

## Choice of Law in Franchise Agreements

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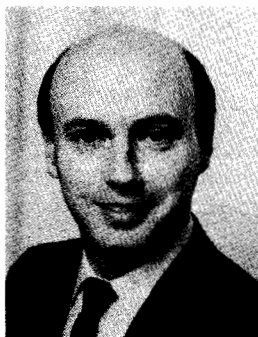
### I. Introduction

Franchise relationships commonly cross state lines, and franchise agreements usually contain a choice-of-law provision. For the sake of uniformity, the franchisor typically chooses the same law to govern all agreements, regardless of where the prospective franchisees are located, and the chosen law is usually the law of the state in which the franchisor's principal office is located.

A number of states have laws aimed at protecting local franchisees.<sup>1</sup> Many of these laws restrict the ability of the franchisor to terminate a franchise agreement without good cause. When a franchisor terminates a franchisee agreement, the terminated franchisee may seek to invoke the protection of the franchise law of the state in which the franchisee is located, notwithstanding the fact that the agreement provides that the law of the franchisor's state applies. Will a court honor the contractual choice of law in such a case or will it apply the franchise law of the state in which the franchisee is located?

The answer depends on whether application of the law chosen in the contract violates the fundamental policy of the franchisee's state. If so, as a rule, the chosen law will not apply. Where the franchise business is located in a state that has a protective franchise law, most courts have applied such franchise law regardless of the choice of law set forth in the contract, holding that application of the chosen law would be contrary to a fundamental policy of the franchisee's state.

In two recent cases, however, the Sixth and Eighth Circuits applied the law chosen by parties. These courts did not hold that the application of such law was not contrary to the fundamental policy of the franchisee's state as a general matter. Instead, the court in each case examined the relationship of the parties and determined that the franchisee in that particular case did not need the special protection



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of the local franchise law. Based on a determination that the litigating parties were of equal bargaining power, these courts declined to find that application of the law chosen by the parties was contrary to the fundamental policy of the franchisee's state. In *Modern Computer Systems v. Modern Banking Systems*,<sup>2</sup> the Eighth Circuit declined to apply the franchise relationship law of Minnesota, the state in which the franchise was located, citing the parties' choice of Nebraska law. In *Tele-Save Merchandising v. Consumers Distributing*,<sup>3</sup> the Sixth Circuit declined to apply the Ohio Business Opportunity Plans Act, citing the contractual choice of the law of New Jersey, the franchisor's state.

This article reviews these cases. It also reviews cases in which franchisees have sought to invoke the protection of the franchise law of the franchisor's state rather than the law of the state in which the franchisee is located, citing the contractual choice of the law of the franchisor's state. Will the franchise law of the franchisor's state apply because the contract calls for the application of the law of the franchisor's state? Can such a choice extend the territorial reach of such law? These issues will typically arise where there is no franchise law in the franchisee's state. The holdings in these cases usually turn on the territorial reach of the particular

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## choice of law

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statute. In a few cases, however, the franchise law of the franchisor's state was applied based on the contractual choice of law.

### II. Choice of Law Principles

Generally speaking, courts will enforce the parties' choice of law as set forth in their written agreement. This is consistent with the principles set forth in the *Restatement (Second) of Conflict of Laws*<sup>4</sup> and the Uniform Commercial Code.<sup>5</sup> The rationale of the courts is their desire to protect the autonomy and justified expectations of the parties. Honoring the parties' contractual choice of law promotes certainty and predictability in contractual relations.<sup>6</sup> These are basic objectives of contract law.

This rule has exceptions, however. Under the *Restatement*, the law chosen by the parties will not be applied if the chosen state has no "substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."<sup>7</sup> Under the Uniform Commercial Code, the law of the state chosen by the parties must bear a "reasonable relation" to the parties or the transaction.<sup>8</sup> The principal reason for this requirement is to ensure that the contractual choice of law is not used in a local transaction to evade an otherwise applicable local law.<sup>9</sup> In practice, the parties' choice of law will virtually always be reasonable.<sup>10</sup>

In some situations, a court will not honor the choice of law of the parties even where there is a reasonable basis for the parties' choice. These are the situations in which application of the law of the chosen state would be contrary to a fundamental policy of a state that has a materially greater interest. The fundamental policy principle is set forth in section 187(2)(b) of the *Restatement*.<sup>11</sup>

For example, where the contract provides that the law of the franchisor's state will govern, the court may apply the franchise law of the franchisee's state even though the state of the franchisor bears a reasonable relation to the parties or the transaction. In such a case, the court might reason that the franchisee's state is the one with a materially greater interest and that application of the law of the franchisor's state would be contrary to a fundamental policy of the franchisee's state. The fact that such law is a matter of fundamental policy may be specifically indicated in the statute or it may be implied from a statutory provision that the protections of such law cannot be waived by contract or that violations are subject to criminal penalties.

In addition, contractual choice-of-law provisions are usually intended to specify the law that will apply to the interpretation and construction of contractual provisions. A contractual choice-of-law provision will not affect tort law and other matters of local concern.<sup>12</sup> Arguably, many of the

requirements of the franchise laws are matters of local concern and do not relate to questions of contract law.<sup>13</sup> In the franchising cases, however, most courts have focused on the issue of whether these matters of local concern are of fundamental policy.

Although a number of theories of conflicts of law have been formulated by scholars and used by the courts,<sup>14</sup> most courts facing the question of whether to apply the protective law of the franchisee's state in the face of a contractual provision that the law of the franchisor's state will govern have cited the *Restatement*. Therefore, the remainder of this section analyzes the *Restatement* in more detail.

Under section 187 of the *Restatement*,<sup>15</sup> the law chosen by the parties will apply if the chosen law on the issue could have been set forth as a contractual provision. Even if the chosen law on the issue could not have been set forth as a contractual provision, it will be enforced as long as there is a reasonable basis for the choice and it is not contrary to a fundamental policy of a state that has a materially greater interest.

In a *Restatement* analysis, then, the first question is whether the parties could have resolved the issue by an explicit provision in their agreement directed to that issue.<sup>16</sup> If such a contractual provision would be effective, the choice will be enforced. However, if the parties could not have re-

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solved the issue by means of such a contractual provision, a court following the *Restatement* will move on to the next prong of the analysis.

In *Sheldon v. Munford*,<sup>17</sup> a Georgia corporation granted Indiana residents a franchise for a store in Indiana. The agreement provided that Georgia law governed. The franchisee plaintiffs alleged that the defendants were unfairly competing with them in violation of Indiana's Deceptive Franchise Practices Act. Citing section 187(1) of the *Restatement*, the court held that the first step in the analysis was to determine if the contested issue was one which the parties could have resolved by an explicit provision in their agreement. If so, held the court, then the chosen law would govern. In fact, the parties did include a noncompete provision in the agreement that, in substance, provided the franchisee with the protection it would have had under Indiana law. The court applied the laws of Georgia, as chosen

by the parties, rather than Indiana's Deceptive Franchise Practices Act. The court held that because there was no conflict, there was no need to go any further with the analysis.<sup>18</sup>

In most franchise cases in which this question arises, the issue is not one the parties could have determined by explicit agreement. For example, assume these facts. The franchisee is seeking an injunction against termination pursuant to the franchise laws of the state in which the franchise is located. Such laws specifically provide for injunctive relief and do not permit waiver of the franchisee's rights by contract. The agreement provides that the laws of the franchisor's state apply. The laws of the franchisor's state do not provide for injunctive relief to prevent a franchisor from terminating a franchise agreement. The issue is whether injunctive relief is available. Could the agreement have specifically provided that injunctive relief is not available? The answer is no; such a provision would not have been enforceable in the franchisee's state. Therefore, the issue is not one the parties could have resolved by an explicit provision in their agreement directed to the issue. Accordingly, the chosen law would not apply under this first prong of the analysis.

If the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, the *Restatement* provides that the law of the state chosen by the parties will nevertheless govern except in either of two cases: where there is no reasonable basis for the parties' choice or where application of the law of the chosen state would be contrary to a fundamental policy of the state whose laws would apply in the absence of a choice-of-law provision.

The law of the franchisor's state is always a reasonable basis for the parties' choice. At least one of the parties has a substantial relationship to the chosen state, and the selection of one law to apply to all of the franchisor's agreements allows for uniform interpretation.

This leaves three questions under section 187(2)(b) of the *Restatement*. First, which state's laws would apply under section 188 of the *Restatement* in the absence of a choice? If the law of the chosen state would apply, that is the end of the inquiry; that law will apply. Section 188(1) of the *Restatement* provides that the law of the state that has the most significant relationship to the transaction and the parties will apply.<sup>19</sup> The state with the most significant relationship is determined by reference to the principles in section 6 and the contacts listed in section 188(2) of the *Restatement* according to their relative importance with respect to the particular issue. These principles include the policies of the forum and the other interested states, the protection of justified expectations, predictability of result, and ease in the determination of the law to be applied.<sup>20</sup>

In the absence of a choice-of-law provision, it is most likely that the law of the franchisee's state will govern. The franchise laws are generally intended to protect local franchisees. The franchise agreement is largely performed in the

state in which the franchise is located.<sup>21</sup> The *Restatement* also provides generally that a contract for the rendition of services will be governed by the law of the state where the contract requires that the services be rendered.<sup>22</sup> Franchise agreements can be characterized as agreements for the rendition of services.<sup>23</sup> Such agreements are often negotiated in the franchisee's state.<sup>24</sup> For all of these reasons, the laws of the franchisee's state would probably apply in most, if not all, cases in the absence of a contractual choice-of-law provision.

The second question under section 187(2)(b) of the *Restatement* would be the following: If the laws of a state other than the chosen state would apply in the absence of a choice-

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of-law provision, does the state whose law would apply have materially greater interest than the chosen state in the determination of the particular issue? If so, the analysis proceeds to the next question. Where the issue involves the protection of a franchisee under the laws of the state in which the franchise is located, that state will almost always have a materially greater interest than the state of the franchisor. The franchisee's state has a greater interest in applying its laws to the local franchise than does the franchisor's state in general contractual relations of its residents.

The third question is whether application of the chosen law would be contrary to a fundamental policy of the state with a materially greater interest. If so, the chosen law will not apply. In our example, the issue is whether application of the law of the franchisor's state would be contrary to a fundamental policy of the state in which the franchise is located. If so, the law of the franchisee's state will apply rather than the chosen law of the franchisor's state. This was the central issue facing the Eighth Circuit and the Sixth Circuit in their recent decisions.

### III. Invoking the Protective Law of the Franchisee's State

A. Modern Computer Systems and Tele-Save  
*Modern Computer Systems* involved a conflict between the franchise relationship laws of Nebraska and Minnesota. The plaintiff, located in Minnesota, sought to enjoin termination, alleging violations of the Minnesota Franchise Act.

The district court in Nebraska, citing the parties' choice of Nebraska law, denied injunctive relief on the basis that the Minnesota Franchise Act did not apply. The circuit court reversed and applied Minnesota law on the basis that Minnesota had the most significant relationship and that application of Nebraska law would be contrary to the fundamental

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policy of Minnesota.<sup>25</sup> On rehearing, this decision was vacated and the court affirmed the holding of the district court, denying injunctive relief.<sup>26</sup> The court held on rehearing that no fundamental public policy of Minnesota overrides the choice-of-law provision.

The court found first that Minnesota did not have a greater interest than Nebraska. In reaching this conclusion, the court looked at the contacts between the parties and the two states, finding that they were "fairly evenly divided between Nebraska and Minnesota."<sup>27</sup> Next, the court held that this was not a case of a financially powerful franchisor taking advantage of an inexperienced franchisee. The court noted that "[S]ome evidence of oppressive, unreasonable or unfair use of superior bargaining position, as in a contract of adhesion, is required before a court can justifiably disregard a mutually agreed upon choice-of-law clause."<sup>28</sup>

The court's emphasis on the relative bargaining power of the parties was based entirely on the holding in *Tele-Save Merchandising v. Consumers Distributing*,<sup>29</sup> in which the Sixth Circuit had held the parties' choice of New Jersey law prevailed over the Ohio Business Opportunity Plans Act, which otherwise would have applied because of the plaintiff's residence in Ohio. In *Tele-Save*, the court held that the Ohio Business Opportunity Plans Act did not represent a fundamental policy of Ohio. A statute embodies a fundamental state policy, held the court, if it is designed to protect a person against the oppressive use of superior bargaining power. In this case, the contract "was freely negotiated by aggressive and successful business executives, untainted by the suspicion and misgivings characteristic of adhesion contracts."<sup>30</sup>

In addition to allegations of Ohio statutory violations, the complaint alleged claims for breach of contract and fraud, which were actionable under New Jersey law. The court held that there would be no significant difference in the application of the laws of the two states. The court also rejected

the argument that section 6(1) of the *Restatement*<sup>31</sup> required the application of Ohio law, again pointing to the equality of bargaining power of the parties.

### B. *The Dissenting Opinions*

In both *Modern Computer Systems* and *Tele-Save*, there were vigorous dissents that would have applied the law of the state in which the franchise business was located. In *Modern Computer Systems*, the dissent found that the contested issue was not one which could have been resolved by a contractual provision and that Minnesota had a materially greater interest than Nebraska in the outcome of the issue.<sup>32</sup> The dissent then held that application of Nebraska law would violate a fundamental policy of Minnesota.<sup>33</sup>

The dissent gave several reasons for its fundamental policy holding. First, the dissenting judges cited the antiwaiver provision of the Minnesota Franchise Act.<sup>34</sup> Second, the dissent pointed out that the Nebraska Franchise Practices Act extends only to franchises within the state. Thus, application of Nebraska law would leave *Modern Computer* without the remedies available under either state franchise law. This would be contrary to the purpose of the Minnesota legislature to afford franchisees in the state more protection than had been available under common law. Third, the dissent cited Minnesota cases specifically holding that any attempt to narrow the applicability of the Minnesota Franchise Act violates public policy. Finally, the dissent held that the *Tele-Save* case, on which the majority relied, "is based on faulty reasoning."<sup>35</sup>

The Minnesota Legislature . . . did not exempt from the scope of the franchise act those franchisors who have equal bargaining power with their franchisees. The presumption on the part of the Legislature is that all franchise transactions must be regulated to avoid unfair trade practices. The Legislature has decided that all such agreements are subject to state regulation, not just those found unfair after the fact."<sup>36</sup>

This is the core of the difference between the majority and the dissent. The majority looked at the intent of the legislature and decided that such intent was not served in the particular case. However, the laws themselves do not make a distinction based on bargaining power. If an arrangement falls within the scope of one of these laws, then the protections afforded by that law are available to the franchisee regardless of any actual lack of equality of bargaining power of the parties.

In his dissenting opinion in the *Tele-Save* case, Judge Milburn indicated that New Jersey common law would not provide an adequate remedy.<sup>37</sup> Citing section 6 of the *Restatement* and the language of the Ohio Business Opportunity Plans Act,<sup>38</sup> Judge Milburn also held that the "Ohio legislature expressly intended the Act to apply to these facts, and this court . . . may not disregard the directions of the Ohio legislature."<sup>39</sup>

Judge Milburn held that the Ohio law was indeed a matter of fundamental policy:

Ohio has a clearly expressed fundamental policy of protecting small, inexperienced purchasers of business opportunity plans from the unfair and misleading practices often utilized by economically superior sellers of business opportunity plans. . . . The fact that the Ohio legislature considered these protections fundamental is evidenced by the fact that Ohio provided criminal sanctions for violations of the Act.<sup>40</sup>

He also pointed to the fact that Ohio has expressed a fundamental policy of prohibiting enforcement of provisions waiving the protections of the Act.<sup>41</sup>

One may sympathize with the desire of the courts in *Modern Computer Systems* and *Tele-Save* to find an exception to the application of the franchise laws when equity did not require such application. The franchise relationship laws are flawed to the extent that they assume that all franchisees are in need of protection against powerful franchisors. The difficulty with these decisions, however, is that the laws in question were clearly based on fundamental policy; the laws themselves made no exception based on the relative bargaining power of the parties. Rather than denying that a matter of fundamental policy was involved, the court in each case might have acknowledged its decision for what it was, namely, an equitable exception to the law. Another remedy would be to change the law itself.

### C. Other Cases

*Modern Computer Systems* and *Tele-Save* are not the only cases in which a court declined to apply the franchise relationship law of the franchisee's state based on the contractual choice of the law of the franchisor's state. In *Sullivan v. Savin*,<sup>42</sup> the court honored the parties' choice of New York law, declining to apply the Indiana Deceptive Franchise Practices Act in a dispute involving the termination of a franchise agreement. The plaintiff had been appointed a dealer of the defendant's copiers in part of Indiana. The termination would have been lawful under New York law but unlawful under Indiana law. The court did not analyze whether the application of New York law would violate the fundamental policy of Indiana. The court also did not refer to the language of the Indiana Act specifically indicating that it applies to any agreement with "a franchisee who is a resident of Indiana. . . ."<sup>43</sup>

Most courts, however, have held that the parties to a franchise agreement cannot avoid the franchise law of the state in which the franchisee is located by providing in their agreement that the laws of another state will govern. In *Bush v. National School Studios*,<sup>44</sup> the Supreme Court of Wisconsin held that a Wisconsin dealer was entitled under the Wisconsin Fair Dealership Law to damages for wrongful termination by a Minnesota company notwithstanding the parties' choice of Minnesota law. This holding was based on specific legislative language declaring the Wisconsin Fair Dealership Law to be fundamental policy and providing that its effect cannot be varied by contract. Similarly, in *Lulling v. Barnaby's Family Inns*,<sup>45</sup> agreements between an Illinois

franchisor and its Wisconsin franchisees contained a choice of Illinois law and forum. The federal district court in Wisconsin declined to dismiss the case, holding that the Wisconsin Franchise Investment Law embodies public policy that can best be dealt with by Wisconsin courts.

Similar decisions have been reached with respect to the franchise laws of other states. In *Winer Motors v. Jaguar Rover Triumph*,<sup>46</sup> the New Jersey court applied the Connecticut relationship law notwithstanding the parties' choice of New Jersey law. The plaintiff was a Connecticut dealer and the defendant was a New Jersey auto importer. The court held that Connecticut was "the state with the overriding interest in the fair treatment of its franchisees."<sup>47</sup> In *Carlos v. Philips Business Systems*,<sup>48</sup> the plaintiff had places of business in and franchise agreements for parts of New Jersey, Connecticut, and Ohio. The defendant was a supplier whose principal place of business was in New York. Although the agreements provided that New York law would govern, the court applied the franchise relationship laws of Connecticut and New Jersey with respect to the franchise agreements covering those states.<sup>49</sup>

In *R & R Associates v. Deltona*,<sup>50</sup> the court held that a Connecticut franchisee was entitled to the protection of the Connecticut franchise relationship law notwithstanding the contractual choice of Florida law.<sup>51</sup> The court cited the anti-waiver provision of the Connecticut franchise relationship law, holding that the choice-of-law provision, "to the extent that it would operate to deprive the plaintiff of his rights under the Act, must be considered void."<sup>52</sup> In addition, the court held that application of Florida law would be contrary to important Connecticut policy.

In *Huebner v. Sales Promotion*,<sup>53</sup> the Washington Court of Appeals affirmed an award of damages and rescission on the basis that the defendants had unlawfully offered and

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sold a franchise not registered in Washington, although the agreement provided that Texas law would govern.

In an action by a sales representative in Puerto Rico against an Indiana manufacturer, a federal district court, citing the *Restatement*, held that the application of Indiana law would frustrate a fundamental policy of Puerto Rico as set forth in the Puerto Rico Dealers' Act.<sup>54</sup> The agreement provided that Indiana law would govern.

The holdings in *Modern Computer Systems* and *Tele-Save*, then, are contrary to the holdings of most courts that have faced similar issues. The desire of the courts in *Modern Computer Systems* and *Tele-Save* to avoid application of franchise relationship laws under the circumstances of these particular cases is understandable. Once the court in each case found a lack of inequality of bargaining power, it saw no need to extend to the franchisee the special protection of the law of the franchisee's state. Unfortunately, the law itself does not make such an exception. Also, these courts may have gone too far in holding that no fundamental policy is involved as a general matter. The Ohio Business Opportunity Plans Act, which the franchisee in the *Tele-Save* case sought to invoke, specifically provides that its application is a matter of public policy.<sup>55</sup> The franchise relationship laws of California and Delaware also specifically provide that the protections they afford are a matter of public policy.<sup>56</sup> In Wisconsin, the legislature has specifically declared not only that the Wisconsin Fair Dealership law is a matter of public policy, but also that there is "inherently" an inequality of bargaining power between franchisors and franchisees.<sup>57</sup> What is a court to do when the facts of a particular case are different from those proclaimed by the legislature? As an equitable matter, these holdings are fair.

#### IV. Invoking the Protective Law of the Franchisor's State

The discussion above has examined the application of the protective franchise law of the franchisee's state where the contract provides that the law of the franchisor's state will govern. The issue has been whether application of the law of the franchisor's state would be contrary to a fundamental policy of the franchisee's state. A related question arises where, under the same facts, the franchisee seeks to invoke the protective franchise law of the franchisor's state rather than the law of its own state. This might happen where the franchisee's state has no franchise law. Which law will apply, then, where the agreement calls for the application of the law of the franchisor's state, the franchise is located in another state, and the franchisee seeks the protection of the franchise relationship law of the chosen state?

##### A. Franchise Relationship Laws

Most courts faced with this issue have held that the franchise law of the franchisor's state will not apply. The reason is that, in most cases, the franchise law of the franchisor's state applies only to franchise businesses located within the state. Most of the state franchise relationship laws specifically apply when the franchisee has a place of business within the state.<sup>58</sup> Therefore, even applying these laws would not afford protection to the out-of-state franchisee in most cases.<sup>59</sup>

In *Premier Wine & Spirits v. Gallo*,<sup>60</sup> a federal district court in California held that the California Franchise Relations Act did not apply where the franchisee was not dom-

iciled in California and the franchise business was not operated in California, notwithstanding the choice of California law. In that case, a South Dakota wine distributor was licensed as a wholesaler of alcoholic beverages in South Dakota and California but only operated a business in South Dakota. The defendant supplier was located in California, and the agreement provided that California law would govern.<sup>61</sup>

In *Bimel-Walroth v. Raytheon*,<sup>62</sup> the court held that the Wisconsin Fair Dealership Law did not apply when the dealer was out of state. In that case, a Wisconsin manufacturer sold its home laundry appliances to the plaintiff, an Ohio distributor. The manufacturer terminated the agreement and the plaintiff sued, among other things, for viola-

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tion of the Wisconsin Fair Dealership Law, citing the choice of Wisconsin law in the agreement. The court cited section 135.02(5) of the Wisconsin Fair Dealership Law, which provides that "'Dealer' means a person who is a grantee of a dealership situated in this state."

However, an argument used successfully by a franchisee in one case was that the choice was that of the franchisor. In *Dep't of Motor Vehicles v. Mercedes-Benz*,<sup>63</sup> a Florida court held that the New Jersey Franchise Practices Act applied where the agreement called for the application of New Jersey law, even though the franchisee and the franchise business were in Florida. The court held that since the New Jersey resident franchisor contracted in New Jersey to have New Jersey substantive law apply to it, "it cannot now be heard to complain about the extraterritorial application of the act."<sup>64</sup> The court did not discuss the specific provision of the statute limiting the application of the Act to a franchise "the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey."<sup>65</sup>

##### B. Territorial Reach of Franchise Disclosure Laws

The territorial reach of the state franchise registration and disclosure laws is not as clearly limited to the state in which the franchise business is located. These laws generally apply to offers and sales made in the state.<sup>66</sup> Under most of these laws, an offer or sale is in the state "if an offer to sell is made or accepted in this State or an offer to buy is accepted in this State," or words substantially to this effect.<sup>67</sup>

Despite their apparent similarity, these laws vary widely in the scope of their application and exemptions. The Vir-

ginia and Indiana franchise laws clearly do not apply where the franchise business and the franchisee are not located in the state.<sup>68</sup> In some states, there is an exemption from registration, but not from the disclosure requirements, if the franchise business is not located in the state and the franchisee is not domiciled in the state.<sup>69</sup> In two states, there is an exemption from the registration requirements for an offer to a small number of franchisees in the state; however, this exemption does not extend to the disclosure requirements.<sup>70</sup> In other states, there is an exemption from both registration and the detailed disclosure requirements, but not from the antifraud provisions where the offeree is a non-domiciliary and the franchise business will not be operated in the state.<sup>71</sup>

While the precise geographic scope of the franchise registration and disclosure laws varies, there are many situations in which these laws apply extraterritorially. In most cases, the franchise law of the state in which the franchise is located will apply, regardless of the state of the franchisor. In some cases, the franchisee is a company with its principal office in one state, while the franchise business is in another state. The law of the state in which the franchisee's principal office is located may apply where an offer is accepted in that state. The law of the state in which the franchise business is located may also apply. In addition, the law of the franchisor's state may apply where the offer originates from that state.

Application of the franchise disclosure law of the franchisor's state based on the fact that the offer originates from the franchisor's state was demonstrated in the case of *Mon-Shore Management v. Family Media*.<sup>72</sup> In that case, the court applied the New York Franchise Sales Act when the offer merely originated in New York, even though the offerees and the franchise businesses were outside the state. This holding was based, in part, on the broad territorial scope of the New York franchise law.<sup>73</sup>

The *Mon-Shore* holding has not yet been followed by other courts. On the contrary, in *In re Montgomery Ward Catalog Sales*,<sup>74</sup> a federal district court in Pennsylvania held that the Illinois Franchise Disclosure Act did not apply where the franchisees were located outside of Illinois and had no franchise locations in Illinois, notwithstanding the choice of Illinois law. The court held that when a statute is silent as to extraterritorial effect, there is a presumption that it has none. Since the Illinois Franchise Disclosure Act had no language expressly extending its reach to out-of-state franchisees, the Illinois legislature did not intend the act to have extraterritorial effect. This case was decided after the new franchise law was enacted in Illinois, but before the new law was to become effective in January 1988. The court indicated that its ruling with respect to the prior law was unaffected by the fact that the new law was expressly limited to franchisees located in Illinois.

The holding in the *Mon-Shore* case is directly contrary to

the holding in *Montgomery Ward*. The statutory language regarding the territorial reach of the New York franchise registration law at issue in *Mon-Shore* was virtually identical to that of the prior Illinois statute at issue in *Montgomery Ward*.<sup>75</sup> The court in *Montgomery Ward* cited the reference to Illinois residents in the language of the statute as evidence that the legislature did not intend the law to have extraterritorial effect:

Illinois residents have suffered substantial losses where the franchisor or his representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between the franchisor and franchisee, the prior business experience of the franchisor and other factors relevant to the franchise offered for sale.

The New York statute contains virtually identical language referring to New York residents.<sup>76</sup>

Whether or not the *Mon-Shore* holding has broad application, there are many situations in which conflicts of law can arise as a result of the broad territorial reach of the franchise laws. In some cases, a franchisor may be required to register an offer to a single prospective franchisee in two or three states. For example, an offer by a New York franchisor to a resident of Indiana for a franchise to be located in Virginia may be subject to the requirements of the franchise laws of New York, Indiana, and Virginia. This raises problems where the application of these laws results in conflicts. Which franchise offering circular should be used? Every registration state requires minor variations. Which agreement should be used? Virginia requires negotiation;

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New York prohibits negotiation. Which earnings claim document should be used? Indiana and Virginia have adopted the Item XIX UFOC revision; New York has not.<sup>77</sup>

### C. Choice of Law and Franchise Disclosure Laws

Any franchisor would be tempted by the possibility of avoiding the laws of one or more such states simply by specifying in the agreement which law will govern. Cases like *Modern Computer Systems* and *Tele-Save* make it possible, by contract, in narrowly defined situations, to avoid franchise relationship laws that would otherwise apply. It is not at all clear that a court would reach the same result where the local law is a franchise disclosure law.

The *Mon-Shore* case raises the possibility of invoking the franchise law of the franchisor's state by contract. The court

held by way of dictum in *Mon-Shore* that a clause providing that New York law governs "is sufficient, without more, for New York's Franchise Sales Act to be applied in this litigation."<sup>78</sup> For franchisors, the *Mon-Shore* holding is more of a trap than an opportunity. In addition, this holding is questionable.

The basis for the holding in the *Mon-Shore* case was simply that "New York will honor a provision in an agreement stipulating that the law of a particular jurisdiction will govern the relations between the parties."<sup>79</sup> This is an overstatement of New York law. New York, like other states, will not apply the parties' contractual choice of law in all cases.<sup>80</sup> Nevertheless, the *Mon-Shore* case has yet to be questioned by a New York court.

The agreement at issue in the *Montgomery Ward* case also contained a choice-of-law provision. However, the court in that case held that this provision did not extend the territorial reach of the Illinois franchise disclosure law. Can the holdings in *Montgomery Ward* and *Mon-Shore* be distinguished on the basis of the wording of the contractual choice-of-law provisions? The particular choice-of-law clause in the *Mon-Shore* case was extremely broadly stated. The agreement provided as follows with respect to governing law:

This agreement shall be deemed made in the state of New York and all rights and obligations of the parties hereunder shall be governed as to validity, construction, and in all other respects by the law of New York.

The choice-of-law provision in the *Montgomery Ward* case was arguably narrower than that in the *Mon-Shore*. "This Agreement shall be governed in all respects by the laws of Illinois." However, it is doubtful that the choice-of-law clause in the *Mon-Shore* case would have invoked application of the New York Franchise Sales Act if the offers had not been made from New York.

## V. Conclusion

The Minnesota Franchise Act, at issue in the *Modern Computer Systems* case, like most of the state laws giving franchisees specific protection against termination without good cause, was enacted in the 1970s. At that time, there was widespread sentiment that franchise protection laws were required as a matter of fundamental policy. The Federal Trade Commission Rule on Franchising, which requires disclosure but does not regulate franchise terminations, became effective in 1979. Since that time, very few states have enacted new franchise relationship laws. Presumably, the states have generally concluded that disclosure is adequate. Since the 1970s, the franchise marketplace has also matured. Franchisors and franchisees know better what to look for and what to expect in a franchise relationship. There is also an increasing number of large franchisees whose economic power is often equal to that of their franchisors, as demonstrated by the *Modern Computer Systems* and *Tele-Save* cases.

Nevertheless, franchise relationship laws remain on the books in several states. In this environment, it is not surprising that courts may look for ways to avoid application of the franchise relationship laws where such application would be inequitable, namely, in those cases where there is no inequality in bargaining power.

Until the state franchise relationship laws are modified or repealed, the *Modern Computer Systems* and *Tele-Save* cases are likely to lead to increased litigation over the question of governing law. Many franchise agreements provide that the law of the franchisor's state will govern, and some franchisors may see in these cases an opportunity to avoid application of the protective law of the franchisee's state. Many franchisors will also continue to provide in their franchise agreements that the law of the franchisor's state will govern. There is always a chance that such choice of the law will avoid application of the law of the franchisee's state in a few cases, as occurred in *Modern Computer Systems* and *Tele-Save*. In addition, even though such a provision will not prevent application of a local franchise relationship law in most cases, it will promote a uniform interpretation with respect to contractual issues not within the scope of the franchise laws.

Franchisors located in states that have protective franchise laws, however, must be more cautious. Selection of the law of the franchisor's state might result in application of the franchise law of the franchisor's state. Franchisors in such states might choose the law of the franchisor's state generally, while providing that the franchise law of that state will not apply unless it would apply in the absence of the contractual choice of law. Such a clause in a franchise agreement by a New York franchisor, for example, might read as follows:

This agreement will be governed by and construed in accordance with the laws of the state of New York; provided, however, that this choice of New York law shall not include the New York Franchise Sales Act, and nothing herein will be deemed to extend or otherwise affect the scope or application of such Act.

This clause would prevent the franchisee from invoking the protective franchise law of the franchisor's state based on the contractual choice of law. It would avoid a holding such as that in the *Mon-Shore* case that the choice of New York law is sufficient to invoke the application of the New York Franchise Sales Act or another franchise disclosure law. A similar clause referring to a franchise relationship law of the franchisor's state, such as the New Jersey Franchise Practices Act, would avoid a holding that the parties intended that law to apply.<sup>81</sup>

In those cases in which the franchisee is located in a state with a protective franchise law, that law will apply in most cases regardless of the contractual choice of law. However, the clause set forth above should not affect the franchisor's argument that the protective franchise law of the franchisee's state does not apply when there is no inequality of bargaining power between the parties. □

## Footnotes

1. Fifteen states require registration or disclosure in connection with the sale of franchises, seventeen states have substantive laws governing the relationship between franchisors and franchisees (generally requiring "good cause" for termination), twenty-two states have business opportunity laws, and many more states have industry-specific laws governing agreements with automobile dealers, gas stations, and liquor distributors. *See generally* Bus. Fran. Guide (CCH).

2. 871 F.2d 734 (8th Cir. 1989). After this case was decided, Minnesota amended its franchise law to expressly invalidate contractual choice-of-law provisions which have the effect of waiving compliance with any provision of such law. Bus. Fran. Guide (CCH) ¶ 3230.21.

3. 814 F.2d 1120 (6th Cir. 1987).

4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) [hereinafter cited as RESTATEMENT]:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

5. U.C.C. § 1-105(1):

"[W]hen a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."

6. *See* Bush v. National School Studios, 407 N.W.2d 883, 886 (Wis. 1987). *See also* RESTATEMENT § 187, Comment e.

7. *See supra* note 4.

8. *See supra* note 5. A reasonable relation does not necessarily mean a significant contact with the chosen state. Official Comment 1 to U.C.C. section 1-105 provides, in part, as follows:

"[A]n agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen."

9. *See* SCOLES & HAY, CONFLICT OF LAWS 644 (1984).

10. RESTATEMENT § 187, Comment f: "rarely, if ever, will the parties choose a law without good reason for doing so."

A statute in New York provides that the choice of New York law will be enforced even if the transaction does not bear a reasonable relation to New York, if the amount of the contract is \$250,000 or more. GEN. OB. LAW § 5-1401(1) (McKinney's Supp. 1987).

11. *See supra* note 4. Written arbitration clauses in contracts involving interstate commerce are generally enforced under the Federal Arbitration Act, notwithstanding the public policy expressed in state franchise laws. *See* Southland v. Keating, 465 U.S. 1 (1984) (holding that a dispute under the California Franchise Investment Law was arbitrable).

12. *See* Mackey v. Judy's Foods, 867 F.2d 325 (6th Cir. 1989) (a tort claim was governed by Alabama law notwithstanding a choice of Tennessee law); Computerized Radiological Services v. Syntrex, 595 F. Supp. 1495

(E.D.N.Y. 1984) (a tort claim can be governed by New York law despite a contractual choice of California law); *Wise v. Kentucky Fried Chicken*, 555 F. Supp. 991 (D.N.H. 1983) (New Hampshire tort law applied notwithstanding a choice of Kentucky law); *Fleischmann Distilling v. Distillers Co.*, 395 F. Supp. 221 (S.D.N.Y. 1975) (antitrust claims were not affected by a choice of English law).

13. *Cf.* Memorandum of the South Dakota securities division, which requires that franchisors provide for application of South Dakota law to "matters of local concern" such as franchise registration, employment and covenants not to compete. Bus. Fran. Guide (CCH) ¶ 5410.01.

14. *See generally* SCOLES & HAY, *supra* note 9. *See also* G. E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (August 1987). This article makes it clear that a majority of states have not yet adopted the *Restatement* rules with respect to contracts. *See, e.g.,* Faltings v. International Business Machines Corp., Bus. Fran. Guide (CCH) ¶ 9394 (4th Cir. 1988); *see also* Chesapeake Supply and Equipment v. J.I. Case Co., C.A. No. 88-1046-A (E.D. Va. 1988).

15. *See supra* note 4.

16. Issues the parties could not have determined by explicit agreement directed to such issue include questions of capacity, formalities, and substantial validity. RESTATEMENT § 187, Comment d.

17. 660 F. Supp. 130 (N.D. Ind. 1987).

18. In a footnote, the court specifically indicated as follows:

However, if it is later determined that the contract provision provides less protection to the Sheldons than the Indiana law, the contract will be modified to comply with the Indiana statute. Clearly, contracting to provide less protection is something the parties could not do under Indiana law.

660 F. Supp. at 137 n.4.

19. RESTATEMENT § 188(1).

20. The factors listed in *Restatement* § 6 are:

(a) the needs of the interstate and international systems;

(b) the relevant policies of the forum;

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

(d) the protection of justified expectations;

(e) the basic policies underlying the particular field of law;

(f) certainty, predictability and uniformity of result; and

(g) ease in the determination and application of the law to be applied.

21. *See* RESTATEMENT § 188(2)(c).

22. *Id.* § 196.

23. *See* Berliner Foods Corp. v. The Pillsbury Co., 633 F. Supp. 557 (D. Md. 1986). *See generally* the dissenting opinion in Sally Beauty Co. v. Nexxus Products Co., 801 F.2d 1001 (7th Cir. 1986).

24. *See* RESTATEMENT §§ 188(2)(b) and 188(3).

25. 858 F.2d 1339 (8th Cir. 1988).

26. 871 F.2d 734 (8th Cir. 1989).

27. *Id.* at 739:

Nebraska is MB's state of incorporation and principal place of business, the site of the negotiation and signing of the MC-MB agreement, and the state named in the choice-of-law clause. Minnesota is the place of performance of the contract, MC's place of incorporation, and the home of a great deal of MC's clientele.

28. *Id.*

29. 814 F.2d 1120 (6th Cir. 1987).

30. *Id.* at 1123.

31. *See supra* note 20.

32. The dissent held, first, that Nebraska has declined to regulate franchises outside the state. Second, Minnesota

is the place of performance of the contract, as well as the place of incorporation of Modern Computers. Modern Banking delivers its product to Minnesota and enters into contractual arrangements in Minnesota with Minnesota customers for use of its software packages. Clearly, Minnesota would be the state of the applicable law if no choice-of-law provision existed.

871 F.2d at 741.

33. The vacated circuit court decision in *Modern Computer* also held that fundamental state policies were involved, citing, among other things, the attorney general's position. 858 F.2d at 1344 n.8.

34. MINN. STAT. § 80C.21. See also MINN. RULES pt. 2860.4400, subpt. D (1987).

35. 871 F.2d at 743.

36. *Id.*

37. 814 F.2d at 1126.

38. The act is applicable to "any claim arising from the sale or lease of a business opportunity plan" in Ohio. OHIO REV. CODE § 1344.10(A).

39. 814 F.2d at 1126.

40. *Id.* at 1125. In a footnote, Judge Milburn also took issue with the majority's holding that there was no inequality of bargaining power between the parties. 814 F.2d at 1125 n.2.

41. Sections 1334.15 and 1334.06(E)(a).

42. 560 F. Supp. 938 (N.D. Ind. 1983).

43. IND. CODE ANN. § 23-2-2.7-1 (Burns 1984).

44. 407 N.W.2d 883 (Wis. 1987).

45. 482 F. Supp. 318 (E.D. Wis. 1980).

46. 506 A.2d 817 (N.J. 1986). See also *Colt Industries v. Fidelco Pump & Compression Corp.*, 700 F. Supp. 1330 (D.N.J. 1987).

47. 506 A.2d at 821.

48. 556 F. Supp. 769 (E.D.N.Y. 1983), *aff'd*, 742 F.2d 1432 (2d Cir. 1983).

49. The court held further that the termination laws of Connecticut and New Jersey did not have extraterritorial effect. 556 F. Supp. at 777.

In another case involving a multistate franchise, the court applied the Connecticut Franchise Act only to the franchises located within Connecticut. *Power Draulics-Nielsen v. Libbey Owens-Ford*, Bus. Fran. Guide (CCH) ¶ 9075 (S.D.N.Y. 1988). See also *Darche v. Beatrice Foods*, 538 F. Supp. 429 (D.N.J. 1981), *aff'd*, 676 F.2d 685 (3d Cir. 1982). But see *Chesapeake Supply and Equipment v. J.I. Case Co.*, 700 F. Supp. 1415 (E.D. Va. 1988); *Wilburn v. Cartwright*, Bus. Fran. Guide (CCH) ¶ 7645 (E.D. Wis. 1979), *modified*, 514 F. Supp. 493 (E.D. Wis. 1981), *rev'd*, 676 F.2d 698 (7th Cir. 1982), *aff'd*, 543 F. Supp. 174 (E.D. Wis. 1982).

50. Bus. Fran. Guide (CCH) ¶ 7525 (D. Conn. 1980).

51. *Id.* at 12,253:

Nobody is concerned at this juncture about which law governs the case, as a general matter. We are concerned, rather, about plaintiff's right to invoke the protections of the Connecticut Franchises Act in the face of the provision in the agreement that says the agreement shall be governed by Florida law.

52. *Id.*

53. 684 P.2d 752 (Wash. 1984), *cert. denied*, 474 U.S. 818 (1985).

54. *Southern International Sales Co. v. Potter & Brumfield*, 410 F. Supp. 1339 (S.D.N.Y. 1976).

55. See *supra* note 41.

56. CAL. BUS. & PROF. CODE § 20010; DEL. STAT. § 2552(e).

57. The Wisconsin Fair Dealership Law provides, in part, as follows:

The underlying purposes and policies of this chapter are:

(a) To promote the compelling interest of the public in fair business relations between dealers and grantors, and in the continuation of dealerships on a fair basis;

(b) To protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships. . . . (Emphasis added.)

WIS. STAT. § 135.025(2).

58. ARK. STAT. ANN. § 4-72-203; CAL. BUS. & PROF. CODE § 20015; CONN. GEN. STAT. § 42-133h; DEL. CODE ANN. § 2551(1); 1987 Ill. Laws, ch. 85-551, §§ 18, 19, 20; IND. CODE, tit. 23, art. 2, ch. 27, § 2; MO. REV. STAT. § 407.400; NEB. REV. STAT. § 87-403; N.J. REV. STAT. § 56:10-4; VA. CODE § 13.1-559; WIS. STAT. ANN. § 135.02(2). The Indiana and Minnesota franchise relationship laws will also apply if the franchisee is merely a resident of the state. IND. CODE, tit. 23, art. 2, ch. 27, § 2; MINN. STAT. § 80C.19 (1986). The franchise relationship laws of Hawaii, Michigan, Mississippi, and Washington are silent regarding territorial reach.

59. Section 6(1) of the *Restatement* provides that a court should follow a statutory directive of its own state regarding choice of law. See *supra* note 20. RESTATEMENT § 6(1), Comment b: "The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect." See also *supra* note 49.

60. 644 F. Supp. 1431 (E.D. Cal. 1986), *aff'd*, 846 F.2d 537 (9th Cir. 1988).

61. See also *Gilchrist Machinery v. Komatsu*, 601 F. Supp. 1192 (S.D. Miss. 1984); *S & R v. Nissan*, Bus. Fran. Guide (CCH) ¶ 8146 (D. Md. 1984).

62. 796 F.2d 840 (6th Cir. 1986).

63. 408 So. 2d 627 (Fla. 1981), *modified*, 455 So. 2d 404 (Fla. 1984), *petition for rev. denied*, 462 So. 2d 1107 (Fla. 1985).

64. 408 So. 2d at 630.

65. N.J. REV. STAT. § 56:10-4.

66. CAL. CORP. CODE § 31110; HAWAII REV. STAT. § 482E-3(a); 1987 Ill. Laws, ch. 85-551, § 10; MD. ANN. CODE art. 56, § 347(a); MICH. COMP. LAWS ANN. § 445.1508(1); MINN. STAT. ANN. § 80C.02; N.Y. GEN. BUS. LAW § 683.1; N.D. CENT. CODE § 51-19-03; OR. REV. STAT. § 650.010; R.I. GEN. LAWS § 19-28-5.A.; S.D. CODIFIED LAWS ANN. § 37-5A-6; VA. CODE § 13.1-560; WASH. REV. CODE ANN. § 19.100.020; WIS. STAT. ANN. § 553.21(1).

The Virginia franchise law applies only where the agreement requires the franchisee to establish or maintain a place of business in the state. VA. CODE § 13.1-559. The Indiana franchise law will apply either if the franchisee is a resident of the state or the franchise is to be operated in the state. IND. CODE ANN. tit. 23, ch. 2.5, § 2.

67. CAL. CORP. CODE § 31013(a); MD. ANN. CODE art. 56, § 347(m)(3); MICH. COMP. LAWS ANN. § 445.1504(2); MINN. STAT. ANN. § 80C.19(1); N.Y. GEN. BUS. LAW § 681.12(a); N.D. CENT. CODE § 51-19-02(14)(b)(1); OR. REV. STAT. § 650.015(1); R.I. GEN. LAWS § 19-28-3(k)(1); S.D. CODIFIED LAWS ANN. § 37-5A-7.1; WIS. STAT. ANN. § 553.59(1).

68. See *supra* note 66.

69. 1987 Ill. Laws, ch. 85-551, § 10. An offer is exempt from registration in California, Maryland, Minnesota, and Wisconsin if the offeree is non-resident, nondomiciliary, not present, the franchise is elsewhere, and there is no violation of the law of any foreign jurisdiction. CAL. ADMIN. CODE 310.100.1; Code of Md. Reg. § 02.02.10.04A; MINN. STAT. ANN. § 80C.03(h); WIS. ADMIN. CODE § 32.05(1)(e).

70. In Washington, registration is not required where the offer is for fewer than ten franchises within the state and no advertising is done in the state. WASH. REV. CODE ANN. § 19.100.030(4)(b)(ii). New York exempts certain offers to not more than two persons. N.Y. GEN. BUS. LAW § 684.3(c).

71. HAWAII REV. STAT. § 482E-4(4); MICH. COMP. LAWS ANN. § 445.1506(1)(d).

72. 584 F. Supp. 186 (S.D.N.Y. 1984).

73. *Id.* at 193.

74. 680 F. Supp. 182 (E.D. Pa. 1987).

75. Ill. § 3(21):

(a) A sale of a franchise is made in this state when an offer to sell is made in this state, or . . .

(b) An offer to sell is made in this state when the offer either originates from this state or . . .

See N.Y. GEN. BUS. LAW § 681.12 (McKinney's).

76. N.Y. GEN. BUS. LAW § 680.1 (McKinney's).

77. On November 21, 1986, the North American Securities Administrators Association unanimously adopted revisions to Item XIX of the Uniform Franchise Offering Circular, the earnings claims section. Two states (New York and Minnesota) failed to implement the Item XIX UFOC revision.

The FTC is now studying the question of whether to amend the Rule to broaden its preemption of state franchise registration and disclosure requirements, thereby eliminating potential inconsistencies in federal and state franchise requirements. 54 Fed. Reg. 7041 (Feb. 16, 1989). There is no

indication that any such preemption would affect the franchise relationship laws such as the one at issue in *Modern Computer Systems*.

78. 584 F. Supp. at 193. New York law has been applied in other cases as well, where the contract called for the application of New York law and the franchise was located in another state. See text accompanying note 42 *supra*. See also *McGowan v. Pillsbury Co.*, Bus. Fran. Guide (CCH) ¶ 9409 (W.D. Wash. 1989); *Peugot Motors v. Eastern Auto Distributors*, Civil Action No. 87-785-N (E.D. Va. 1988). The New York choice-of-law statute also calls for broad application of New York law. See *supra* note 10.

79. 584 F. Supp. at 193.

80. See *Staten Is. Rustproofing Inc. v. Ziebart Rustproofing Co.*, Bus.

Fran. Guide (CCH) ¶ 8492 (E.D.N.Y. 1985), in which New York law was held to apply "[i]n light of Michigan's lack of sufficient contacts here . . ." in an action brought by a New York franchisee against a Michigan franchisor for breach of contract. This was in spite of a contractual choice of Michigan law, the state of incorporation of the franchisor. See also *Carlos v. Philips Business Systems*, 556 F. Supp. 769 (E.D.N.Y. 1983), *aff'd*, 742 F.2d 1432 (2d Cir. 1983).

81. With such a clause, the outcome might have been different, for example, in *Dep't of Motor Vehicles v. Mercedes-Benz*, 408 So. 2d 627 (Fla. 1981), *modified*, 455 So. 2d 404 (Fla. 1984), *petition for rev. denied*, 462 So. 2d 1107 (Fla. 1985).