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SETTLEMENTS & RELEASES: BEST PRACTICES FOR ENSURING STRONG SETTLEMENTS AND ENFORCEABLE RELEASES

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Table of Contents

YOU'VE SETTLED YOUR ACTION OR ARBITRATION, NOW WHAT? BEST PRACTICES FOR ENSURING STRONG SETTLEMENTS AND ENFORCEABLE RELEASES

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I. INTRODUCTION

The majority of franchise litigation, both commenced and threatened, leads to one standard result: settlement. The commercial uncertainty of the judicial system ultimately drives parties to resolve their disputes by themselves rather than leave the decision-making in the hands of judges or juries. The fees, expenses, and time involved in litigating a dispute are a constant nagging reminder to franchise parties that making peace, however initially unpalatable, can end the drain and distraction of continued adversarial relations.

Despite settlement being the end result of most actions and arbitrations, the documentation and finalization of settlement arrangements is often an afterthought. When feuding parties finally decide to put down their weapons and seek peace, counsel often work to paper the settlement arrangements as quickly as possible to ensure that neither party has second thoughts about the compromise. As the old adage goes, "time kills deals." Because of this post-settlement haste, key issues and problems concerning settlement are often overlooked and therefore give rise to future problems and disagreements when, as sometimes happens, the settlement does not unfold smoothly. Moreover, the settlement structures and options available to parties are not fully explored because of the urgency of closing the deal.

Because of the importance of settlement in franchise law, franchise counsel attendees at the International Franchise Association Legal Symposium over about the past decade have had significant opportunities to learn about settlements and releases through a variety of insightful seminars. The 2011 presentation *What Happened to My Settlement Agreement? Drafting, Enforcing and Litigating Settlement Agreements*,[1] provides an excellent summary on key issues to take into account with respect to settlements, and the 2013 presentation on *Negotiating A Settlement Agreement*,[2] provides a unique analysis of ethical issues regarding the topic. These papers are a bedrock foundation for franchise-related settlement and release issues.

The purpose of this paper and the accompanying presentation is to continue the development of this area of study with the franchise bar and to provide analysis into best practices and alternatives on a variety of current key settlement and release issues. Based on a review of recent franchise case law, nine different areas of focus have been identified. These areas provide a view of troublesome, controversial, or emerging issues with respect to settlement that should be addressed by franchise counsel to ensure the agreements they negotiate, draft, or enter into, fully reflect the best interests of their clients. The areas are:

1. Parties upon which settlements and releases are binding;

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[1] Ted Pearce, Sandy Tucker, and Corby Anderson, "*What Happened To My Settlement Agreement? Drafting, Enforcing, and Litigating Settlement Agreements*, " International Franchise Association 44th Annual Legal Symposium, 2011, and Fredric Cohen, Norman Leon, and Robert Zisk, "*Negotiating a Settlement Agreement*," International Franchise Association 46th Annual Legal Symposium, 2013.

[2] Int'l Franchise Ass'n Legal Symposium, *Negotiating A Settlement Agreement* (2013).

2. Restrictions on attorney's right to practice;

3. Purchasing assets from the franchisee or permitting a sale to a third party;

4. Statutory impediments to settlements and releases;

5. Requirement for independent legal advice;

6. Confidentiality and non-disparagement;

7. Dispute resolution within settlement;

8. Scope and specificity of claims releases; and

9. Enforcing a settlement.

Although this list is not a complete canvassing of legal issues arising out of settlements and releases, they will deliver insight into the jurisprudential and statutory guidance concerning resolution of franchise disputes and also where future of areas of controversy will lie. As is explained below, the papering of a settlement is as important as the negotiation, and perhaps even more complex in certain situations. Franchise counsel can always do with another tool in their toolbox that allows them to issue-spot problems and provide workable solutions to them, which this paper hopes to provide.

II. NINE KEY ISSUES IN SETTLEMENTS AND RELEASES

1. Parties Upon Which Settlements and Release are Binding

A common concern with respect to settlement of franchise disputes is the breadth and scope of the parties' obligations. Franchisors generally look to have the obligations under the settlement agreement apply to the widest range of parties affiliated with the franchisee in order to provide assurances that the contractual obligations are performed. In some cases, this includes contractual parties such as guarantors. In other cases, this can include those who are not parties to the actual franchise agreement or related documents, such as directors, officers, family members, and employees. This issue largely arises with respect to the non-competition obligations and non-solicitation obligations that either flow from the original franchise agreement or emerge as a result of settlement.

There is extensive jurisprudence on the enforceability of non-competition provisions and non-solicitation provisions to non-parties in the franchise context. This was addressed in the 2015 IFA presentation on *What Do You Mean I Have To Enforce This Provision!?! The Six Most Important Provisions To Run By A Litigator Before*

Finalizing Your Franchise Agreement.[3] These cases generally address the post-term application of non-competition and non-solicitation provisions to non-parties without broaching the issue of those provisions in a post-settlement context. In some cases, where a franchisor can show that former employees of its franchisee are "in active concert or participation with" the former franchisee, it may successfully obtain an injunction against them if those former employees continue to operate a competing business following the termination of the franchise agreement.[4] Similarly, given that the franchises are often "mom and pop" or otherwise family-operated businesses, franchisors have on occasion successfully obtained injunctions against family members of former franchisees who continue to operate a competitive business at a former franchise location.[5] A common thread of advice is that franchisors should consider expressly including close family members of the franchisee as being bound by the non-competition provision, particularly in circumstances where family members are involved in the operation of the business and received training. The failure of a non-compete to cover family members may be cited as a reason for denying the franchisor relief against them.[6]

The drafting of a settlement agreement with non-competition and non-solicitation provisions provides the parties with a second opportunity to negotiate post-relationship obligations. In these circumstances, unlike a franchise agreement which is entered into before the commencement of the commercial relationship, both parties are entering the negotiations without any misapprehension of what is expected from the other party. As such, it is arguable that the contractual obligations should be looked at with a more careful eye. Courts are sometimes reluctant to extend settlement-based obligations onto individuals, usually the principals of franchise corporations, when those individuals are not signatories to the settlement agreement. Although the settlement in *Pinzone v. Papa's Wings, Inc*., a decision from the Court of Civil Appeals of Alabama, arose in a family law context, it still provides a warning that franchise parties should be careful in examining and defining non-confidentiality obligations. In this case, a restaurant franchise owner (Pinzone) transferred his interest in a pizza restaurant (Papa's Pizza) to his former wife (Brill) as part of a divorce settlement.[7] Brill sold her interest to Nicholson,

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[3]James Susag and Derek Ronde, "*What Do You Mean I Have To Enforce This Provision!?! The Six Most Important Provisions To Run By A Litigator Before Finalizing Your Franchise Agreement*," International Franchise Association, 48th Annual Legal Symposium, 2015.

[4] *H&R Block Tax Servs,. LLC v. Strauss*, No. 1:15-CV-0085, 2015 U.S. Dist. LEXIS 13011 (N.D.N.Y. Feb. 4, 2015) (ordering an injunction against two former employees of former franchisee operating tax preparation franchise where the employees continued performing tax preparation services at the franchisee's location).

[5] *See, e.g., Aamco Transmissions, Inc. v. Romano*, 42 F. Supp. 3d 700, 711 (E.D. Pa. Aug. 21, 2014) (refusing to dismiss claim for breach of restrictive covenant brought against non-signatory wife of franchisee husband on the theory she benefitted from husband's agreeing to restrictive covenant); *see also Winmark Corp. v. Brenoby Sports, Inc.*, 32 F. Supp. 3d, 1206, 1221 (S.D. Fla. June 12, 2014) (recognizing under Florida law, a non-signatory under the signatory's control or otherwise being used to aid or abet the signatory may be enjoined).

[6] S*ee id.* at 1222 (noting that family members were not covered by the terms of the non-compete and refusing to enforce non-compete against them).

[7] *Pinzone v. Papa's Wings, Inc.*, 72 So.3d 620 (2010).

the owner of Papa's Wings, Inc.[8] Pinzone later opened up a Papa's Pizza restaurant, and was sued by Papa's Wings, Inc. in an attempt to enjoin Pinzone from using the name and logo.[9] The court, ultimately rejected Papa's Wings, Inc.'s injunction, and commented:

> **We also note that Pinzone was not a party to the contract concerning Brill's sale of the Fairhope business to Nicholson. "A person who has not executed or signed the contract or covenant is not bound by the stipulation against engaging in business, and he may not be enjoined from competing with the covenantee." Thus, because the existence of a covenant not to compete cannot be implied, cannot be proven by parol evidence, and cannot be used to bind a person who was not a party to the contract, Pinzone cannot be prohibited from competing with the Fairhope business unless the settlement agreement between Pinzone and Brill contained an express covenant for Pinzone not to compete with the Fairhope business.[10]**

The court unequivocally rejected any attempt to imply a non-competition term into the settlement agreement between Brill and Pinzone for the benefit of Nicholson, stating:

> **The settlement agreement does not contain any provision that can be construed as a covenant not to compete. The settlement agreement provides for only the transfer of the Fairhope business to Brill. Pinzone's transfer of his interest in the Fairhope business to Brill cannot imply the existence of a covenant barring Pinzone from competing with the Fairhope business. Therefore, Pinzone is not barred from generally competing with the Fairhope business.[11]**

As such, out of an abundance of caution, there should be a broad attempt to capture all of the parties who could potentially undermine the purpose of the settlement within the ambit of the settlement agreement. Key owners, operators, and family members should be made signatories to settlement agreements where feasible, particularly if there is a real risk of competition after settlement.

As with most jurisprudence, there are exceptions arising from unique fact scenarios. Courts certainly can extend their authority to enforce non-competition provisions against non-parties, particularly if it is proven that a signatory is working with such non-parties to evade their obligations under the provisions. However, in situations where the potential future breach is apparent, it is always preferable to address the

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[8] *Id.* at 622.
[9] *Id.*
[10] *Id.* at 624.
[11] *Id.* at 625.

issue at the outset by binding the non-party rather than relying on a court to enforce a questionable obligation after the fact.

Another area of potential due diligence with respect to settlement is to ensure that a party who is signing on behalf of a corporation does in fact have the requisite corporate authority. A recent franchise-related decision from the Fourth Circuit Court of Appeals, *Medicine Shoppe International Inc. v. Siddiqui*, held that a factual dispute regarding whether conditions precedent in a settlement agreement were met arose where it was unclear whether an individual had authority to sign franchise-related documents on behalf of a settling corporate party.[12] This factual dispute prevented the resolution of litigation involving the settlement by way of summary judgment.[13] Although the specific facts of that case were convoluted and involved multiple transfers of interests in a franchised pharmacy and the death of one of the parties, it nevertheless pointed out the necessity of ensuring that the requisite individuals with signing authority were present for the purposes of executing settlement documents.

In *Patel v. Patel*,[14] a Georgia Court of Appeals' decision, the court denied a motion to enforce a settlement agreement between two franchisees in respect of the sale of franchised businesses because a question of fact remained as to one of the parties' capacity to execute the franchise agreement. In that case, an individual (Girish) was president of a franchisee company, Kakas, but signed a settlement agreement in his individual capacity. The settlement agreement did not designate whether Girish signed in his individual or his representative capacity. This and other factors prevented the court from enforcing the settlement at first instance. The conclusion that can be drawn from *Patel* and *Medicine Shoppe* is that a settlement can easily be undermined by either a franchisee or franchisor acting beyond their legal authority, and although the blame for this would lie with the offending party, it is in the best interest of all parties to the settlement to ensure that the settlement survives and that all signatories have the requisite authority to execute the agreement.

2. Restrictions on Attorney's Right to Practice

In settlement discussions, one largely underexplored topic is a franchisor attorney's request that the franchisee attorney agree not to represent any other franchisees in the system in exchange for additional settlement funds or even as a key condition to settlement. This request and potential settlement provision raises a number of concerns, including questions of the ethics of both franchisor and franchisee counsel and certain statutes and ethics rules.

Maine for example, prohibits such a provision in a settlement agreement under 14 M.R.S.A. § 169: "[A] settlement of litigation may not include a condition that an attorney representing a party in that litigation is not permitted to represent other persons

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[12] *Medicine Shoppe International Inc. v. Siddiqui*, No. 12-2001, Bus. Franchise Guide (CCH) 15,165 (4th Cir. Nov. 5, 2013).
[13] *Id.*
[14] *Patel v. Patel*, No. A14A0548, 2014 WL 2853825 (Ga. Ct. App. June 24, 2014).

who are similarly situated in a related action involving a party that the attorney opposed in the settled litigation. A condition not in compliance with this section is void and unenforceable is against public policy." Similarly, most state rules of professional conduct include a rule prohibiting a lawyer from participating in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[15] The policy underlying these prohibitions includes:

- The importance of "prohibit[ing] corporate 'buyouts' of plaintiff's attorneys. The traditional rationale for this prohibition is that there is a strong public interest in having available plaintiff's attorneys for future clients, an interest which outweighs allowing lawyers to restrict their future representation autonomy even where it would increase the overall size of a settlement (and thereby maximize a present client's recovery)."[16]

- Maintaining "the public policy [that] favors the right to practice law . . . ."[17]

Some courts have limited the application of these ethical rules by construing them narrowly. For example, in *Feldman v. Minars*, the defendants moved to disqualify a law firm from representing the plaintiffs on the grounds that such representation breached a settlement agreement entered into by the law firm and one of the defendants in an earlier action related to the same investment.[18] Pursuant to that earlier settlement agreement, the plaintiffs in the earlier case agreed to settle their claims against defendants. In that settlement agreement, the law firm agreed not to represent, assist, or cooperate with any other parties or attorneys arising out of the same investment, and not to encourage other parties to commence actions against defendants.

The New York Appellate Division noted that although the New York Code of Professional Responsibility prohibits attorneys from entering into agreements that restrict their right to practice law, the only thing that the law firm agreed to was not to "assist or cooperate" with other parties in actions against the defendants and not to "encourage any other parties or attorneys to commence such action or proceeding."[19] The court went on to hold that the law firm actively solicited additional parties to bring lawsuits against defendants and that the prohibition on restrictions of lawyers did not prohibit the law firm's agreement not to solicit or encourage parties to commence actions.[20]

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[15] *See, e.g.,* ABA Model Rules of Professional Conduct 5.6(b).
[16] *Adams v. BellSouth Telecommunications, Inc.*, No. 96-2473-CIV, 2001 WL 34032759 at *7 (S.D. Fla. Jan. 29, 2001).
[17] *Kasdan Simonds Riley & Vaughan, LLP v. Terravita Corp.*, No. 1 CA-CV 08-0361, 2009 WL 888541 at *3 (Ariz. Ct. App. Apr. 2, 2009).
[18] *Feldman v. Minars*, 230 A.D.2d 356, 357 (N.Y. App. Div. 1997).
[19] *Id.*
[20] *Id.* at 359

While the court was able to find a narrow exception to the prohibition on lawyer restrictions due to the particular language in the settlement agreement, the court provided an explicit policy rationale for doing away with the prohibition on lawyer restrictions altogether. The court referred to Model Rule 5.6(b) (and corresponding state ethics rules) as "an anachronism, illogical and bad policy."[21] The court went on to hold:

> **[W]e would conclude that an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York. At the least, failure to enforce a freely entered-into agreement would appear unseemly, and the "clean hands" doctrine would preclude the offending attorneys from using their own ethical violations as a basis for avoiding obligations undertaken by them.[22]**

The court based its position on the assumption that the market will resolve issues related to lawyer restrictions in settlement agreements.

For many plaintiff-side counsel, the rationale put forth by the court in *Feldman v. Minars* is illogical and bad policy. Specifically, the court's line of thinking is criticized for ignoring the fiduciary responsibility that a lawyer has to his or her client and the complications that arise as a result, and ignoring the fact that the equitable "clean hands" doctrine is a two-way street. For example, the court stated that if a claim has merit and the elimination of one lawyer creates a vacancy, the market will produce a replacement and not enough lawyers would agree to such a restriction that would deprive worthy claimants of their choice of counsel. If, however, a dispute is close to settling but a franchisee plaintiff wants an additional $10,000 towards the settlement payment, a franchisor or franchisor attorney could agree to such additional funds on the condition that the franchisee plaintiff's attorney not represent similarly situated persons in the future.

This may place the lawyer in an untenable position. On the one hand, if the attorney does not agree, he or she could be violating the attorney's fiduciary responsibility to obtain the best outcome possible for the client. On the other hand, if the attorney agrees to the restriction to obtain additional settlement funds for his or her client, the attorney is likely violating the prohibition on restricting his or her services. If the rule were abolished and the market were left to sort things out, this could result in franchisee plaintiffs being unable to find the type of experienced counsel they would prefer to have represent them. There is not an endless supply of franchisee-side attorneys.

Moreover, leaving it up to the market would allow franchisors and franchisor attorneys to obtain significant control over who can represent franchisees. For example, a franchisor in every settlement discussion could offer an additional sum of $1,000 if the

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[21] *Id.* at 360 (quoting Gillers, *A Rule Without a Reason, Let the Market, Not the Bar, Regulate Settlements that Restrict Practice*, 79 ABA J. 118, Oct. 1993).
[22] *Id.* at 361.

plaintiff franchisee's attorney agrees not to represent similarly situated franchisees. With a fiduciary responsibility to the client, it is not clear a franchisee attorney could reject such an offer, and franchisors could essentially prevent franchisee attorneys from ever representing franchisees in the same system.

Despite the holding in the *Feldman* case, most courts have held such restrictions in practice to be unenforceable. For example, in *Cardillo v. Bloomfield 206 Corp.*, an attorney, as part of settlement negotiations, agreed not to represent litigants against defendant Bloomfield in the future.[23] The attorney later brought an action seeking a determination that the restriction on her right to practice was void and unenforceable.[24] Bloomfield argued that the restriction should be enforced because the attorney entered into the agreement restricting practice separate and apart from her client's settlement agreement, but the court rejected this because while the restriction was not in the same document as the settlement agreement, the practice restriction agreement was negotiated simultaneously and was intertwined with the substantive settlement agreement.[25] More importantly, Bloomfield argued that the attorney should be equitably estopped from litigating on behalf of clients against Bloomfield because she agreed to the restriction and affirmed that it was separate from the settlement agreement, but the court disagreed, noting that defendant had not acted in good faith by obtaining the attorney's agreement not to represent litigants in the future against defendant and that there would be no injustice if the agreement restricting practice was rendered void.[26] Moreover, the court held that if the doctrine of equitable estoppel were applied here, the purpose of Model Rule 5.6(b) to allow clients to choose their own counsel would be thwarted and essentially read the rule out of existence.[27]

Similarly, in *Adams v. Bellsouth Telecommunications, Inc.*,[28] counsel for plaintiffs suggested to defendant's counsel that in exchange for a settlement, his law firm would agree not to represent any current or former employee of BellSouth against the company for a period of one year. Defendants confirmed by letter that settlement was contingent on such an agreement from plaintiffs' counsel.[29] In further settlement discussions, an offer of $1.5 million was made subject to the attorney restriction, but one of the attorneys representing plaintiffs suggested that such an agreement restricting an attorney's right to practice may be unethical.[30] Thus, a work-around was discussed whereby BellSouth could hire plaintiffs' counsel via a consulting arrangement, which would have the effect of preventing their future representation of persons against BellSouth.[31]

[23] *Cardillo v. Bloomfield 206 Corp.*, 411 N.J. Super. 574, 576 (N.J. App. Div. 2010).
[24] *Id.*
[25] *Id.* at 579.
[26] *Id.* at 580-81.
[27] *Id.* at 581.
[28] *Adams v. Bellsouth Telecommunications, Inc.*, No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001).
[29] *Id.* at *1.
[30] *Id.*
[31] *Id.*

Because this work-around was likely going to be more restrictive than a one year restriction, plaintiffs' counsel sought additional settlement funds, but defendant's counsel insisted that the funds for the attorney had to be taken out of the $1.5 million settlement. Eventually, the parties agreed to settle for $1.6 million, and plaintiffs' counsel sent a closing statement to plaintiffs, but the closing statement did not include the following: $120,000 for the consulting agreement, a $230,000 engagement fee to plaintiffs' counsel, and a fee of $51,500 for non-economic expenses.[32] Plaintiffs' counsel never informed plaintiffs of the consulting agreement or the full terms of the agreement and instead simply told plaintiffs the specific amounts they would each receive, and then coerced at least some plaintiffs to agree to the deal by threatening to withdraw as counsel.[33]

The court held that defendant's counsel violated Florida Bar Rule 4-5.6(b), which prohibits a lawyer from offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."[34] The comments to the Rule explain: "Subdivision (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client". The court held further that defendant's counsel jumped at the opportunity to restrict plaintiffs' counsel from future representation to protect its own client's interest, and the purpose of the ethical rule prohibiting attorney restrictions is to prohibit corporate buyouts of plaintiffs' attorneys.[35] The fact that defendant's counsel insisted that any funds to plaintiffs' counsel come from the global settlement fund created an egregious situation in which defendant's counsel pitted plaintiffs' counsel against its clients. Defendant's counsel was thus sanctioned and required to take five hours of courses on Florida ethics prior to reappearance in the United States Southern District of Florida.[36]

Moreover, in *Hu-Friedy Manufacturing Company v. General Electric Company*, the parties sought to get around the prohibition on restricting the lawyer's right to practice law by seeking to enforce a protective order entered into by the attorney in a previous case.[37] The court, however, rejected this approach on the grounds that the effect of using a protective order to restrict an attorney's right to practice in subsequent matters is the same as an agreement restricting the lawyer's right to practice.[38] The party seeking to enforce the protective order by restricting the lawyer's right to practice argued that the attorney would have a "head start" because the attorney was already familiar with the facts and had engaged in discovery. The court held that this amounts to an "unimpressive" argument that it is unfair for a party to not have to pay other counsel to duplicate work already done by another attorney, and that any merit it may have is

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[32] *Id.*
[33] *Id.*
[34] *Id.* at *2.
[35] *Id.* at *7.
[36] *Id.* at *10.
[37] *Hu-Friedy Mgf. Co., Inc. v. General Electric Co.*, No. 99 C 0672, 1999 WL 528545 (N.D. Ill. July 19, 1999.
[38] *Id.* at *2.

outweighed by the policy underlying Rule 5.6(b).[39] Thus, the defendant's motion to enforce the protective order was denied to the extent it was being used to restrict an attorney's practice.

There is an argument that restrictions on a right to practice go beyond questions of mere representation. The American Bar Association has opined, similar to the court in *Hue-Friedy*, that even a restriction on a lawyer's ability to use information gleaned from a case constitutes a restriction on the ability to practice prohibited by Model Rule 5.6(b):

> **A prohibition on a lawyer's use of information gained during representation of a client is similar to a proposed settlement provision that bars a lawyer in future representations from subpoenaing certain records or fact witnesses, or using certain expert witnesses. Knowledge of the existence of these records, or witnesses, and an agreement not to use such knowledge is tantamount to agreeing not to subpoena or use the information. The Committee believes that each of these restrictions is a restriction on the lawyer's right to practice.[40]**

This is not intended to prohibit restrictions on the disclosure of confidential information, including settlement terms, but the ABA made a distinction between *using* information and *disclosing* information. Essentially, maintaining confidentiality is of the utmost importance, but using information gleaned from an earlier case is something lawyers are essentially required to do -- that is, represent their client's interest to the best of his or her ability. Therefore, restrictions on a lawyer's right to use information learned in a case are likely void and unenforceable, but this does not mean that an attorney can disclose settlement terms if the settlement is subject to a confidentiality provision. It is a blurry distinction, but the overall goal seems to be to allow attorneys to use substantive information from earlier cases in future cases without disclosing substantive information about earlier particular matters.

Not only do attempts to restrict an attorney's practice often end up void and unenforceable, but they can also open up attorneys to ethics hearings. For example, in *In re Hager*, an attorney who represented clients in a potential class action against a shampoo manufacturer entered into a settlement under which the manufacturer agreed to refund the attorney's clients and pay the attorney and co-counsel $225,000 in fees and expenses in return for agreeing not to represent present or future clients on similar claims against the manufacturer.[41] An attorney disciplinary proceeding was brought against the attorney on the grounds that by agreeing not to represent future clients with similar claims against the manufacturer violated the rule of professional responsibility that prohibits a lawyer from entering into a settlement agreement that restricts his or her right to practice.

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[39] *Id.* at *3.
[40] ABA Comm'n on Ethics and Professional Responsibility, Formal Op. 00-417, *Settlement Terms Limiting a Lawyer's Use of Information* (2000).
[41] *In re Hager*, 812 A.2d 904, 908 (D.C. Ct. App. 2002)..

The court agreed with the Board of Professional Responsibility's recommendation that the attorney's license be suspended for one year for violating Rule 5.6(b). The court looked to the rationale underlying Rule 5.6(b):

> **First, permitting such agreements restricts the access of the public to lawyers, who by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.[42]**

Because the attorney received payment for agreeing not to represent similar clients in the future, sanctions against the attorney were justified. The court also noted that disgorgement of the $225,000 may be an appropriate condition of re-instatement, but left that issue open until a later date.[43] This case was particularly egregious because the attorney restricting his right to practice also received $225,000 from the opposing party for his agreement not to represent similar clients in the future, and the attorney did not disclose this to his clients.

Both franchisee and franchisor counsel must keep Model Rule 5.6(b) in mind when in settlement negotiations. There is jurisprudence to suggest that an offer or request to restrict an attorney's right to represent future clients may be unethical or sanctionable conduct. If an attorney's right to practice becomes a bargaining chip, there is an argument to be made that this situation creates a conflict of interest, puts the possibly restricted attorney in an untenable position, and may be unjust.

In contrast to the conservative approach taken in American jurisprudence, Canadian case law indicates that restrictions on an attorney's rights to represent future clients are an acceptable practice. In *Bob Brown Pontiac Buick GMC Limited v. General Motors of Canada Limited*, the Ontario Superior Court of Justice bluntly approved of the concept of such restrictions, but cautioned that the court would examine the breadth of the restrictive covenant with a keen eye.

> **As the plaintiffs candidly acknowledged in their Factum, neither Ontario courts nor the Law Society of Upper Canada have prohibited or regulated such restrictions on representation by counsel. In the absence of any such prohibition, I see no reason to interfere with a bargain freely struck by a sophisticated lawyer at a**

[42] *Id.* at 918 (quoting ABA Formal Opinion 93-371 (1993)).
[43] *Id.* at 923–24.

> **sophisticated law firm, especially when the concerns about enforceability of the term are being raised several years after GMC performed its obligations under the Settlement Letter. That said, courts view restrictive covenants, such as that found in section 10 of the Settlement Letter, with a critical eye and interpret them strictly in accordance with their terms.**[44]

In that case, due to the specific language of the settlement terms, an attorney who had changed firms was permitted to continue to act against a defendant despite a restricting agreement reached between his former firm and the defendant.

3. Purchasing Assets from the Franchisee or Permitting a Sale to a Third Party

The settlement of a dispute between franchisors and franchisees can often result in a scenario where the franchise relationship is brought to an end via the franchisor purchasing the assets of the franchisee. By keeping the franchised business as a going concern, the value generated through this sale can provide a useful bargaining chip that provides helpful settlement alternatives that cannot be achieved if the franchise is terminated outright.

Once the location is purchased as part of the settlement of a dispute, the franchisor is then able to either operate the location corporately or re-sell it to a new or existing franchisee. A significant benefit from this type of arrangement is that the franchisee is able to obtain some compensation for its assets without having to expend time and resources on shopping the franchise in an often uncertain market. If the franchisee is facing potential termination for infractions under the franchise agreement, there is the opportunity to obtain at least some compensation instead of the loss of the business in its entirety. The purchase of the franchise can be beneficial to the franchisor as well, as the franchisor can compel the exit of a problematic franchisee at its own speed without having to wait for the franchisee to sell its business by itself. As well, if the franchisee is underperforming based on what the franchisor believes are the personal qualities or failures of the franchisee, a franchisor buy-out may provide the franchisor with assets that are undervalued and allow the franchisor to implement a quick turnaround and re-sell the franchise for a profit based on improved financial results. Also, a franchisor buy-out can often free up a valuable territory from an underperforming franchisee.

A key concern for a franchisor purchasing assets from a franchisee as part of a settlement is that the franchisee must have clear title to the assets that are being conveyed. Franchisors must ensure that they are purchasing assets free and clear of any encumbrances that the franchisees have put on the assets. This may require more than simple representations and warranties by the selling franchisee or an indemnity in

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[44] *Bob Brown Pontiac Buick GMC Limited v. General Motors of Canada Limited*, 2012 ONSC 5454 ¶ 36 (Can LII).

relation to the sale. Creditors may emerge to challenge the conveyance after the sale, so it is generally necessary for franchisors to perform some due diligence on the assets before purchase. This would include, dependent on the specific requirements of the jurisdiction, determining whether there is clear title to the assets, and if not, what proceeds from the sale should be diverted for the purposes of removing secured and other creditors.

If parties to a settlement agreement are not sufficiently specific in respect to what precisely is being purchased, the court may not provide assistance if the franchisor believes that it has been short-changed. In *California Sun Tanning USA, Inc. v. Electric Beach, Inc.*, the court rejected an appeal by a franchisor of a lower court's decision to enforce a settlement agreement between franchise parties.[45] In that case, the franchisor acquired the franchise and its assets as part of a settlement of a dispute. The franchisor later complained that the franchisee had failed to satisfy substantial obligations (rent, taxes, and utilities), allowed the facilities to fall into disrepair, and absconded with various assets and merchandise.[46] The franchisor demanded a deduction in the settlement funds held in escrow, a point that was negotiated between the parties but was unresolved. The parties could not agree on the amount of the deductions, and the franchisee moved to enforce the settlement.[47] The District Court confirmed the deduction of some amounts from the settlement funds held in escrow, but rejected others and ultimately enforced the settlement.[48] On appeal, the franchisor, California Sun, claimed that the settlement agreement was unenforceable. In rejecting the arguments of the franchisor, the Court commented:

> **California Sun claims that because it "mistakenly" believed that Electric Beach had agreed to transfer all assets of the franchise free of encumbrances, but did not so agree in fact, it is not duty-bound to perform its own end of the bargain. We disagree.[49]**

The Court of Appeals noted that the District Court in fact found that the settlement agreement implicitly contemplated that California Sun was to receive the franchise assets free and clear of all encumbrances and made appropriate deductions. Accordingly, there was no mistake and "California Sun received everything for which it bargained."[50]

In that regard, it is necessary for a franchisor to obtain evidence, either from its own due diligence or through evidence produced by the franchisee, that the assets are not subject to any encumbrance due to tax liability or other statutory liability.

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[45] *California Sun Tanning USA, Inc. v. Electric Beach, Inc.*, No. 08-4843, 369 Fed. Appx 340 (3d Cir. 2010).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

Furthermore, to the extent that there is bulk sales legislation in the jurisdiction, it has to be complied with.

In some cases, there may need to be corporate assurances from the franchisee that there exists corporate authority on behalf of the franchisee corporation to effect the sale of the assets. As addressed above in the discussion of the need for all required parties to execute settlement documents, there may be a need to ensure that the franchisee corporation has executed sufficient resolutions to allow for the sale of the assets, particularly where the ownership of the franchisee corporation may be in flux or in dispute. Although this potentially sounds like a hypothetical scenario, ownership breakdowns are often a significant source of franchisee decline, so an abundance of caution may be required in such a situation.

In cases where the settlement involves an acquisition of shares of stock from the franchisee corporation, the franchisor should ensure that steps are taken to prevent significant changes from occurring to the assets of the corporation. In *Kenworth of South Louisiana, LLC v. Bristow*, Kenworth acquired the shares of Acadiana Mack, a truck dealership, pursuant to a settlement agreement. The Bristow/Prices were the owners of Acadiana Mack.[51] However, as described by the court, the financial position of the dealership changed dramatically prior to the closing of the settlement.[52]

> **In February 2008, KSL [Kenworth] received a balance sheet indicating a total net worth of Acadiana Mack of $1,413,456, including cash on hand in the amount of $557,014. KSL's August 2008 petition claims that in the two months following the issuance of the balance sheet, the Bristow/Prices "looted the corporation's bank accounts," issuing checks amounting to $469,108.67 to its shareholders and a check to Longman Russo, APLC, the law firm that negotiated the Stock Purchase Agreement on their behalf, in the amount of $72,121, the day before the closing on April 29, 2008. KSL claimed these disbursements rendered the former Acadiana Mack insolvent.**

KSL sued and obtained summary judgment in respect of the "looting" of Acadiana Mack, but the litigation serves as a cautionary tale in respect of potential misconduct in a share purchase settlement scenario. Specifically, the purchaser should ensure that there are personal guarantees by corporation shareholders or other relevant parties to ensure that the franchisor has some recourse in the event of financial mismanagement of the corporate franchisee in the days prior to the closing of any settlement transaction.

As noted above, settlement agreements can include provisions wherein the franchisee is permitted time to sell their assets to a third party that is not the franchisor. If the franchisor is unable or unwilling to assume responsibility for the franchise location, such a strategy may provide an opportunity for the franchisee to exit the system with

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[51] *Kenworth of South Louisiana, LLC v. Bristow*, 34 So. 3d 380 (La. Ct. App. 2010).
[52] *Id.*

appropriate compensation while allowing the franchisor to remove a problematic franchisee from its system. However, there are risks to this strategy, as the franchisee will seek to maximize its return on investment by obtaining the highest possible price for its franchise, which will potentially delay a sale process and/or sell to a new franchisee candidate who may not be financially viable or otherwise acceptable to the franchisor. In other words, by permitting the sale to a third party, the franchisor loses control over the process of who the next franchisee will be.

In *Dunkin' Donuts Franchised Restaurants LLC v. Sandip Inc*., the parties to a franchise agreement entered into a conditional settlement agreement under which the franchisees were permitted to sell their two donut shops if the franchisor permitted the sale.[53] Under the terms of the agreement, the franchisor was not permitted to "unreasonably" reject a proposed sale.[54] The franchisee provided two proposed sales agreements, both involving the same buyer, but both of those agreements were rejected by the franchisor.[55] Under the terms of the settlement agreement, if there was no sale, the franchisor was permitted to reinstitute its litigation, which it did.[56] The franchisee filed a counterclaim for breach of the settlement agreement.[57] Ultimately, the court found in favour of the franchisor on its claim against the franchisee and rejected the counterclaim.[58] Dunkin' Donuts provided convincing evidence of its analytic process to determine whether or not to approve a sale, which included a consideration of projected profits and liabilities.[59] The franchisor further demonstrated that it followed the process in this case, therefore establishing that its decision to reject the sale candidates was "made pursuant to a firmly established policy that [was] grounded in reasonable business conditions."[60] Although the franchisor was ultimately successful in respect of its litigation, the case demonstrates that settlements that are conditional on franchise sales to third parties are inherently fraught with uncertainty, and the process has to be managed with caution and the realization that the settlement itself may potentially lead to further litigation.

In *Alan Arsenault Holdings Ltd. v. TDL Group Corp*, a recent Canadian decision arising out of settlement agreement where the franchisee was permitted to find a buyer for its franchises, the court identified several pitfalls to these types of settlements. In this case, the franchisor, Tim Hortons, terminated two franchises, which resulted in litigation and a mediated settlement.[61] Under the settlement agreement, the arrangement to exit the franchisee from the system was as follows:

- The franchisee would be entitled to hold their franchises to operate both stores for a period of two years;

[53] *Dunkin' Donuts Franchised Restaurants LLC v. Sandip Inc*., 712 F. Supp.2d 1325 (N.D. Ga.2010).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Alan Arsenault Holdings Ltd v TDL Group Corp,* 2016 ABQB 97 (CanLII).

- After two years, operation of the franchises would transfer to a new party under the franchisor's succession plan. This phase would last for a further four years, during which the franchisee would receive a royalty of 7% of gross income. At the conclusion of the four year period, Tim Hortons would pay the franchisees $400,000 per franchise.[62]

The two steps required to transfer the franchise were:

- A new operator need to be chosen, which was to be done cooperatively but with the franchisor having the final say; and

- The franchisee would need to enter into an operating agreement with the new operator. The settlement agreement contained the form of agreement to be entered into between the franchisee and the prospective operator.[63]

Although the parties had ostensibly reached an agreement, the court in this case noted that the settlement required the cooperation of the parties, and that the structure provided for two significant financial disincentives for the franchisee:

- There was a disincentive for the franchisee to agree on a timely change of operatorship. As soon as the change happened, the franchisee would no longer receive revenue from the operation of the restaurants but instead would only receive a 7% royalty.

- There was a disincentive for the franchisee to agree on an existing operator taking over the locations, as the franchisee believed that the operator would give preference to its existing franchises, which were not subject to the 7% royalty.[64]

The court commented on the apparently inevitable future conflict arising from this settlement:

> **In view of this commercial misalignment, in retrospect it is not surprising that timely selection of the new operator(s) was problematic. This was exacerbated by the fact that the Settlement Agreement did not contain hard and clear deadlines for such selection, leaving it open for argument that no such deadlines exist.**

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[62] *Id.*
[63] *Id.*
[64] *Id.*

> **It also became apparent during the protracted (and ultimately unsuccessful) succession process that the lack of clarity in respect of deadlines was fertile ground for development of "sidecar" issues. That is, issues of contract interpretation arising due to passage of implicit milestones.**[65]

In this case, the transfer process broke down, with the franchisee eventually refusing to enter into operating agreements with the new operators until all outstanding "sidecar" commercial issues were resolved.[66] This led to the frustration of the Settlement Agreement and Tim Hortons unilaterally terminating the franchises.[67] Ultimately, the franchisee unsuccessfully sought an injunction to prevent the terminations.[68]

This decision provides a helpful example of the need for clear, simple terms in any settlement agreement, as well as unambiguous deadlines that are enforced by the parties. Moreover, when drafting a settlement agreement that allows the franchisee to sell the franchise, the arrangement should be examined with an objective eye to ensure that there are no financial disincentives to the parties that stand in contrast with the agreed-upon need for the franchisee to exit the system.

4. Statutory Impediments to Settlements and Releases

Another important consideration for any settlement agreement between franchise parties is whether the settlement agreed upon is in fact valid under the statutory regime that governs the parties' relationship. Many jurisdictions across the United States (as well as Canada and other jurisdictions) have instituted potential legislative impediments to settlements. In other words, there may be statutory restrictions on how the parties can craft their settlements, as parties may be legally forbidden from waiving certain rights. There may be valid statutory purposes for such limitations, but they do impose an obligation on franchisors to ensure that they are not bargaining for a right that they cannot legally enforce. An excellent summary of these statutes can be found in "*Settlement and Releases in Franchise Disputes: How To Make Sure It's Over When It's Over*," a 2007 paper from the American Bar Association's 30th Annual Forum on Franchising.[69]

Usually, these statutes prevent the waiver and release of rights on a prospective basis. In other words, a franchisee party cannot waive a statutory right in advance of the relationship starting. However, these statutes often either have express language exempting the settlement of disputes, or have been logically interpreted by courts as exempting settlements. Courts have recognized that it is contrary to the foundational

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[65] *Id.* at ¶¶ 12–13.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Martin Gilbert and Allan Hillman, "*Settlements and Releases In Franchise Disputes: How To Make Sure It's Over When It's Over*," American Bar Association, 30th Annual Forum on Franchising, 2007.

principle of settlement to have non-waiver provisions that cannot be contracted out of by two parties seeking to end disputes between them.

Despite the principle of exemption (and express statutory language in some cases), franchisees have continued to attempt to rely on the non-waiver provisions to escape settlement agreements.

For example, in respect of automobile dealers, many states have franchisor protection acts to ensure that dealer franchisees' rights are protected against unilateral or unfair actions by franchisors. In *General Motors LLC v. Canton Motor Sales, Inc.*, GM and Canton, a dealer in Georgia, entered into settlement agreement wherein Canton was reinstated as a franchisee but strict performance conditions were imposed on Canton.[70] In the event of the breach of these conditions, GM reserved the option to purchase Canton's customer lists, business records, goodwill, and intangible assets for a relatively nominal sum.[71] Several months into the settlement, GM refused to approve Canton's proposed sale of the franchise because Canton had not met its performance requirements. GM advised that it was exercising its option to purchase the assets.[72]

Although Canton did not deny that it did not meet the performance requirements, it claimed that the settlement agreement did not comply with the *Georgia Motor Vehicle Practices Act* (the "*GMVPA*"), which provides that "[t]the franchisor shall not arbitrarily refuse to agree to [a proposed sale] unless the franchisor can prove that its decision is not arbitrary and that the new...owner...is unfit or unqualified to be a dealer..."[73] There was no dispute that the new proposed owner was indeed qualified.[74]

The court ultimately held that the settlement did not violate the GMVPA and upheld the enforceability of the settlement agreement.[75] It pointed to other language in the legislation that did not "prohibit a dealer from voluntarily entering into a valid release agreement to resolve a specific claim, dispute, or action" between the franchisor and dealer, and found that "the Georgia statute...permits a dealer to voluntarily enter into a release agreement to settle a dispute with the franchisor.[76]

As outlined above, other cases have followed the principles outlined in *Canton Motors*, namely that dealer protection legislation does not extend to mutual agreements between the manufacturer franchisor and the dealer to terminate a franchise. The mischief that this legislation is intended to address is "unilateral conduct of the franchisor," not an exit strategy or settlement that was agreed upon by both franchise parties."

[70] *General Motors LLC v. Canton Motor Sales, Inc.*, No. 1:12-CV-01994-JEC, 2014 WL 901430 (N.D. Ga. Mar. 7, 2014).
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

Some state franchise legislation requires franchisees to have legal representation in order for their settlement of claims under the legislation to be enforceable. As is also discussed in next section of this paper, in *Taylor v. 1-800-GOT-JUNK?, LLC*, the United States Court of Appeal addressed an Oregon franchisee's claim under the Washington State Franchise Investment Protection Act ("FIPA") that was brought after the franchise parties had entered into a full and final settlement agreement in respect of a dispute between the parties.[77] The franchisees were not represented by counsel during the negotiation of the settlement and the execution of the release.[78] FIPA provided that "any agreement...purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is void," unless executed "pursuant to a negotiated settlement in connection with a bona fide dispute between a franchisee and a franchisor...represented by independent legal counsel."[79] The franchisor was able to obtain summary judgment against the franchisee because FIPA included a territorial restriction, namely that the legislation only applied to conduct occurring in Washington. In this case, although the governing law of the franchise agreement was Washington law, neither of the parties was in that state.[80] However, the decision does serve as a warning that there may be statutory requirements of independent legal advice that must be met in order to have an enforceable settlement.[81]

Despite the common sense approach taken by courts in interpreting the non-waiver legislation in different jurisdictions, there does remain the possibility of the non-waiver provisions causing an impediment to settlement. In *Grayson v. 7-Eleven, Inc.*, the U.S. District Court, S.D. California dealt with competing summary judgment motions between franchisees and a franchisor in respect of a class action concerning the recovery of federal excise tax refunds.[82] The plaintiff franchisees had signed a release when they terminated their franchise agreements in 2004 and 2005, but brought claims in respect of refunds that 7-Eleven, the franchisor, received in 2007.[83] 7-Eleven argued that the claims were barred by the release.[84] The plaintiff franchisees contended that California Civil Code section 1668 prevented the release of claims of intentional wrongdoing. In this case, the causes of action pleaded were conversion, money had and received, and breach of implied contract.[85] Ultimately, the court characterized these three causes of action as not involving intentional wrongdoing, and granted 7-Eleven summary judgment.[86] However, if different causes of action had been pleaded, there remained the possibility that the claims could have gone ahead.

[77] *Taylor v. 1-800-GOT-JUNK?, LLC,* 387 F. App'x 727 (9th Cir. 2010).
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Grayson v. 7-Eleven, Inc.,* No. 09-CV-1353 MMA WMC, 2011 WL 2414378 at *1 (S.D. Cal. June 10, 2011).
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

Canadian franchise disclosure legislation (such as the *Arthur Wishart Act (Franchise Disclosure), 2000*) also contains prohibitions on legislative rights without any statutory exemption. However, Canadian courts have held that releases made by franchisees in respect of disputes concerning statutory rights are valid. The principles supporting this holding were set out in 1*518628 Ontario Inc. v. Tutor Time Learning Centres*, where the Ontario Superior Court of Justice commented:

> **In my view, s. 11 does not have application to a release given (with the advice of counsel) by a franchisee in the settlement of a dispute for existing, known breaches of the *Act* by the franchisor in respect of its disclosure obligations, which would otherwise entitle the franchisee to a statutory rescission.**
>
> **The settlement of a claim arising from and consequential to an existing statutory right of rescission is not in itself "a waiver or a release" of that statutory right to rescission. It is a release of the claim arising from having exercised the right of rescission or being in the position to exercise the right of rescission. In my view, if a franchisee, as in the instant situation, with full knowledge of a breach of the franchisor's obligations to disclose as required by the *Act* and regulations, and with the benefit of independent legal advice, chooses to affirm the franchise agreement as a term of a settlement of the claims that arise from the franchisor's breach, then the franchisee can no longer rescind and make a claim to the remedies afforded by s. 6(6) of the *Act*.**[87]

5. The Need for Independent Counsel

Most settlement agreements contain, simply as a matter of course, a provision stating that the parties had the opportunity to consult with independent counsel or did consult with independent counsel. Does such a provision provide any benefit to the settling parties?

As discussed above, the Washington Franchise Investment Protection Act (FIPA) includes a provision expressly addressing the use of independent counsel in a settlement agreement between franchisor and franchisee:

> **Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is void. <u>A release or waiver executed by any person pursuant to a negotiated settlement in</u>**

[87] *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, 2006 CanLII 25276 ¶ 108–09 (ON SC).

> **<u>connection with a bona fide dispute between a franchisee and a franchisor, arising after their franchise agreement has taken effect, in which the person giving the release or waiver is represented by independent legal counsel, is not an agreement prohibited by this subsection</u>.**[88]

This provision expressly requires representation by independent counsel for a release or waiver by a franchisee to be enforceable. It appears that this portion of the statute has only been litigated once in *Taylor v. 1-800-Got-Junk? LLC*.[89] In that case, a franchisee asserted claims against a franchisor despite a release that the parties entered into prior to the filing of the lawsuit.[90] The franchisee argued that the release was not enforceable in light of the fact that the franchisee was not represented by counsel during negotiation and execution of the release, thereby rendering it invalid under Section 19.100.220(2).[91] The court held, however, that while the franchise agreement contained a Washington choice of law provision, FIPA did not apply to the franchisee in Oregon because FIPA contains an express territorial restriction.[92] Therefore, the court never got to the substance of Section 19.100.220(2), but releases involving Washington-based franchisees could very well be subject to attack where the franchisee entered into the release without representation of counsel.

On the other hand, the language at issue is negative in the sense that it says a release entered into when represented by counsel is not prohibited by the statute, but it does not affirmatively state that independent counsel is a pre-requisite to an enforceable release. Absent case law expounding on the substantive meaning of this statute, it is not clear whether independent counsel is an absolute requirement to obtaining a release from a Washington franchisee to settle a bona fide dispute, but franchisors and franchisor counsel should be aware that this is a possibility.

Generally, however, there is no requirement that a franchisee, or any party for that matter, be represented by counsel in order for a signed release to be enforceable. For example, in *Cottman Transmission Systems, Inc. v. Metro Distributing, Inc.*, pro se defendants entered into a settlement with the plaintiff Cottman that was represented by counsel.[93] Shortly after entering into the release, however, the defendants presented reasons to the court as to why they believed the settlement should not be binding, despite the oral settlement being memorialized in open court on the record.[94] They argued, among other reasons, that there was no written agreement, that they felt pressured to settle by the magistrate judge conducting the settlement conference, and that they did not have an opportunity to have an attorney review the settlement.[95] The

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[88] Wash. Rev. C. § 19.100.220(2).
[89] No. 09-35661, 2010 WL 2788780 (9th Cir. July 14, 2010).
[90] *Id.* at *1.
[91] *Id.*
[92] *Id.*
[93] No. CIV. A. 92–2131, 1993 WL 481555 (E.D. Pa. Nov. 19, 1993).
[94] *Id.* at *1.
[95] *Id.* at *3.

court held, however, that having counsel is not a prerequisite to enter into a binding settlement agreement:

> **It would be a travesty of justice if Judges conducting settlement conferences participated in by parties who were not represented by counsel but who are competent businessmen would be permitted to walk away from a settlement agreement that was entered into voluntarily and was memorialized on the record.[96]**

It is not clear whether the court would have reached a different conclusion if the defendants were not "competent businessmen." Nonetheless, it seems that absent fraud or duress, the advice of counsel is not a requirement to enter into a binding settlement.[97]

This principle is echoed in *Beck v. Beck*. In that case, a husband was without counsel at time he executed a family settlement agreement, the purpose of which was to settle respective interests of himself and four surviving children in proceeds of a promissory note held by himself and his wife at the time of her death.[98] The fact that he lacked counsel was insufficient to void the agreement, because there was no allegation that husband was either unable to or denied an opportunity to read the agreement or that fellow signatories gave him any false or misleading information.[99] In other words, the lack of advice from counsel without some sort of overreach on the part of the other party will likely not result in the voiding of the settlement agreement.

Even where a party is able to obtain highly favorable terms in a settlement agreement due to the other party's lack of counsel will not result in a voiding of the agreement. For example, in *Cavalier v. Graham*, as a result of the collision between the Cavalere vehicle and another, Graham sued the Cavaleres and Allstate insurance.[100] The defendants answered by claiming accord and satisfaction in that Graham's claim had been settled.[101] Graham argued that the settlement was void due to fraud, estoppel, and failure of consideration.[102] Graham alleged fraud in that Allstate did not tell him how bad his injuries were and settled his claim for less than it was worth.[103] The alleged

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[96] *Id.* at *4.
[97] *See, e.g.*, Estate of Holland, 377 N.Y.S.2d 854 (N.Y. Sup. Ct. 1974) ("The additional argument of objectant Doris Mazur that the decree of February 28, 1972 is not binding upon her because she did not understand the waiver and consent she executed and because she was not represented by counsel at that time is without merit. In a proceeding to judicially settle a fiduciary's account, no obligation exists on the part of the fiduciary, their counsel or the court, to specifically advise an adult competent party of their right to retain counsel of their own choice. A competent adult in the absence of fraud or undue influence is bound by their execution of a document in a civil proceeding regardless of whether they were or were not represented by counsel at the time.").
[98] 36 N.C. App. 774, 776-77 (N.C. Ct. App. 1978).
[99] *Id.* at 777.
[100] 432 So.2d 756 (Fla. Ct. App. 1983).
[101] *Id.* at 756.
[102] *Id.*
[103] *Id.*

estoppel was that Graham was not represented by counsel when he entered into the release with Allstate and because Allstate was more knowledgeable about the claims and knew they were worth more than Graham received.[104] Graham also claimed a failure of consideration because he returned the funds to Allstate eight days after signing the settlement agreement.[105]

In discovery, as a result of Graham's arguments, he sought production of Allstate's complete file pertaining to his claim and asked questions to Allstate's investigator pertaining to that defendant's work product.[106] The trial judge granted the discovery request over the defendant's objection, but the Florida Court of Appeals reversed. Graham then claimed that there was a compelling necessity justifying such discovery, and the trial court ordered the same discovery. The trial court held that the line of cases allowing for discovery in actions for bad faith against an insurance company for failure to settle within policy limits should allow him to obtain the discovery he sought. The Florida Court of Appeals held, however:

> **What counsel for the plaintiff and the trial judge seemingly failed to comprehend, despite our prior opinion, is that this is *not* a bad faith case. Allstate had no fiduciary duty to Graham. It was not obligated to advise him of the extent of his own injuries, its evaluation of liability, or the value of his claim. He was the adverse party. Allstate's duty was to the Cavaleres. If Graham was incompetent for any reason to execute a valid release, this fact cannot be discovered in Allstate's files. Indeed, such incompetency is not even alleged in the plaintiff's reply. Nor is it factually alleged that the release was obtained or induced by any fraudulent misrepresentations. The alleged fraud is Allstate's silence, in regard to matters in which it was entitled to remain silent insofar as it was dealing with Graham and not its own insureds.[107]**

In other words, if a party enters into a "bad deal" because he or she was not represented by counsel, that is not enough to void a settlement agreement where the other party obtained a favorable settlement due to the other party's ignorance of the law, unless there is also some sort of procedural overreach in negotiations, such as fraud, duress, or taking advantage of one's incompetency.[108]

6. Confidentiality & Non-Disparagement

In resolving contentious disputes parties often agree to keep the terms of their settlements confidential and refrain from disparaging each other. Franchisors have a

[104] *Id.* at 756–57.
[105] *Id.* at 757.
[106] *Id.*
[107] *Id.*
[108] *Id.*

particular interest in protecting the reputation of their systems by obtaining confidentiality agreements that can help limit the fallout from disputes, which regardless of their outcome, may suggest that some franchisees are being treated differently than others. But this interest is not always shared by franchisees departing the system, and it can conflict with statutes intended to protect franchisees through franchisors' disclosure obligations and safeguards for franchisees' free association.

a. Confidentiality

Before a franchisor enters into a settlement agreement requiring confidentiality, the franchisor must first consider its disclosure obligations. In Item 3 of the Franchise Disclosure Document (FDD) franchisors must disclose whether they were "a party to any material civil action involving the franchise relationship in the last fiscal year."[109] This disclosure includes "all material settlement terms . . . *whether or not the agreement is confidential*."[110]

A recent Seventh Circuit decision demonstrates the issues that can arise when franchisors enter into confidential settlement agreements without carving out their disclosure obligations. In *Caudill v. Keller Williams Realty, Inc.*, the Seventh Circuit affirmed a lower court's dismissal of a franchisee's claim that a franchisor breached the confidentiality provision of a settlement agreement by disclosing the settlement's terms in Item 3 of the franchisor's FDD.[111]

The franchisee alleged that the franchisor's disclosure not only caused actual damages in the form of lost profits and reputational harm, but also breached the confidentiality agreement's liquidated damages provision, which established damages of $10,000 per breach.[112] The franchisee claimed that she was entitled to approximately $20 million in liquidated damages because the franchisor had sent the FDD to approximately 2,000 prospective franchisees and other interested parties.[113]

The Seventh Circuit, however, affirmed the lower court's dismissal of the franchisee's claim on the basis that she had failed to establish her damages.[114] The Seventh Circuit agreed with the lower court that liquidated damages were unavailable because there was no basis to conclude that their amount was "a reasonable estimate at the time of contracting of the likely damages from breach," a requirement to recover liquidated damages in most jurisdictions.[115]

The Seventh Circuit acknowledged that "[o]ne can . . . *imagine*" that a conflict could arise between a confidentiality agreement and a franchisor's disclosure

[109] 16 C.F.R. § 436.5(c)(ii).
[110] *Id.* at n.2 (emphasis added).
[111] *See* 828 F.3d 575, 578 (7th Cir. July 6, 2016).
[112] *See id.* at 576.
[113] *See id.* at 577.
[114] *See id.*
[115] *Id.* (citing *FPL Energy, LLC v. TXU Portfolio Management Co., L.P.*, 426 S.W.3d 59, 69 (Tex. 2014); *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289–90 (7th Cir. 1985)).

obligations, assuming the franchisee's damages went beyond mere "speculation."[116] But the Seventh Circuit also noted that an additional requirement for the franchisee to recover in such circumstances would be that the disclosure must not be one that is "required by state or federal law."[117]

In most cases, franchisors should try to obtain one-way confidentiality provisions that bind only the franchisee. This is because franchisees usually exit the system after signing a settlement agreement—or have already exited the system—and so they have no reason to speak with other franchisees about their settlement. On the other hand, the franchisor needs to manage the franchise system and live with the consequences of the settlement. Thus, franchisees have no reason to disclose the terms of a settlement, but the franchisor should be able to make any truthful disclosures, voluntarily or as required by law.

If a one-way confidentiality provision does not make sense in the context of the settled dispute, or the franchisee simply will not agree to it, the parties must make sure to carve out the franchisor's disclosure obligations from any confidentiality agreement. This could range from agreeing that disclosure is permissible "to the extent required by state or federal law," to specifying the precise settlement terms that the franchisor may disclose in the FDD.

Some franchisees may argue that franchisors' disclosure obligations obviate the purpose of confidentiality agreements, rendering them illusory, unnecessary, or meaningless, since the franchisor will ultimately need to disclose the settlement agreement's material terms, and thus the information will become publically available regardless of the confidentiality agreement. But this argument has some problems.

Information subject to a confidentiality agreement is not like information subject to an evidentiary privilege, like the one afforded to attorneys and their clients, where information loses its privilege upon disclosure to a third-party. In a confidentiality agreement, the promising party agrees not to disclose information to others, and unless the contract provides otherwise, this obligation is unaffected by anyone else's disclosure of the information to third-parties.

Moreover, a confidentiality agreement provides benefits notwithstanding franchisors' disclosure obligations. For example, confidentiality agreements can provide franchisors with greater control over the accuracy and spread of information related to the settlement. Confidentiality agreements are also effective when settling with multiple franchisees, in either a single concerted action, or multiple actions being litigated around the same time as each other. Confidentiality agreements in these situations prevent the litigants from learning about the terms of each other's settlement agreements, which could otherwise serve as an obstacle to settlement when the litigants have materially different claims, from either a liability or damages perspective.

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[116] *Id.* at 578 (emphasis added).
[117] *Id.*

In addition to carve-outs for disclosure obligations, the parties should carve out disclosures for the parties' other foreseeable needs. For example, confidentiality agreements should permit disclosures to third-party professionals, such as accountants or attorneys, and when required by law, such filing taxes or responding to subpoenas. It may be wise for the parties to agree to provide notice to each other when such obligations compel disclosure of the settlement agreement's terms. To address the fact that third-parties are not bound by confidentiality agreements, parties can agree that they will instruct the third-parties that the terms of the settlement may not be disclosed. This obviously would not bind the third-party to the confidentiality agreement, but it would setup obligations for the parties themselves, which could in turn be breached.

To avoid inferences drawn from silence, parties might agree to a prepared response to third-party inquiries about the settlement terms, such as, "The franchise dispute has been resolved to the mutual satisfaction of both parties." Finally, the parties may choose to stipulate to liquidated damages for breaches of the confidentiality agreement, so long as the amount is a reasonable estimate of actual loss and cannot be construed as a penalty.[118]

b. Non-Disparagement

In a non-disparagement agreement, the parties agree not to make any statements that are disparaging about each other to third-parties. Practically speaking, this serves to convert what would otherwise be a defamation claim, sounding in tort, into a breach of contract claim. The benefit being that the latter cannot be defeated by the statement's truth, a privilege of the person who made it, or their lack of culpability.[119]

The scope of a non-disparagement agreement should identify the parties about whom disparagement statements may not be made, such as the franchisor, franchisee, their officers and directors, and other franchisees in the system. For additional specificity, the non-disparagement agreement can also identify subject matters about which disparaging statements may not be made, such as the lawsuit, franchise system, and its products or services.

The non-disparagement agreement may specify the type of conduct that is prohibited, such as publications to the media, statements to other franchisees, or vendors. Going further, the non-disparagement agreement might prohibit the franchisee from providing voluntarily assistance or cooperation with litigation against the franchisor. And looking backward, a non-disparagement agreement can also require a party to undertake remedial actions to cure whatever disparaging statements have already been made, such as removing false or disparaging social media or other publications.

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[118] *See* Restatement (Second) of Contracts § 356 ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.").

[119] *See* Restatement (Second) of Torts § 558 (stating the elements of defamation as including a "false and defamatory statement," "unprivileged publication," and "fault amounting at least to negligence").

In order to give additional leverage for a claim for violating a non-disparagement agreement, the parties can agree that equitable relief will be available to prevent an ongoing breach. Alternatively, the parties can agree to a liquidated damages provision. Generally speaking, both equitable relief and liquidated damages would be permissible in a franchise relationship to protect the parties' goodwill and reputation, which are typically subject to irreparable harm and difficult to quantify.

As with confidentiality agreements, the parties should carve out their legal obligations, such as disclosure laws and responding to subpoenas, as well as statements to third-party representatives, such as accountants, attorneys, and perhaps even business partners. In addition, franchisors should limit non-disparagement clauses to statements by the "company" as opposed to its representatives, particularly those out in the sales field, where there are frequent interactions with third-parties interested in matters related to the franchise.

Before entering into a non-disparagement agreement, franchisors should consider any applicable state laws that make it unlawful for the franchisor to prohibit the right of free association among franchisees. There are eight states with such laws; some protect franchisees' right to "join" an association, while others protect franchisees' right to "free association" more generally.[120] Although there are no reported decisions on this issue as of the date of this Paper, a franchisee might argue that the protections afforded by these laws conflict with their obligations under a non-disparagement agreement.

7. Dispute Resolution

Usually an afterthought buried in the "Miscellaneous" section of a settlement agreement is the dispute resolution provision. Given the typical boilerplate language used in dispute resolution provisions, there is often not a lot of thought given to the drafting and negotiation of such provisions. Nonetheless, when a dispute resolution provision in a settlement agreement is invoked to enforce the terms therein, it becomes one of the most important terms incorporated into the settlement agreement.

The significance of dispute resolution provisions and the care with which they should be drafted is exemplified in *Heron v. Sky NJ, LLC*.[121] In that case, a plaintiff sought to avoid the arbitration provision in a settlement agreement by arguing that because the release did not cover claims against the defendant for gross negligence the plaintiff's claim for gross negligence was not subject to the arbitration provision in the settlement agreement.[122] The court, however, disagreed because of the breadth of the language in the arbitration provision. The arbitration provision stated that it included

[120] Ark Code § 4-72-206(2); Haw. Rev. Stat. § 482E-6(2)(A); Mich. Stat. § 445.1527(a); Minn. Rules § 2860.4400; Neb. Rev. Stat. § 87-406(2); N.J. Rev. Stat. § 56:10-7(b); Wash. Rev. Code § 19.100.180(2)(a).
[121] Civ. Action. No. 15-5686, 2016 WL 705246 (E.D. Pa. Feb. 22, 2016).
[122] *Id.* at *3.

"any disputes regarding this agreement."[123] The court noted that even though claims for gross negligence were excluded from the release in the settlement agreement, claims for gross negligence were still related to the settlement agreement because the settlement agreement preserved the plaintiff's right to file a claim for gross negligence.[124] As a result, the plaintiff's claims were dismissed and the court ordered that they be submitted to arbitration.[125] Had the plaintiff wanted to maintain the right to pursue claims for gross negligence in court, it should have taken care to expressly exclude such claims from the arbitration provision, but the scope of the arbitration provision was so broad that it incorporated claims otherwise exempt from the settlement. In other words, even claims not released in a settlement agreement may still be subject to dispute resolution provisions in such a settlement agreement.

Moreover, in *Midwest Mailing & Shipping Sys. V. Neopost USA Inc.*,[126] the plaintiff contended that the settlement agreement provided that disputes about enforcing its terms would be brought in Illinois state court.[127] The provision at issue provided: "This Agreement shall be construed, interpreted, and enforced in accordance with the laws of the State of Illinois. All disputed and any actions that may be necessary to enforce this Agreement shall be brought before the Honorable Julia Nowicki, or if unavailable the Judge sitting in her place, who shall retain jurisdiction over this matter."[128]

The defendant took the position that because the settlement agreement acknowledged the continuation of a dealership agreement, which did not contain such a limiting forum selection clause, the forum selection clause in the settlement agreement could not apply.[129] The dispute resolution provision, however, applied to disputes arising from the settlement agreement and although the dispute arose from a breach of the dealership agreement, the plaintiff was seeking to enforce the terms of the settlement agreement, not the dealership agreement.[130] Thus, not only must parties to settlement agreements consider the scope and breadth of dispute resolution provisions, but also how such provisions interact with any other agreements still in force.

Another question that arises when negotiating dispute resolutions is what sort of dispute resolution would be most effective. In this author's experience, most settlement agreements call for arbitration of disputes related to the settlement agreement. There are, however, specific provisions that attorneys should consider when negotiating settlement agreements. For example, if a settlement agreement comes out of mediation, parties may want to consider submitting any disputes in relation to enforcing the terms to the mediator either in mediation or in arbitration. The obvious benefit of keeping the same mediator involved is that he or she will be familiar with the parties,

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] No. 15 C 7752, 2016 WL 367952 (N.D. Ill. Jan. 28, 2016).
[127] *Id.* at *1.
[128] *Id.*
[129] *Id.* at *2.
[130] *Id.*

their interests, and the underlying dispute. Some, however, may view this is a bad thing because the mediator's previous experience with the parties may color his or view of future disputes, and he or she may come to subsequent disputes with certain biases against one or both parties.

Whether or not an approach like this makes sense may depend in part on the complexity of the dispute and settlement agreement. For example, if the settlement simply involves payments being made from one party to another, keeping a mediator involved in the dispute resolution provision may make sense. He or she will be familiar with the underlying dispute and the settlement agreement, and enforcement of the settlement agreement is less likely to be complicated by bias if its terms are straightforward.

8. The Scope & Specificity of Claims Releases

Practically every settlement involves a claims release. In the context of settling franchise disputes, claims releases present some unique issues. Regardless of whether the settlement ends the franchise relationship, there are certain obligations that will continue, heightening the likelihood of future claims. The variety of third-parties and transactions involved in the franchise relationship also makes it hard to anticipate every possible claim that might exist at the time of the settlement agreement, and sometimes claims continue over a period of time, creating a question about when the claim came into existence.

As a result, when drafting claims releases, franchise attorneys must pay particular attention to whatever obligations will survive the franchise agreement's termination. And when the settlement will not end the franchise relationship, franchise attorneys must be even more cognizant of the claims that are being released so that the release does not unintentionally affect the parties' future dealings.

A release is an agreement to extinguish legal claims, and as such, they are governed by the law of contracts, from formation and interpretation to enforcement and avoidance.[131] This means that enforceable releases require all of the elements of a contract, including offer, acceptance, consideration, mutuality, and capacity.[132] The rules of contract interpretation also apply to interpretation of releases.[133] In many jurisdictions, the statute of frauds requires that releases be written and signed by the

[131] *See* Restatement (Second) of Contracts § 284 ("A release is a writing providing that a duty owed to the maker of the release is discharged immediately or on the occurrence of a condition.");*In re World Bazaar Franchise Corp.*, 167 B.R. 985, 989 (N.D. Ga. 1994) ("A settlement agreement is a contract, the construction of which is a question of law for the court."). As discussed in Part 4 of the Paper, some jurisdictions have statutes governing claims releases as well.
[132] *See Karnes v. Quality Pork Processors*, 532 N.W.2d 560, 562 (Minn. 1995) ("As with any contract, a release requires consideration, voluntariness, and contractual capacity.").
[133] *See, e.g.*, *Miller v. KFC Corp.*, 2000 U.S. Dist. Lexis 11110 (N.D. Texas 2000) (holding that an oral agreement purportedly reached during settlement negotiations between franchisor and franchisee was unenforceable because Texas law requires releases to be documented in writing).

parties.[134] And as with contracts, releases can be avoided on grounds such as fraud, duress, and mistake, which are not uncommon allegations when franchisees feel that they have been the victim of disparate bargaining power.[135]

In drafting release language, the answers to many questions depend on the situation at hand. For example, whether the parties should exchange mutual releases depends on the likelihood of future claims and the extent to which the releases have served as consideration for the settlement agreement. Drafting release language is a common challenge in settling franchise disputes in light of the obligations that survive termination of the franchise agreement and the increased likelihood of unknown, continuing, and future claims.

a. General v. Limited Releases

The universe of releases is sometimes described as binary, categorized broadly into two groups: general and limited. This distinction is helpful conceptually, and indeed, most courts afford it some sort of legal significance.[136] As discussed further below, however, there are situations in drafting and interpretation that the distinction between a general and limited release breaks down and becomes less clear, in which case courts may not always adhere to the labels applied by the parties.

The parties to a general release intend it to cover all claims in existence when the release is executed, typically regardless of the parties' knowledge, at least so long as that intention is expressed. The following is a basic example of a franchisee's general release:

> **Franchisee hereby releases, waives, and discharges Franchisor Release Parties[137] from all Claims[138] present and future, whether known or unknown,[139] including but not**

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[134] *See* Restatement (Second) of Contracts § 284 (1981) ("The rules of interpretation that apply to contracts generally apply also to writings that purport to be releases.").
[135] *See, e.g.*, *Gruver v. Midas Int'l Corp.*, 925 F.2d 280, 282 (9th Cir. 1991) (requiring franchisee to prove "(1) wrongful acts or threats; (2) financial distress caused by those acts; and (3) the absence of any reasonable alternative to the terms presented by the wrongdoer" in order to avoid release on basis of economic duress).
[136] *See generally* TIMOTHY J. CHORVAT, SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES § 9.02 (Richard Rosen, Ed. 2017) (comparing cases involving general and limited releases).
[137] If the parties intend the release to apply to more than just the parties, they should define the parties being released more broadly. For example, "Franchisor Release Parties" could be defined to include the parties and "their past, present, and future parents, subsidiaries, affiliates, predecessors, successors, and assigns, and any officers, directors, shareholders, owners, partners, agents, representatives, employees, and attorneys."
[138] In a general release, claims can be defined broadly and in an illustrative nature. For example, "Claims" can be defined as including but not limited to "all causes of action, demands, damages, lawsuits, actions, judgments, costs, attorneys' fees and any other rights, remedies, obligations, or liabilities of any kind or character."
[139] It is advisable to specify that the parties are releasing unknown claims because some courts have held that is material. *Convey Compliance Sys., Inc. v. 1099 Pro, Inc.*, 443 F.3d 327, 331 (4th Cir. 2006) ("If it can be shown that the parties intended to release all unknown claims, it will be considered binding.").

> **limited to Claims that were or could have been brought by Franchisee in the Lawsuit or arising from or relating to the Franchise Agreement.**[140]

Courts will usually not interpret general releases to apply to claims that do not yet exist, unless the release clearly provides otherwise and doing so is permitted by law.[141] If the parties intend to release future claims, they should be sure to carve out any statutory prohibitions. To reduce the complexity of the release and improve its readability, terms such as Franchisor or Franchisee Release Parties, Claims, Effective Date, Lawsuit, and Franchise Agreement can be defined in the settlement agreement's recitals or definitions section.

The parties to a limited release, on the other hand, intend it to cover only those claims that are specifically identified in the release itself. The following is a basic example of a franchisor's limited release:

> **Franchisor hereby releases, waives, and discharges Franchisee Release Parties from all Claims in existence as of the Effective Date arising from or relating to Franchisee's failure to pay the royalties required under Section 3 of the Franchise Agreement. This limited release does not apply to any other Claims that Franchisor may have against Franchisee Release Parties, including but not limited to Claims arising from or relating to the continuing obligations under the Franchise Agreement's Section 12 titled "Franchisee's Covenants Not to Compete," Section 13 titled "Indemnification," Section 14 titled "Confidential Information," and Section 15 titled "Franchisee's Obligations Upon Termination or Expiration."**

A failure to exercise reasonable diligence in investing claims not specifically identified in a limited release usually will not permit a party to escape its limitations.[142]

As with whether the parties should exchange mutual releases, whether a release should be general or limited depends on the situation at hand. On one hand, a general release may be more acceptable to the parties if the franchise relationship is ending,

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[140] Providing additional specificity about the subject matters of the release claims can reduce ambiguity, but the release should provide that it is not limited to the specified claims. In providing additional specificity, it is advisable to use the phrase "arising out of or relating to," rather than just "relating to," "connected with," or "arising under," because courts have interpreted that phrase more broadly. *See Pinnacle Pizza Co. v. Little Caesar Enterprises, Inc.*, 560 F. Supp. 2d 786, 792 (D.S.D. 2008), *aff'd*, 598 F.3d 970 (8th Cir. 2010) (holding that franchisee's release was limited to claims "relating to" a specific franchise location where "[t]he release of 'all claims' [was] limited by the clause, 'relating to or connected with the Franchise Agreements terminated hereby, the franchise relationship, the . . . restaurants identified herein, or [the franchisor] and its related entities'").

[141] Some states prohibit prospective waivers of rights under their franchise relationship laws.

[142] *See Rochester Ford Sales, Inc. v. Ford Motor Company*, 001 U.S. Dist. LEXIS 10018 (D.N.H. June 21, 2001) ("Whether [the dealer's] choice was wise or unwise in hindsight is beside the point; its choice was voluntary and uncoerced.").

since there is likely a shared interest in finality. On the other hand, the parties may prefer a limited release if the franchise relationship is continuing, since there is likely a shared interest in protecting existing and future obligations, whether known or unknown.

A third option is a covenant not to sue. In most cases, a covenant not to sue will produce the same effect as a release, although technically no claims have been released.[143] Since covenants not to sue generally only apply to specific parties, they are sometimes useful to preserve the right to bring claims against third-parties.[144]

Hopefully, the parties to the settlement agreement have negotiated an understanding about the scope of claims that they expect the settlement agreement to release, and the attorneys drafting the settlement agreement can proceed accordingly. However, when this understanding is not clear, problems can arise as drafts circulate between the attorneys. This is particularly true as the release language become more complex, incorporating elements of both general and limited releases, which is not all together unusual in settling franchise disputes.

Where language renders a release ambiguous, a party may find that a court interprets the release contrary to its original intent. For example, in *ASI Sign Sys., Inc. v. Architectural Sys., Inc.*, the court held that a general release was ambiguous, specifically referring to its lack of clarify over the term "claim," explaining that "[t]he fact that the language of the Release is broad, expansive and cast in absolute terms does not mean that it is capable of only one reasonable interpretation."[145]

Similarly, in *Carlile v. Snap-on Tools*, a court held that a release was limited to specific claims, despite containing words of a general release, when it did not specify that it applied to unknown claims that were not necessarily in the minds of the parties when they executed it.[146] These cases show why it is important for franchise attorneys to analyze each release individually, avoid copying and pasting boilerplate releases, and instead use precise language based on a thorough understanding of the parties' past and future relationship, their dispute, and its negotiated resolution.

b. Continuing Post-Termination Obligations

Franchise agreements provide that certain obligations continue after the franchise agreements' termination. These obligations bind the franchisee, and typically include matters such as the franchisee's promise not to operate a competitive business,

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[143] *Gruver v. Midas Intern. Corp.*, 925 F.2d 280 (9th Cir. 1991) (holding that there is no distinction between a release and a covenant not to use).

[144] *See J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of Am.*, 696 N.W.2d 681, 684 (Mich. 2005) ("A release immediately discharges an existing claim or right. In contrast, a covenant not to sue is merely an agreement not to sue on an existing claim. It does not extinguish a claim or cause of action. The difference primarily affects third parties, rather than the parties to the agreement.").

[145] *ASI Sign Sys., Inc. v. Architectural Sys., Inc.*, 210 F.3d 354 (2d Cir. 2000).

[146] 648 N.E.2d 317, 321 (Ill. Ct. App. 1995) ("Where there are only words of general release, the courts will restrict the release to the thing or things intended to be released and will refuse to interpret generalities so as to defeat a valid claim not then in the minds of the parties.").

return and refrain from disclosing any confidential or propriety information, cease operations and use of the franchisors' marks, de-identify the franchise location, and indemnify the franchisor from future claims.

In light of these continuing obligations, it is essential for franchisors to carve out from a release any claims that could arise from the specific, continuing obligations set forth in the franchise agreement. As taught by the Eighth Circuit's decision in *BASCO, Inc. v. Buth-Na-Bodhaige*, franchisors should make sure to identify the specific obligations that are not being released, and not just generally refer to the "surviving obligations," since that general reference may be held ambiguous.[147]

An example of language reserving franchisor's continuing obligations is set forth above in Part 8.B of the Paper. When identifying specific claims that are reserved from a release, it is advisable to use language indicating that the list is illustrative and not exhaustive, such as "including but not limited to," so that general terms are not interpreted as being limited by reference to a list of more specific items.[148]

c. Unknown, Continuing & Future Claims

Whether a release applies to unknown, continuing, or future claims depends not only on the release language itself, but in many cases on state statute as well.[149] As discussed in Part 4 of the Paper, a release that purports to apply to future claims may be invalid under state statutes that prohibit prospective waivers of rights under state franchise relationship laws.[150]

Even in the absence of these statutes, releases are often construed narrowly to apply to known claims in existence at the time of the settlement agreement, at least

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[147] 198 F.3d 1053 (8th Cir. 1999); *see also Iron & Silk, Inc. v. Champion Arts, Inc.*, 2003 WL 21246599 at *4 (Cal. Ct. App. May 29, 2003) ("The reference to the Franchise Agreement provisions on post-termination obligations provides some assistance to the parties by identifying steps required to disassociate the businesses, even though the provisions may be fragmentary and partially inapplicable.").

[148] *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 753 (Miss. 2003) (holding that dealer released all claims because "[t]he Release Introduction includes the relevant language 'including but not limited to'"); *Carlile*, 648 N.E.2d at 321 ("Where there are words of general release in addition to recitals of specific claims, the words of general release are limited to the particular claim to which reference is made.").

[149] These statutes, however, will not prohibit the settlement of existing claims. *See NBT Assocs., Inc. v. Allegiance Ins. Agency CCI, Inc.*, 2011 WL 6122775, at *6 (E.D. Mich. Dec. 9, 2011) ("[The statute] specifically states that this prohibition 'shall not preclude a franchisee, after entering into a franchise agreement, from settling any and all claims.'"); *Edwards v. Kia Motors of Am., Inc.*, 8 So. 3d 277, 281 (Ala. 2008) ("[T]here is no indication of a legislative intent to prohibit the parties to an automobile-dealership franchise agreement from reaching a good-faith settlement of existing claims after those claims arise and entering into a binding settlement agreement.").

[150] To the extent that an anti-waiver provision of state franchise relationship law renders a franchisee's release invalid, a settlement agreement's severability clause can save its application to other claims. *Williams v. Stone*, 109 F.3d 890, 894 (3d Cir. 1997) (holding that anti-waiver provision of state franchise relationship law "invalidates the Release only insofar as the Release purports to waive a cause of action pursuant to the [statute]").

unless the parties express their intent otherwise.[151] Courts will generally not interpret releases to apply prospectively to future claims that come into existence after the release. [152]

For example, in *Scheck v. Burger King Corp.*, a franchisor argued that a franchisee's release barred the franchisee's claim that the franchisor had improperly permitted another location to encroach the franchisee's territory because the franchisee knew about the franchisor's plan to open the location prior to signing the release.[153] The court, however, held that the release did not bar the franchisee's claim because it did not come into existence until the franchisor actually allowed the location to be opened.[154]

But it is not always clear when claims are fully matured, or when parties should know of their existence, for the purpose of determining whether they fall within the scope of a release. The franchise relationship is ripe with the possibility for conflict between the scope of releases and their applicability to unknown, continuing, and future claims, particularly with respect to the most common claims alleged in the franchise relationship: misrepresentation and breach of contract.

Misrepresentation claims can present issues because a representation's falsity is not always immediately apparent at the time it is made.[155] For example, if a franchisor provides misleading financial performance information outside of an FDD during the sale of a franchise, in can be unclear when the franchisee's claim comes into existence. What if during the franchise relationship, the franchisee later signed a general release settling an unrelated dispute that arose after entering into the franchise agreement?

The franchisor could argue that the claim existed when the alleged misrepresentation was made and relied upon, or alternatively when the franchisee acknowledged, either in an FDD receipt, questionnaire, or the franchise agreement, that the franchisor did not make any misleading financial performance representations outside of the FDD. The franchisee, however, could argue that the claim came into

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[151] *Compare Carlile*, 271 Ill.App.3d 833 (Ill. Ct. App. 1995) ("A general release is inapplicable to an unknown claim."); *with Pinnacle Pizza Co.*, 560 F. Supp. 2d at 793 ("A reading of the plain language of the . . . release demonstrates to the court that it was the intent of the parties to release [the franchisee] of all claims, both 'known or unknown' at the time it was entered into.").

[152] *Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, 1997 WL 166497 (S.D.N.Y. April 9, 1997) (holding that distributor's release of claims "arising from the distributor relationship" did not apply to prospective claims by construing the claims as alleging "concerted conduct" unrelated to the distributor relationship and because prospective waivers of such claims would violate public policy); *Midland Mgmt., LLC. v. Burger King Corp.*, 217 F. Supp. 2d 1261, 1265 (S.D. Fla. 2001) (holding that settlement agreement pertaining to operations issue did not release subsequent claims in connection with renewal of franchise agreement).

[153] 756 F.Supp. 543, 549 (S.D. Fla. 1991).

[154] *Id.*

[155] *Carlile*, 271 Ill.App.3d 833 (holding that a franchisee's release did not apply to its claim arising from a misrepresentation that occurred prior to the release, reasoning that "[t]he words of general release here should not be interpreted to defeat a claim for fraud which was not in the minds of the parties, certainly not in the mind of [franchisee]").

existence when the franchisee's business did not experience the represented financial performance, and he or she discovered that the representation was untrue. If the former was true, the release would apply to the claim, while if the latter was true, the release would not apply to the claim.

Similar issues can arise with breach of contract claims involving a continuous breach beginning before the time of the release and continuing afterwards. In these cases, whether a general release bars such claims typically depends on whether the breach is construed as a series of independent but related breaches or one continuing breach.

With respect to a series of independent but related breaches, a release will generally apply to breaches that arose before the release, but not after. For example, in *Pinnacle Pizza Co. v. Little Caesar Enterprises, Inc.*, the court held that a franchisee's breach of contract claim arising from its alleged ownership of a menu item innovation involved a series of actionable breaches.[156] As a result, the court held that the "release applie[d] to all alleged wrongful conduct that occurred by [the franchisor] prior to" the release.[157]

Whether a release applies to a single continuous breach that began prior to the release likely depends on the specificity of the release language and the nature of the alleged breach. For example, in *DNB Fitness, LLC v. Anytime Fitness, LLC*, a group of franchisees alleged the franchisor had failed to disclose a continuing monthly fee, which constituted a breach of the franchise agreement.[158] Several of the franchisees, however, had signed broad general releases when the franchises were transferred to them, releasing "any and all claims . . . arising from the franchise agreements" prior to the date the transfer agreements were executed.[159]

The franchisees argued that a new breach of contract claim came into existence each time the franchisor charged the undisclosed fee.[160] The court, however, held that since the alleged wrongful conduct was a failure to disclose the fee, which occurred prior to the execution of the franchise agreements and the releases, the failure to disclose did not give rise to a new cause of action each month, and the franchisees had released their breach of contract claims.[161]

But a release might not apply to a continuous breach of contract claim where the release language is ambiguous and the nature of the alleged breach makes its existence clear. For example, in *ASI Sign Sys., Inc. v. Architectural Sys., Inc.*, a franchisee argued that a franchisor had released its claim arising from the franchisee's operation of an unauthorized location that began prior to the release.[162] Noting that the

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[156] 560 F. Supp. 2d 786, 793 (D.S.D. 2008).
[157] *Id.*
[158] 2012 WL 1952662 at *1 (N.D. Ill. May 30, 2012).
[159] *Id.* at *2.
[160] *Id.* at *3.
[161] *Id.*
[162] 210 F.3d 354 (2d Cir. 2000).

release was ambiguous, and the parties knew about the unauthorized location at the time of the release, the court held that it was "unclear whether the Release [was] intended to bar prospective claims arising from the continued operation of that office after the signing of the Release."[163]

The takeaway from the forgoing cases is that each settlement presents unique issues in drafting effective release language. Before drafting the release, franchise attorneys should consult with their clients about the history and future of the parties' franchise relationship, and whether there are any other issues—however collateral, remote, or unrelated they may seem—that could give create future exposure, and thus should be considered in drafting the release. The forgoing cases illustrate that often times the more salient a claim, the less forgiving a court will be in determining whether it falls within the scope of a broad general release that does not specifically address the claim, or is ambiguous about its scope. At the same time, courts are more likely to enforce releases when they specifically refer to the claims that the parties intend to release.[164]

When it comes time to draft the release itself, franchise attorneys should avoid copying and pasting boilerplate language from previous releases. Instead, they should take the time to draft unique language, which provides an opportunity to become familiar with the parties' relationship, their other exposures, and the implications of the release. Limited releases demand such focus, but general releases should also include language that while broad, is deliberately simple and clear. Perfunctory reliance on boilerplate releases perpetuates archaic and unnecessary language, which makes them more difficult to understand, increases the risk of ambiguity, and reduces the likelihood that the attorney will have considered all of the potential implications of the release.

9. Enforcing or Avoiding the Settlement Agreement

Ideally, the settlement agreement ends the parties' dispute. But the fact that many aspects of the franchise relationship survive its termination not only makes settlement agreements in franchise disputes more complex, it also increases the likelihood future disputes. In the event of a breach there are several remedies available to the non-breaching party to enforce the settlement agreement.

Franchisors in particular can make enforcement of settlement agreements easier if they have anticipated their breach and included dispute resolution procedures and enforcement mechanisms in the agreement. On the other hand, avoiding the settlement agreement is typically a more daunting task, although there are some grounds for recession such as fraud and duress, which are not uncommon defenses to franchisees.

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[163] *Id.*

[164] *Giuffre Motor Car Co., LLC v. Kia Motors Am., Inc.*, 2016 WL 5477599, at *7 (E.D.N.Y. Sept. 29, 2016) (rejecting franchisee's argument that claims had not yet "ripened" at the time of the release when the release referred to the franchisee's claims).

a. Jurisdiction

The first issue faced by a party wishing to enforce the terms of a settlement is: where should I go? The answer is obvious if the parties have anticipated the issue and agreed to a dispute resolution procedure, as discussed in Part 7 of the Paper. In the absence of one, the parties will likely end up back in court. But which court? Once again, the answer is obvious if the parties have agreed to a forum, as discussed in Part 7 of the Paper. Otherwise, there might be several options available, including the court where the lawsuit was filed, where the franchise agreement dictates, the franchisor or franchise resides, or the settlement agreement was made.

To simplify matters, the parties should not only agree to an exclusive forum for such disputes in the settlement agreement, but assuming that forum is the same one where the lawsuit was filed, they should also include in their stipulation of dismissal that the court retains jurisdiction over the parties. This is because enforcement of a settlement agreement requires its own independent basis for jurisdiction, and failure to retain that jurisdiction, particularly in federal court, risks the court refusing to hear motions related to the enforcement of the settlement agreement.[165] For example, while a federal court might have had subject matter jurisdiction over a dispute involving a franchisee's improper use of a trademark, the dismissal of those claims can divest the court of its jurisdiction, leaving only a dispute over a settlement agreement, which involves purely questions of state law.[166]

b. Motions to Enforce

Courts have inherent authority to enforce settlement agreements in litigation pending before them.[167] Consequently, if the court has not yet dismissed the claims and the lawsuit is still pending, then the non-breaching party can simply move to enforce the settlement agreement. But if the claims have been dismissed and the lawsuit is no longer pending, then the non-breaching party will either need to begin a new lawsuit, or move to vacate the dismissal.[168] As discussed above, post-judgment relief is made is easier if the parties' stipulation of dismissal incorporated the terms of the settlement, agreed that the court retains jurisdiction over the parties, and this is reflected in court's order dismissing the lawsuit.[169]

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[165] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994) ("Enforcement of the settlement agreement, however, whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.").

[166] *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 831 (10th Cir. 2005) ("The general rules of contract interpretation under state law apply to settlement agreements.").

[167] *See Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) ("It is well established that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them.").

[168] *See, e.g.*, Fed. R. Civ. P. 60(b)(6) (providing grounds for vacating a judgment entering dismissal of claims).

[169] *See Lynch, Inc. v. SamataMason, Inc.*, 279 F.3d 487, 489 (7th Cir. 2002); *Infinite Sec. Sols., L.L.C. v. Karam Properties, II, Ltd.*, 37 N.E.3d 1211, 1220 (Ohio 2015) ("A trial court has jurisdiction to enforce a

A motion to enforce a settlement agreement should include a request for specific performance. When drafting such a motion, it is important for the moving party to be as specific as possible about the persons and conduct it wants enjoined. This is because an order for injunctive relief must describe in reasonable detail the conduct required or restrained and there must be clear and convincing evidence in order for a party to be held in contempt for violating it.[170]

Consequently, a court would probably not generally enjoin violations of "post-termination obligations" without additional specificity. A court might also refuse to enforce an injunction against an unspecified party, so they should be clearly set out to avoid concerns about who the settlement is binding upon, as discussed in Part 1 of the Paper. Once the court has ordered enforcement of the settlement agreement, a motion for contempt is available to sanction future violations.[171]

c. Consent Judgments

A consent judgment is an agreement by the settling parties that in the event of a breach the non-breaching party may file a stipulated judgment asking the court to enter the stipulated judgment against the breaching party.[172] Consent judgments are often governed by state statute.[173] In practice, consent judgment itself is often attached as an exhibit to the settlement agreement.

The principal benefit of a consent judgment is that their violation risks contempt and sanctions, providing a procedural short cut to pleading and motion practice, and additional deterrent against a breach.[174] Consent judgments are therefore the most effective when the parties have continuing obligations under the settlement agreement, such as a franchisee's covenant not to compete, misappropriation of trade secrets and confidential information, or trademark infringement.

If a dispute was settled for less than the full amount of damages, it is common for the parties to agree to a consent judgement for the full amount of damages. Or, the judgment can be for injunctive relief.[175] In order to enforce a consent injunction, most courts will still require the moving party to establish the underlying factors required to obtain injunctive relief, including a reasonable likelihood of success, potential for

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settlement agreement after a case has been dismissed only if the dismissal entry incorporated the terms of the agreement or expressly stated that the court retained jurisdiction to enforce the agreement.").

[170] *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) ("'An injunction is a matter of equitable discretion' and is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'").

[171] *See Ruskin v. AAF-McQuay, Inc.*, 844, 670 S.E.2d 517, 519 (Ga. Ct. App. 2008) (affirming award of sanctions for contempt of violation of order enforcing settlement agreement against distributor).

[172] *Khan Inc. v. Wortham*, 983 S.W.2d 539, Bus. Franch Guide (CCH) ¶ 11,524 (Mo. Ct. App. 1998).

[173] *See, e.g.*, Minn. Stat. § 548.22.

[174] *Little Caesar Enterprises, Inc. v. K&M Pizza, LLC*, Case No. 12-MC-158 (D.N.J. Dec. 17, 2012).

[175] *See Lawn Doctor, Inc. v. Rizzo*, 646 F. App'x 195, 199 (3d Cir. 2016) (affirming enforcement of consent injunction against franchisee).

irreparable harm, favorable balance of hardships, and the effect on public interest. In some circumstances, it may be appropriate to provide the breaching party with an opportunity to cure the breach before the non-breaching party may enter the consent judgment.

d. Liquidated Damages

Liquidated damages are helpful when actual damages would be difficult to measure. This is not uncommon in franchise disputes where improper use of the franchisor's marks or propriety information is a concern. Nevertheless, most jurisdictions require that liquidated damages bear some relationship to actual loss, in order to avoid imposition of penalties, which public policy disfavors. While there is no harm in including acknowledgments that the amount is "difficult to calculate," a "reasonable estimate," and "not a penalty," such language is not dispositive of the issue, and courts will still analyze whether the amount of liquidated damages approximates the actual loss.

Some have argued that an agreement to liquidated damages interferes with a party's ability to obtain equitable relief on the grounds that it is a tacit admission that harm can be remedied through monetary means without specific performance. At least the Restatement (Second) of Contracts § 361, however, provides that "[s]pecific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages."

e. Grounds for Rescission

Since settlement agreements are contracts, they share the same grounds for recession and avoidance. This includes fraud, duress, and mistake,[176] which are not uncommonly invoked by franchisees to avoid franchise agreements, and unsurprisingly, sometimes releases as well.[177] But establishing the facts necessary to support these defenses can be an uphill battle.

For example, the defense of duress typically requires a showing of physical coercion or that the party asserting the defense had no other reasonable economic alternative.[178] In *Aulakh v. 7-Eleven, Inc.*, the court rejected a franchisee's attempt to avoid a release absent "physical coercion" or "economic coercion" rising to the level of "bankruptcy or financial ruin."[179] The court rejected "[t]he possible loss of . . . sunk costs" as insufficient, as was the threat of withholding a contractual right based on the

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[176] *See Palczynski v. Dep't of Energy*, 374 F. App'x 984, 985 (Fed. Cir. 2010) ("[A]n appellant must show that the agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake.").
[177] *Fred Menke's Car Store, Inc. v. Volvo of N. Am. Corp.*, 862 F.2d 869 (4th Cir. 1988) (rejecting dealer's argument that release was invalid based on "evidence of bad faith, fraud, duress and lack of consideration that precludes the award of summary judgment based on the agreement").
[178] *Edwards v. Kia Motors of Am., Inc.*, 486 F.3d 1229, 1236 (11th Cir. 2007) (rejecting dealer's claim of economic duress to avoid release because of absence of "wrongful acts or threats" and a "reasonable alternative to the terms presented by the wrongdoer").
[179] 2006 WL 224398 at *1 (E.D. Cal. Jan. 27, 2006).

parties' differing interpretations, since those rights could be enforced by law.[180] As a result, duress does not generally exist when a manufacturer's re-purchase of inventory is contingent upon a dealer's execution of a release, at least so long as that condition is expressed in the parties' dealership agreement.[181]

But there are situations where a sufficient quantum of bad facts can warrant avoiding a release based on fraud and duress. In *Carlile v. Snap-on Tools*, a dealer presented sufficient facts to avoid summary judgment on a release based on his defense of economic duress.[182] The dealer alleged that the manufacturer had fraudulently misrepresented the dealership opportunity and induced the dealer into bad investments.[183] The manufacturer obtained the release in connection with the dealership's termination, instructed the dealer to provide a fabricated reason for the termination, and refused to refund the dealer's inventory unless the dealer executed the release.[184] Based on these facts, the court held that "[a] genuine issue of material fact . . . exists whether [the dealer] was subjected to economic duress when he signed the release."[185]

As with all contracts, settlement agreements are also subject to attack on the basis that they are not final or do not constitute a meeting of the minds necessary to form a valid agreement. Consequently, courts have refused to enforced settlement agreements between franchisors and franchisees when they are not in writing as required by a statute of frauds,[186] or when handwritten revisions make it ambiguous whether the parties reached a final agreement.[187] On the other hand, courts have enforced settlement agreements between franchisors and franchisees despite the absence of a final writing when their conduct indicates agreement,[188] or when agreement is reflected in a memorandum[189] or emails.[190] Ultimately, competent franchise counsel should be able to guide the parties through the settlement process, negotiating and drafting a proper settlement agreement supported by valid consideration, in a manner that avoids exposure to any grounds for recession.

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[180] *Id.* at *7.
[181] *Campbell v. Snap-On Tools Corp.*, 941 F.2d 677 (8th Cir. 1991) (rejecting dealer's duress defense because manufacturer was entitled to release in exchange for dealer's repurchase benefits under dealership agreement); *Rochester Ford Sales, Inc. v. Ford Motor Co.*, 2001 WL 799594 at *5 (D.N.H. June 21, 2001)) (same).
[182] *See* 271 Ill.App.3d 833.
[183] See i*d.* at 834-36.
[184] *Id.* at 836.
[185] *Id.* at 840.
[186] *Miller v. KFC Corp.*, 2000 WL 1123588 at *2 (N.D. Tex. Aug. 3, 2000) ("There is no series of writings that makes the alleged settlement more than a "purely oral agreement.").
[187] *FasTax, Inc. v. Jackson Hewitt, Inc.*, 2014 WL 1117951 at *5 (D.N.J. Mar. 20, 2014) ("The court cannot find that FasTax gave unequivocal consent to remove the pages with the critical handwritten notations.").
[188] *Campbell*, 941 F.2d at 678 ("[The dealer] was bound by the terms of that agreement when he later received and accepted the $18,000.").
[189] *Iron & Silk, Inc. v. Champion Arts, Inc.*, 2003 WL 21246599 at *4 (Cal. Ct. App. May 29, 2003) ("We find that the memorandum was sufficiently definite to allow the court to determine whether the parties' obligations have been performed or breached.").
[190] *California Sun Tanning USA, Inc. v. Elec. Beach, Inc.*, 369 F. App'x 340, 347 (3d Cir. 2010) (holding that record of emails made "the material terms of the agreement pellucidly clear").

III. CONCLUSION

The legal issues surrounding settlements and releases will likely continue to be a constantly changing and evolving area of law for franchise counsel. As noted in the introduction, the haste by which parties put together settlement documentation, the lack of foresight into potential flaws in settlement agreement, and the existing hostility between adversarial franchise parties make settlement a ripe area for continued controversy. Parties will rush towards a deal; parties will agree to terms just to end the litigation; parties will reconsider their bargain after the fact and look for potential avenues of escape. Litigation counsel must remain vigilant on knowing where the law stands on emerging issues regarding settlements and releases to ensure that their clients are fully informed of the options available to them in respect of settlement, the potential downsides or weaknesses to the settlements they have struck, and the strength of their legal positions if the compromise they have reached falls apart. Although it is often never easy to settle a case, it can be even worse dealing with a settlement gone awry. Our hope is that this paper (and the accompanying presentation) provides a helpful roadmap to guide franchise counsel through the process.