Some Maxims of Franchise Law

*David Gurnick**

I. Introduction

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A maxim is a short statement expressing a general truth or rule or principle. It is a proposition agreed upon by everyone "without proof, argument, or discourse."[1] In law, maxims are traditional legal principles that through repeated application become solidified into concise expressions.[2] In earlier times, ancient maxims were considered "as central pillars of the law," and "teaching of the law was organized round them."[3] Today, many books and articles discuss maxims of jurisprudence, law, and equity.[4] Some maxims have been enacted as legislation.[5] Even when maxims compete or conflict, they provide useful

1. Chrisman v. Linderman, 100 S.W.2d 1090, 1092 (Mo. 1907) (quoting Sir Edward Coke, Institutes of the Laws of England; Or, A Commentary Upon Littleton § 67a (1832)).

2. *Maxim*, Black's Law Dictionary (11th ed. 2019); *see also Maxim*, Oxford Dictionary of Law (9th ed. 2018) (noting equitable maxims are "short pithy statements used to denote the general principles that are supposed to run through equity"); Britt Hanson, *A (Mostly) Succinct History of English Legal Language*, 48 Ariz. Atty. 28, 34 (Aug. 2012) ("When Henry II expanded the jurisdiction of the royal courts, laws needed to be interpreted consistently across the realm—and over time. Thus, judges began to report the reasons for decisions, recording them, and using these same reasons to decide case after case. This was novel. And it led to legal maxims, principles and doctrines.").

3. J. Stanley McQuade, *Ancient Legal Maxims and Modern Human Rights*, 18 Campbell L. Rev. 75, 120 (1996).

4. *See, e.g.*, George Frederick Wharton, Legal Maxims, with Observations and Cases (Baker, Yoorhis & Co., 1878); *see also* Herbert Broom, A Selection of Legal Maxims, Classified and Illustrated (T & J.W. Johnson, 1852); Roger Young & Stephen Spitz, *Suem-Spitz's Ultimate Equitable Maxim: In Equity Good Guys Should Win and Bad Guys Should Lose*, 58 S.C. L. Rev. 175 (2003); Roscoe Pound, *The Maxims of Equity*, 34 Harv. L. Rev. 809 (1921); Jeremiah Smith, *The Use of Maxims in Jurisprudence*, 9 Harv. L. Rev. 13 (1895).

5. *See, e.g.*, Cal. Civ. Code §§ 3509–3548.

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signposts for analysis and focus to assist a court in deciding a case.[6] Put simply, maxims have a long-established, important role in law.[7]

In the franchise and distribution context, courts routinely search for maxims to inform their decisions.[8] For example, in 1985, the New Jersey Supreme Court reversed a trial court's award of compensation to a franchisee whose franchise had been lawfully terminated for good cause due to fraudulent underreporting.[9] After confirming that the applicable relationship statute required no such payment, the court looked for, but found, "nothing in the general body of franchise law to indicate" that the franchisee "should receive value for his franchise as a condition of termination."[10] The court further "uncovered no equitable maxim or other guiding principle that would support the [trial] court's disregard of the terms of the franchise agreements,"[11] and, finding no maxim, the court ruled that the trial court had no basis to award the franchisee any compensation.[12]

It is no longer debatable that franchise and distribution law has become a discernible discipline.[13] So far, however, no assembly of maxims has been identified for relevance in distribution and franchising law. This article suggests some principles that can be considered maxims for distribution and franchise law and seeks to generate thought and further development of maxims for the field.

6. POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 112 (2014) (noting "a threshold dispute has arisen as to which of two competing maxims establishes the proper framework for decision").

7. An 1878 text discusses approximately 1,256 maxims. *See generally* Wharton, *supra* note 4.

8. *See, e.g.*, Jay Bharat Devs., Inc. v. Minidis, 84 Cal. Rptr. 267, 273 (Ct. App. 2008) (in a franchise termination case, the court indicating that "venerable doctrine of unclean hands arises from the maxim that one who comes to court seeking equity must come with clean hands"); Charania v. Ramada Inns, 383 S.E.2d 603, 604 (Ga. Ct. App. 1989) (where party claimed no agreement existed, while claiming advantage of an executed agreement he signed, operative maxim was that to be enforceable a contract must be signed by the party sought to be bound).

9. Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 495 A.2d 66, 74 (N.J. 1985).

10. *Id.* at 74.

11. *Id.*

12. Maxims may be largely agreed, but they are not immutable. In 1985, the New Jersey Supreme Court could not find a maxim indicating a terminated franchisee was entitled to compensation. Since then, several states enacted laws that *require* compensation in favor of terminated franchisees. For example, California now requires a franchisor to offer to repurchase the franchisee's resalable current inventory that meets the franchisor's standards at the lower of fair wholesale market value or price paid by the franchisee. Cal. Bus. & Prof. Code § 20035. Some other states have a similar requirement. *See, e.g.*, Wash. Rev. Code §§ 19.100.180(2)(i), (j) (requiring a franchisor to compensate a nonrenewed franchisee for inventory, supplies, equipment and furnishings and to purchase inventory and supplies from a terminated franchisee).

13. The Federal Trade Commission Franchise Rule, state disclosure laws, state relationship laws, and federal and state special industry laws all focus specifically on franchise sales and relationships. The American Bar Association has a body devoted to the study and discussion of franchise law, the ABA Forum on Franchising. This body publishes a journal devoted to the field of franchise law, the *Franchise Law Journal.* The ABA has published a textbook for courses on franchise law. The State Bar of California recognizes franchise and distribution law as a field of specialization for lawyers.

II. Some Maxims of Distribution and Franchising Law

A. *To Be Enforceable, a Contract Must Be Signed by the Party Sought to Be Bound.*

Franchises are contractual relationships.[14] Usually they are based on a written contract. The first maxim addresses the situation where not all parties have signed a franchise agreement.

For example, in *Charania v Ramada Inns, Inc.*, a hotel franchisor obtained damages for its breach of contract claim against a franchisee under a written franchise agreement and personal guaranty.[15] Although the franchisee admitted signing the agreement and guaranty, it argued that the franchisor's failure to sign meant there was no legal agreement.[16] The court rejected the franchisee's argument, noting the franchisee signed and claimed the advantage of the agreement.[17] "The operative maxim," said the court, "is that to be enforceable a contract must be signed by the party sought to be bound," and because enforcement against the franchisor was not at issue, the party sought to be bound was the franchisee, which had signed the agreement.[18]

The maxim stands for the proposition that to enforce a written agreement against a party, that party must have signed the agreement.[19] The maxim also stands for the proposition that an agreement may be enforced against a party who signed, even if the party seeking enforcement did not itself sign the agreement.[20]

It is important to note, however, that the inverse of this maxim is not always true. The absence of a signature does not necessarily relieve that party from performance. For example, in *Carlock v. Pillsbury*, individual plaintiffs formed corporations to operate franchised retail ice cream stores.[21] The corporations were not parties to written franchise agreements.[22] Defendants argued this circumstance barred claims by those corporations for

14. *See, e.g.*, Robert W. Emerson & Lawrence J. Trautman, *Lessons About Franchise Risk From YUM! Brands and Schlotsky's*, 24 Lewis & Clark L. Rev. 997, 1003 (2020) ("A franchise is a contractual relationship where one party, the franchisor, provides business tips and tricks to another party, the franchisee. In exchange, the franchisee provides the franchisor with a royalty fee."); Deborah S. Coldwell, Judith R. Blakewayaal, Clifford B. Husted & Paul Goldean, *Franchise Law*, 53 SMU L. Rev. 1055, 1056 (2000) ("A franchise is a contractual relationship consisting of three elements: (1) a significant association between the franchisee's business and the franchisor's trademarks; (2) payment of a franchise fee; and (3) the franchisor's right to exercise significant power over, or provide significant assistance to, the franchisee in the operation of its business."); Barry Winyett Tyerman, Note, *A Tempest in a Chicken Bucket: Some Reflections on Franchise Regulation in California*, 17 UCLA L. Rev. 1101, 1102 (1970) (A "franchise is a contractual relationship in which each party agrees to undertake certain obligations embodied in the franchise agreement in return for concurrent advantages.").

15. Charania v. Ramada Inns, 383 S.E.2d 603, 604 (Ga. Ct. App. 1989).

16. *Id.*

17. *Id.* (noting the franchisee operated under the agreement for more than six months).

18. *Id.*

19. *See id.*

20. *See id.*

21. *See* Carlock v. Pillsbury, 719 F. Supp. 791, 800 (D. Minn. 1989) (summarizing parties).

22. *Id.* at 854.

fraudulent inducement or breach of contract.[23] Defendants noted that the standard franchise agreement granted rights only to persons who signed the agreement.[24] Plaintiffs claimed defendants consistently dealt with the corporations as franchisees, selling them ice cream, accepting payments, and treating them as parties to written franchise agreements.[25] Plaintiffs claimed this course of dealing established implied contracts with the same terms as the defendants' standard form of franchise agreement.[26]

The court agreed. The court noted that in certain circumstances "a contract may be implied from the conduct of the parties."[27] Whether an implied contract exists is determined by objective manifestations of the parties.[28] Whether a contract is to be implied, and the existence of its terms, are questions for the trier of fact, which defeated the defendants' motion for summary judgment.[29]

B. *"The Cornerstone of a Franchise System Must Be the Trademark or Trade Name of a Product."*[30]

Courts often refer to a franchisor's trademark as the "cornerstone" of a franchise system.[31] Indeed, every test to determine whether a business relationship constitutes a franchise requires a license to use the franchisor's trademarks.[32] The product or service that is franchised, the advertising of the

23. *Id.* at 853.
24. *Id.* at 854.
25. *Id.*
26. *Id.* at 853.
27. *Id.* at 854.
28. *Id.*
29. *Id.*
30. Susser v. Carvel Corp., 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964).
31. *See*, *e.g.*, Krebs Chrysler-Plymouth, Inc. v. Valley Motors, 141 F.3d 490, 497 (3d Cir. 1998); Mumford v. GNC Franchising LLC, 437 F. Supp. 2d 344, 350 (W.D. Pa. 2006); Instructional Sys., Inc. v. Comput. Curriculum Corp., 614 A.2d 124, 139 (N.J. 1992); Lasday v. Allegheny Cty., 453 A.2d 949, 951 (Pa. 1982); Atl. Richfield Co. v. Razumic, 390 A.2d 736, 740 (Pa. 1978); *see also* W. Michael Garner, *Trademarks in Franchising: The Basics*, 14 Wake Forest J. Bus. & Intell. Prop. L. 599, 600 (2014) ("It has been said that a trademark is the cornerstone of a franchise system.").
32. *See* 16 C.F.R. § 436.1(a)(1); Cal. Corp. Code § 31005(A)(2); 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); Md. Code Reg. § 14-201(e)(2); Mich. Comp. Laws § 445.1502(2)(b); N.Y. Gen. Bus. Law § 681(3)(b); N.D. Code § 51-19-02(5)(a)(2); Okla. Stat. tit. 71, § 802(5)(b); Or. Rev. Stat. § 650.005(4)(b); R.I. Gen. Laws § 19-28.1-3(g)(1)(C); Va. Code § 13.1-559; Wash. Rev. Code § 19.100.010(6)(A)(ii); Wis. Stat. § 553.03(4)(a)(2); Cal. Comm'r of Fin. Prot. & Innovation (formerly Comm'r of Corporations), Comm'r Release 3-F, When Does an Agreement Constitute a "Franchise" (June 22, 1994); Carlos v. Philips Bus. Sys., Inc., 556 F. Supp. 769, 776 (E.D.N.Y. 1983) (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 station prominently featured the franchisor's name), *aff'd*, 742 F.2d 1432 (2d Cir. 1983); Kim v. Servosnax, Inc., 13 Cal. Rptr. 2d 422, 425–29 (Ct. App. 1992) (licensee's business operating office building cafeteria was "substantially associated" with licensor's trademark 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 a cafeteria in the building).

"brand," and the license that binds the franchisee and franchisor together all have at their heart the franchisor's trademarks or other identifying names or symbols.

This second maxim recognizes that a fundamental, essential element of the franchise relationship is the operation by the franchisee in association with the franchisor's brand. The Federal Trade Commission (FTC), in adopting its Trade Regulation Rule on Franchising, noted that, typically in franchising, "a company (the franchisor) owns a trademark which it licenses others to use upon condition that the user (the franchisee) conform its business operations to the franchisor's standards, insofar as it is associated with the trademark."[33] As stated by the Commissioner who administers the California Franchise Investment Law, "the objective of the Law is to deal with a multiplicity of business arrangements presented to the public as a unit or marketing concept operated pursuant to a uniform marketing plan and under a common symbol."[34]

C. *Franchising Involves Unequal Bargaining Power of Franchisors and Franchisees and Therefore Carries Within Itself the Seeds of Abuse*

Decades ago, courts acknowledged the conventional wisdom that franchisors, the parties who owned the trademark and intellectual property and granted the franchise rights, were the better-informed, more sophisticated, often larger, stronger parties in franchisor-franchisee relationships.[35] This wisdom held that, as a result, franchisors often took unfair advantage of their franchisees.[36] To address this imbalance, Congress first enacted the Automobile Dealers' Day in Court Act, prescribing good faith in automobile

33. Fed. Trade Comm'n, Statement of Basis and Purpose for Trade Regulation Rule on Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59614, 59623 (Dec. 21, 1978).

34. Cal. Comm'r of Fin. Prot. & Innovation (formerly Comm'r of Corporations), Comm'r Release 3-F, When Does an Agreement Constitute a "Franchise" (June 22, 1994).

35. *See*, *e.g.*, Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1222–23 (3d Cir. 1976) ("The franchise system in this country today is not free from problems. Most, if not all, of these arise from the disparity in power and sophistication between franchisor and franchisee."); Dep't of Labor & Indus. v. Lyons Enters., Inc., 374 P.3d 1097, 1102 (Wash. 2016) (stating, the "franchisor normally occupies an overwhelmingly stronger bargaining position and drafts the franchise agreement so as to maximize its power to control the franchisee") (internal quotations and citations omitted).

36. *Lyons Enters., Inc.*, 374 P.3d at 1102; *see also*, *e.g.*, Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Dick. L. Rev. 105, 107 (2004) (explaining that the relationship between franchisor and franchisee is characterized by inequality. Franchisees typically are small businesspersons, while franchisors typically are large corporations, and the agreements tend to reflect this gross bargaining disparity because they usually are form contracts the franchisor prepared and offered to franchisees on a take it or leave it basis. The franchise agreement usually also lets the franchisor terminate or refuse to renew for virtually any reason.).

manufacturer-dealer relationships,[37] and the Petroleum Marketing Practices Act,[38] which regulates petroleum franchisor-franchisee relationships. Addressing this imbalance was also among the reasons for the issuance by the FTC of regulations regarding franchising and business opportunities.[39] And many states cited to this perceived imbalance to support laws regulating presale franchise registration and disclosures, laws regulating termination, nonrenewal and other aspects of franchise relationships,[40] and other laws regulating franchisor relationships.[41]

In the case law context, two California opinions further developed the third maxim that unequal bargaining power carries with it the "seeds of abuse." In *E. S. Bills v. Tzucanow*, a gas station franchisee, which also leased the building from the franchisor gasoline supplier, complained that gasoline prices were too high and began to buy from another source in breach of the franchise agreement.[42] After excluding evidence that the franchisor charged the public lower retail prices at its franchisor-owned stations than it charged the franchisee at wholesale, the trial court ruled in favor of the franchisor to evict the franchisee based on the above breaches.[43] The California Supreme Court reversed, holding that excessive pricing could refute the supplier's claim of good cause for termination.[44] In a concurrence, Justice Mosk noted that the imbalance of power between the franchisor and franchisee and the franchise agreement's nature as an adhesion contract were seeds of abuse in the franchise relationship.[45]

Relatedly, in *Postal Instant Press, Inc. v. Sealy*, a California appellate court considered whether a franchisee's failure to timely pay past royalties entitled the franchisor to both terminate the franchise agreement and obtain

37. In 1939, the FTC found that General Motors, Chrysler, Ford, and other car makers imposed unfair conditions on dealers. They forced dealers to sign agreements that did not clearly define the parties' rights and obligations. They conducted unfair inspections of dealer facilities. They forced dealers to buy more cars than could be sold. They forced dealers to invest in facilities without a long-term agreement and without assuring dealers would be provided enough cars to sell. *See* 1939 Fed. Trade Comm'n Ann. Rep. 22, 25–26. In response to these concerns, in 1956, Congress enacted the Automobile Dealers' Day in Court Act. 15 U.S.C. §§ 1221–1225.

38. 15 U.S.C. §§ 2801–2841.

39. 16 C.F.R. §§ 436.1–436.11. The FTC's Statement of Basis and Purpose for Franchise Rule notes, for example, that "a serious informational imbalance exists between prospective franchisees and their franchisors," "many prospective franchisees possess a low level of business sophistication," and "misrepresentations and failure to disclose material facts are widespread in franchising." 43 Fed. Reg. 59625, 59627 (Dec. 21, 1978).

40. *See, e.g.*, Freedman Truck Ctr., Inc. v. Gen. Motors Corp., 784 F. Supp. 167, 171 (D.N.J. 1992) (noting that New Jersey Franchise Practices Act "reflects the legislative concern over longstanding abuses in the franchise relationship," and that the legislature "recognized the franchisor's superior bargaining position in the franchise relationship").

41. *See, e.g.*, Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1222–23 (3d Cir. 1976) ("Abuses such as arbitrary franchise terminations and fraudulent promotional schemes have been the object of legislative concern.").

42. E. S. Bills v. Tzucanow, 700 P.2d 1280, 1283 (Cal. 1985).

43. *Id.* at 1283–84.

44. *Id.* at 1285–87.

45. *Id.* at 1288 (Mosk, J., concurring).

damages for future lost royalties.[46] Reversing the trial court, the appellate court held that the franchisor's decision to terminate the franchise agreement, not the franchisee's breach of the agreement, was the proximate cause of the lost future royalties.[47] Absent this necessary causal connection, the lost future royalties awarded by the trial court were deemed by the appellate court to be excessive, oppressive, and disproportionate to the loss.[48]

In the decision, the appellate court observed that "franchise agreements are commercial contracts" but they "exhibit many of the attributes of consumer contracts."[49] The court described "a prevailing, although not universal, inequality of economic resources between the contracting parties," stating that franchisees "typically, but not always, are small businessmen or businesswomen" or people "seeking to make the transition from being wage earners and for whom the franchise is their very first business" and that franchisors "typically, but not always, are large corporations."[50] Franchise agreements, the court continued, "tend to reflect this gross bargaining disparity" because they usually are "form contracts the franchisor prepared and offered to franchisees on a take-or-leave-it basis."[51] Owing to what the court saw as great bargaining disparity and adhesion contracts, it concluded: "Franchising involves the unequal bargaining power of franchisors and franchisees and therefore carries within itself the seeds of abuse. Before the relationship is established, abuse is threatened by the franchisor's use of contracts of adhesion presented on a take-it-or-leave-it basis."[52]

Many commentators and participants in franchising challenge this maxim. One commentator argues that prejudging the parties' bargaining power in this way is wrong because "[b]argaining power is never a simple issue and can change instantly and radically upon an infinite array of inputs."[53] Another commentator criticizes the import of this maxim on multiple grounds.[54] First, "classification of franchise agreements as adhesion contracts . . . disregards the fact that would-be franchisees are not limited to purchasing a

46. Postal Instant Press, Inc. v. Sealy, 51 Cal. Rptr. 2d 365, 368–75 (Ct. App. 1996).
47. *Id.* at 369–70.
48. *Id.* at 371.
49. *Id.* at 374–75.
50. *Id.* at 373.
51. *Id.*
52. *Id.* at 374 (quoting Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1222–23 (3d Cir. 1976)); *see* Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1282 (9th Cir. 2006) (quoting *Postal Instant Press Inc.*, 51 Cal. Rptr. at 373). Numerous commentators have repeated this phrase in descriptions of franchising. *See*, *e.g.*, Filemon Carrillo & Jazlyn Cabula, *Claiming Rescission: The Battle for Equity*, 42 Franchise L.J. 47 (2022) (quoting *Postal Instant Press Inc.* and noting that unsuspecting franchisees who do business "with the wrong franchisor can find themselves losing their life savings, struggling with severe debt, and dealing with costly litigation"); Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 Am. Bus. L.J. 659, 713 (2013) (stating that "likened to an adhesion contract, with the power disparity very much weighted toward the franchisor, the franchise agreement 'carries within itself the seeds of abuse'").
53. Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, 45 Wake Forest L. Rev. 607, 625 (2010).
54. Mary deLeo, Note, *Emasculating Goliath: Did* Postal Instant Press v. Sealy *Strike an Unfair Blow at the Franchising Industry?*, 25 W. St. U. L. Rev. 117, 154 (1997).

franchise in order to start a business in their desired area. The option to enter into the market as an independent entrepreneur is always available."[55] Second, the commentator notes that "[the] prospective franchisees are not forced to deal with only a few franchisors whose contract terms are identical; the phenomenal growth in franchising has created competition among franchisors to attract the best from among qualified franchisees."[56]

Another commentator questions the continued applicability of this maxim. Today, franchisees "are more savvy than their counterparts forty years ago, most notably because of the presale information available to them and the widespread emergence of the multiunit franchisee."[57] In fact, the presale information available in modern disclosure documents is "the very information a number of states and the FTC have determined will allow the franchisee to make an informed buying decision."[58]

D. *Franchise Laws Are Liberally Construed to Quell the Harm They Seek to Protect Against*

Some franchise protection statutes include the rule of liberal construction as a statutory mandate.[59] Even without this instruction, courts deem most franchise-related statutes as remedial or protective and therefore interpret them liberally to effectuate their objective to reduce or stop the mischief they are directed to eliminate.[60]

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55. *Id.*

56. *Id.*

57. William Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship*, 28 Franchise. L.J 23, 28 (2008).

58. *Id.*

59. *See*, *e.g.*, N.Y. Gen. Bus. Law § 695(2) ("This article shall be liberally construed to effect the purposes thereof."); Wis. Stat. § 135.025(1) ("This chapter shall be liberally construed and applied to promote its underlying remedial purposes and policies."); A.J. Temple Marble & Tile v. Union Carbide Marble Care, 618 N.Y.S.2d 155, 161 (N.Y. App. Div. 1994), *aff'd*, 625 N.Y.S.2d 904 (N.Y. App. Div. 1995), *aff'd as modified*, 663 N.E.2d 890 (N.Y. 1996) (New York Franchise Sales Act "is remedial in nature, and therefore, to be liberally construed.").

60. *See*, *e.g.*, Khorenian v. Union Oil Co., 761 F.2d 533, 535 (9th Cir. 1985) (Petroleum Marketing Practices Act must be construed liberally to achieve legislative goal of protecting franchisees); Va. Imps., Ltd. v. Kirin Brewery of Am., LLC, 589 S.E.2d 470, 478 (Va. Ct. App. 2003) (Virginia's Beer Franchise Act and Wine Franchise Act are to be liberally construed and applied to promote their underlying purposes and policies); Dr. Pepper Bottling Co. v. Frantz, 842 S.W.2d 37, 41 (Ark. 1992) (noting and applying rule of liberal construction to Arkansas Franchise Practices Act); Bush v. Nat'l Sch. Studios, Inc., 407 N.W.2d 883, 887 n.2 (Wis. 1987) (quoting Wisconsin Fair Dealership Law provision, Wis. Stat. § 135.025, which states as a statutory rule of construction that the "chapter shall be liberally construed and applied to promote its underlying remedial purposes and policies"); Muha v. United Oil Co., 433 A.2d 1009, 1013 (Conn. 1980) (court noting no disagreement with plaintiffs that Connecticut Franchise Act's purpose was to correct abuses in franchise relationships, particularly in the petroleum industry, its provisions are remedial "and should be liberally construed in favor of the class sought to be benefited."); Gentis v. Safeguard Bus. Sys., Inc., 71 Cal. Rptr. 2d 122, 124 (Ct. App. 1998) (remedial or protective statutes like the California Franchise Investment Law "are liberally construed to effect their object and quell the mischief at which they are directed;" accordingly, regarding the definition of a franchise, "this means each element should be construed liberally to broaden the group of investors protected by the law"); Enservco, Inc. v. Ind. Sec. Div., 623 N.E.2d 416, 424–25 (Ind. 1993) (noting that Indiana's franchise fraud statute directs in Section 23-2-2.5-47 that it be liberally construed to prohibit and prevent fraud and assure disclosure of

But liberal construction has its limits. In *Muha v. United Oil Co.*, the lessees of a service station argued that the owner of (and distributor of gasoline to) the station constituted a franchisor under the then-applicable Connecticut statute.[61] Although the legislature had recently amended the statute to expressly qualify this type of business relationship as a franchise, the version applicable to the relevant time period did not, and the Connecticut Supreme Court refused to apply the rule of liberal construction to stretch it so.[62] The court said it was "true that the original franchise act was remedial in nature," and the legislature could have adopted a broader statutory definition of franchisors, but it did not do so; and "courts are not empowered in such a situation to alter the meaning of clear language employed by the legislature."[63] The court concluded that when "the language used by the legislature is plain and unambiguous, there is no room for construction by the courts and the statute will be applied as its words direct."[64]

E. *Ambiguity in a Written Agreement Is Interpreted Against the Drafter*

The fifth maxim relates to contract interpretation, which is appropriate for an industry, like franchising, that relies on written agreements. A contract is ambiguous if reasonably susceptible to more than one meaning.[65] Circumstances can make terms of an agreement ambiguous.[66] The agreement may

sufficient and reliable information for investors to exercise independent judgment in franchise transactions).

61. *Muha*, 433 A.2d at 1012.

62. *Id.* at 1013.

63. *Id.*

64. *Id.* at 1013–14; *see also* Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 911 (9th Cir. 1978) ("[G]ood faith" in the federal Automobile Dealers Day in Court Act, 15 U.S.C. § 1222, has a "limited and restricted meaning and is not to be construed liberally."); Kusel Equip. Co. v. Eclipse Packaging Equip., Ltd., 647 F. Supp. 80, 81 (E.D. Wis. 1986) (once a business relationship is found to be a dealership, the law is liberally construed to effectuate its purpose of protecting dealers, but, the definition of dealership is not to be construed expansively); Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 627 F. Supp. 1202, 1209–10 (S.D.N.Y. 1986) ("[G]ood faith" in Automobile Dealers' Day in Court Act "has a specific, narrow meaning, and is not to be construed liberally.").

65. *See, e.g.*, Knipe Land Co. v. Robertson, 259 P.3d 595, 601 (Idaho 2011) (contract term is ambiguous when there are two different reasonable interpretations, or its language is nonsensical); Cal. Teachers Ass'n v. Governing Bd. of Hilmar Unified Sch. Dist., 115 Cal. Rptr. 2d 323, 328 (Ct. App. 2002) (contract is ambiguous if "reasonably susceptible to more than one interpretation"); Pioneer Peet, Inc. v. Wuality Grassing & Servs., Inc., 653 N.W.2d 469, 473 (Minn. Ct. App. 2002) (stating that writing is ambiguous if, judged by its language alone and without resort to extrinsic evidence, it is reasonably susceptible of more than one meaning).

66. *See, e.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc., 907 S.W.2d 517, 520 n.4 (Tex. 1995) ("If a contract called for goods to be delivered to "the green house on Pecan Street," and there were in fact two green houses on the street, it would be latently ambiguous."); *see also*, Joshua M. Silverstein, *Contract Interpretation and the Parol Evidence Rule: Toward Conceptual Clarification*, 24 Chap. L. Rev. 89, 108 (2020) (noting classic example in the case of Raffles v. Wichelhaus, 159 Eng. Rep. 375 (1864), wherein a contract said that certain cotton would arrive on the ship "Peerless." But two ships had that name, "creating an ambiguity that only became apparent when the language of the agreement was applied to the subject matter of the contract—the cotton on the ship 'Peerless.'").

contain wording that on its face can have multiple meanings.[67] Or an agreement with ostensible facial clarity insofar as the judge is concerned, may be susceptible to other meaning understood by the parties.[68] Countless circumstances, many unanticipated, can generate ambiguity.[69]

When parties advance inconsistent interpretations of a contract, courts often adopt the construction that is unfavorable to the drafter.[70] In Latin, this maxim is *verba chartarum fortuis accipiuntur contra proferentem*, but often shortened to *contra proferentem*.[71] It is a rule of construction "based on elementary notions of fairness—that the drafting party was responsible for including the particular language in the contract and presumably had the greater opportunity to clarify the language in its favor, if that was the parties' intent, or at least to protect its own interests from a lack of clarity."[72] As explained by Blackstone, "the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words,"[73] and by this principle "all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them."[74]

But the principle of construing ambiguities against the drafter is not absolute. For courts to invoke it, they first must find the contract ambiguous. For

67. *See*, *e.g.*, T.G.I. Friday's, Inc. v. Int'l Rest. Grp., Inc., 569 F.2d 895, 898–99 (5th Cir. 1978) (restriction against licensee of T.G.I. Friday's using "names of the days of the week" in any other business was ambiguous as to whether it prohibited use of all seven days, or just certain other days, and construing against drafter did not restrict use of "Saturday" in another business); Donald W. Lyle v. Heidner & Co., 278 P.2d 650, 653 (Wash. 1954) (order for lumber designating delivery in late November/early December set indefinite time and was ambiguous as to time for delivery; it was understood in the industry to mean delivery anytime from December 1 to 15 and understood to allow, if necessary, up to thirty days for arrival of a vessel to ship the product if a vessel was not in the port); *see also* Silverstein, *supra* note 66, at 98 (discussing ambiguity in agreements with illustration based on the *Lyle* case).

68. *See*, *e.g.*, Pac. Gas & Elec. Co. v. G.W. Thomas Drayage Co., 442 P.2d 641, 644 (Cal. 1968) ("[T]est of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.").

69. *See*, *e.g.*, Charter Oil Co. v. Am. Emp'rs' Ins. Co., 69 F.3d 1160, 1167 (D.C. Cir. 1995) ("Latent ambiguity can arise where language, clear on its face, fails to resolve an uncertainty when juxtaposed with circumstances in the world that the language is supposed to govern.").

70. Caterpillar Tractor Co. v. Collins Mach. Co., 286 F.2d 446, 450–51 (9th Cir. 1960) ("[W]hen two inconsistent interpretations of a contract are advanced the construction which is unfavorable to the drafter shall be adopted."); Clise Inv. Co. v. Stone, 13 P.2d 9, 10–11 (Wash. 1932) (same); *see also* St. Charles Foods, Inc. v. Am.'s Favorite Chicken Co., 198 F.3d 815, 821 (11th Cir. 1999) (applying the rule that ambiguity be construed against the drafter); Fiat Distribs., Inc. v. Hidbrader, 381 N.E.2d 1069, 1071 (Ind. Ct. App. 1978) (noting the word "current" in the contract and as applicable to the situation, was ambiguous and its meaning was not made clear in the contract; therefore, it was proper for the trial court to consider parol evidence and to construe the meaning against the drafter of the contract).

71. David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. Colo. L. Rev. 431, 438–39 (2009).

72. Impac Mortg. Holdings, Inc. v. Timm, 255 A.3d 89, 97 (Md. 2021).

73. Herbert Broom, A Selection of Legal Maxims 379 (3d ed. 1852).

74. *Id.*

example, in *NaturaLawn of America, Inc. v. West Group, LLC*, a franchisee sued for violating the franchise agreement's post-termination restrictive covenant, arguing that the covenant should not be enforced because the franchise agreement, which expired by its terms, had not been terminated by either party.[75] The franchisee claimed this at least created a question of ambiguity, which the court should construe against the franchisor.[76] In rejecting the argument, the court stated:

> "[E]xpiration" of an agreement is a more specific type of "termination." The fact that both words appear in other provisions of the Franchise Agreements does not undercut this conclusion. Indeed, the Franchise Agreements provide that the non-compete clause would apply after termination "for any reason." Clearly, "expiration" is one reason for the "termination" of an agreement. There is no substantial reason identified by defendants why a court would bend over backwards to distort the plain meaning of these everyday terms in order to find an ambiguity in the Franchise Agreements so that the agreements might be "interpreted" against [the franchisor] as the drafter of the agreements.[77]

Courts, therefore, first apply other rules of construction, like contract terms must be interpreted according to their plain meaning, and only turn to *contra proferentem* where uncertainty remains.[78] As the California Supreme Court explained, the *contra proferentem* principle "applies only as a tie breaker, when other canons fail to dispel uncertainty."[79]

F. *There Is No Private Cause of Action Under the FTC Franchise Rule*

In 1978, the FTC adopted the regulation entitled *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures*.[80] This rule, generally referred to as the "FTC Franchise Rule" or "Franchise Rule," seeks to regulate the process by which franchises are sold, most notably by requiring franchisors to provide various pieces of information in a certain format.

In the seminal case to address whether the Franchise Rule contains a private right of action, the D.C. Circuit analyzed the history of the Federal Trade Commission Act (FTCA) and various considerations that affect the

75. NaturaLawn of Am., Inc. v. West Grp., LLC, 484 F. Supp. 2d 392, 401 (D. Md. 2007).
76. *Id.*
77. *Id.*
78. Cal. Civ. Code § 1654 ("In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."); AWIN Real Estate, LLC v. Whitehead Homes, Inc., 472 P.3d 165, 170 (Mont. 2020) (noting Mont. Code § 28-3-206 provides: "In cases of uncertainty not removed by" other specified parts of the code, "the language of a contract is interpreted most strongly against the party who caused the uncertainty to exist"); Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 287 (Ct. App. 1998) (explaining that if uncertainty is not removed by other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it).
79. Pac. Gas & Elec. Co. v. Super. Ct., 19 Cal. Rptr. 2d 295, 309 (Ct. App. 1993), *abrogated by* Advanced Micro Devices, Inc. v. Intel Corp., 885 P.2d 994 (Cal. 1994).
80. 16 C.F.R. §§ 436.1–436.11; *see* Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59614, 59621 (Dec. 21, 1978).

analysis whether a statute creates a private right of action.[81] The court concluded that the FTCA

> nowhere purports to confer upon private individuals, either consumers or business competitors, a right of action to enjoin the practices prohibited by the Act or to obtain damages following the commission of such acts. On careful examination of the Act and its legislative history, both when passed in 1914 and amended in 1938, we find strong indication that Congress did not contemplate or intend such a private right of action.[82]

Rather, the FTC is the authority with enforcement authority concerning the FTCA.[83]

Although now well-settled, these early rulings on the absence of a private right of action under the Franchise Rule met resistance. The Franchise Rule, with its mandated pre-offer disclosures, is "analogous to the Securities Exchange Commission Rules on disclosure which have been held to be enforceable by private right of action."[84] In the securities context, private rights of action were implied in areas not expressly provided in the statutes. For example, in *Ernst & Ernst v. Hotchfelder*, the U.S. Supreme Court noted that although Securities and Exchange Commission Rule 10(b) "does not, by its terms, create an express civil remedy for its violation, and there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy, the existence of a private cause of action for violations of the statute and the Rule is now well established."[85] In *J. I. Case Co. v. Borak*, the Court again permitted a private right of action to enforce a Securities Exchange Act regulation, noting that private enforcement "provides a necessary supplement to Commission action."[86]

In fact, the FTC, in its Statement of Basis and Purpose for the Franchise Rule, included language that supported interpreting the final rule to include a private right of action:

> The Commission believes that the courts should and will hold that any person injured by a violation of the Rule has a right of action against the violator under the Federal Trade Commission Act, as amended, 15 U.S.C. §§ 41–58 (1976), and this Rule. The existence of such a right is necessary to protect the members of the class of whose benefit the statute was enacted and the rule is being promulgated, is consistent with the legislative intent of the Congress in enacting the Federal Trade Commission Act, as amended, and is necessary to the enforcement

81. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 987 (D.C. Cir. 1973) ("[P]rivate actions to vindicate rights asserted under the Federal Trade Commission Act may not be maintained.").

82. *Id.* at 988–89; *see also* Drake v. Sometime Spouse, LLC, 784 F. App'x 602, 604 (10th Cir. 2019) (no private right of action under FTC Act); Lingo v. City of Albany Dep't of Cmty. & Econ. Dev., 195 F. App'x 891, 894 (11th Cir. 2006) (same).

83. *See, e.g.*, Roberts v. Cameron-Brown Co., 556 F.2d 356, 361 n.6 (5th Cir. 1977) (noting "regulation is in the hands of the administrative agency, and not the private citizen").

84. Freedman v. Meldy's, Inc., 587 F. Supp. 658, 660 (E.D. Pa. 1984).

85. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) (citing multiple prior precedents).

86. J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

> scheme established by the Congress in that Act and to the Commission's own enforcement efforts.[87]

But in another early case, *Days Inn of America Franchising, Inc. v. Windham*, the U.S. District Court for the Northern District of Georgia rejected the franchisee's argument that the FTC's Statement of Purpose supports a private right of action.[88] The district court emphasized that Congress, not the FTC, decides whether to create a private right of action and "no express or implied evidence exists demonstrating that Congress adheres to the position advanced by the FTC. Indeed, the legislative history . . . reveals Congressional disdain for the FTC's rulemaking procedures."[89] The *Windham* court cited *Freedman v. Meldy's, Inc.*, which noted "Congress' intent has not been shown to have changed in any way as a result of the FTC's 1979 franchise disclosure rules."[90] The district court also noted that "whether or not a private right of action exists for any act of Congress is a matter traditionally left to the judiciary."[91]

As a result of the above cases and others, it is now generally accepted that no private right of action exists under the Franchise Rule.[92]

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87. *See* Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59614. 59723 (Dec. 21, 1978).

88. Days Inn of Am. Franchising, Inc. v. Windham, 699 F. Supp 1581 (N.D. Ga. 1988).

89. *Id.* at 1582–83 (noting that other courts also followed *Freedman* in declining to permit a private right of action).

90. Freedman v. Meldy's, Inc., 587 F. Supp. 658, 662 (E.D. Pa. 1984).

91. *Id.* at 660.

92. *See, e.g.*, Morrison v. Back Yard Burgers, Inc., 91 F.3d 1184, 1187 (8th Cir. 1996) (no private cause of action existing despite knowing violation of Franchise Rule); Banek Inc. v. Yogurt Ventures U.S.A. Inc., 6 F.3d 357, 359 (6th Cir. 1993) (noting lower court dismissed Franchise Rule claim because there is no private right of action under the rule); Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974) ("[T]he provisions of the Federal Trade Commission Act may be enforced only by the Federal Trade Commission. Nowhere does the Act bestow upon either competitors or consumers standing to enforce its provisions."); Senior Ride Connection v. ITN Am., 225 F. Supp. 3d 528 , 531 n.1 (D.S.C. 2016) (noting "no federal private right of action to enforce the Franchise Rule"); A Love of Food 1, LLC v. Maoz Vegetarian USA, Inc., 70 F. Supp. 3d 376, 382 (D.D.C. 2014) ("The FTC can bring suit to enjoin a franchisor's failure to furnish the required information in violation of the Franchise Rule, but no private right of action is available . . . ."); Vino 100, LLC v. Smoke on the Water, LLC, 864 F. Supp. 2d 269, 281 (E.D. Pa. 2012) (Franchise Rule "defines conduct that the FTC considers a violation of § 5 of the Federal Trade Commission Act"; but private parties "are not permitted to enforce § 5 of the Federal Trade Commission Act. Only the FTC may do so."); St. Martin v. KFC Corp., 935 F. Supp. 898, 907 (W.D. Ky. 1996) (Congress intended to make the administrative program for enforcing the FTCA an exclusive one and did not intend to permit a private cause of action under the FTCA and regulations.); Brill v. Catfish Shaks of Am. Inc., 727 F. Supp. 1035, 1041 (E.D. La. 1989) (intent and actual harm are not required to establish violation of the Franchise Rule but there is no private right of action for the violation); Layton v. AAMCO Transmissions, Inc., 717 F. Supp. 368, 371 (D. Md. 1989) (Franchise Rule violation does not give rise to a private cause of action.); *Windham*, 699 F. Supp. at 1582 (Congress's intent of no private right of action had not changed following FTC's statement in favor of private right of action and distinguishing "sole federal court decision supporting" private right of action, *Guernsey v. Rich Plan of Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976), on ground that in *Guernsey* the FTC had taken enforcement action, but had not done so here); Olivieri v. McDonald's Corp., 678 F. Supp. 996, 1000 n.2 (E.D.N.Y. 1988) (noting several courts concluded there is no private right of action under the Franchise Rule); Akers v. Bonifasi, 629 F. Supp. 1212,

However, the absence of a private right of action for violating the FTC Rule, does not necessarily mean no repercussions exist for violating the rule. Many state laws prohibit unfair or deceptive practices.[93] These are often called "Little FTC Acts."[94] In a few states, violation of the Franchise Rule may be grounds for a claim under a Little FTC Act.[95] And some courts even hold that a Franchise Rule violation is a per se Little FTC Act violation.[96]

In *Legacy Academy, Inc. v. Mamilove, LLC*, the Georgia Court of Appeals ruled that a claim under the state's Little FTC Act could be based on violation of the Franchise Rule.[97] Georgia's Little FTC Act states: "When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby."[98] A jury found in favor of a franchisee that there had been a Franchise Rule violation.[99] On appeal, the court ruled that although there is no private cause of action under the Franchise

1221–22 (M.D. Tenn. 1985) (private litigants cannot invoke federal court jurisdiction for violating Franchise Rule, as exclusive remedial power is vested by Congress in the FTC); Legacy Acad., Inc. v. Mamilove, LLC, 761 S.E.2d 880, 892 (Ga. App. 2014), *aff'd in part and rev'd in part on other grounds*, 771 S.E.2d 868 (Ga. 2015) ("[P]lain language of 15 U.S.C. § 45 clearly shows that the statute does not provide a private cause of action.").

93. *See* Stephanie L. Kroeze, *The FTC Won't Let Me Be: The Need for a Private Right of Action Under Section 5 of The FTC Act*, 50 Val. U.L. Rev. 227, 241 (2015) ("Since the 1970's, most every state, in one form or another, has enacted its own Little FTC Acts governing consumer protection law.").

94. *See*, *e.g.*, Tucker v. Sierra Builders, 180 S.W.3d 109, 114–15 (Tenn. Ct. App. 2005) (describing broad scope of Tennessee's Little FTC Act, noting such acts are so designated due to similarity to provisions of the FTCA prohibiting unfair or deceptive trade practices, and explaining the Tennessee Act, "like the little FTC acts of many other states, explicitly provides that it is to be interpreted and construed in accordance with interpretations" of the FTCA by the federal courts).

95. *See*, *e.g.*, Bethany L. Appleby, Robert S. Burstein & John M. Doroghazi, *Cause of Action Alchemy: Little FTC Act Claims Based on Alleged Disclosure Violations*, 36 Franchise L. J. 429 (2017).

96. Nieman v. Dryclean USA Franchise Co., 178 F.3d 1126, 1128–29 (11th Cir. 1999) (under Florida Deceptive and Unfair Trade Practices Act, a franchisee could sue a Florida franchisor for violating the FTC Franchise Rule); Aurigemma v. Arco Petroleum Prods. Co., 734 F. Supp. 1025, 1029 (D. Conn. 1990) (noting that courts construing the Connecticut Unfair Trade Practices Act are to be guided by FTC and judicial interpretations given to the FTCA and allowing claim under that act to proceed where plaintiff's allegations arose from the defendant franchisor's alleged noncompliance with the disclosure requirements of Franchise Rule); Rodopoulos v. Sam Piki Enters., Inc., 570 So. 2d 661, 665 (Ala. 1990) (FTC regulations were admissible in fraud case regarding defendants' duty to disclose and approving trial court's instruction to the jury that in "the course of this trial, there has been reference to regulations promulgated by the Federal Trade Commission. I charge you that you may consider those regulations in determining what duty, if any, the defendants owed the plaintiffs to disclose [their] earnings relative to the operation of [their] business."); Morgan v. Air Brook Limousine, Inc., 510 A.2d 1197, 1206 (N.J. Super. Ct. 1986) (a franchisor's failure to comply with the Franchise Rule is an act or practice in violation of the New Jersey Consumer Fraud Act).

97. Legacy Acad., Inc. v. Mamilove, LLC, 761 S.E.2d 880, 892 (Ga. Ct. App. 2014), *aff'd in part and rev'd in part*, 771 S.E.2d 868 (Ga. 2015).

98. Ga. Code § 51-1-6.

99. *Legacy Acad., Inc.*, 761 S.E.2d at 882.

Rule, the franchisee could pursue a claim under the state's Little FTC Act based on Franchise Rule violations.[100]

Similarly, a Texas state court addressed whether a franchisee could maintain a cause of action against a franchisor under the Texas Deceptive Trade Practices—Consumer Protection Act due to the failure to make required pre-sale disclosures under the Franchise Rule.[101] The Texas Deceptive Trade Practices-Consumer Protection Act states that it applies to violations of the FTCA or its regulations.[102] A jury ruled in favor of the franchisee, and the Texas Court of Appeals upheld the jury verdict, stating:

> [A]ppellants complain that the failure to disclose upon which appellee relies for one of its DTPA claims is based solely on failure to give written disclosures required by the Federal Trade Commission, and that, since there is no private federal remedy, the failure to disclose cannot give rise to a DTPA claim either. Appellee brought this action on the ground that failure to make such written disclosures was a deceptive act under §17.46(b) [of the DTPA]. Appellee clearly did not bring an action under federal law. Appellants' violation of federal law was merely used as a basis for finding an independent violation of the DTPA. The DTPA itself provides in §17.49(b) that: "The provisions of this subchapter do apply to any act or practice prohibited . . . by a rule or regulation of the Federal Trade Commission."[103]

Thus, while the maxim is correct that there is no private cause of action for violating the Franchise Rule, there may be a cause of action under a state's Little FTC Act for violation of the Franchise Rule.

G. *More Than Just a Franchise Law Violation Is Necessary for a Franchisee to Rescind*

In the 1970s, states began enacting laws regulating offers and sales of franchises and ongoing franchise relationships.[104] The laws were a response to the problem of misrepresentations made by franchisors in selling franchises

100. *Id.* at 892–93.

101. Tex. Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873 (Tex. App. 1988).

102. Tex. Bus. & Com. Code § 17.41–17.63.

103. *Tex. Cookie*, 747 S.W.2d at 877; *see* Fla. Auto Auction of Orlando, Inc. v. U.S., 74 F.3d 498, 502 n.2 (4th Cir. 1996) (rejecting an argument that a duty imposed by federal regulations cannot give rise to a state common law claim); TC Tech. Mgmt. Co. v. Geeks on Call Am., Inc., 2004 WL 5154906, at *5 (E.D. Va. 2004) (holding that a franchisee could use the FTC Rule in establishing a fraud by omission claim against a franchisor who concealed information relating to earnings claims); Rodopoulos v. Sam Piki Enters., Inc., 570 So. 2d 661, 666 (Ala. 1990) (holding that federal franchise disclosure rule created a duty to disclose applicable to common law claims).

104. *See*, *e.g.*, William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship*, 28 Franchise L.J. 23, 27–28 (2008) (discussing California Franchise Investment Law, that took effect January 1, 1971; Delaware Franchise Security Law, that took effect July 8, 1970, prohibited termination or nonrenewal of franchised distributors without good cause or in bad faith; New Jersey Franchise Practices Act passed in 1971, which prohibited arbitrary and capricious cancellation of franchises while preserving right of franchisors to safeguard their interests through clear nondiscriminatory standards; and Washington state passage of Franchise Investment Protection Act in 1971, taking effect in 1972).

and other oppressive tactics used by franchisors against franchisees.[105] These statutes can appear to establish strict liability for violations. One court stated that a state's franchise statute "appears to impose absolute legal liability, akin to strict liability, on franchisors that make an "untrue statement of a material fact."[106]

However, courts have generally held that these franchise laws are not strict liability statutes.[107] Even in the *Long John Silver's* decision, quoted above, the court ultimately held that "a franchisee must establish reasonable reliance to merit an award of damages" under Minnesota's franchise law.[108] The North Dakota Supreme Court similarly concluded that "violation of franchise law does not place a franchisee in a position where he is entitled to automatic rescission."[109] In *Two Men & a Truck/International v. Two Men & a Truck/Kalamazoo*,[110] the U.S. District Court for the Western District of Michigan examined an earlier Michigan appellate state court ruling, which held that a franchisor's violation of the franchise law gave the franchisee an unqualified right to rescission (essentially finding the statute to be one of strict liability).[111] The court found the prior ruling "to be an anomaly and contrary to precedent set by the Michigan Supreme Court" and chose to follow the earlier decision's dissenting opinion.[112] The earlier decision's dissent, and thus the rule of decision in *Two Men & a Truck*, endorsed an unclean hands defense to a claim of rescission for violation of the state's franchise law.[113]

105. *See*, *e.g.*, Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 San Diego L. Rev. 709, 713 (2014) (explaining that state legislation and federal rulemaking sought to police franchisor representations and franchisor-franchisee relationships due to reputation of franchisors as dishonest businesspersons looking to swindle investors).

106. Long John Silver's Inc. v. Nickleson, 923 F. Supp. 2d 1004, 1016 (W.D. Ky. 2013); *see also* Brill v. Catfish Shaks of Am., Inc., 717 F. Supp. 1035, 1042 (E.D. La. 1989) (noting Franchise Rule makes it "an unfair or deceptive act or practice for a franchisor to fail to provide a franchisee with" the franchise disclosure document information, and that "intent and actual harm are not required to establish a violation"); Martino v. Cottman Transmissions Sys., Inc., 554 N.W.2d 17, 21 (Mich. Ct. App. 1996) (upon a franchisor's violation of the Michigan Franchise Investment Law, a franchisee has an unqualified right to rescission, whether or not the franchisee has unclean hands); Enservco, Inc. v. Ind. Sec. Div., 623 N.E.2d 416, 423 (Ind. 1993) ("[C]ulpability is not an element of a violation" under Indiana's franchise law, and the absence of language "bearing on mental state" indicated the legislature intended the statute to "operate as strict liability provisions.").

107. *See*, *e.g.*, Dunn v. Nat'l Beverage Corp., 729 N.W.2d 637, 654 (Minn. Ct. App. 2007) ("[T]he franchise statute is not a 'strict liability' statute."). *But see* EV Scarsdale Corp. v. Engel & Voelkers N.E. LLC, 13 N.Y.S. 3d 805, 813 n.6 (App. Div. 2015) (stating that Section 683 of New York's franchise law "is a strict liability statute," and on that basis denying a defendant franchisor's motion to dismiss, but in further comments allowing for the possibility that there may have been no damages).

108. *Long John Silver's Inc.*, 923 F. Supp. 2d at 1016.

109. Peck of Chehalis, Inc. v. C.K. of W. Am., 304 N.W.2d 91, 98 (N.D. 1981).

110. Two Men & a Truck/Int'l v. Two Men & a Truck/Kalamazoo, 955 F. Supp. 784 (W.D. Mich. 1997).

111. *Martino*, 554 N.W.2d at 21.

112. *Two Men & a Truck/Int'l*, 955 F. Supp. at 785 ("[T]his Court finds the dissent in *Martino* to reflect the way the Michigan Supreme Court would apply the remedy of rescission to violations of the [Michigan Franchise Investment Law].").

113. *Id.* at 785–86 (quoting *Martino*, 554 N.W.2d at 24 (Taylor, J., dissenting)).

The case of *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.* presents another example of the absence of strict liability under a state's franchise law.[114] There, a federal district court found the defendant franchisor sold a franchise to a franchisee "without having registered its offering prospectus in the state of Maryland, and, thus, it violated Maryland's registration requirement."[115] But, despite the violation, the franchisee presented no evidence to connect defendant's failure to register its offering prospectus in Maryland to the franchisee's business losses. To the contrary, the record indicated that the failure to register was generally harmless.[116] The court rejected several claims for relief by the franchisee, despite these and other violations.[117] The court concluded that "a franchisee must demonstrate that a franchisor's failure to register caused the harm that the franchisee sustained in order to be entitled to money damages for registration violations."[118]

H. *A Franchise Relationship Alone Does Not Create a Fiduciary Duty*

Fiduciary duty can be an elusive concept in law.[119] Some scholars consider fiduciary relationships to be a subset of contract relationships.[120] Under this notion, fiduciary and non-fiduciary contracts are at opposite ends of a continuum.[121] Others view fiduciary relationships as existing wherever a vulnerable party is called on to trust another[122] or where "one party gives another discretion and control over a critical resource."[123] Hence, a fiduciary relationship can be created by an agreement or can be implied in law.[124] A

114. A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., 70 F. Supp. 3d 376 (D.D.C. 2014).
115. *Id.* at 396.
116. *Id.* at 397.
117. *Id.* at 395.
118. *Id.* at 397; *see also* Cluck-U Chicken, Inc. v. Cluck-U Corp., 358 F. Supp. 3d 1295, 1315 (M.D. Fla. 2017) (ruling that technical violations of the Franchise Rule were not *per se* violations of Florida Deceptive and Unfair Trade Practices Act and a triable issue existed whether misrepresentations and omissions in the sale of a franchise were material and were relied on by Plaintiffs).
119. Kelli Alces, *The Fiduciary Gap*, 40 Iowa J. Corp. L. 351, 355 (2015) (noting fiduciary duty has at times seemed to be one of the most elusive concepts in Anglo-American law).
120. *Id.* at 356.
121. *Id.*
122. *Id.* at 360
123. *Id.* at 358; *see also* Rajala v. Allied Corp., 919 F.2d 610, 614 (10th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) (explaining three kinds of fiduciary relationships: (1) those specifically created by contract such as principal-agent, attorney-client, and trustor-trustee; (2) those created by formal legal proceedings such as guardian/conservator and ward, and executor and administrator of an estate; and (3) those implied in law due to the facts of the transactions and relationship of the parties).
124. *See, e.g.*, Pizza Mgmt., Inc. v. Pizza Hut, Inc. 737 F. Supp. 1154, 1182 (D. Kan. 1990) (Generally, "there are two types of fiduciary relationships: (1) those specifically created by contract such as principal and agent and (2) those implied in law due to the factual situation surrounding the transactions and relationship of the parties to each other and to the transactions. The latter category depends on the facts in each case."); Gen. Bus. Machs. V. Nat'l Semiconductor Datachecker/DTS, 664 F. Supp. 1422, 1425 (D. Utah 1987) (fiduciary or confidential relationship "may be created by contract or by circumstances where equity will imply a higher duty in a relationship because the trusting party has been induced to relax the care and vigilance he would ordinarily exercise.").

comment to the *Restatement (Second) of Torts* states that a fiduciary relation "exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation."[125] Fiduciary relationships can exist though the parties do not designate their relationship as such.[126]

Traditional fiduciary relationships include those among trustees and beneficiaries, agents and principals, lawyers and clients, directors and officers and their corporation, and partners in a partnership.[127] The debate over whether the franchisor assumes any fiduciary duties on behalf of its franchisees has been discussed by scholars and litigated with some frequency.[128] Almost uniformly, courts rule that the franchise relationship does not itself establish a fiduciary relationship.[129]

125. Restatement (Second) of Torts § 874 cmt. A. (1979); *see*, *e.g.*, Mahaska Bottling Co. v. PepsiCo Inc., 271 F. Supp. 3d 1054, 1081 (S.D. Iowa 2017) (quoting section 874).

126. Alces, *supra* note 119, at 358 ("If explicitly calling the relationship fiduciary were required, it would be easy to take advantage of relatively unsophisticated parties and avoid fiduciary obligation entirely. Indeed, we must compare relationships that have not been called fiduciary explicitly to those that typically are fiduciary to decide whether uncertain relationships are fiduciary.").

127. *See generally* Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 Am. U. L. Rev. 75 (2004).

128. *See*, *e.g.*, D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399, 1478 (2002) (noting "courts consistently hold that franchisors have no fiduciary duty"; and though "the issue is persistent," commenting that "courts have reached the correct conclusion"); Marc A. Wites, *The Franchisor as Predator: Encroachment and the Implied Covenant of Good Faith*, 7 U. Fla. J.L. & Pub. Pol'y 305, 325–27 (1996) (discussing the 1979 *Arnott* decision and noting "despite the compelling reasoning in *Arnott*, subsequent decisions refused to find an inherent fiduciary duty in franchise relationships" and "most courts refuse to find a fiduciary duty in the franchise relationship"); Anne L. Austin, *When Does A Franchisor Become a Fiduciary?:* Crim. Truck & Tractor Co. v. Navistar International Transportation Corporation, 43 Case W. Rsrv. L. Rev. 1151, 1161–62 (1993) (noting majority of jurisdictions reject automatic imposition of per se fiduciary duty in a franchise relationship); Harold Brown, *Franchising—A Fiduciary Relationship*, 49 Tex. L. Rev. 650 (1971) (arguing for fiduciary duty of franchisors in favor of franchisees).

129. *See*, *e.g.*, Broussard v Meineke Disc. Muffler Shops, 155 F.3d 331, 348 (4th Cir. 1998) (explaining fiduciary obligations are out of place in relationship of two business entities pursuing their own interests and is unnecessary in view of protection provided by federal regulations); Williams v. Dresser Indus., 120 F.3d 1163, 1170 n. 41 (11th Cir. 1997) ("[E]xcept in cases of franchise terminations or when a duty is created by the express terms of a contract," courts do not impose general fiduciary obligations upon franchisors); Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992) (holding parties to a contract are not fiduciaries, even if contract is a franchise); McGuirk Oil Co. v. Amoco Oil Co., 889 F.2d 734, 737–38 (6th Cir. 1989) (finding no evidence of a confidential relationship); O'Neal v. Burger Chef Sys., Inc., 860 F.2d 1341, 1350 (6th Cir. 1988) (explaining franchise agreements do not give rise to fiduciary relationships); Premier Wine & Spirits v. E. & J. Gallo Winery, 846 F.2d 537, 540–41 (9th Cir. 1988) (bare franchisor-franchisee relationship not enough to establish fiduciary relationship); Bright v. Land O'Lakes, Inc., 844 F.2d 436, 440 (7th Cir. 1988) ("[W]e are unconvinced that the contractual relationship between a distributor, Bright, and a processor, Land O'Lakes or Norris, rises to the level of a fiduciary relationship."); Boat & Motor Mart v. Sea Ray Boats, Inc., 825 F.2d 1285, 1292 (9th Cir. 1987) ("[R]elation between a franchisor and a franchisee is not that of a fiduciary to a beneficiary."); Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 485 (5th Cir. 1984) (noting that, except in franchise termination cases, courts have not imposed fiduciary obligations on franchisors); Murphy v. White Hen Pantry Co., 691 F.2d 350, 355–56 (7th Cir. 1982) (declining to find fiduciary duty); Collins v. Int'l Dairy Queen, 54 F. Supp. 2d 1351, 1352 (M.D. Ga. 1999) (The "vast majority of

Though the absence of a fiduciary duty arising from the franchise relationship itself may be stated as a maxim, this does not mean fiduciary obligations are entirely absent from franchise relationships. The existence of a franchisor-franchisee, dealer-distributor, or manufacturer-distributor relationship has been held "not to preclude a finding of a fiduciary relationship" in particular situations.[130] For example, the concept of a fiduciary duty has been mentioned in the context of terminations.[131] Many courts indicate openness to finding a fiduciary obligation when justified by particular factual circumstances.[132]

One frequently cited case, *Arnott v. America Oil Co.*, did suggest that a fiduciary duty is inherent in franchising.[133] In that matter, a gas station franchisor, characterized as a "major oil company," terminated a franchisee by terminating his lease and evicting him from the service station that he operated.[134] The franchisee originally operated a station in Minneapolis, Minnesota, but the oil company persuaded him to lease and operate a station in Sioux Falls, South Dakota.[135] The oil company repeatedly violated policies promising its franchisee would be free to offer competitive brands of motor oil; to obtain tires, batteries, and accessories from any supplier; to set his

courts who have considered the issue have ruled that a franchisor-franchisee relationship, standing alone, does not create a fiduciary relationship."); AAMCO Transmissions, Inc. v. Harris, 759 F. Supp. 1141, 1147 (E.D. Pa. 1991) (franchise relationship is not fiduciary in nature); Layton v. AAMCO Transmissions, Inc., 717 F. Supp. 368, 371 (D. Md. 1989) (franchisor-franchisee relationship is not fiduciary); Saey v. Xerox Corp., 31 F. Supp. 2d 692, 699 (E.D. Mo. 1998) (noting New York and Missouri courts reject proposition that franchisor-franchisee relationship automatically gives rise to a fiduciary duty); Oil Express Nat'l, Inc. v. Burgstone, 958 F. Supp. 366 (N.D. Ill. 1997) (fiduciary relationship could exist outside traditional attorney-client, principal-agent, trustee-beneficiary, or partnership relationships, but party must prove it is highly dependent on advice of another to establish such duty); St. Martin v. KFC Corp., 935 F. Supp. 898, 908 (W.D. Ky. 1996) (holding no rigid formula or classification establishes what conditions create fiduciary relationships, each individual situation is considered, and decisions do not say a franchise agreement cannot impart a fiduciary relationship but standing alone it does not create a fiduciary duty); Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1362 (D. Kan. 1996) (explaining fiduciary duties do not arise just from franchise relationship in which one party has more discretion than the other and that something above and beyond ordinary franchise relationship must be shown).

130. Collins v. Int'l Dairy Queen, 54 F. Supp. 2d 1351, 1352 (M.D. Ga. 1999); *see also* Gen. Bus. Machs. v. Nat'l Semiconductor Datachecker/DTS, 664 F. Supp. 1422, 1425 (D. Utah 1987) ("Several courts and authorities have recognized that within appropriate circumstances a franchise relationship may give rise to fiduciary duties" and citing decisions).

131. *See* Newark Motor Inn Corp. v. Holiday Inns, Inc., 472 F. Supp. 1143, 1152 (D.N.J. 1979) (noting that cases finding a quasi-fiduciary relationship involved franchise termination).

132. *See*, *e.g.*, Mahaska Bottling Co. v. PepsiCo Inc., 271 F. Supp. 3d 1054, 1081 (D. Iowa 2017) (discussing fiduciary relationships); *Saey*, 31 F. Supp. 2d at 699 (rejecting proposition that no fiduciary relationship may ever exist between a franchisor and franchisee and stating that an examination of the facts is necessary); Carter Equip. Co. v. John Deere Ind. Equip. Co., 681 F.2d 386, 390–91 (5th Cir. 1982) (holding district court did not err in submitting to jury the question whether fiduciary duty existed in particular franchise relationship and explaining rules and circumstances surrounding how to determine if a fiduciary relationship exists); Picture Lake Campground v. Holiday Inns, Inc., 497 F. Supp. 858, 869 (E.D. Va. 1980) (explaining franchise relationship is a business relationship, not a fiduciary relationship).

133. Arnott v. Am. Oil Co., 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

134. *Id.* at 876.

135. *Id.* at 877.

own prices; and would be free from coercion or pressure from the company.[136] The company then pressured the franchisee to remove competitive brands and buy from specified suppliers.[137] The oil company's representatives made misrepresentations and exerted other pressures on the franchisee, including during a severe nationwide gas shortage, which hurt the franchisee's profitability.[138] Eventually, the franchisor cancelled the franchisee's lease for the station location.[139] A jury found that the franchisor made fraudulent representations, breached a fiduciary duty by terminating the franchisee's lease without good cause, and committed other wrongs.[140]

On appeal, the franchisor argued that the evidence did not support the existence of a fiduciary relationship.[141] The Eighth Circuit, which called the existence of a fiduciary relationship a "close question," found the relationship between an oil company and its dealer was a franchise, and found that a fiduciary duty was inherent in that relationship.[142] Looking to other cases, the court indicated the franchisee, by virtue of the franchisor's dominant position and the legal structure of the agreements whose terms the franchisee could not vary, was compelled to rely on the franchisor's good faith.[143] The court also noted legislation restricting franchisors from terminating a franchise without good cause, as an indicator of the fiduciary nature of the franchise relationship.[144] The Eighth Circuit concluded that the district court did not err in instructing the jury that a fiduciary relationship existed between the parties and ample evidence supported the jury verdict that the franchisor breached that duty.[145]

Though the *Arnott* court stated a fiduciary duty is inherent in franchise relationships, subsequent decisions declined to follow or narrowed the scope of the decision. [146] The Eighth Circuit later stated *Arnott* decided only that "*arbitrary termination* of Arnott's service station lease constituted a breach of Amoco's implied duty of 'good faith and fair dealing.'"[147] The court added that, because the duty of good faith and fair dealing is inherent in every business relationship, labeling the duty as "fiduciary" was unnecessary.[148] The Eighth Circuit stated, therefore, that *Arnott* does not stand for the

136. *Id.* at 877–78.
137. *Id.* at 878.
138. *Id.* at 879.
139. *Id.*
140. *Id.* at 876.
141. *Id.* at 881.
142. *Id.*
143. *Id.* at 881–84.
144. *Id.* at 883.
145. *Id.* at 884.
146. *See*, *e.g.*, Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 485 (5th Cir. 1984) (distinguishing *Arnott* as having "applied no more than basic contract principles to hold that the defendant breached a duty of good faith and fair dealing"); Cap. Ford Truck Sales, Inc. v. Ford Motor Co., 819 F. Supp. 1555, 1579 n. 31 (N.D. Ga. 1992) ("*Arnott* takes a distinctly minority position and numerous courts have refused to follow the case.").
147. Bain v. Champlin Petroleum Co., 692 F.2d 43, 48 (8th Cir. 1982).
148. *Id.*

proposition that the grant of a franchise in all instances imposes on the franchisor all the duties and responsibilities which traditionally pertain to a true fiduciary."[149] *Arnott* is thus one more of the cases indicating that a franchise relationship does not by itself establish a fiduciary obligation, but a fiduciary relationship may be found to exist when justified by the facts.[150]

I. *Franchise Laws Are Construed Liberally, but Exemptions Are Construed Narrowly*

State franchise registration and disclosure laws are structured to establish a general rule that prohibits the offer or sale of a franchise in the state, unless the offer and sale are registered, or exempt from registration.[151] A typical provision in a state's franchise registration law states that "it shall be unlawful for any person to offer or sell any franchise in this state unless the offer of the franchise has been registered under this part or exempted . . . ."[152] In practice, the statutes create a general rule requiring a franchise to be registered, and an exception for franchises that are exempt from registration, or excluded by definition from the scope of the law.

Courts routinely hold that the franchise laws, as remedial statutes, are to be construed liberally. As stated by one court: "As a general matter, remedial or protective statutes such as the Franchise Investment law are liberally construed to effect their object and quell the mischief at which they are

149. *Bain*, 692 F.2d at 48; *see also* Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 171 (8th Cir. 1987) ("We have construed the holding in *Arnott* . . . as resting on the implied covenant of good faith and fair dealing, and have held that a franchise or other ordinary business relationship does not alone create fiduciary duties."); Pinnacle Pizza Co. v. Little Caesar Enters., 560 F. Supp. 2d 786, 801 (D.S.D. 2008) (same).

150. In *Roberts v. C.R. England, Inc.*, 318 F.R.D. 457, 510 (D. Utah 2017), the U.S. District Court for the District of Utah, on a motion for class certification, cited *Arnott* for the proposition that "a franchisee relationship may give rise to a fiduciary duty." The court added that the question of fiduciary duty would require addressing if the relationship between independent contractors and defendants, driven by inducement to invest in becoming long haul delivery drivers, leasing vehicles, and entering into independent contractor agreements, together with disparity in access to information, created a fiduciary relationship. *Id.*

151. *See*, *e.g.*, Cal. Corp. Code § 31110 (unlawful to offer or sell any franchise in the state unless the franchise has been registered or is exempt); 815 Ill. Comp. Stat. § 705/5(1) (same); Ind. Code § 23.3.3.5.5 (a person wanting to offer for sale a franchise in Indiana and who is not exempt must register the franchise with the Indiana Securities Commissioner); Md. Code Bus. § 14-214; Minn. Stat. § 80C.02; N.Y. Gen. Bus. Law § 683.1; Va. Code Ann. §13.1-560; Wash. Rev. Stat. § 19.100.020(1); *see also* Tyerman, *supra* note 14, at 1124 ("The proposed Franchise Investment Law makes it unlawful for any franchisor to offer or sell any franchise in this state unless the offer has been registered or exempted."). State franchise registration and disclosure laws are modeled on securities laws, which have the same general structure. *See*, *e.g.*, Keating v. Superior Court, 645 P.2d 1192, 1202–03 (Cal. 1982), *rev'd in part, appeal dismissed in part sub nom.*, Southland Corp. v. Keating, 465 U.S. 1 (1984) ("California's policy of protecting judicial remedies for this state's franchise investors was patterned after, and is consistent with, federal policy in the analogous area of securities."); *see also* Neal H. Brockmeyer, *Regulation of Securities Offerings in California: Is It Time for a Change After a Century of Merit Regulation?*, 54 Loy. L.A. L. Rev. 1, 60–61 (2020) (noting 1933 Securities Act prohibited offer or sale of securities unless a registration statement is filed with the SEC and is in effect or the offer or sale is exempt).

152. Cal. Corp. Code § 31110. Similar or equivalent formulations appear in 815 Ill. Comp. Stat. § 705/5(1); Ind. Code § 23.3.3.5.5; Md. Code Bus. § 14-214; Minn. Stat. § 80C.02; N.Y. Gen. Bus. Law § 683.1; Va. Code Ann. § 13.1-560; Wash. Rev. Stat. § 19.100.020(1).

directed."[153] This principle in franchise laws follows from the same principle applied in the securities laws[154] and more broadly to rules on construing remedial legislation generally.[155] This principle of liberal construction means that, when defining and applying terminology of the law, the elements are likewise "construed liberally to broaden the group of investors protected by the law and to carry out the legislative intent."[156]

However, this maxim of liberal construction does not mean that every business relationship falls within the coverage of a franchise law. As stated by the Arkansas Supreme Court, "[T]he business relationship created by this contract was not a franchise within the meaning of that term in [the Arkansas Franchise Act]. We give a liberal construction to the act to effectuate its remedial purposes. However, we must still apply its provisions according to their plain meaning."[157] The court noted that the legislature intended the state's franchise law to apply where a person grants another a license to "sell or distribute goods or services within an exclusive or nonexclusive territory."[158] But the case before the court concerned insurance: the defendant "maintained no inventory, had no authority to set prices, and could not enter into a binding contract,"[159] and had authority "no further than to solicit and procure applications for insurance."[160]

In contrast to the liberal interpretation of franchise laws, exemptions and exclusions from the coverage of the law are construed narrowly.[161] This prin-

153. Kim v. Servosnax, Inc., 13 Cal. Rptr. 2d 422, 427 (Ct. App. 1992); *see* Thompson v. Amoco Oil Co., 903 F.2d 1118, 1119 (7th Cir. 1990) (explaining Petroleum Marketing Practices Act is Congress's attempt to decrease bargaining power disparity between franchisors and franchisees, and, as remedial legislation, must be given a liberal construction consistent with its purpose to protect franchisees).

154. *See*, *e.g.*, Gordon v. Drews, 595 S.E.2d 864, 868 (S.C. Ct. App. 2004) ("[S]ecurities laws are remedial in nature and, therefore, should be liberally construed to protect investors."); Blau v. Redmond, 240 S.E.2d 273, 276 (Ga. Ct. App. 1977) ("Georgia Securities Act is remedial in nature, intended for the protection of investors, and is to be broadly and liberally construed to effectuate its aim.").

155. *See*, *e.g.*, State *ex rel.* Hodge v. Town of Turtle Lake, 508 N.W.2d 603, 606 (Wis. 1993) (holding that state open meeting law should be construed liberally to achieve its purpose of providing public full information regarding government affairs, while exemption should be construed strictly).

156. *Kim*, 13 Cal. Rptr. 2d at 427.

157. Stockton v. Sentry Ins., 989 S.W.2d 914, 917 (Ark. 1999).

158. *Id.*

159. *Id.*

160. *Id.*; *see* Super Value Stores, Inc. v. D-Mart Food Stores, Inc., 431 N.W. 2d 721, 726 (Wis. Ct. App. 1988) (Wisconsin Fair Dealership Law should be liberally construed to promote its underlying purposes and policies, but agreement expressly permitted alleged conduct and defendant therefore did not violate plain language of statute defendant was alleged to have violated; a different conclusion would not be liberal construction but would mean rewriting the statute).

161. *See*, *e.g.*, Morris v. Int'l Yogurt Co., 729 P.2d 33, 35–36 (Wash. 1986) (exemptions normally construed narrowly and require strict compliance); City of Hesperia v. Lake Arrowhead Cmty. Servs. Dist., 250 Cal. Rptr. 3d 82, 94 (Ct. App. 2019) (statutory exemptions must be narrowly construed); Bd. of Medical Quality Assurance v. Andrews, 260 Cal. Rptr. 113, 119 (Ct. App. 1989) ("[S]tatutes conferring exemptions from regulatory schemes are narrowly construed."); *see also* Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 673 F. Supp. 1493, 1501–02 (C.D. Cal. 1987) (franchisor not qualifying for exemption under two states' franchise laws due to failing, prior to

ciple, too, follows from the same principle applied in the securities laws[162] and other laws.[163]

III. Conclusion

Maxims provide useful guideposts in understanding the law, summarizing historical wisdom, and communicating well-established rules and principles of law to clients, courts, and the community. The law is filled with maxims of law and jurisprudence. As the field of franchise law has developed, it is now possible to recognize and state some acquired wisdom as maxims. As the field continues to develop, additional elements are likely to be recognized and established as useful maxims.

selling the franchise, to file required exemption notices), *aff'd in part*, *remanded in part*, 890 F.2d 165 (9th Cir. 1989).

162. *See*, *e.g.*, U.S. v. Custer Channel Wing Corp., 376 F.2d 675, 678 (4th Cir. 1967) (Section 5 of the Securities Act being for protection of the public, the terms of an exemption must be strictly construed against the one claiming it); Gordon v. Drews, 595 S.E.2d 864, 868 (S.C. Ct. App. 2004) ("We are mindful that we must narrowly construe exemptions under the Act because the securities laws are remedial in nature and, therefore, should be liberally construed to protect investors."); Blau v. Redmond, 240 S.E.2d 273, 276 (Ga. Ct. App. 1977) (noting that while securities law is to be broadly and liberally construed to effectuate its aim, "its exceptions must be narrowly viewed").

163. *See*, *e.g.*, State *ex rel.* Hodge v. Town of Turtle Lake, 508 N.W.2d 603, 606 (Wis. 1993) (noting that state open meeting law should be construed liberally to achieve its purpose of providing public full information regarding government affairs, while exemption should be construed strictly); Cmty. Lutheran Sch. v. Iowa Dep't of Job Serv., 326 N.W.2d 286, 289 (Iowa 1982) (tax exemption statutes being strictly construed with doubts resolved in favor of taxation and against exemption); Town of La Pointe v. Madeline Island Ferry Line, 508 N.W.2d 440, 442 (Wis. App. 1993) (same).