the franchise by failing to operate for 5 consecutive days that [name of Plaintiff] was required to operate the business under the terms of the franchise, or shorter period, after which it

was reasonable in the circumstances for [name of Defendant] to conclude that [name of Plaintiff] did not intend to continue operating, [unless the failure was due to fire, flood, earthquake, or similar causes beyond [name of Plaintiff]'s control]. [Cal. Bus. & Prof. Code § 20021(b)]

- [Name of Plaintiff] repeatedly violated one or more requirements of the franchise, whether or not [name of Plaintiff] corrected them after notice. [Cal. Bus. & Prof. Code § 20021(g)]
- That [name of Plaintiff] was convicted of a felony or other criminal misconduct is relevant to operation of the franchise. [Cal. Bus. & Prof. Code § 20021(i)]
- [Name of Plaintiff] failed to pay a franchise fee or other amount due to [name of Defendant] or [name of Defendant]'s affiliate within 5 days after receiving written notice that the fee or other amount was overdue. [Cal. Bus. & Prof. Code § 20021(j)]
- [Name of Defendant] made a reasonable determination that continued operation of the franchise by [name of Plaintiff] would result in imminent danger to public health or safety. [Cal. Bus. & Prof. Code § 20021(k)]
- [Name of Plaintiff] [refused/failed] to substantially comply with a material and reasonable obligation of the franchise agreement. [Conn. Gen. Stat. § 42-133f]
- [Name of Plaintiff] materially violated the franchise agreement. [Ind. Code § 23-2-2.7-1(7)]
- [Name of Plaintiff] received at least 24 hours' notice to cure a default under the franchise agreement that materially impaired the goodwill of [name of Defendant]'s trademark and failed to cure the default. [Minn. Stat. § 80C.14(3)(3)]

Sample of the Instruction in Plain English:

The following are good cause for termination of the franchise before expiration of its term.

[Insert applicable statutory statement of good cause from the state's statute. Here are some examples:]

- [Name of Plaintiff] abandoned the franchise by failing to operate for 5 consecutive days that [name of Plaintiff] was required to operate the business under the terms of the franchise, or shorter period after which it was reasonable in the circumstances for [name of Defendant] to conclude that [name of Plaintiff] did not intend to continue operating, [unless the failure was due to fire, flood, earthquake, or similar causes beyond [name of Plaintiff]'s control]. [Cal. Bus. & Prof. Code § 20021(b)]
- [Name of Plaintiff] repeatedly violated one or more requirements of the franchise, whether or not [name of Plaintiff] corrected them after notice. [Cal. Bus. & Prof. Code § 20021(g)]

- That [name of Plaintiff] was convicted of a felony or other criminal misconduct is relevant to operation of the franchise. [Cal. Bus. & Prof. Code § 20021(i)]
- [Name of Plaintiff] failed to pay a franchise fee or other amount due to [name of Defendant] or [name of Defendant]'s affiliate within 5 days after receiving written notice that the fee or other amount was overdue. [Cal. Bus. & Prof. Code § 20021(j)]
- [Name of Defendant] made a reasonable determination that continued operation of the franchise by [name of Plaintiff] would result in imminent danger to public health or safety. [Cal. Bus. & Prof. Code § 20021(k)]
- [Name of Plaintiff] [refused/failed] to substantially comply with a material and reasonable obligation of the franchise agreement. [Conn. Gen. Stat. § 42-133f]
- [Name of Plaintiff] materially violated the franchise agreement. [Ind. Code § 23-2-2.7-1(7)]
- [Name of Plaintiff] received at least 24 hours' notice to cure a default under the franchise agreement that materially impaired the goodwill of [name of Defendant]'s trademark and failed to cure the default. [Minn. Stat. § 80C.14(3)(3)]

Comment:

States have widely varying definitions or descriptions of good cause, or just cause or other justification, to terminate a franchise before expiration of its term or to refuse to renew the franchise at the end of its term. Reference to the particular state's statute is essential. Good cause is an objective standard in the sense that it looks to whether cause, as defined by statute or agreement existed, and whether such cause was the reason for the action taken; not at whether the action meets an objective standard of reasonableness that goes beyond the provisions of the statute or agreement. *Sheldon v. Munford, Inc.*, 950 F.2d 403, 407 (7th Cir. 1991); *Century 21 Real Estate LLC v. All Prof. Realty, Inc.*, 889 F. Supp. 2d 1198, 1225 (E.D. Cal. 2012) ("Good cause" is defined in the California Franchise Relations Act; the Act "makes no mention of a 'good faith' requirement.").

Authorities:

Ark. Code Ann. § 4-72-202(7); Cal. Bus. & Prof. Code §§ 20020–20021 (good cause for termination); 20025 (good cause for nonrenewal); Conn. Gen. Stat. § 42-133f; Del. Code Ann. tit. 6, § 2552(a), (b); Haw. Rev. Stat. § 482E-6(2)(H); 815 Ill. Comp. Stat. § 705/19; Ind. Code § 23-2-2.7-1(7); Iowa Code § 523H.7-8; Mich. Comp. Laws § 445.1527(c); Minn. Stat. § 80C.14(3); Mo. Rev. Stat. § 407.405(1); Neb. Rev. Stat. § 87-404(1); N.J. Stat. Ann. § 56:10-5; Wash. Rev. Code § 19.100.180(2)(j); P.R. Laws Ann. § 278(d); V.I. Code Ann. § 132.

5. Instruction on Interference with Sale or Transfer

Instruction:

It is unlawful for a franchisor to refuse to permit a transfer of ownership of a franchise or the entity that is a franchisee, except for good cause. [Name of Plaintiff] claims that [name of Defendant] refused to permit [name of Plaintiff]'s proposed sale of [name of Plaintiff]'s [brand name of franchise] franchise and that [name of Defendant] did not have good cause for this refusal.

Good cause means:*

(1) The proposed transferee failed to meet a reasonable qualification or standard of the franchisor;

(2) The proposed transferee or any affiliated person of the proposed transferee is a competitor of the franchisor;

(3) The proposed transferee is unable or unwilling to agree in writing to comply with and be bound by all lawful obligations imposed by the franchise, including, without limitation, instruction and training, and to sign the franchisor's current form of the franchise agreement.

(4) The franchisee or proposed transferee failed to pay money owing to the franchisor and to cure any default in the franchise agreement or other agreement with the franchisor.

A franchisor or subfranchisor has 30 days after being notified in writing of a proposed transfer to approve or disapprove in writing the proposed transfer and must state its reason for disapproval.

If a franchisor or subfranchisor fails to approve or disapprove a proposed transfer in writing within 30 days, it is deemed to have approved the transfer.

*This list consists of examples. A state's franchise relationship statute, or the parties' agreement, may specify fewer, additional, and/or different circumstances that constitute good cause.

Sample of the Instruction in Plain English:

A franchisor may not refuse consent to a transfer of ownership of a franchise or the entity that is a franchisee, except for good cause. [Name of Plaintiff] claims [name of Defendant] refused to permit [name of Plaintiff]'s proposed sale of [name of Plaintiff]'s [brand name of franchise] franchise and that [name of Defendant] did not have good cause to refuse.

Good cause means:*

(5) The proposed transferee did not meet a reasonable qualification or standard of the franchisor;

(6) The proposed transferee or an affiliated person of the proposed transferee is a competitor of the franchisor;

(7) The proposed transferee is unable or unwilling to agree in writing to comply with and be bound by all lawful obligations of the franchise,

including without limitation instruction and training, and to sign the franchisor's current franchise agreement.

(8) The franchisee or proposed transferee failed to pay money owed to the franchisor and to cure a default in an agreement with the franchisor.

A franchisor has 30 days after being notified in writing of a proposed transfer to approve or disapprove in writing the proposed transfer and must state its reason for disapproval.

If a franchisor fails to approve or disapprove a proposed transfer in writing within 30 days, it is deemed to have approved the transfer.

Comment:

The structure of the Michigan statute does not precisely prohibit interference with a franchisee sale but makes it unlawful for a franchise agreement to permit the franchisor to refuse to permit a transfer of ownership except for good cause. Mich. Comp. Laws § 445.1527(g); *see also* Minn. Stat. § 80C.14(5).

Authorities:

Ark. Code Ann. § 4-72-205; Cal. Bus. & Prof. Code § 20028; Haw. Rev. Stat. § 482E-6(I); Iowa Code § 523H.5; Mich. Comp. Laws § 445.1527(g); Neb. Rev. Stat. § 87-405; N.J. Stat. Ann. § 56:10-6.

6. Instruction on Interference with Succession to Spouse, Heirs, or Estate

Instruction:

A franchisor is required to allow [a deceased franchisee's surviving spouse, heirs, or estate] [the surviving spouse, heirs, or estate of a deceased majority shareholder of the franchisee] a reasonable time to take over the ownership interest in the franchise of the person who died. During this time, the surviving spouse, heirs, or estate must be given the opportunity to meet the franchisor's qualifications or sell, transfer, or assign the franchise to someone who meets the qualifications. The franchisor is permitted to require, during this time, that the surviving spouse, heirs, or estate maintain all the standards and obligations of the franchise.

[Name of Plaintiff] claims that [he/she/it] is the [surviving spouse/heir/estate] of [name of person who died] and that [name of Defendant] failed to allow [name of Plaintiff] a reasonable time to take over [name of person who died]'s ownership interest in the [name of the franchise] franchise. To succeed in this claim, [name of Plaintiff] must prove that (1) [name of person who died] owned [an interest in the [[name of franchise] franchise was the majority shareholder of the franchisee entity]; (2) [name of Plaintiff] is the surviving spouse, heir, or estate of [name of person who died] (3) [name of Defendant] did not give [name of Plaintiff] a reasonable time after [name of person who died] died, to [take over] [sell, transfer or assign] the ownership

interest of [name of person who died]; (4) [name of Plaintiff] [was qualified] [had the ability to become qualified] [had a buyer or transferee who was qualified] to become the franchisee; and that (5) during the time needed to qualify to [take over] [sell, transfer, or assign] the ownership interest of [name of person who died], [name of Plaintiff] maintained all the standards and obligations of the franchise.

Sample of the Instruction in Plain English:

A franchisor must give the surviving spouse, heirs, or estate of [the deceased franchisee] [the deceased majority shareholder of the franchisee] a reasonable time to take over the ownership of the person who died. During this time, the franchisor must give the surviving spouse, heirs, or estate the chance to meet the franchisor's qualifications or sell the franchise to someone who meets the qualifications. During this time, the franchisor can require the surviving spouse, heirs, or estate to maintain the standards and obligations of the franchise.

[Name of Plaintiff] claims [he/she/it] is [name of person who died]'s [surviving spouse/heir/estate] and claims [name of Defendant] did not allow [name of Plaintiff] a reasonable time to take over [name of person who died]'s ownership in the [name of the franchise] franchise. To succeed in this claim, [name of Plaintiff] must prove that (1) [name of person who died] owned [an interest in the [name of franchise] franchise was majority shareholder of the franchisee entity]; (2) [name of Plaintiff] is the surviving spouse, heir, or estate of [name of person who died] (3) [name of Defendant] did not give [name of Plaintiff] a reasonable time after [name of person who died] died, to [take over] [sell, transfer, or assign] the ownership of [name of person who died]; (4) [name of Plaintiff] [was qualified] [had the ability to become qualified] [had a buyer or transferee who was qualified] to become the franchisee; and (5) during the time needed to qualify to [take over] [sell, transfer, or assign] the ownership of [name of person who died], [name of Plaintiff] maintained all the standards and obligations of the franchise.

Comment:

An unpublished decision of a U.S. District Court in Indiana held that Indiana's statute requires only that a franchisor allow the family/heirs/estate of a deceased franchisee the opportunity to wind down the franchisee's business. *Ayers v. Marathon Ashland Petroleum LLC*, 2007 WL 3171445, at *4 (S.D. Ind. Oct. 26, 2007). However, the *Ayers* decision concerned a petroleum franchise, and it noted that the Indiana statute is preempted by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq*.

Authorities:

Cal. Bus. & Prof. Code § 20027; Ind. Code § 23-2-2.7-2(3); Iowa Code §§ 523H.5(12)(a), 537A.10(5)(h).

7. Defense to Claim of Interference with Succession to Spouse, Heirs, or Estate

Instruction:

[Name of Defendant] claims that [name of Plaintiff] was allowed a reasonable time to take over the ownership interest or to sell, transfer, or assign the interest, but that [name of Plaintiff] was not, during this time, able to meet [name of Defendant]'s qualifications to be an owner of that interest in the franchise and was not able to sell, transfer, or assign the ownership interest of [name of person who died] to someone who could meet the qualifications. [[Name of Defendant] also claims that during the time allowed for [name of Plaintiff] to qualify to take over, sell, transfer, or assign the ownership interest, [name of Plaintiff] failed to maintain all the standards and obligations of the franchise.]

To succeed in this defense, [name of Defendant] has the burden to prove that [name of Plaintiff] was allowed a reasonable time to take over the ownership interest or sell, transfer, or assign the interest, but [name of Plaintiff] did not, during this time, meet [name of Defendant]'s qualifications to be an owner of that interest in the franchise and did not sell, transfer, or assign the ownership interest of [name of person who died] to someone who met the qualifications. [[Name of Defendant] has the burden to prove that during the time allowed for [name of Plaintiff] to qualify to take over, sell, transfer, or assign the ownership interest, [name of Plaintiff] failed to maintain all [name of Defendant]'s standards and obligations of the franchise.]

Sample of the Instruction in Plain English:

[Name of Defendant] claims [he/she/it] gave [name of Plaintiff] a reasonable time to take over ownership or to transfer ownership. [Name of Defendant] claims [name of Plaintiff] was not able to meet [name of Defendant]'s qualifications to be the owner and was not able to transfer [name of person who died]'s interest to someone who could meet the qualifications. [[Name of Defendant] claims [name of Plaintiff] failed to maintain all the standards and obligations of the franchise.]

To succeed in this defense, [name of Defendant] must prove that it allowed [name of Plaintiff] a reasonable time to take over ownership or transfer the interest, but [name of Plaintiff] did not meet [name of Defendant]'s qualifications to be the owner of that interest and did not transfer [name of person who died]'s interest to someone who met the qualifications. [[Name of Defendant] must prove that in the time allowed for [name of Plaintiff] to qualify to take over or transfer the ownership interest, [name of Plaintiff] failed to maintain all [name of Defendant]'s standards and obligations of the franchise.]

Comment:

In the absence of statutory or contractual protection, the death of a franchisee may permit the franchisor to terminate the franchise. *See*, *e.g.*, *Iannuzzi*

v. Exxon Co., U.S.A., Div. of Exxon Corp., 572 F. Supp. 716, 721 (D.N.J. 1983) (noting that "a franchise agreement is a contract of a personal nature and in the absence of a provision that it survives the death of the franchisee, it terminates upon the death of the franchisee"). But a franchisee has often developed a business with a meaningful, potentially substantial, value. When a franchisee or principal owner of a franchisee entity dies, the business does not stop; and a desire of the late franchisee may have been that heirs could continue to operate the business or sell it and receive the financial value. Some states provide statutory protection for this interest. The franchisor has an interest in the franchise being operated according to the franchisor's standards. Therefore, in states that assure heirs a right to operate or sell the interest of the deceased franchisee, a reasonable, but not unlimited, time is allowed to take over ownership and meet the franchisor's qualifications or transfer the business to someone who meets the qualifications.

Authorities:

Ark. Code Ann. § 4-72-206(4); Cal. Bus. & Prof. Code § 20027; Ind. Code § 23-2-2.7-2(3); Iowa Code §§ 523H.5(12)(a), 537A.10(5)(h).

F. *Relations Act Remedies*

1. Measure of Damages for Wrongful Termination

Instruction:

A franchisor that wrongfully terminates or nonrenews a franchise is liable for the damages caused thereby. The [terminated/nonrenewed] franchisee's damages are the actual or reasonable value of the franchisee's business when the franchisor cuts off the franchise.

The franchise is to be valued as of the date when the franchisee stopped operating the franchise.

Sample of the Instruction in Plain English:

A franchisor that wrongfully terminates or nonrenews a franchise is liable for the damages caused. The [terminated/nonrenewed] franchisee's damages are the actual reasonable value of the franchisee's business when the franchisor cuts off the franchise. The franchise is to be valued as of the date when the franchisee stopped operating the franchise.

Comment:

Franchise relations statutes in several states specify the elements of damages for a wrongfully terminated franchise. Where the remedy is to compensate the terminated franchisee for the value of the business, traditional valuation methods and instructions on value apply, but are not specific to franchising. *See, e.g., Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 278 (3d Cir. 1995) (noting that "courts allow a plaintiff to recover either the present value of lost future earnings or the present market

value of the lost business, though not both"). The valuation is an objective, not a subjective, measure. It is "that price upon which willing parties, buyer and seller, would agree for the sale of the franchisee's business as a going concern," not the subjective value to the parties themselves. *Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc.*, 180 F.3d 542, 547 (3d Cir. 1999). A California court held that damages for wrongful termination of a franchise were limited to breach of contract damages. *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am.*, 8 Cal. Rptr. 3d 840, 115 Cal. App. 4th 168, 183 (2004) (terminated franchisee's remedy for wrongful termination of its franchise was limited to contract damages).

Authorities:

Cal. Bus. & Prof. Code § 20035; Conn. Gen. Stat. §§ 42-133f; Del. Code Ann. tit. 6, § 2553; Haw. Rev. Stat. § 482E-6(3), (5); Mo. Rev. Stat. § 407.410(2); Neb. Rev. Stat. § 87-409; Wash. Rev. Code § 19.100.180(2)(i)–(j); P.R. Laws Ann. § 278b; *Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 278 (3d Cir. 1995) (terminated franchise is valued as of date when franchisee stopped operating the franchise); *Westfield Centre Serv., Inc. v. Cities Serv. Oil Co.*, 432 A.2d 48, 55 (N.J. 1981) (terminated franchisee's damages are measured in terms of actual or reasonable value of franchisee's business when the franchisor cuts off the franchise).