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Fortune from Fortitude: Strategies for Supply Chain Resilience

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1. *Introduction*

In addition to the convenience, speed, ease-of-access, and brand recognition traditionally offered by franchise brands, customers value and repeatedly reward franchise brands that consistently provide high quality products and offerings. Service performance consistency across brand locations has been found to significantly impact a consumer's perceived value, sentiment, and satisfaction in a given interaction[1] and, generally speaking, franchisor standardization requirements have been found to positively affect sales.[2] As such, a franchise system's decisions about what products and services are offered, how they arrive and are deployed at the given location, and how to ensure that each location is in a position to consistently offer the products and services will each have material impacts on that franchise system's ability to succeed. Efficient and intentionally constructed franchise supply chains serve to avoid, prepare for, and address these consistency concerns.[3]

This paper follows the 2025 IFA Legal Symposium presentation and paper titled "Supply Chain Management in Franchise Systems: Legal Risks and Strategies for Compliance,"[4] which examined franchise supply chain structures, comparing franchisor-managed and franchisee purchasing cooperative-managed models, and which outlined their respective benefits, challenges, and governance considerations. This paper builds on a portion of that paper relating to common risks faced in franchise supply chain management[5] and shifts the focus to how those same frameworks operate when tested, examining franchise supply chain performance during real world disruptions that require immediate, decisive action.

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1. Miyoung Jeong, Hyejo Hailey Shin, Minwoo Lee & Jongseo Lee, *Assessing Brand Performance Consistency from Consumer-Generated Media: The US Hotel Industry*, 35 INT'L J. OF CONTEMP. HOSPITALITY MGMT. 2056 (2023) (finding that brand performance consistency significantly influences consumers' perceived value, sentiment, and satisfaction, as demonstrated by the empirical results of study exploring consumers perceptions among five top hotel brands, as measured by processing TripAdvisor reviews across the United States).

2. *See* Jyh-shen Chiou & Cornelia Droge, *The Effects of Standardization and Trust on Franchisee's Performance and Satisfaction: A Study on Franchise Systems in Growth Stage*, 53 J. OF SMALL BUS. MGMT. 129 (2015) (finding that standardization requirements positively affect both sales and service performance).

3. Steve Pattison, Suzie Trigg & Sarah Walters, *Supply "Chain Links" and its Implications on the Franchise Systems,* INT'L FRANCHISE ASS'N 51ST ANN. LEGAL SYMP. (2018).

4. Toni Brown, Kim Magyar & Vanessa Miller, *Supply Chain Management in Franchise Systems: Legal Risks and Strategies for Compliance*, INT'L FRANCHISE ASS'N 57TH ANN. LEGAL SYMP. (2025).

5. *Id*. at 13-17.

Supply chain resilience is often discussed as a function of structure, whether the franchisor centrally manages the supply chain or procurement is handled through a franchisee owned purchasing cooperative.[6] While decision-making authority and who actually conducts the supply chain operations differ between these models, the practical reality is the same. Disruption does not respect organizational charts. Whether the supply chain is managed by the franchisor or by a supply chain cooperative,[7] the system as a whole bears the operational, financial, legal, and reputational consequences when supply fails. Resiliency, therefore, is not model specific. It is a system-wide imperative that must be addressed, regardless of who sits in the leading seat.

This paper examines how franchise systems can prepare for and respond to three of the most common and consequential supply chain disruptions encountered in practice: (1) *When Products are in the Supply Chain, but Should Not*: foodborne illness, product recalls, and product withdrawals; (2) *When Products Should be in the Supply Chain, but Are Not*: inventory shortages, stock outages, and force majeure events; and (3) *When Vendors Should be in the Supply Chain, but are Out*: sudden exits by vendors from the market and supply chain.

Each of these scenarios presents distinct risks, but all require advance planning, contractual foresight, contractual oversight, and operational playbooks to avoid cascading failures across the system. Specifically, this paper presents contractual and legal strategies informed by the practical realities faced by counsel working across legal and operational disciplines. By focusing on these real-life disruptions, this paper aims to provide practical guidance that applies across franchise systems of all structures, reinforcing that fortitude in supply chain planning is ultimately what allows franchise brands to preserve continuity, protect the brand, and emerge from inevitable disruptions.

2. *When Products are in the Supply Chain, but Should Not: Product Recalls, Market Withdrawals, Foodborne Illness Events*

Foodborne illness events and product recalls represent some of the most acute and high-stakes disruptions a franchise supply chain can face. Beyond the immediate public health consequences, these incidents trigger cascading legal, financial, and operational exposures that can affect an entire franchise system within days. Even a single outbreak can compromise or entirely eliminate a restaurant outlet's annual profits,

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6. *Id*.; *see also* Andrew P. Beilfuss, Jess Dance & Jason C. Williams, *Running on Empty: Dealing with Supply Chain Issues*, A.B.A. 43RD ANN. F. ON FRANCHISING, at 3-5 (2020); Gina Romo, R. James Straus & Suzanne Trigg, *Building an Effective Supply Chain and Distribution System*, A.B.A. 35TH ANN. F. ON FRANCHISING (2012).

7. *See* Brown et al., *supra* note 4, at 1-7 (describing two prevailing franchise supply chain models); *see also*, Beilfuss et al., *supra* note 6, at 3-5 (describing the various structures that are commonly used in franchise supply chain models: franchisor-controlled, outsourced via broadline distribution, outsourced via dedicated system partners, and franchisee participation or purchasing cooperative-controlled); Chelsey K. "Bud" Culp, III & Rochelle B. Spandorf, *Sourcing Products and Services for the System: Efficiencies and Traps in Supply Chain Management*, A.B.A. 32ND ANN. F. ON FRANCHISING (2009).

with modeled costs ranging from approximately $4,000 for minor incidents to nearly $2 million or more for large-scale outbreaks, driven primarily by lawsuits, legal fees, fines, insurance premium increases, and lost revenue.[8] Importantly for franchise systems, these figures do not account for downstream impacts such as system-wide operational disruption, franchisee closures, or prolonged brand damage following public disclosure of contamination events.

For some of the same reasons that franchise restaurant chains have enjoyed success—that is, their scale, increased sales through menu standardization, and improved unit economics through, among other things, complex distribution and supply chains—franchise restaurant chains have been at the center of some of the most consequential[9] foodborne illness events in U.S. history.[10] "The ramifications of a delay in responding to a food safety issue due to confusion or inconsistency in product recall policies at the manufacturer and distributor levels can be devastating for a franchise system."[11]

For franchise systems, the damage is rarely confined to the individual location where contamination first occurs. Because products are sourced, distributed, and

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8. Sarah M. Bartsch, Lindsey Asti, Sindiso Nyathi, Maria L. Spiker & Bruce Y. Lee, *Estimated Cost to a Restaurant of a Foodborne Illness Outbreak*, 133 PUB. HEALTH REP. 274 (2018) https://doi.org/10.1177/0033354917751129 (estimating that "the cost of a single foodborne illness outbreak ranged from $3,968 to $1.9 million for a fast-food restaurant, $6,330 to $2.1 million for a fast-casual restaurant, $8,030 to $2.2 million for a casual-dining restaurant, and $8,273 to $2.6 million for a fine-dining restaurant").

9. "In [1993], the first major public *E. coli* outbreak in modern U.S. history hit the Jack in the Box restaurant chain. The source of the *E. coli* was the restaurant's meat, resulting in four deaths, more than six hundred people sick, and between twenty and thirty million dollars in total losses. In responding to the outbreak, the franchisor promised to cover all medical costs of those who were affected and made changes to its suppliers and food safety protocols." Morgan Ben-David, *Managing Catastrophic Risks in Franchise Systems*, 38 FRANCHISE L.J. 207, 221 (2018).

This 1993 *E. coli* outbreak was so dire that it was an agenda item for President Bill Clinton's first cabinet meeting, and Jack in the Box reported massive operational, financial, and reputational damage across its franchise system, including store closures, lost sales, and long-term restructuring efforts. Elsa A. Murano, H. Russell Cross & Penny K. Riggs, *The Outbreak that Changed the Meat and Poultry Inspection Systems Worldwide*, 8 ANIMAL FRONTIERS 4 (2018).

10. For example, between 2015 and 2018, Chipotle suffered multiple outbreaks involving *E. coli*, norovirus, Salmonella, and Clostridium perfringens that collectively sickened over 1,100 people, ultimately leading to the largest criminal food-safety fine in U.S. history ($25 million). U.S. DEP'T OF JUSTICE, Press Release, *Chipotle Mexican Grill Agrees to Pay $25 Million Fine and Enter a Deferred Prosecution Agreement to Resolve Charges Related to Foodborne Illness Outbreaks* (Apr. 21, 2020; updated Feb. 5, 2025), https://www.justice.gov/archives/opa/pr/chipotle-mexican-grill-agrees-pay-25-million-fine-and-enter-deferred-prosecution-agreement (last visited Mar. 31, 2026).

11. Pattison et al., *supra* note 3, at 19 (citations omitted).

standardized systemwide, contaminated ingredients or mislabeled products can quickly spread across numerous locations before detection. The speed at which products must be identified, removed, and replaced often leaves little room for deliberation, placing legal counsel at the center of real-time decision making. Against this backdrop, effective crisis management for foodborne illness, recalls, and product withdrawals depends heavily on the contractual tools available to counsel before an incident occurs. Indemnification provisions, insurance requirements, recall cooperation clauses, and clear allocation of recall costs are not abstract legal constructs. They are operational mechanisms that determine whether a franchise system can respond quickly, allocate responsibility efficiently, and limit systemwide fallout. This section examines these challenges through a legal and operational lens, focusing on how counsel can structure supplier and distributor agreements to support decisive action when products are in the system but should not be.

While this section focuses primarily on foodborne illness and food-related withdrawals and recalls, the analysis below is also relevant to non-food products, including equipment, fixtures, and furnishings. In food-related claims, questions of causation are often complex and contested, whereas defects in non-food products may, depending on the circumstances, present a more direct causal relationship to injury. The best practices discussed below were developed for situations involving uncertainty within the supply chain and remain applicable in non-food contexts, where the causal analysis may at times be more straightforward, though fact-dependent.

2.1 Recalls, Product Withdrawals: Best Practices in Vendor Agreements

(i) Recall Provision

A recall is generally understood to be the removal or correction of a marketed product that violates regulatory requirements and may pose a risk to public health or safety.[12] Recalls may be voluntary, initiated by a firm upon identifying a defect or compliance issue, or involuntary, when a regulatory agency mandates action after determining that a product poses a risk or violates applicable law.[13] In practice, the term "recall" often functions as an umbrella concept encompassing several related, but distinct, corrective actions within the supply chain. These include market withdrawals and corrections (often referred to as retrofits), which differ primarily in the severity of the issue and the level of regulatory oversight involved.[14] A market withdrawal refers to the removal of a product from distribution due to a minor violation or quality issue that does not

12. U.S. FOOD & DRUG ADMIN., *Food Recalls: What You Need to Know* (last accessed Apr. 8, 2026) https://www.fda.gov/food/buy-store-serve-safe-food/food-recalls-what-you-need-know.

13 *Id.*

14 *Id.*; U.S. FOOD & DRUG ADMIN., *Recalls, Corrections and Removals (Devices)* (last accessed Apr. 8, 2026) https://www.fda.gov/medical-devices/postmarket-requirements-devices/recalls-corrections-and-removals-devices.

typically warrant legal or regulatory action.[15] In contrast, a correction or retrofit involves repairing, modifying, or relabeling a product to bring it into compliance.[16] While these actions may resemble recalls operationally, they are distinguished by their lower risk profile, more limited scope, and reduced regulatory consequences.

Courts evaluating recall related liability tend to focus on whether a party met the obligations actually imposed on it, rather than on whether a recall was executed perfectly. In Lapuyade v. Rawbar, Inc., a distributor avoided liability by showing that it promptly notified a restaurant of a product recall and instructed it to check inventory and quarantine affected product, even though notice was provided by telephone and did not replicate the manufacturer's suggested written recall language.[17] The court emphasized that the distributor discharged its duty based on the steps it took and the restaurant's confirmation that no recalled product remained. The case illustrates the value of addressing recall notice, response steps, and coordination expectations in supplier and distributor agreements before a crisis occurs, especially because most recalls are nominally "voluntary," yet often compelled by pressure from other system purchasers and supplier partners.[18] When recall obligations, notice protocols, timing expectations, and internal response steps are not articulated by contract or otherwise in a manual, disputes tend to turn on retrospective judgments about what constituted "reasonable" recall conduct under emergency conditions.

A comprehensive recall provision should address or include the following[19]:

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15. U.S. FOOD & DRUG ADMIN., *Recalls Background and Definitions* (last accessed Apr. 8, 2026) https://www.fda.gov/safety/industry-guidance-recalls/recalls-background-and-definitions; U.S. FOOD & DRUG ADMIN., *supra* note 14.

16. U.S. FOOD & DRUG ADMIN., *supra* note 14*; U.S. Food & Drug Admin., Corrective and Preventive Action Basics* (Nov. 4, 2014) https://www.fda.gov/files/about%20fda/published/CDRH-Learn-Presenation--Corrective-and-Preventive-Action-Basics.pdf.

17. Lapuyade v. Rawbar, Inc., 18-474 (La. App. 5 Cir. 12/27/18), 263 So. 3d 508, writ denied, 2019-0315 (La. 4/15/19), 267 So. 3d 1126. This case did not arise in the franchise context. The court's analysis is nevertheless instructive because it illustrates how liability exposure can hinge on whether recall notice and response steps were reasonably discharged in light of the parties' contractual and operational expectations. In franchise and other system-wide supply chains, reliance on informal or minimal recall instructions, such as telephone notice alone, may be insufficient. Written notice, documented communications, and verifiable compliance measures are often advisable or required, reinforcing the importance of allocating clear, documented recall obligations by contract or system manuals in advance of a crisis.

18. U.S. FOOD & DRUG ADMIN, *supra* note 12.

19. *See* Beilfuss et al., *supra* note 6 at 25; Pattison et al., *supra* note 3 at 17-19.

1. Scope of Recall.

- Define the term “recall” broadly to capture the full range of product-related corrective actions, including product recalls, market withdrawals, administrative detentions, seizures, quarantines, removals from distribution, and corrective actions mandated or reasonably anticipated by governmental authorities.

- Clarify that the scope includes both mandatory and voluntary recalls, as well as recalls initiated in response to system-wide risk, supplier’s failure to conform to the terms of the agreement (including the product warranties), purchaser pressure, quality deviations, or safety concerns, even in the absence of a formal regulatory order.

- Specify that recall obligations apply to products at all stages of the supply chain, including products in transit, warehoused inventory, products delivered but not yet sold, and products already introduced into commerce where retrieval remains feasible.

2. Timely Notice.

- Require notice within a defined time period (e.g., within 4 hours of discovery), rather than relying on undefined “immediate” or “prompt” notice.

- Designate, either in the agreement or the supplier code of conduct, the contact person(s) who should receive the recall notice.

- Require notice for any circumstance that could affect product safety, quality, regulatory compliance, or suitability for use, not just government- or supplier-initiated recalls.

3. Recall Authority and Control.

- Permit the franchisor or supply chain administrator to unilaterally (after consultation with the supplier) initiate, coordinate, and/or mandate a recall or product or market withdrawal based on the severity of the issue, regardless of whether a governmental authority has acted.

- Allow the franchisor or supply chain administrator to expand the scope of a recall if necessary to protect the system or brand.

4. Procedures and Coordination.

- Require suppliers and distributors to provide their recall and withdrawal procedures in advance.

- Require that the supplier or distributor follow the recall plan required by the governmental authority or the franchisor or supply chain administrator. Alternatively, ensure that the franchisor or supply chain administrator has the right to review and approve the supplier or distributor's recall procedures and, if insufficient, to impose, supplement, or replace those procedures.

- Require cooperation from vendors with system-wide communications, logistics, and product removal efforts.

5. Financial Responsibility and Indemnification.

- Require the supplier or distributor to indemnify the franchise system and its purchasers for all costs and expenses associated with the recall, including:

    - Replacement products and freight (including expedited freight);

    - Labor costs to identify, segregate, and remove recalled products;

    - Internal and external communications and notification costs; and

    - Administrative overhead and legal expenses related to recall management.

- Require that the supplier or distributor face quasi-strict liability for these costs and expenses if the vendor does not cooperate with the recall procedures.

6. Replacement, Refund, and Continuity.

- Require replacement of recalled products at no additional charge or, if replacement is unavailable, a full refund.

- Permit the franchise system to source substitute products from alternative suppliers during the recall period without breach or penalty.

7. Reimbursement Mechanics

- Specify how recall-related costs are calculated, documented, and reimbursed.

- Include defined timelines for reimbursement to prevent suppliers from using delay as leverage.

(ii) Warranties

While the Uniform Commercial Code[20] provides some limited implied warranties[21] for the sale of goods[22] in the absence of an effective disclaimer,[23] franchisors or supply chain purchasing cooperatives should include express product warranties from suppliers and distributors to ensure that goods sold into the franchise system are adequate and that the franchise system would enjoy the full benefits of the recall and indemnification provisions negotiated elsewhere.

The types of express warranties to include in the supply agreement will depend on the specific type of goods being purchased and the specific franchise system at issue. At a minimum, these express warranties should: (i) restate (or, better yet, improve upon) the

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20. Article 2 of the Uniform Commercial Code (U.C.C.), which has been adopted in every state except Louisiana, governs the sale of goods over $500 between merchants. Article 2 would, absent an express disclaimer or deviation by contract, apply to most transactions in franchise supply chains. *See* Patrick J. Maslyn & W. Andrew Scott, *Contractual and Business Aspects of Structuring Supplier Agreements*, A.B.A. 30TH ANN. F. ON FRANCHISING, at 12-23 (2020); Romo et al., *supra* note 6, at 15-16; *see also* Joyce G. Mazero & Leonard H. MacPhee, *Setting the Stage for a "Best in Class" Supply Chain*, 36 FRANCHISE L.J. 219, 228-30 and fn. 42 (2016).

21. U.C.C. § 2-312 (AM. LAW INST. & UNIF. LAW COMM'N 2022) (implied warranty of title and warranty against infringement); *id.* § 2-313 (creation of express warranties by oral or written "affirmation[s] of fact or promise[s] made by seller . . . [relating] to the goods and [which] become[] part of the basis of the bargain", including descriptions of goods, samples, or models); *id.* § 2-314 (implied warranty of merchantability; other implied warranties arising from course of dealing or usage of trade); *id.* § 2-315 (implied warranty of fitness for a particular purpose); *see also id.* § 2-317 (providing that, when possible, warranties for goods should be interpreted as cumulative and consistent with each other); *but see id.* §§ 1-103 & 1-303(e)(1) and § 2-302 (providing that express terms of sales contracts prevail over implied terms, unless those express terms are unconscionable or unlawful).

22. *Id.* § 2-105(1) (defining a "good" as a tangible, movable thing).

23. *See id.* § 2-316.

implied warranties under the U.C.C.;[24] (ii) provide that the products will strictly conform to the specifications and standards for such products;[25] (iii) provide the products will conform to applicable law, including, as applicable, a warranty against adulteration, misbranding, or contamination for food products, a warranty that the goods adhere to the applicable regulatory packaging and labeling requirements;[26] and (iv) provide that the products will be safe and free from defects in design or workmanship.

In contrast to supply agreements, distribution agreements generally include limited warranties reflecting the distributor's role as an intermediary rather than the originator of the goods. In that context, warranties are generally limited to matters within the distributor's control, such as warranties that: (i) the products will be handled, stored, and transported in compliance with applicable law; (ii) the distributor will not adulterate or mislabel the products; and (iii) the products will be maintained in materially the same condition, and in original packaging, as received from the supplier.[27] Regardless of whether the distributor provides express warranties, the franchise system should require the distributor to pass through upstream supplier warranties to the fullest extent practicable, thereby preserving the system's ability to assert product-level rights against the party best positioned to address them.

As noted elsewhere, "[w]arranties are risk allocation devices."[28] If the products distributed into the franchise system do not conform to these warranties, the mere existence of the express warranties provide something for the franchisor, purchasing cooperative, and system purchasers (including, as applicable, the distributors purchasing from the suppliers) to point to when attempting to address the issue with the supplier. Conversely, the franchise system would face an uphill battle if the parties included a disclaimer of warranties and the purchased goods did not conform to the franchise system's expectations. In all cases, a disclaimer of warranties should only be a negotiated concession if the franchisor, supply chain cooperative, and the operations team(s) are comfortable with the scope and breadth of the express warranties set forth in the vendor agreement.

A note about interplay between product warranties and recalls: Of course, as discussed above,[29] franchisors and purchasing cooperatives should ensure that the supplier agreement clearly permits the initiation of a recall by the franchise system due to the goods' failure to conform to the warranties. Conversely, if a produce product is the

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24. *See supra* notes 20 and 21.

25. *See* Pattison et al., *supra* note 3, at 18; Beilfuss et al., *supra* note 6, at 25; Mazero & MacPhee, *supra* note 20, at 228.

26. *See* sources cited *supra* note 21.

27. *See* Beilfuss et al., *supra* note 6 at 25.

28. Maslyn & Scott, *supra* note 20, at 12.

29. *See supra* text accompanying notes 17-19.

subject of an advisory warning from the U.S. Food & Drug Administration (FDA), such advisory warning would render the produce unmerchantable and may serve as the basis of the buyer's rightful rejection and claim for breach of the warranty of merchantability, depending on whether the risk of loss had shifted to the buyer.[30] If the FDA advisory was issued prior to shipment, the subsequent shipment by supplier or distributor would either permit the supplier or distributor to voluntarily recall the produce or could serve as the basis for a breach of the warranty of merchantability (leading to rightful rejection); or, if the FDA advisory warning was issued after receipt and acceptance by the buyer, the buyer must pay for the produce because the risk of loss had already passed to the buyer[31] (unless the parties' contract provides otherwise and accounts for this scenario in its recall provisions).

(iii) Indemnification

Critically, when a recall is attributable to supplier, manufacturer, or distributor fault, franchise systems, and the purchasers operating within them, expect counterparties to stand behind their products. While indemnity is often framed as a backward-looking remedy, allocating losses *after* a disruption occurs, it also operates as a forward-looking governance mechanism that shapes supplier behavior and mitigates risk before failures materialize. In practice, indemnification is one of the principal tools franchisors use to align incentives across the supply chain and to exert leverage when continuity, quality, or compliance is threatened.

A comprehensive indemnity should include or address the following:

1. Broad Coverage of the Franchise System and its System Purchasers.[32]

- Extend beyond the immediate contracting parties to protect the franchisor, its subsidiaries and affiliates, and the system purchasers who may not be signatories to the supply agreement.[33]

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30. *See* U.S. DEP'T OF AGRIC.: AGRIC. MKTG. SERV., *FDA Advisory Alert on Romaine Lettuce and the PACA* (last accessed April 2, 2026) https://www.ams.usda.gov/rules-regulations/paca/fda-advisory-alert-romaine-lettuce-and-paca.

31. *Id.*

32. As used herein, "system purchasers" is meant to cover the franchisor, the operators of the outlets (both corporate and franchised units), distributors, subsidiaries and affiliates of the franchisor, and any system purchasing co-operative.

33. In *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2012 WI 70, 342 Wis. 2d 29, 42, 816 N.W.2d 853, 859, the Wisconsin Supreme Court held that a restaurant franchisor was entitled to equitable indemnity from its meat processor for settlement payments arising out of a child's death caused by contaminated meat served at a franchise location. The court focused not on the operational role of the franchisor or franchisee, but on the origin of the defect and the commercial

- A comprehensive indemnity clause that is most favorable to the franchise system should not be limited only to third party claims that are asserted against the contracting party (whether franchisor or the system's purchasing cooperative). Instead, in addition to the scope of indemnified parties set forth above, the most protective indemnification clause will cover all damages suffered by the indemnified parties, whether indirect or direct. As a fallback position, the indemnification clause should at least cover third party claims and the *direct* losses suffered by the indemnified parties, instead of just being confined to third party claims.

2. Broad Inclusion of Events Giving Rise to Indemnification Claims. At a minimum, indemnification should cover breaches of the supply agreement itself. Standing alone, however, breach-based indemnity is often insufficient, particularly where agreements cannot anticipate the full range of disruptions that may occur or where the agreement lacks the full range of vendor obligations. A comprehensive indemnity should therefore extend to losses, damages, claims, and liabilities arising out of or relating to:

- the preparation, processing, manufacture, completion, delivery, storage, handling, marketing, sale, consumption, or use of the goods;[34]
- breach of express and implied warranties;
- failures to comply with specifications;
- defective, adulterated, or misbranded products;
- (foodborne) illness, personal injury, or property damage affecting customers, system purchasers, or other third parties;
- product recalls, market withdrawals, quarantines, or other corrective actions;

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expectation that the supplier bears responsibility for harm caused by its product. The decision underscores the importance of indemnity provisions that protect not only the immediate contracting party, but also downstream operators forced to respond to customer injury, litigation, or regulatory action. Note that recovery here hinged on the supplier's agreement with the distributor, which required that the supplier indemnify the distributor and *its customers* which casted a net to protect the franchisor.

34. Romo et. al, *supra* note 6, at 21.

- governmental inquiries, enforcement actions, fines, or penalties; and

- intellectual property infringement claims, including patent, copyright, trademark, or trade dress claims associated with product formulations, packaging, or supplier-provided materials.

3. Comparative Fault and Proportional Allocation. Vendors frequently resist broad indemnity obligations by pointing to the reality that products pass through multiple hands, raising concerns about downstream mishandling or operational negligence. Indemnity provisions should address this reality directly through comparative-fault or proportional-allocation language, rather than allowing it to erode the indemnity entirely.

4. Limitation of Liability. As further discussed below with regard to inventory shortages,[35] the franchisor or supply chain cooperative should only accept a limitation of liability clause or cap on recoverable damages after careful consideration and only as a negotiated concession. If a limitation of liability clause or cap is included, third party claims for which an indemnitee is entitled to indemnification should be carved out or excluded from the limitation of liability or cap or should be expressly understood and described as "direct damages" that are not subject to the liability-limiting clause and its disclaimer of "indirect" or "consequential damages." These third-party claims, absent this exclusion or clarifying statement, are "likely to be classified as a consequential damage as to the indemnified party" and therefore disclaimed.[36] This would effectively undo the indemnification provision that the franchisor or supply chain cooperative worked hard to include in the supply agreement. In addition to the foregoing, vendors have increasingly requested a "super-cap," meaning a separate cap on liabilities otherwise excluded from the general limitation of liability, and such requests should generally be declined at the outset; to the extent any concession is made, any super-cap on recall obligations, third-party claims, confidentiality breaches, intellectual property breaches, or indemnification obligations materially undermines the intended carve-out by reintroducing capped exposure and must be narrowly tailored so as not to negate the underlying obligation. Any cap, whether "super" or ordinary, should factor in and account for the risk profile of the product, the volume of business with the vendor, and the profile of the contracting party. The

35. *See infra* Part 3.1(iii).

36. *See* Kate Wegrzyn, *Consequential Damage Disclaimers in Supply Agreements*, FOLEY & LARDNER LLP: FOLEY BLOGS (Mar. 14, 2018), https://www.foley.com/insights/publications/2018/03/consequential-damage-disclaimers-in-supply-agreeme/.

amount of this cap can be arrived at in any number of ways, including as a function of some multiple of amounts paid or payable, the limits of the required insurance policies, the value of the estimated volumes, and so on.

(iv) Insurance

Indemnification, no matter how carefully drafted, is often illusory unless it is supported by insurance that can actually respond when a crisis occurs. In a supply-chain disruption, indemnity allocates responsibility; insurance determines whether that allocation has practical value. Viewed together, they operate as a belt-and-suspenders approach to risk transfer. Forward-thinking franchisors therefore focus not only on protecting themselves, but on ensuring that their supplier partners maintain insurance sufficient to mitigate system-wide risk when failures occur.

In practice, insurance provisions are often among the most readily accepted contractual protections, once a franchisor evaluates the appropriate types of coverage and coverage limits for its supply chain and articulates those requirements in a principled, risk-based manner. That is, in connection with determining the appropriate insurance coverage and requirements, the franchisor should[37]:

1. Start with risk allocation, not boilerplate defaults. Insurance requirements should be informed by a deliberate assessment of the vendor's role in the supply chain, the nature of the product, and the realistic downstream exposure posed by a failure. This assessment is best conducted in coordination with a qualified risk manager or insurance advisor, rather than relying on market-standard certificates or distributor boilerplate. Franchisors and supply chain administrators should ensure that the types and amounts of insurance correspond with the relative risk profile of the products, supplier or distributor, and allocation to the franchise system. These types of insurance typically include: (i) commercial general liability insurance; (ii) product liability or product recall; (iii) automobile (hired and non-hired); (iv) workers' compensation and employer liability; (v) cybersecurity risk; (vi) if applicable, all-risk or property; and (vii) umbrella/excess coverage. With increasing frequency, franchisors and supply chain administrators also require business interruption insurance with regard to the vendors' own interruptions.

2. List the additional insureds. Require the franchisor, supply chain cooperative (if applicable), and their respective affiliates, successors, and assigns to be named as additional insureds. Additional-insured status ensures that these parties receive direct protection under the vendor's policies for claims arising out of the vendor's products or services, without first prosecuting an indemnity claim. This protection is particularly critical in recall, contamination, and product-liability scenarios, where claims are frequently asserted simultaneously against the franchisor, distributors, and

37. *See* Mazero & MacPhee, *supra* note 20, at 237-38.

franchisees based on brand association alone. In those situations, system parties often must immediately incur defense costs, remediation expenses, and settlement payments before liability is fully adjudicated. Additional-insured coverage allows the franchisor and other protected parties to tender such claims directly to the vendor's insurer (recognizing, of course, that insurers may still contest coverage, as that is the nature of insurance companies).

3. Ensure that coverage for additional insureds are primary and non-contributory. Without primary and non-contributory language, insurers may attempt to shift defense or indemnity obligations to the franchisor's own policies, undermining the intended risk transfer. This endorsement reinforces the commercial expectation that vendor insurance responds first for vendor-caused losses, preserving the franchisor's insurance for unrelated system risks.

4. Require a waiver of subrogation in favor of the franchisor, franchisees, and, if applicable, the purchasing cooperative and system purchasers. A waiver of subrogation prevents the vendor's insurer, after paying a claim, from seeking recovery against the franchisor or listed additional insureds, which would otherwise recycle liability back into the system the insurance was meant to protect.

5. Require delivery of certificates of insurance (and endorsements) evidencing required coverages. It is important to ensure that the franchisor or purchasing cooperative monitor a vendor's compliance with the insurance provision by requiring regular delivery of the vendor's certificate of insurance. Reviewing and calling out any defects in the COI is just as important, of course, as receiving the COI in the first place. Franchisors and franchise supply chain administrators oftentimes engage a third party to assist with these insurance monitoring efforts.

6. Impose a continuous-coverage obligation, with deviations treated as a material breach. Vendor agreements should require the vendor to maintain required insurance at all times during the term and to provide immediate notice of cancellation, non-renewal, or material modification. Failure to maintain coverage should constitute a breach permitting suspension of purchases or termination, recognizing that uninsured periods represent unacceptable system risk.

7. Reserve the right to recalibrate coverage as system risk evolves. Franchisors should retain the ability to require changes to limits or additional coverages where the supplier's product mix, distribution footprint,

or regulatory risk materially expands, ensuring that insurance remains aligned with actual exposure over time.

8. Tie insurance requirements directly to indemnity obligations. Insurance should be expressly positioned as financial backstop for the supplier's indemnification obligations, not as a substitute for them.

(v) "Tying Out" Supply Chain Agreements

Because a recall, market withdrawal, or product removal requires efforts from all of the key players in the franchise supply chain—namely, the franchisor, the supply chain management entity (e.g., if applicable, the purchasing cooperative), the supplier or manufacturer, the distributor, the logistics services provider, and the franchisees—the franchisor or supply chain administrator should ensure that the agreements with each participant supports the recall.

While tying out the supply chain is one documentation strategy, most commonly employed by larger regional and national franchise systems to impose standardized terms and conditions across the system,[38] the underlying principle is broadly applicable. Supply-chain disruptions are easier to manage when the system controls the operative terms governing supplier and distributor performance. Effective response requires coordinated obligations and aligned authority across supplier agreements, distribution arrangements, purchasing-cooperative documents, and system-level protocols. At that point, the analysis necessarily shifts from what the system *can* do under its agreements to what it *will* do operationally, moving from rights assessment directly into execution strategy.

"Tying out" the supply chain ensures that: (i) the supplier agreement vests recall authority in the franchisor or purchasing cooperative and imposes corresponding obligations for cooperation; (ii) the distribution agreement requires distributors to comply with recall directives, quarantine affected product, and provide necessary traceability and logistics support; and (iii) the franchise agreement obligates franchisees to immediately implement recall instructions, remove or isolate impacted products, and cooperate with system-wide communications and remediation efforts. When those agreements are structured to speak with one voice, the system can respond with clarity and speed; when they are not, execution may become fragmented, delayed, or subject to avoidable legal or operational uncertainty.

In many systems, this alignment is achieved through a Master Vendor Agreement, negotiated at the outset of the supplier or distribution relationship, that governs supply to all authorized system purchasers and establishes uniform terms across the supply

38 Romo et al., *supra* note 6, at 18.

chain.[39] These master agreements typically set forth provisions that apply to every purchase order and invoice, survive termination, and address product specifications, traceability, reporting, recall authority, indemnification, and insurance.[40] When supported by consistent obligations in franchise agreements, distribution agreements, and any purchasing cooperative documents, the result is a contractual framework that functions as an operational playbook when a disruption occurs.

Recall events reward preparation, not improvisation. When a disruption begins, counsel and system representatives should be able to pick up the phone knowing that the contractual framework (recall authority, indemnification, insurance, and coordinated supplier obligations) already favors immediate action and structured resolution. Those tools allow the franchisor to move immediately from diagnosis to execution, rather than negotiating responsibility, coverage, and control in real time. In recall and withdrawal scenarios, resilience is not reactive; it is contractual, and it determines whether the system leads the response or absorbs it.

2.2 Recalls, Product Withdrawals: Operational Considerations

In addition to (or, in the authors' experience, notwithstanding) the terms of the supply and distribution agreements between the franchisor or purchasing cooperative and the supplier and/or distributor, the respective business teams can employ certain best practices to reduce the impact of any recall, product or market withdrawal, removal, and similar actions. These operational considerations and best practices include:

- **Cooperation Amongst All Parties**. As obvious, and perhaps aspirational, as this point seems, effective cooperation among all supply-chain participants is essential to managing recalls and product withdrawals in a franchise system. Of particular importance is the identification of a clearly defined coordinator, whether the franchisor or the purchasing cooperative, and whether it is counsel themselves or the contract management team member, it is typically the party that maintains the primary commercial relationships with the affected suppliers and distributors. This coordinator serves as the system's single source of truth and trust.[41] Because the coordinator and the relevant supply-chain partners are

39. Culp & Spandorf, *supra* note 7, at 36; Romo et al., *supra* note 6, at 31 ("Consistency of Agreements"); Beilfuss et al., *supra* note 6, at 21-26.

40. Culp & Spandorf, *supra* note 7, at 36; Romo et al., *supra* note 6, at 15-33; Beilfuss et al., *supra* note 6, at 21-26.

41. *See* Julie Littman, *What Restaurants, Suppliers Can Learn from McDonald's E. coli Outbreak,* RESTAURANT DIVE (Nov. 12, 2024), https://www.restaurantdive.com/news/mcdonalds-ecoli-response-teaches-suppliers-restaurants/732322/. McDonald's e-coli quarter pounder experience illustrates how long-standing, trusted supplier relationships enhance recall readiness. Rather than cycling through suppliers or relying on competitive bidding alone, McDonald's maintains suppliers that are deeply integrated into its operational processes, allowing the company to execute an established response plan when a disruption occurs. As one industry

familiar with both the contractual framework and one another's operational roles, they are better positioned to act decisively and in coordination.

- **Approved Suppliers and Quality Assurance**. Franchise systems that invest in supplier onboarding[42] for "Approved Supplier" qualifications, periodic audits, and inspection protocols are better positioned to identify compliance gaps before they escalate into recalls or market withdrawals. Importantly, vendor agreements should expressly contemplate these quality-assurance audits and inspections, both to preserve audit rights and to reinforce that compliance is an ongoing operational obligation rather than a one-time condition of approval.

- **Traceability and Prompt Action**. The devil may work fast, but the media works faster. The ability to quickly identify where a product is affected, and to stop the bleeding just as quickly, has become a defining feature of effective recall response. Ideally, a franchise system's supply chain should be structured around Hazard Analysis and Critical Control Point (HACCP) principles, which provide a systematic, preventative framework for identifying, evaluating, and controlling food-safety risks through the analysis of certain biological, chemical, and physical hazards before they result in contamination or recall events.[43] By requiring suppliers to identify critical control points, establish verification procedures, and implement corrective actions, HACCP-based programs improve system visibility and reduce dependence on post-incident investigation.[44] In addition to HACCP principles, the Food Safety Modernization Act ("FSMA")[45] seeks to strengthen the safety of the U.S. food supply by shifting the regulatory focus from reacting to food safety incidents to preventing them. FSMA implements this approach through regulations that, among other requirements, mandate supplier verification for food sold in the United States, impose FDA registration obligations, and enhance traceability throughout the supply chain.[46] In response, many participants in the food and beverage industry are increasingly looking to enhanced traceability tools, including

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observer noted, this integration enabled McDonald's to respond swiftly and confine the situation once the issue arose.

42. *See* Pattison, *supra* note 3, at 15. A Franchisor's onboarding due diligence should include, among other key measures, a review of the vendor's ownership and organizational structure, financial condition, insurance coverage, maintenance of required licenses and permits, litigation and criminal history, operational capabilities, regulatory compliance posture, and overall alignment with the brand's quality assurance requirements, standards, and system requirements.

43 Romo et al., *supra* note 6, at 10.

44. *Id.*

45. 21 U.S.C. §§ 2201-2252. FSMA amended the Federal Food, Drug, and Cosmetic Act.

46. Beilfuss et al., *supra* note 6, at 37-38.

blockchain-enabled systems, to improve food safety, streamline supply-chain processes, and trace products and ingredients back to their origin in seconds.[47] Technologies such as centralized traceability and reporting platforms (e.g., BellTower Technology) can play a meaningful role by consolidating supplier data, lot information, distribution paths, and inventory status, enabling faster quarantines, more targeted removals, and more defensible decision-making as events unfold.

- **Centralized Crisis Response Team**. A centralized voice for a centralized system represents true operational optimization, ensuring that information, directives, and timelines are communicated consistently across the board. This unified approach is critical, as the public rarely distinguishes between the actions of individual supply-chain participants; responsibility and reputational impact are instead attributed to the brand as a whole. While internal coordination may involve multiple stakeholders, recall instructions, public statements, and franchisee directives should be centralized to maintain clarity and control, a role that most often rests with the franchisor. Operational facilitation of the recall, however, is often best suited to the purchasing cooperative or other supply-chain administrator that maintains ongoing commercial relationships with suppliers and distributors. Alignment between the franchisor and any supply-chain cooperative is therefore essential to avoid conflicting directives.

- **Operations Manuals**. While the contractual framework should incorporate by reference, link, or otherwise attach an operations manual or supplier code of conduct, which serve to promote ethical practices and mitigate reputational risk for both parties, those documents also play a critical operational role in recall preparedness.[48] They help translate high-level contractual obligations into practical, executable standards governing supplier behavior and system expectations. Rather than attempting to (and concededly never fully succeeding at) memorializing every operational contingency in the initial agreement, operations manuals can establish step-by-step expectations for recall response, including notice procedures, record retention, quarantine protocols, and internal and external communications. Supplier codes of conduct can further require, among other measures, compliance with applicable health and safety laws[49] and product safety and quality standards.[50] While potentially impactful on whether a supplier or distributor continues to be an approved supplier to the

47 Ben-David, *supra* note 9, at 9.

48 Romo et al., *supra* note 6, at 70.

49 *See Ethics and Human Rights*, RESTAURANT BRANDS INT'L, https://www.rbi.com/English/sustainability/ethics-and-human-rights/default.aspx, (last visited Apr. 10, 2026).

50 *See Supplier Code of Conduct*, WINGSTOP, https://ir.wingstop.com/supplier-code-of-conduct/ (last visited Apr. 10, 2026).

franchise system, and whether the goods they sell into the system are still approved and/or comply with the terms of the vendor agreement, policies and best practices regarding ethics, corporate social responsibility (CSR), Environmental, Social, and Governance (ESG), and related requirements, reporting, auditing, and legal compliance concerns are outside of the scope of this paper.

3. *When Products Should Be in the Supply Chain, but are Not: Inventory Shortages*

Between tariffs and trade wars,[51] conflict in Iran and the Strait of Hormuz, ships stuck in the Suez Canal,[52] the Russia-Ukraine war,[53] and COVID-19,[54] it is safe to say that supply chain administrators (and their attorneys) have in recent times become seasoned veterans with respect to inventory shortages caused by sudden, unexpected disruptions. In addition to these macro-level supply chain hiccups, franchise systems commonly deal with micro-level inventory calamities.

Many times, the relevant parties' interests align when faced with the disruption giving rise to the shortage—for example, the franchisor, franchisees, purchasing cooperatives, distributors, and suppliers would all want egg shortages resulting from avian flu to end; *however*, the franchise system is interested in obtaining eggs at the same or lower price, while the supplier is most interested in maintaining its margin, which leads to a perverse incentive to conduct an "efficient breach" and allocate volume to other, higher-margin customers. In these instances, a franchise system's supply chain management team will be tested. Can they lean on the relationship with the supplier to come to a resolution? Will they be able to line up alternate suppliers in time to minimize shortages (or, to minimize the amount in surcharges paid to the ransoming supplier under reservation)? How can they stabilize the supply chain without driving the supplier into bankruptcy or pushing the parties to the courthouse?

As with the other disruptions described in this paper, an outage of core products can have devastating impacts on a franchise system's finances, operations, and

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51. *See* Erica York & Alex Durante, *Trump Tariffs and the U.S.–China Trade War*, TAX FOUNDATION (Mar. 13, 2026), https://taxfoundation.org/research/all/federal/trump-tariffs-trade-war/ (last visited Apr. 10, 2026).

52. *See* Michael R. Gordon and Declan Walsh, *"A Giant Ship Got Stuck in the Suez Canal. Here's What Happened Next,"* THE NEW YORK TIMES (July 17, 2021), https://www.nytimes.com/2021/07/17/world/middleeast/suez-canal-stuck-ship-ever-given.html.

53. *See* Louise Collins, *Iran Energy Crisis: Disrupting Global Supply Chains*, SUPPLY CHAIN DIGITAL (Apr. 8, 2026), https://supplychaindigital.com/news/iran-energy-crisis-disrupting-global-supply-chains.

54 *See* Mattias Hedwall, *The Ongoing Impact of COVID-19 on Global Supply Chains*, WORLD ECON. F. (June 22, 2020), https://www.weforum.org/stories/2020/06/ongoing-impact-covid-19-global-supply-chains/.

reputation.[55] In the simplest terms, when a customer walks into a franchised restaurant outlet expecting to purchase a hamburger only to find that they are out of beef, the customer will leave dissatisfied—and will not care that the outage is due to the impact of New World screwworm on Central and South American cattle herds.[56]

3.1 Inventory Shortages: Best Practices in Vendor Agreements

During a shortage, teams often try to solve problems informally: negotiating allocations, finding substitutes, calling suppliers, or making ad hoc decisions. Those workarounds may help initially, but shortages quickly reveal where improvisation breaks down: conflicting expectations, inconsistent treatment across the system, unclear authority, or disputes over pricing, substitutions, or performance obligations. As those gaps emerge, it becomes clear that the most effective tools are the ones put in place *before* the crisis.

Although system participants may initially share a common goal during an inventory shortage, contractual clarity often determines how long that alignment holds. Vendor agreements therefore play a central role in defining allocation rights, performance standards, and risk allocation when supply constraints persist. In particular, agreements, specifications, or manuals that account for operational realities such as manufacturing choke points, shared production steps, facility dependencies, or required allergen-related changeovers are better positioned to manage shortages predictably, even where nominal capacity exists across multiple lines or facilities. This section examines contractual best practices that help franchise systems navigate those pressures with greater stability and predictability.

(i) Forecasting, Inventory Requirements

While franchisors and purchasing cooperatives should be weary of making minimum or definite volume commitments—and should only do so after carefully considering the system's purchasing history, the availability of suitable alternate products, the financial benefits attributable to the hard commitment, and the specifications for the product are expected to be modified in the near future—franchisors and purchasing cooperatives should weigh the respective costs, risks, economic benefits, and stability provided by committing to product forecasting procedures or minimum inventory

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55. *See* Abby Jenkins, *Supply Chain Disruptions: An Expert Guide*, Oracle NetSuite (Nov. 14, 2024), https://www.netsuite.com/portal/resource/articles/erp/supply-chain-disruptions.shtml (summarizing the key impacts of supply chain disruptions: (i) financial impact from increased costs of goods sold, sourcing expedited or alternative sources, and lost sales and lost customers; (ii) operational impact from delays, quality-control concerns, safety risks, and other operational issues that divert a supply chain manager's attention away from other areas; and (iii) reputation impact from the corresponding increased costs, dip in quality, delays in delivery, and outages of product).

56. *See* U.S. DEP'T OF AGRIC.: ANIMAL & PLANT HEALTH INSPECTION SERV., *Pest Alert: New World Screwworm (Cohliomyia hominivorax)*, APHIS-24-036 (rev. Dec. 2025), https://www.aphis.usda.gov/sites/default/files/pest-alert-new-world-screwworm.pdf.

requirements. When working through this risk-reward analysis, franchisors and purchasing cooperatives should decide whether the parties' forecasts are binding and such consideration should include: (i) whether allowances should apply and at what level (e.g., forecasted quantity +/- 20%); (ii) whether the entire forecast is binding or just a portion (typically tied to the supplier's required lead-times); and (iii) what consequences arise from a failure to meet a binding forecast (e.g., "take-or-pay" calculations for liquidated damages, reconciliation via volume award or term extensions, springing exclusivity or requirement percentage commitments, and reconciliation via per-unit price additions). Again, it is important to keep in mind that any binding forecast creates a minimum purchase obligation on the part of the contracting party. Any failure to meet the binding forecast would give the seller the option of: (i) seeking resale damages (a seller's equivalent to "costs of cover")[57]; or (ii) seeking its market price damages,[58] plus the seller's incidental damages,[59] and, if damages under Section 2-706 or Section 2-708(1) are inadequate (which sellers typically argue is the case), the seller's lost profits.[60]

If the parties do not intend that any forecasts are binding, language should be included in the order procedure or lead-time provision of the vendor agreement clarifying that all forecasts are for informational purposes only and not intended to create binding commitments or minimum purchase obligations on the part of the franchisor, purchasing cooperative, or the system purchasers.

If a supplier or distributor is required to maintain a minimum inventory level, franchisors and purchasing cooperatives will likely be asked to provide some assurances that the vendor will not be required to carry too much inventory or for too long. These assurances typically range from (i) franchisor- and cooperative-friendly: a requirement to meet, confer, and create a plan to address any inventory concerns (whether excess, short, fast-moving, slow-moving, and upcoming obsolete or discontinued inventory), to (ii) supplier- and distributor-friendly, a requirement that the buyer purchase and pickup, or pay for the disposal of (the ongoing storage of), the inventory at issue.

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57. U.C.C. § 2-706 (AM. LAW INST. & UNIF. LAW COMM'N 2022) (sellers may resell goods that it still possesses due to a buyer's wrongful cancellation, repudiation, rejection, or revocation and recover from the buyer seller's difference between the contract price and resale price, plus incidental damages).

58. *Id*. § 2-708(1) (sellers may, if the seller does not resell the goods not purchased by buyer, recover damages based on the difference between the contract price and the market price for the products at the time and place of tender, plus incidental damages).

59. *Id.* §§ 2-706, 708(1).

60. *Id*. § 2-708(2) (sellers, as a "lost volume seller," may seek to recover lost profits (including reasonable overhead) that the seller would have made from full performance, plus any incidental damage, "due allowance for costs reasonable incurred, and due credit for payments or proceeds of resale"). For a fuller discussion of a seller's remedies under the U.C.C., *see generally infra* Part 5.

(ii) Quantity Term: Requirements

As opposed to a volume commitment set to a sum certain, franchisors and purchasing cooperatives oftentimes structure vendor agreements as "requirements contracts"—"an agreement in which the supplier is required to sell and the franchisor [or its system purchasers are required] to purchase all of the [franchise system's] requirements for a particular product."[61] This quantity term—if structured as a nonexclusive percentage of the franchise system's total requirements or other estimated requirement (as opposed to a hard volume commitment or an "all requirements" term that creates implied or quasi-exclusivity)[62]—is generally understood to be the optimal structure, as it permits the franchise system "to increase and/or decrease purchase order volume without incurring contractual liability to the vendor."[63] Note that, with respect to suppliers, franchisors and supply chain cooperatives can fall within this preferred formulation by tying the requirements commitment to an allocation of volumes by distribution center or group of system purchasers. The franchise supply chain administrator, however, should be sure to reserve the right to modify, supplement, or reallocate the distribution centers and to make clear that the franchisor or purchasing cooperative is not obligated to make up any volume resulting from such reallocations.

A requirements term allows the franchise system to bind the supplier or distributor to a quantity term without providing for a specific quantity in the contract. This, in turn, is helpful when a supplier or distributor claims that they are unable to supply the requested quantity of goods (whether through repudiation or, importantly, by rejecting a purchase order), as it forecloses the argument that the vendor had not committed to supply the required quantities. Put differently, if instead the vendor agreement was structured as a purchase order-by-purchase order relationship, the vendor would be free to reject the system purchasers' order or, more likely, threaten rejection and require price increases, longer lead-times, or other concessions from the system purchasers; the requirements term, on the other hand, allows the system purchasers to claim a breach of the vendor agreement based on such rejection.

Franchisors and purchasing cooperatives should be careful when drafting and structuring requirements contracts. Failure to do so may invalidate the entire vendor agreement. Under the Uniform Commercial Code, the quantity term is the one of three

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61. Culp & Spandorf, *supra* note 7, at 38.

62. *See* MSSC, Inc. v Airboss Flexible Prods. Co., 999 N.W.2d 335, 339-42 (Mich. 2023) (discussing differences among outputs, requirements, and release-by-release or Blanket Purchase Order (BPO) quantity terms); *id*. at 345 (citing Cadillac Rubber & Plastics, Inc. v. Tubular Metal Sys., LLC, 952 N.W.2d 576 (Mich. App. 2020)) (finding that "requirements contracts do not always have to be exclusive," as sellers and buyers may agree that the quantity term will be measured by "a nonexclusive part of the buyer's total need").

63. Culp & Spandorf, *supra* note 7, at 38.

essential components of an enforceable sale of goods contract.[64] Sales contracts are enforceable if they lack a price term or a duration term, but not a quantity term. Franchisors and purchasing cooperatives should be aware that a number of jurisdictions[65]

64. *See* U.C.C. § 2-201(1), cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2022) ("Only three definite and invariable requirements as to the memorandum are made by this subsection [relating to the statue of frauds in sales contracts]. First, it must evidence a contract for the sale of goods; second, it must be 'signed', a word which includes any authentication which identifies the party to be charged; and *third, it must specify a quantity*" (emphasis added)).

65. Arkansas: Stacks v. F & S Petroleum Co., 6 Ark. App. 327, 330, 641 S.W.2d 726, 727 (1982) ("Both at common law and under the Uniform Commercial Code, a requirements contract is simply an agreement by the buyer to buy his good faith requirements of goods exclusively from the seller.")

Georgia: Billings Cottonseed, Inc. v. Albany Oil Mill, Inc., 173 Ga. App. 825, 827, 328 S.E.2d 426, 429–30 (1985) (holding that no valid requirements contract existed because, although Albany agreed to furnish all of Billings's requirements, there was "no promise, express or implied, by Billings to purchase its requirements exclusively from Albany," and Billings in fact purchased from other suppliers; emphasizing that "it is the promise of exclusivity that provides the consideration to the seller" in a requirements contract).

Idaho: Bright Harvest Sweet Potato Co., Inc. v. H.J. Heinz Co., L.P., 760 F. App'x 537, 538 (9th Cir. 2019) ("we assume that a valid Idaho requirements contract exists if a buyer agrees to purchase up to a certain amount of its requirements exclusively from one seller").

Illinois: Torres v. City of Chicago, 261 Ill. App. 3d 499, 504–05, 632 N.E.2d 54, 58 (1994) (citing Mid–South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1120 (5th Cir. 1985) ("[A]n essential element of a requirements contract is the promise of the buyer to purchase exclusively from the seller either the buyer's entire requirements or up to a specified amount."); further noting that absent such exclusivity the buyer has effectively promised nothing of value because "[t]he promise [in a requirements contract] contains one very definite element that specifically limits the promisor's future liberty of action; he definitely promises that he will buy of no one else" (quoting 1A Corbin on Contracts § 156, at 33 (1963))).

Indiana: Watson Water Co., Inc. v. Indiana-Am. Water Co., Inc., 85 N.E.3d 840, 850 (Ind. Ct. App. 2017) ("A requirements contract is one in which the purchaser agrees to buy all of its needs of a specified material exclusively from a particular supplier, and the supplier agrees, in turn, to fill all of the purchaser's needs during the period of the contract.").

Missouri: Propane Indus., Inc. v. Gen. Motors Corp., 429 F. Supp. 214, 218 (W.D. Mo. 1977) ("A 'requirements' contract is generally defined as a contract in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller. Although the buyer does not agree to purchase any specific amount, the requisite mutuality and consideration for a valid contract is found in the legal detriment incurred by the buyer in relinquishing his right to purchase from all others except from the seller.").

New York: Harman Becker Auto. Sys., Inc. v. Avnet, Inc., 237 A.D.3d 539, 539 (N.Y. App. Div. Apr. 15, 2025) ("A requirements contract requires the buyer 'to buy all of its particular needs

require that the buyer grant some level of exclusivity to the seller in order for a requirements quantity term to be enforceable. Or, put differently, that the buyer be required to actually purchase or arrange for the purchase of some minimum quantity.[66]

Furthermore, recent court decisions have called into question whether contracts previously presumed to fall with the U.C.C. Section 2-306(1) framework lack the clear and precise quantity term required and, instead, constitute a "release-by-release" quantity term, which would permit a seller to reject a purchase order.[67] In particular, agreements that operate one purchase order at a time, or that let the buyer freely decide whether to buy from the seller at all, are increasingly being viewed as optional arrangements rather than true requirements contracts. This risk is heightened where agreements rely on broad

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in certain products from one supplier.'"); *but see* Corning Inc. v. VWR Int'l, Inc., 2007 WL 841780, 62 U.C.C. Rep. Serv. 2d 488 (W.D. N.Y. 2007) (finding that an agreement established a requirements contract by calling for the buyer to purchase all requirements of reusable glass from a manufacturer, even though the agreement provided non-exclusivity and alternate suppliers for a particular subset of its customers).

Ohio: Bass, Hurwitz & Poliner, CPA's v. State, No. 88AP-1120, 1989 WL 87078, at *2 (Ohio Ct. App. Aug. 3, 1989) (citing *Fuchs v. United Motor Stage Co*., 135 Ohio St. 509, 21 N.E.2d 669, 670 (1939) ("A requirements contract is a contract in writing where one party promises to buy exclusively, and the other party agrees to deliver specific goods or services which the buyer may need for a certain period of time.").

Oregon: Wilsonville Concrete Prods. v. Todd Bldg. Co., 281 Or. 345, 350, 574 P.2d 1112, 1114-15 (1978) ("Both at common law (pre-code) and under the Oregon Uniform Commercial Code, a requirements contract is simply an agreement by the buyer to buy his good faith requirements of goods exclusively from the seller.").

Texas: Baylor Cnty. Special Util. Dist. v. City of Seymour, 709 S.W.3d 5, 12–13 (Tex. App. 2025), review denied (Sept. 5, 2025) ("A 'requirements contract' is a contract wherein the buyer agrees to purchase all the specified goods it requires from the seller to the exclusion of third parties.").

See also California: Amber Chemical, Inc. v. Reilly Industries, Inc., 63 U.C.C. Rep. Serv. 2d 69 (E.D. Cal. 2007) (it is not essential that a requirements contract containing a minimum purchase quantity also be for exclusive dealings; a promise to purchase a minimum quantity in exchange for a fixed price was sufficient consideration for a requirements contract).

66. 1 White, Summers, & Hillman, Uniform Commercial Code § 4:20 (6th ed.).

67. *See generally id.* ("The Michigan Supreme Court, in MSSC, Inc. v. Airboss Flexible Products Co., has recognized a 'release-by-release contract,' which looks like a requirements contract but is not, which means that the parties to such a contract are not bound to conduct further transactions. A release-by-release contract is generally one where the buyer provides a blanket purchase order (PO) that contains no fixed quantity term. Under that PO, the buyer issues "releases" from time to time, each with a firm quantity that the buyer is ordering. While the individual releases may become binding contracts, if the overarching blanket PO has no stated quantity term, the contract fails the UCC's statute of frauds, and the parties are not bound by it.").

allocation ranges, such as commitments to purchase anywhere between 50% and 100% of requirements. Courts have questioned whether such wide ranges meaningfully constrain the buyer's discretion or instead render the quantity term too illusory to be enforceable under § 2-306(1).[68] A more defensible approach may be to tie purchasing commitments to something concrete, such as sourcing requirements for a specific distribution center or defined group of locations. This makes clear that the buyer is committing to purchase and the seller is committing to supply, while still allowing volumes to rise or fall based on real demand. By anchoring the obligation to a known sourcing channel, the agreement reduces the risk that an inventory shortage turns into a contractual dispute at the same time that the system is trying to restore supply.

Lastly, franchisors and purchasing cooperatives should keep in mind that "requirements" terms based upon stated, estimated, or percentage requirements partially depend on the franchise system's forecast of demand. Under the U.C.C., the forecasts must be made in good faith[69] and the buyer may not demand any quantities that are unreasonably disproportionate to the forecast or, as applicable, the estimated volume set forth in the agreement.[70] This stated estimate is just that, an estimate, and "is to be regarded as a center around which the parties intend the [quantity] variation to occur."[71] As such, the franchise system supply chain administrator should use its best efforts to accurately forecast or estimate its requirements and to keep the vendor continuously appraised of any anticipated fluctuations in the estimated requirements.

(iii) (No) Limitations of Liability

The authors of the 2025 IFA presentation and paper upon which this paper builds accurately note that "[r]emedy and damage limitations help define the boundaries of responsibility."[72] They also rightly note that "if the franchisor is not involved in the manufacturing or distribution of the products, the franchisor will want to retain its rights to the fullest extent," which contrasts with the franchisor's desires if the franchisor is a captive distributor or supplier.[73] As one would expect, suppliers and distributors will want to exclude or limit as possible in order to mitigate their financial exposure. This oftentimes

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68. *See* FCA US, LLC v. MacLean-Fogg Comp. Sols., LLC, No. 24-11165, 2025 WL 877534 (slip op.) (E.D. Mich. Mar. 20, 2025) (finding that the use of "65% to 100% of the buyer's requirements" lacked the required precision and definition for an enforceable quantity term necessary to support a valid requirements contract under § 2-306(1), and, as such, the seller was free to accept or reject orders on a "release-by-release" basis).

69. U.C.C. § 2-306, cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2022).

70 *Id.* § 2-306(1).

71 *Id* § 2-306, cmt. 3.

72. Brown et al., *supra* note 4, at 11.

73. *Id.*

presents itself in the vendor agreement as a liability-limiting provision, which excludes certain, or most, types of damages.[74]

Part 5 below provides an overview of the remedies available to each of the parties under Article 2. Due to the breadth of many limitations of liability clauses, and due to the seller's disproportionate benefit from the inclusion of these clauses,[75] franchisors and purchasing cooperatives should be careful when negotiating limitation of liability clauses in vendor contracts. In the context of inventory shortages, three main types of buyer

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74. As noted by Ken Adams, limitation of liability clauses can be expected to contain at least a handful of the following terms, which he prepared after "half an hour of rooting around on EDGAR":

1. Consequential damages
2. Special damages
3. Direct damages
4. General damages
5. Indirect damages
6. Incidental damages
7. Punitive damages
8. Exemplary damages
9. Loss of profits
10. Collateral damages
11. Delay damages
12. Loss of anticipated revenues
13. Loss of savings
14. Loss of goodwill
15. Loss of data
16. Loss by reason of cost of capital
17. Loss of use
18. Loss of production
19. Loss of contracts
20. Increased operating costs
21. Loss of business reputation
22. Lost opportunities
23. Loss of use of equipment
24. Loss by reason of damage to equipment
25. Loss by reason of personal injury
26. Loss by reason of property damage
27. Substitute goods
28. Substitute service
29. Substitute facilities
30. Downtime costs
31. Claims of customers

Kenneth A. Adams, *Limitation-of-Liability Overkill*, Adams on Contract Drafting (Mar. 5, 2020), https://www.adamsdrafting.com/limitation-of-liability-overkill/.

75. *See infra* Part 5 (Remedies).

damages are at play when considering limitation of liability clauses: consequential, incidental, and cover damages.

1. Consequential and Incidental Damages

As further described in Part 5 below, Section 2-715 provides that buyers may recover incidental damages and consequential damages in most cases. Consequential damages include lost profits, so long as the seller "had reason to know" of the lost profits *and* the lost profits could not reasonably have been prevented (such as by effecting cover),[76] and "any injury to person or property proximately resulting from any breach of warranty."[77] Even though Section 2-719 appears to permit the parties to freely contract for "remedies in addition to or in substitution of" or to "limit or alter the measure of damages"[78] provided for under Article 2, Official Comment 1 makes it clear that the parties must have *some* minimum adequate remedies available to them.[79] This is true for consequential damages (except with respect to consequential damages for injury to the person in the case of consumer goods, which is "prima facie unconscionable") that are commercial in nature, which may be limited or excluded unless unconscionable.[80]

This of particular note when the franchise system supply chain manager at issue is not paying for or taking title to the goods themselves, as the entity contracting on behalf of the franchise system's designated purchasers would arguably *only* suffer damages that would be considered consequential from a seller's breach. For example, if a seller delivered goods that did not conform to the contracted-for warranties and an end-user became sick and/or caused an outlet to shut down, the resulting suit from the customer, the loss of goodwill and harm to the brand's reputation, the loss of expected royalties stemming from the outlets' closure, among other things, would all arguably fall within consequential damages because they were foreseeable at the time of contracting and would have arisen "as a consequence" of the seller's breach. The franchisor or purchasing cooperative, unlike the designated purchaser, would generally not be able to recover direct damages for the price because they did not pay for the defective goods and it is unclear to the authors what their direct damage would be for that breach by the supplier.

Nevertheless, the inertia and collective vendor practice of pushing for exclusion of consequential and incidental damages,[81] as well as Section 2-719(3), require franchisors

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76. U.C.C. § 2-715(2)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2022).

77. *Id*. § 2-715(2)(b).

78. *Id.* § 2-719.

79. *Id.* § 2-719, cmt. 1.

80. *Id.* § 2-719(3).

81. KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING 383-85 (A.B.A. 5th ed. 2023).

and purchasing cooperatives to consider and push back on these exclusions. After noting the potential unconscionability in excluding these types of damages, the inconsistent general understanding of the term "consequential," and the perceived interchangeability with "remote" damages for some practitioners,[82] the franchisor and purchasing cooperative should focus discussions on the types of indirect damages that would ordinarily arise from a seller's breach of warranty, breach of quantity commitment, or failure to deliver. This can be accomplished by focusing on the carveouts to the excluded damages and the scope of the limitation of liability clause.

First, if a supplier insists on a limitation of liability clause, the franchisor or cooperative should be sure to exclude the following from the clause:[83]

- breaches of intellectual property warranties, misappropriation or infringement of intellectual property rights, or related indemnities;
- breaches of confidentiality, data-security, or information-use obligations;
- claims arising from fraud, willful misconduct, or gross negligence;
- costs of cover, substitute sourcing, and other incremental procurement expenses incurred to mitigate the shortage;
- incidental damages directly tied to delivery failures, rejected purchase orders, or emergency logistics;
- indemnification against third party claims; and, where possible,
- costs associated with recalls, market withdrawals, or product removals, including those that coincide with or exacerbate an inventory disruption.

Second, when outlining the types of damages that fall within the exclusion,[84] the franchisor and purchasing cooperative should push back on the inclusion of the following exclusions (confusing, we know): (i) "direct" or "general" damages, as these are the ordinary, contracted-for damages that directly arise from the seller's breach; and (ii) incremental, incidental, or cover damages, as described above and in subpart 2 below. From there, franchisors and purchasing cooperatives oftentimes outline the types of consequential, indirect, or special damages that are recoverable (in addition to the carveouts listed above) that are typically tied to lost sales and lost royalties attributable to and arising from the temporary closure of an outlet, business interruption, and other types of consequential costs associated with preparing an outlet to reopen, while expressly

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82. *Id.*

83. *See* Wegrzyn, *supra* note 36.

84. *See* Adams, *supra* note 74.

excluding other categories of consequential damages such as loss of market capitalization or damage to reputation or goodwill.

The practical question is not whether suppliers should bear unlimited risk, but whether the limitation aligns with the economic realities of the relationship. When a vendor is supplying high-volume, brand-critical products for a franchise system, a limitation of liability that excludes the primary forms of foreseeable harm may function less as risk allocation and more as risk elimination.

2. Costs of Cover

When inventory shortages arise, franchise systems rarely have the luxury of waiting for contractual disputes to resolve before restoring supply. Instead, franchisors and purchasing cooperatives are often forced to secure substitute products on an accelerated basis, frequently at higher prices, from non-preferred suppliers, or through alternative distribution channels. In that environment, the ability to recover costs of cover becomes one of the most critical economic protections available to the system.

Franchisors and purchasing cooperatives should ensure that vendor agreements expressly preserve the right to recover costs of cover, incidental damages, and incremental expenses incurred as a result of supply failure or when a supplier communicates, through words or conduct, that it will not perform its contractual supply obligations when due. Although these remedies are generally available under the Uniform Commercial Code, reliance on default statutory protections alone is often insufficient in practice. As discussed above, supplier-drafted agreements frequently attempt to waive, limit, or obscure recovery of cover damages through liability-limiting provisions, disclaimers of consequential damages, and restrictive definitions of recoverable loss.

Under U.C.C. Section 2-712, a buyer who rightfully covers may recover the "difference between the cost of cover [(that is, substitute goods)] and the contract price together with incidental or consequential damages . . . but less expenses saved in consequence of the seller's breach."[85] Section 2-715 further permits recovery of reasonable expenses incurred in arranging substitute purchases, including transportation, handling, and other commercially reasonable mitigation costs.[86]

For franchise systems, those damages often arise not at a single unit level, but across an entire supply chain network operating under compressed timelines. Parties should keep in mind that the cover affected by the system purchaser does not require procurement of identical goods from another seller—instead looking only to whether the cover goods are "commercially usable as reasonable substitutes under the circumstances

85. U.C.C. § 2-712 (AM. LAW INST. & UNIF. LAW COMM'N 2022).

86. *Id.* § 2-715.

of the particular case"[87]—and does not require that a buyer attempt to obtain substitute goods from the defaulting seller before effecting cover with third parties.[88] This is of particular note in the franchise context due to the system purchasers' (typical) obligation to procure goods and equipment that adhere to the specifications set by the franchisor, oftentimes from suppliers approved by the franchisor,[89] which in turn reduces the universe of available cover suppliers for the system purchasers. Here, the "test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner," which includes without unreasonable delay, meaning "reasonable time and seasonable action."[90]

As a matter of best practice, vendor agreements should not only preserve these statutory remedies, but also acknowledge them affirmatively and clarify how they operate in a system-wide context. This may include recognizing that substitute sourcing may involve non-identical products, compressed vetting timelines, or deviations from ordinary procurement processes, without jeopardizing recovery. Agreements that condition recovery of cover on impracticable requirements, such as prior written approval or perfect product equivalence, can substantially undermine the practical value of the remedy during an inventory shortage.

As another consideration, in the context of inventory shortages, costs of cover serve as the primary remedy for a supplier or distributor's failure to perform. Expressly preserving the recovery of cover costs allows those losses to be resolved as a direct contractual matter, rather than prematurely invoking indemnity frameworks that are better suited for third-party claims. Treating cover as an express contractual trigger preserves indemnity as a separate and elevated remedy when customer, regulatory, or recall exposure arises.

Ideally, vendor agreements should also establish a process for documenting and reimbursing cover damages, rather than forcing franchisors or purchasing cooperatives

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87. *Id.* § 2-712, cmt. 2 ("The definition of "cover" under subsection (1) envisages . . . goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case."). *See also* JENNIFER S. MARTIN, AMERICAN BAR ASSOCIATION, *The ABCs of the UCC Article 2: Sales*, ch. 11 (4th ed. 2025) (citing U.C.C. § 2-712, cmt. 2).

88. MARTIN, *supra* note 87, ch. 11 (citing *BRC Rubber & Plastics Inc. v. Cont'l Carbon Co.*, 900 F. 3d 529 (7th Cir. 2018)) (detailing the Seventh Circuit's rejection of a seller's argument that a covering buyer should have accepted an offer of cover from the defaulting seller, as buyers are not required to "'trust its fate' to the breaching seller").

89. *See* Romo et al., *supra* note 6, at 4, 14 (describing that franchisors typically either "issue specifications for products, then permit franchisees to choose a supplier, or . . . approve one or more suppliers for various products, and then provide the specifications directly to the supplier" and describing how specifications are usually provided or developed with vendors as part of the request for proposal (RFP) process).

90. U.C.C. § 2-712, cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2022).

to rely exclusively on post-hoc dispute resolution. Such processes may include defined notice requirements following a supply failure, timelines for submitting cost documentation, interim reimbursement mechanisms, or set-off rights and processes. These procedural guardrails reduce friction during a shortage and allow the focus to remain on supplying the system rather than accounting disputes.

3. Interplay with Inventory Shortages

In short, limitation of liability clauses work to prevent franchisors and purchasing cooperatives from having contractual leverage when working through inventory constraints. As set forth above, the Uniform Commercial Code contemplates a buyer's recovery of money damages when it does not receive goods but no longer needs them or is unable to procure substitute products, as determined through the market price differential provisions of Section 2-713; or cover damages when it does not receive goods, still needs them, and is able to procure substitute goods, as determined through the difference between the contract price and the cover price under Section 2-712; as well as recovery of buyer's incidental and consequential damages under Section 2-715. Under the typical seller-friendly formulations of limitation of liability clauses, the buyer would not be able to recover all or most of these damages.

As such, if a seller were faced with a buyer that had a right to recover these damages under the U.C.C. (or, better yet, the express provisions of the contract) if seller failed to deliver and a buyer that did not have these rights due to their limitation of liability clause, the seller would be incentivized to allocate volume to the buyer holding the rights to recover.

(iv) Scope of "Force Majeure Events"

Many, if not all, supply chain administrators have been challenged by suppliers asserting that a given supply chain disruption constitutes a force majeure event. Interestingly, many suppliers subsequently used this asserted defense to request concessions from the franchise systems, such as price increases, longer lead-times, reduced inventory allocations, or shorted volumes. Force majeure clauses aim to excuse a party's failure to timely perform due to certain unforeseen events that are outside of the control of the affected party.[91]

Relatedly, the U.C.C. includes "commercial impracticability" as a defense to performance when an unforeseen event occurs that (1) was a basic assumption of the contract and (2) makes the performance impracticable.[92] Note, however, that a seller may not successfully claim commercial impracticability due to "increased cost alone . . . unless the rise in cost is due to some unforeseen contingency which alters the essential

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91 Bethany L. Appleby & Gaylen L. Knack, *Structuring and Negotiating Essential Vendor Agreements and Dealing with Financial Terms, Discounts, and Rebates*, A.B.A. 44TH ANN. F. ON FRANCHISING, at 26-27 (2021).

92 U.C.C. § 2-615 (AM. LAW INST. & UNIF. LAW COMM'N 2022).

nature of performance."[93] Furthermore, contracting parties should keep in mind that any force majeure clause included in the agreement could serve to prevent a defense of commercial impracticability—Section 2-615 is predicated on the unforeseen event not being foreshadowed or contemplated in the bargaining process and inclusion of the given unforeseen event in the force majeure clause arguably places it outside of Section 2-615.[94]

Franchisors and supply chain administrators should pay special attention to the force majeure clauses, as "relatively minor wording differences led to vastly different consequences when the COVID-19 pandemic suddenly impacted commerce globally."[95] Below are the several key elements to a force majeure clause, along with related guidance:

> **1. *Cui Bono*?** Generally, franchisors and purchasing cooperatives should keep in mind that force majeure clauses primarily benefit the seller, as the main obligation of the buyer is to pay for the goods (other than, in some instances, arranging for pick-up at seller's facility).
>
> Because the general rule for force majeure is that "a party's performance [is excused] in the event that a designated event actually prevents a party from performing its contractual obligations (not just that performance becomes more expensive),"[96] and because force majeure differs from frustration of purpose,[97] it can oftentimes be difficult to prove that a buyer is excused from its obligation to pay for conforming goods due to a force majeure event. Similarly, courts typically have found that a financial hardship, even due to extreme price increases, will not constitute

93 *Id.* § 2-615, cmt. 4.

94. "Matters involving impossibility or impracticability of performance of contract are concededly vexing and difficult. One is even urged on the allocation of such risks to pray for the 'wisdom of Solomon.' 6 A. Corbin, Contracts § 1333, at 372 (1962). On the basis of all of the facts, the pertinent authority and *a further belief in the efficacy of prayer*, we affirm." American Trading & Production Corp. v. Shell Intern. Marine Limited, 453 F.2d 939, 944 (C.A.2 (N.Y.), 1972) (emphasis added).

95 Appleby & Knack, *supra* note 91, at 26.

96. Brown et al., *supra* note 4, at 16.

97. "The doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated." FRUSTRATION, Black's Law Dictionary (12th ed. 2024). *See also* Tilcon New York, Inc. v. Morris Cnty. Co-op, Pricing Council, No. A-5453-10T3, 2014 WL 839122, at *17-18 (N.J. Super. Ct. App. Div. Mar. 5, 2014) (discussing key elements and differences among frustration of purpose, commercial impracticability, and impossibility).

commercial impracticability or a force majeure event.[98] As such, franchisors and purchasing cooperatives should seek to limit the scope of force majeure clauses.

2. Illustrative List vs. Set List. Franchisors and purchasing cooperatives should draft the list of events qualifying as "force majeure events" not as an illustrative list[99] but instead as a definitive list of events.[100] The removal of the "other events beyond a party's reasonable control" catchall term is preferable[101] and a close scrutinization of the list of events is required. "Contractual descriptions of events that constitute a 'force majeure' event vary, and a party seeking to rely on a force majeure event to suspend performance of an obligation would prefer including language in the definition that is open-ended."[102] Further, these descriptions should not—contrary to the persistent requests from vendors—include upstream disruptions or "supply chain constraints," as the vendors should be subject to the same risk mitigation principles and practices that the franchise system is subject to.

3. Purpose of Provision. Keeping in mind that the force majeure provision is intended to excuse performance for unforeseen events outside of the control of a party, the franchisor and purchasing cooperative should ensure that the provision closely ties the event at issue and the

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98. *See, e.g.,* W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 768 n.12 (1983) ("[e]conomic necessity is not recognized as a commercial impracticability defense to a breach of contract claim."); Hemlock Semiconductor Ops., LLC v. SolarWorld Indus. Sachsen GmbH, 867 F.3d 692, 703 (6th Cir. 2017) ("the simple fact that a contract has become unprofitable for one of the parties is generally insufficient to establish impracticability ... [and] [t]his is especially true when the parties have entered into a contract for the sale of goods at fixed prices because such contracts are made for the very purpose of establishing a stable price despite a fluctuating market."); Tilcon New York, Inc. 2014 WL 839122 (N.J. Super. Ct. App. Div. Mar. 5, 2014) (finding that a seller could not claim commercial impracticability, frustration of purpose, or impossibility of performance as a defense to the continuing obligation to supply at the price fixed by the contract, even though the cost of asphalt cement increased by 135%).

99. For example, "'Force majeure event' includes any event outside of a party's reasonable control, including, without limitation, acts of God, acts of terrorism, civil disturbances, natural disasters, changes in law, pandemics, epidemics, governmentally-declared public health emergencies, and strikes or labor disturbances."

100. For example, "'Force majeure event' includes **the following events that make a party's performance illegal or impossible**: acts of God, acts of terrorism, civil disturbances, natural disasters, changes in law, pandemics, epidemics, governmentally-declared public health emergencies, and **third party** strikes or labor disturbances."

101. Appleby & Knack, *supra* note 91, at 27 (citing JN Contemp. Art LLC v. Phillips Auctioneers LLC, No. 20-cv-4370 (S.D.N.Y. Dec. 16, 2020).

102. Appleby & Knack, *supra* note 91, at 27.

affected party's actual inability to perform. The provision should expressly say that performance will only be excused if the force majeure event makes performance illegal or impossible.

4. Process. To support the workability of the provision, contracting parties should set forth the process for invoking the force majeure clause, including requiring prompt notice; requiring the affected party to use at least diligent or reasonable efforts to mitigate, minimize, or limit damages to the other party; requiring continuous and diligent communication and cooperation among the parties; and requiring the prompt resumption of performance as soon as reasonably practicable following the removal of the cause.

5. Not a Price Increase. In spite of the most favorably drafted force majeure clause, suppliers impacted by inventory constraints and supply chain disruptions will—for better or worse and without regard to applicable law—claim that their performance (at the current price) is made impossible or impracticable due to a force majeure event and, as a consequence, their continued supply can only happen if the parties add a surcharge or other increase to the price. Franchisors and purchasing cooperatives can work to prevent this request by including an express statement in the force majeure clause that any force majeure event will not allow or otherwise justify any increase in the price and that any increase in the costs of production will not, by itself, constitute a force majeure event.

6. Termination Right. Finally, the force majeure clause should place a limit on the amount of time during which the affected party may be excused from performance. This is generally accomplished either by granting the non-affected party a right to terminate if the force majeure event

(v) Disaster Allocation Provisions

Even where a force majeure event excuses performance, vendor agreements should not leave allocation of supply to supplier discretion. Franchisors and purchasing cooperatives can add real protection by requiring that any allocation be applied consistently across the supplier's available production and inventory, together with basic transparency obligations, such as periodic reporting of production levels and customer allocations. Clauses should also permit commercially reasonable substitutions that meet brand standards. Even a simple framework, such as pro rata with limited priority carve-outs for brand-critical items, can materially reduce system-wide disruption if it is paired with visibility and enforceability.

Importantly, clearly defined allocation provisions benefit franchisors and purchasing cooperatives not only when supply is constrained, but also when demand-side shocks reduce system needs.[103] In those circumstances, allocation frameworks can also

103 Romo et al., *supra* note 6, at 26.

help align reduced purchasing or volume commitments, reinforcing that force majeure relief is a tool to manage extraordinary disruptions fairly.[104]

Absent an express allocation framework, suppliers often retain unilateral discretion to prioritize customers, facilities, or markets in ways that may disadvantage franchise systems. Disaster-allocation provisions can mitigate this risk by establishing baseline principles for allocation, such as pro rata distribution or priority treatment for brand-critical products, providing predictability when it is most needed.

3.2 Inventory Shortages: Operational Considerations

What is a world without Wingstop's ranch, Wendy's beef burgers, or Chick-Fil-A's chicken? Hopefully not one these authors, or the franchise systems that rely on them, ever have to inhabit. Yet ingredient shortages, supply interruptions, geopolitical conflicts, tariffs, and force-majeure events are an increasingly regular feature of modern franchise operations. Unlike recalls, where products present in the system must be removed, inventory shortages pose the inverse challenge: products that should be in the supply chain simply are not.

In addition to (and, in the authors' experience, sometimes notwithstanding) the contractual protections set forth in supplier, distribution, and supply-chain governance agreements, operational preparedness plays a critical role in shaping how inventory disruptions are addressed. The operational considerations discussed below are intended to highlight practical approaches franchisors may employ when supply constraints arise.

(i) Deal with Current Supplier

In an environment marked by tariffs, inflationary pressures, and shifting supply chains that can lead to inventory shortages, the first and most practical step is often to engage directly and constructively with the current supplier. Long-standing suppliers usually know the system, the products, and the contractual expectations, which often makes them the fastest and most workable option when shortages arise. For that reason, the first step in responding to an inventory disruption is typically to engage directly with the current supplier rather than immediately seeking alternatives.

Early, straightforward conversations can help determine whether the issue is short-term or likely to persist, what is driving the shortage, and what can realistically be done to mitigate the disruption. These discussions may lead to practical adjustments such as selective inventory buffering, forward purchases, sourcing from different countries, adjusting specifications, modifying pack sizes or configurations, short term modification of contract terms, finding substitute goods, or revising delivery schedules to improve reliability or manage cost impact. Even where supply cannot be fully restored, clear information from the supplier allows systems to plan communications and operational adjustments more effectively.

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104 *Id.*

Franchisors should also review the relevant contractual terms with the supplier, including forecasting commitments, allocation rights, notice requirements, force-majeure provisions, and service-level standards. While contracts may not solve an immediate shortage, they often guide how short-term accommodations or revised expectations are structured. As further discussed below, any temporary adjustments should be intentional, documented, and tied to defined timeframes or ongoing supplier cooperation, while reserving rights under the original contract. Where price increases cannot be avoided, companies should limit their impact by negotiating short-term, narrowly tailored measures rather than permanent price changes, such as using temporary, line-item invoice surcharges instead of embedding increases into base pricing. Vendors should be required to provide supporting documentation to substantiate any proposed increase and to demonstrate that it is driven by specific, verifiable market factors rather than broader commercial pressures. Furthermore, price concessions should always be paired with commitments around continuity of supply, service levels, or future price stability.

Working with the current supplier is often critical to achieving the fastest response and near-term supplementation, but it does not eliminate the need for backup planning. As near-term issues are addressed, systems may continue assessing alternative or secondary sources to reduce risk if conditions do not improve.[105] This approach helps maintain continuity while avoiding over-reliance on assumptions about when supply will return to normal.

(ii) Multiple Sources of Supply

As discussed in the earlier section, "tying out" the supply chain not only enables streamlined governance through the use of Master Vendor Agreements that establish uniform operational standards with supply-chain partners, but also facilitates intentional diversification of supplier relationships.[106] Intentional diversification of supplier relationships allows for the approval and contractual alignment of multiple suppliers for the same product category, enabling the franchise system to shift sourcing seamlessly in response to disruption without renegotiating core legal terms or compromising operational standards. Recent supply-chain disruptions underscore the risk inherent in over-reliance on a single supplier for high-volume, core menu components.[107] Even in sophisticated

105 *See infra* Part 3.2(iv) (Supplier Approval and Onboarding—Emergency Process).

106 Culp & Spandorf, *supra* note 7, at 38.

107. Barbara Guignard, *Lessons from McDonald's E. coli Outbreak on Strengthening Supply Chain*, QSR MAGAZINE (Nov. 20, 2024) https://www.qsrmagazine.com/food/food-safety/lessons-from-mcdonalds-e-coli-outbreak-on-strengthening-supply-chains/ ("The lesson here is that a diversified supplier network isn't just about ensuring supply—it's also about ensuring quality. If contamination affects one supplier, other sources can help keep the business running smoothly without compromising food safety or customer trust."); *See, e.g.*, FDA, Outbreak Investigation of E. coli O157:H7: Onions (October 2024) (tracing McDonald's Quarter Pounder onion outbreak to slivered onions supplied by a single supplier and noting subsequent supplier substitution), available at https://www.fda.gov/food/outbreaks-foodborne-illness/outbreak-investigation-e-coli-o157h7-onions-october-2024; Why KFC's Supplier Change Failed in the UK,

systems with otherwise diversified sourcing, dependency on a sole supplier for a critical ingredient can become a single point of failure when disruption occurs. Franchise system supply chain administrators should explore planned redundancies, both with alternate suppliers waiting on the sidelines and with existing suppliers with respect to alternate facilities for production.

By deploying a standardized contract management process, coupled with purchase orders issued by individual system purchasers, a franchise system can readily onboard and manage multiple suppliers for the same product.[108] This structure is particularly valuable for products that are vulnerable to supply-chain disruption, as it allows the system to pivot between approved suppliers without renegotiating core contractual terms or sacrificing compliance, continuity, or control.[109]

(iii) Connections, Relationships, and Cooperation

Inventory shortages often arise without fault, driven by factors such as weather events, geopolitical instability, tariffs, or other systemic disruptions. In those moments, there may be no clear breaching party, and the fastest path to restoring supply continuity is frequently cooperation rather than enforcement. While this article emphasizes the importance of a well-constructed contractual framework, that emphasis does not negate the reality that relationships function as an operational asset during shortages and often influence allocation decisions when supply is constrained.

As a practical matter of human nature, suppliers and distributors under pressure tend to prioritize partners who are familiar, responsive, and reasonable partners with proven business relationships. That goodwill built from existing business relationships may manifest into interim solutions during supply chain disruptions, which may result in partial shipments to high-volume operators, reallocations across regions/distribution centers, or temporary substitutions to maintain menu continuity. That said, relative buyer strength cannot be ignored. Larger franchise systems with greater purchasing volume often possess inherent leverage during periods of constrained supply, whether through contractual negotiation strength, economic influence, or simply the operational reality that serving those customers first restores more volume for the supplier. That advantage, however, should not obscure the operational reality facing smaller or emerging systems. For those players, relationship capital and cooperation may be the primary means of securing continuity when formal leverage is limited.

That dynamic works best because a contractual framework exists, not in spite of it. Contracts establish the baseline allocation of risk, authority, and expectations;

SupplyChainNuggets (Apr. 26, 2025) (describing nationwide KFC closures following reliance on a single logistics provider and centralized distribution model), available at https://supplychainnuggets.com/lessons-from-kfcs-supplier-change-issues-in-the-uk/.

108. Culp & Spandorf, *supra* note 7, at 38.

109. *Id.*

relationships determine how flexibly parties can operate around that baseline when strict enforcement would harm all participants in the system. Thus, while cooperation and accommodation are often essential during inventory shortages, franchisors and purchasing cooperatives should remain mindful of preserving their contractual rights. For example, a franchisor may acknowledge and accept a temporary allocation, delayed delivery, or substitute product while expressly reserving all rights under the supply agreement, including rights related to specifications, pricing, service levels, and future performance once supply normalizes. Absent that reservation of rights, temporary accommodations carry real risk: repeated acceptance of reduced performance or substitutions can be argued as course-of-dealing[110] or waiver of contractual obligations.[111] Over time, what was intended as a one-off crisis response may be reframed as the new contractual baseline, limiting enforcement options and leverage if shortages persist. To void such possibilities, interim resolutions reached during a shortage should be documented, expressly characterized as temporary, and undertaken with appropriate reservations of rights to ensure that short-term cooperation is not misconstrued as a permanent modification, waiver, or acceptance of non-performance.

(iv) Supplier Approval and Onboarding—Emergency Process

While the traditional supplier onboarding process, which often includes requests for information ("RFIs"), requests for quotes ("RFQs"), and requests for proposals ("RFPs"), is critical to minimizing supply-chain risk in the ordinary course,[112] franchise systems may not be afforded that luxury during a supply-chain disruption. In crisis conditions, continuity often depends on the ability to rapidly substitute suppliers. For rapid supplier substitution, systems should maintain a process for fast-tracking approval of alternate vendors[113] or, where feasible, immediate sourcing through pre-approved supplier partners operating under existing Master Vendor Agreements and capable of meeting system demand.

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110. U.C.C. § 1-303 (AM. LAW INST. & UNIF. LAW COMM'N 2022) (A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct").

111. U.C.C. Sections 2-209(4)-(5) recognizes that even where a contract requires modifications to be in writing, a party's conduct may constitute a waiver of contractual rights. A waiver may arise where a party voluntarily and intentionally relinquishes a known right through words or conduct, including by repeatedly accepting non-conforming performance without objection. While a waiver affecting an executory portion of the contract may generally be retracted upon reasonable notice unless the other party has materially relied on it, repeated or prolonged acceptance of reduced performance can give rise to arguments that contractual requirements have been waived or modified by course of dealing.

112. Pattison et al., *supra* note 3, at 18; Romo et al., *supra* note 6, at 12-15; Beilfuss et al., *supra* note 6, at 11-12; Mazero & MacPhee, *supra* note 20, 221-26.

113. Brown et al., *supra* note 4, at 16.

Franchise supply chain administrators should also be sure to keep their records and notes from the RFI, RFQ, and RFP processes, as well as previous suppliers, as they may come in handy when the system is met with a sudden vendor exit or an inventory shortage. The list of past and participating vendors in the RFI, RFQ, or RFP would likely be the same or similar list of vendors willing to step in when another vendor falls short.

(v) Disaster Plans Review and Execution

Inventory shortages often test not the adequacy of contractual protections, but the system's operational readiness to execute under pressure. Contingency and disaster-response plans seek to provide organizations with a systematic approach to augment the continuity of operations in the event of a crisis or disaster.[114] Planning for and managing disruptions is now a core part of supply chain management, and the goal is twofold: mitigation, which focuses on reducing the likelihood of disruptions, and recovery, which focuses on minimizing their impact when they do occur.[115]

Plans should clearly establish escalation triggers, decision-making authority, communication protocols, and execution steps once a shortage becomes systemwide, and these elements are often best memorialized in an attached disaster response plan or incorporated policy referenced in the relevant vendor agreements. The proposed framework for supply chain resilience contemplates six phases: (1) examination of the organizational and supply chain context, including critical products, customers, and dependencies; (2) leadership and governance, establishing clear roles, accountability, and decision-making authority; (3) prevention and mitigation tactics to reduce vulnerability and improve visibility across the supply chain; (4) recovery and response tactics addressing execution during disruption, including contingency sourcing and resource allocation; (5) assessment and testing of continuity plans through simulations or disruption scenarios; and (6) continuous improvement through documentation of lessons learned, training, and refinement of procedures following disruption events.[116] In the inventory shortage context, this may also include identifying which products are critical to menu continuity; which substitutions have been preapproved from a brand, regulatory, and customer experience perspective; when alternative supplier pathways may be activated; and how decisions are communicated across franchisors, purchasing cooperatives, distributors, and franchisees.

Building on point (6) above, effective disaster planning doesn't end once the immediate shortage is resolved. Continuous improvement in this space is critical, though recent years (or months) may have provided more real-world disruptions than most systems ever expected to encounter in practice. Systems do better when they take the

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114. *See* Nallan C. Suresh, G. Lawrence Sanders & Michael J. Braunscheidel, *Business Continuity Management for Supply Chains Facing Catastrophic Events*, 48 IEEE ENG. MGMT. REV. 129 (2020) (https://par.nsf.gov/servlets/purl/10229443).

115. *Id.*

116. *Id.*

time to look back at what happened and learn from it. Testing the procedures developed, walking through "what if" scenarios, and doing post-incident check-ins with vendors, customers, and key service providers can help catch weak spots before the next shortage hits.[117] It also matters to write down what worked, what didn't, and why certain decisions were made, so that knowledge isn't lost when people or vendors change.[118] Using those lessons to update plans, train teams, and pressure test the system makes it easier to respond faster and with less confusion the next time supply breaks down.[119] Franchisors and system supply chain cooperatives should ensure that they know their supply chain as part of these contingency planning exercises. This requires the franchise system to know who its vendors are using or engaging in ensuring that the goods make it to the operators (such as third party logistics companies, warehouse or storage facilities, and so on). Additionally, the franchise system should ensure that the vendors engaging third parties for some aspect of their performance provide representations and warranties as to such third party's performance (or, at least ensure that the product warranties survive and are not limited by the actions of such third party).

Even strong supply chains can run into trouble if contingency plans sit on a shelf or are never updated as the system changes. That's why franchisors and purchasing cooperatives should regularly review and refresh their disaster recovery, business continuity, and inventory-shortage playbooks so they still match how the supply chain actually works today. These plans should be a standing agenda item at quarterly or annual planning meetings. Talking through them on a regular basis helps keep assumptions current, makes sure the right people are aligned, and ensures the system is ready to act when a disruption hits.

4. *When Vendors Should be in the Supply Chain, but are Out: Vendor Bankruptcy and Other Abrupt Exits*

The franchise system supply chain, like all others, is built and dependent upon a complex series of interlocking relationships that both are a source of competitive advantage and are a major source of fragility. Much like the fragility of complex supply chains on a macroeconomic level, where "disruptions to a few firms may create shortages of essential inputs or destroy accumulated relationship-specific investments and productivities,"[120] franchise supply chains are typically reliant upon a "closed-market"

117. *Id.*

118. *Id.*

119. *Id.*

120. Daron Acemoglu & Alireza Tahbaz-Salehi, *The Macroeconomics of Supply Chain Disruptions*, 92 REV. OF ECON. STUDS. 656, 657 (2025).

system of suppliers and distributors whereby the system purchasers may only source goods, equipment, and services from approved suppliers and distributors.[121]

As with all supply chain participants, "[f]orming and maintaining customized supplier-customer relationships are costly and require relationship-specific investments. Therefore, firms face nontrivial decisions to build or dissolve relationships with their suppliers [and distributors]."[122] However, the unique approval processes, concern relating to the handling of proprietary products and confidential information, need for uniformity and assurance of supply, and the resulting limited number of available sources of supply and distribution make this decision to stay or to move away from a supplier or distributor even more difficult. These concerns and cost-avoidance strategies are likely to become even more relevant as concerns about the stability of the global economy become the reality of instability in the franchise systems' vendor base.

This Part focuses on two types of sudden, unexpected vendor exits: (i) bankruptcy, insolvency, and other financial woes affecting vendors, and (ii) repudiation or (claimed) commercial impracticability.

Though a thorough discussion of bankruptcy, the process and steps for a franchisor or purchasing cooperative to take when a vendor has filed bankruptcy, and the relative rights and statuses to keep in mind when a vendor is insolvent or has filed bankruptcy are all outside of the scope of this paper,[123] franchisors and purchasing cooperatives need to consider the considerable disruption and harm to the franchise system caused by the sudden insolvency or bankruptcy of a key supplier or distributor partner. If a supplier provides proprietary products to the franchise system, the abrupt exit of such supplier could "bring a franchise system to its knees" due to the system's inability to immediately source acceptable alternative products.[124] This also applies for a particular geographical region serviced by a primary distributor that abruptly ceases to deliver to outlets within that given region.[125]

As such, franchisors and supply chain cooperatives should engage in contingency planning and require the same from their vendors; should conduct due diligence and continuous monitoring of vendors' financial wherewithal and should require financial disclosures from key vendors to support these efforts; and should account for potential financial instability of a vendor when preparing the supply or distribution agreement.

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121. *See generally* Romo et al., *supra* note 6, at 8-13; Beilfuss et al., *supra* note 6, at 1-3, 9-16.

122. Acemoglu & Tahbaz-Salehi, *supra* note 120, at 657.

123. For a good resource on this topic, *see* Sarah B. Foster & Glenn D. Moses, *Challenges to a Franchise System When a Third Party, i.e. A Landlord or Supplier Files for Bankruptcy*, A.B.A. 33RD ANN. F. ON FRANCHISING (2010).

124. Beilfuss et al., *supra* note 6, at 15.

125. *Id.*

The supply and distribution agreements can best address the concerns surrounding vendors' financial wherewithal by giving the business teams options and by supporting the teams' ability to assess and monitor a vendor's stability. Among other things, this includes: (i) ensuring that the franchisor or cooperative has a right to immediately terminate for a vendor's bankruptcy or insolvency, including any application for or consent to the appointment of a receiver or trustee, assignment for the benefit of its creditors, and/or inability or unwillingness to perform under the agreement or to pay its debts when due; (ii) requiring that the vendor make representations about its financial health, provide regular financial disclosures to the franchisor or cooperative (including, without limitation, required CFO-to-CFO meetings, certifications, and reviews of (audited) financial statements); (iii) expressly requiring that the vendor hold any accrued "supplier income"[126] in trust or as a bailment, with such supplier income being owned by the franchisor or purchasing cooperative (and, therefore, supporting a finding that these funds are not subject to any bankruptcy of the vendor), and require payment of these supplier income amounts on a regular basis; and (iv) requiring that the vendor assist with transition of the business away from that vendor upon termination (at least termination for cause), including "book-ended" inventory commitments.[127]

Additionally, for particular proprietary or key products, the franchisor and purchasing cooperative should closely scrutinize the intellectual property rights to determine whether the franchise system would be able to completely and seamlessly transition the volumes from the affected vendor to a competitor. From a high level, this may be addressed by ensuring that the franchisor owns the underlying intellectual property (completely, including the know-how, batch recipes, specifications, manufacturing formulae, and other intellectual property required to make identical product), or has a perpetual license to such intellectual property, or by escrowing the intellectual property, with release taking place after vendor's breach and the termination of the vendor agreement.

While a number of the operational considerations when dealing with an insolvent or near-insolvent vendor, or a vendor entering bankruptcy are similar to those set forth above in other contexts,[128] some additional considerations come into play when it is clear

126. Romo et al., *supra* note 6, at 49 ("Franchisor frequently receive remuneration from the franchise system supply chain either by selling products directly to franchisees at a mark-up or by receiving payments or benefits from the franchisor's designated suppliers and distributors ('supplier income')." (citing Steven B. Feirman, *The Legality of Rebates from Suppliers*, 2 Franchise L.J. 23, 71 (Fall 2003)).

127. That is, a requirement that the exiting vendor sell its inventory to the incoming vendor at a set price (typically the cost of goods, plus a pre-arranged handling fee), which is coupled with a corresponding commitment from the incoming vendor to purchase such existing inventory at that set price.

128. *See supra* Part 2.2(i) ("Cooperation Amongst All Parties"), and Part 3.2(i) ("Deal with Current Supplier"), Part 3.2(ii) ("Multiple Sources of Supply"), and Part 3.2(iii) ("Connections, Relationships, and Cooperation").

that a vendor's financial health is in question. Specifically, franchisors and cooperatives should:

- **Assess the Damage**. A sudden exit by a vendor, whether due to actual or impending financial issues, should be treated as an operational crisis first, a financial or legal crisis second. A single vendor's financial distress can create a domino effect, upstream and downstream. First, the franchise system supply chain administrator should assess the likely impact by working with its distributors, other suppliers, and third-party logistics providers, as well as the affected supplier, to identify the inventory of finished goods and inputs on-hand and at the affected supplier. From here, the franchise system should determine how much safety stock it needs to procure, where that stock should be held and/or deployed, and whether there are any "go-dark points" where the outlets will be affected and have to go-dark (the SKUs or quantity at which, or the geographies in which, or the timeframes for the outlets becoming untenable or unable to continue operations).

  This assessment can likely be best accomplished by appointing a cross-functional response team (operations, supply chain, legal, finance, and, if applicable, franchise relations).

- **Funding the Vendor**. Especially in instances where a key vendor falls into bankruptcy so fast that the vendor does not have a chance to get traditional debtor-in-possession ("DIP") lending, which was the case with the AmeriServe bankruptcy,[129] franchisors may find themselves in the position of having to fund or arrange for the funding of a key vendor's continued operations. This temporary financial support, such as accommodation agreements, prepayments, or DIP financing, may be necessary if the vendor is critical to the franchise system. The Bankruptcy Code authorizes and incentivizes DIP financing by offering the lenders special protections.[130] Helping float or right-size a key vendor can take the form of: (i) extending payment terms, (ii) extending financing or lines of credit, (iii) working with other creditors (after seeking advice from bankruptcy counsel), and/or (iv)

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129. Mark Duedall, *The Perishable Agricultural Commodities Act and Its Effect on Secret Liens*, 2 DePaul Bus. & Com. L.J. 707, 709 (2004) ("[AmeriServe's bankruptcy] was also a case in which the company fell into bankruptcy so fast that it did not have traditional debtor in possession or "dip" lending; it had to get dip lending from Burger King and Tricon by virtue of being their sole supplier. It had the ultimate leverage over Burger King and Tricon by virtue of being their sole supplier.").

130. *See* Julian S.H. Chung & Gary L. Kaplan, *An Overview of Debtor in Possession Financing*, Fried, Frank, Harris, Shriver & Jacobson LLP, at 120 (2020), accessible at: https://www.friedfrank.com/uploads/siteFiles/Publications/An%20Overview%20of%20Debtor%20Possession%20Financing.pdf (last accessed Apr. 10, 2026).

leading or helping facilitate strategic transactions or capital investments with the key vendor.[131]

- **Preventative Measures**. As discussed above, franchise systems should be continuously engaged in monitoring of its vendors and their financial health, including through regular audits, review of required reporting or publicly available information, engagement of third-party monitoring service providers, and regular discussions with the vendor's leadership. These monitoring efforts can work to prevent the franchise system from finding itself in a position where it needs to take the decisive (and costly) actions described above. Further, the franchise system should ensure that its core products have multiple sources of supply to mitigate and reduce its risk.

5. *Remedies*

The above analysis and guidance relating to how franchise systems should approach contracting with vendors in anticipation of disruptions, and dealing with vendors in the face of disruptions, is in large part predicated on the remedies generally available to each of the parties under applicable law. Of course, how can one know how to approach a question of structuring a limitation of liability clause, or whether to include such a clause in the first place, if one does not have a firm grasp of the rights and remedies available to such party?

The U.C.C. addresses the subject of recoverable damages in several places, but kicks the discussion off in Article 1 (which applies to all other Articles of the U.C.C.) in Section 1-305:

> The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as expressly provided in [the Uniform Commercial Code] or by other rule of law.[132]

131. *See, e.g.,* Gordian Group, *Case Study: AmeriServe*, https://gordiangroup.com/gg_engagement/ameriserve/ ("Gordian Group advised Yum! Brands with respect to various restructuring options, assisted in the negotiations leading to a sale of AmeriServe to a subsidiary of Wal-Mart and assisted in the restructuring negotiations with Debtor and various creditor constituencies.")

132. U.C.C. § 1-305(a) (AM. LAW INST. & UNIF. LAW COMM'N 2022) (brackets not added).

While the inclusion of "other rule of law" Section 1-305 arguably renders this Section to be a restatement of law or an exception that swallows the rule,[133] franchisors and purchasing cooperatives should consider first pointing to this Section when a supplier or distributor attempts to negotiate a limitation of liability clause into the vendor agreement. Nevertheless, U.C.C. Article 2 outlines the remedies available to the parties, including those that would likely be covered by a limitation of liability provision. Before discussing how a franchisor or purchasing cooperative should approach these discussions, it is helpful to outline the remedies available to the parties for the other party's breach under Article 2:

- Seller's Remedies[134]:
    - Specific to a buyer's insolvency: (i) right of reclamation of goods (if seller is a cash seller that has tendered delivery but has not been paid);[135] (ii) right of replevin against a buyer that fails to pay for the goods (for sales on credit);[136] and (iii) a limited right to stop goods in transit upon discovery of the insolvency.[137]
    - In connection with buyer's breach, when seller has the goods at issue:
        - cancel the contract;[138]
        - identify completed, conforming goods to the breached contract, which permits the resale of such goods;[139]
        - complete production of works-in-process (in the exercise of reasonable commercial judgment) and identify those goods to the breached contract;[140]

133. *See* Paul S. Turner, *Consequential Damages:* Hadley v. Baxendale *Under the Uniform Commercial Code*, 54 S.M.U. L. REV. 655, 665-66 ("The phrase 'other rule of law' is also used ambiguously. . . . Conceivably, [this phrase] may include the common law or even that the damages are generally available, except to the extent that other rules of law make them unavailable.")

134. *See generally* U.C.C. § 2-703 (AM. LAW INST. & UNIF. LAW COMM'N 2022) (indexing seller's remedies under Article 2).

135. *Id.* § 2-507.

136. *Id.* § 2-702.

137. *Id.* § 2-705.

138. *Id.* § 2-703(f).

139. *Id.* § 2-704(1).

140. *Id.* § 2-704(2). Note that this Section gives a manufacturer broad discretion over the completion of production and places the burden on the buyer to show that the seller's action in

- cease production of works-in-process (in the exercise of reasonable commercial judgment) and "resell for scrap or salvage value or proceed in any other reasonable manner";[141]

- resell the goods it has in its possession, at a public or private sale, and recover (along with incidental damages) the difference between the resale price and the contract price, so long as the resale was "made in good faith and in a commercially reasonable manner";[142]

- either: (i) recover damages based on a hypothetical substitute transaction, measured by the difference between "the market price at the time and place for tender" and the unpaid contract price (along with incidental damages);[143] or (ii) recover the full price of the goods, if seller, after reasonable effort, is unable to resell goods identified to the contract at a reasonable price or if the efforts to resell would be futile (for example, customized goods or goods made to a specification that a seller is prohibited from reselling under the terms of an agreement with the franchisor or purchasing cooperative);[144] and

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completing manufacture was commercially unreasonable. *Id.* § 2-704, cmt. 2. Further, at least one court stated that Section 2-704 may give a manufacturer the right to complete production of goods and identify those to the repudiated contract even if the produced goods are not conforming to the buyer's specifications for the goods. Applying Section 2-704, that court noted that "even if [seller] offered a nonconforming [good] to [buyer] after [buyer's] repudiation, [seller] may have been within his rights to do so . . . . Given that [buyer] said he was cancelling, it might well have been 'reasonable' to complete the tank (*even if not exactly to [buyer's] specifications*), see if [buyer] was still interested, and then try to sell it to someone else." *Larkin v. Saber Auto., LLC*, 736 F. Supp. 3d 193, 201 (S.D.N.Y. 2024) (emphasis added) (citations omitted).

141. U.C.C. § 2-704(2) (AM. LAW INST. & UNIF. LAW COMM'N 2022).

142. *Id.* § 2-706(1). Note that this Section anticipates a seller effecting resale through a series of transactions, subject to the duty of good faith, including for goods that were not in existence at the time of buyer's anticipatory repudiation with respect to such future goods, but were identified to the contract under Section 2-704. *Id.* § 2-706, cmt. 7. Note that the timing for this resale transaction will depend on the type of goods at issue, the other goods that seller is engaged in commercializing, and other circumstances. *Id.* § 2-706, cmt. 5. *See Wisconsin Cranberry Co-op. v. Groupe Alimonco, Inc.*, 884 N.W.2s 535 (Wis. App. 2016) (finding that a seller's resale made four months after the buyer's breach was still a resale, even though the goods were fungible, due to the fact that the seller's other sales were of specialty cranberries and not whole cranberries of the type that buyer contracted for, and, therefore, that seller could recover the contract difference and its freezer-storage costs as incidental damages).

143. U.C.C. § 2-708(1) (AM. LAW INST. & UNIF. LAW COMM'N 2022).

144. *Id.* § 2-709(b). Note, however, that a seller that obtains the full price must hold goods for the breaching buyer if the goods are identified to the contract and are still in seller's control. If

- recover certain lost profits as a "lost volume seller" if seller can prove that recovery of resale (or hypothetical resale) damages does not "put the seller in as good a position as performance would have done."[145]

- In connection with buyer's breach, when seller no longer has the goods:

  - recover the full price of the goods, if buyer has accepted the goods but did not pay;[146] or

  - recover the full price of the goods, if buyer had the risk of loss of goods that were damaged or lost "within a commercially reasonable time after risk of loss has passed to the buyer."[147]

- In connection with any buyer breach, regardless of what party possesses the goods, a seller may recover its incidental damages.[148]

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seller is able to sell those goods, it will need to provide a credit to the buyer if that sale occurs. *Id*. § 2-709(2).

A recent Kentucky case provides a good illustration of the requirement that a seller attempt to resell the goods before recovering the full price under § 2-709(b). *Cogan Imports, Inc. v. Dharod*, 3:16-CV-00352-GNS, 2019 WL 3536000 (W.D. Ky. Aug. 2, 2019). In that case, the court granted summary judgment in favor of buyer because the seller could not prove damages, even though the buyer breached the contract to purchase a Ferrari for $2.7 million. The seller sought either specific performance—which the court rejected, stating that Section 2-716 is "clearly a buyer's remedy" and, in any event, specific performance would not have been available under other Kentucky rule of law because the car was not unique—or the full price under Section 2-709—which the court also rejected, noting that the buyer had neither accepted the goods nor accepted risk of loss for the goods, and that the seller did not make any attempt to resell the car. *Id.* at *4-5.

145. U.C.C. § 2-708(2) (AM. LAW INST. & UNIF. LAW COMM'N 2022). "This section permits the recovery of lost profits in all appropriate cases, which would include standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer." *Id.* § 2-708, cmt. 2.

146. *Id*. § 2-709(1)(a).

147. *Id.*

148. *Id.* § 2-710. A seller's incidental damages include "any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." *Id.*

Of note, Section 2-710 and the other seller remedies provided in Article 2 (other than the lost profits recoverable in limited circumstances under Section 2-708(2)) do not expressly recognize a seller's recovery of consequential damages. Due to the limitation on recovering consequential or special damages to the instances "specifically provided in [the Uniform Commercial Code]"[149] and because courts have placed an emphasis on whether an Article 2 remedy is styled as a "buyer remedy" or "seller remedy," there has been a demonstrated willingness to prevent a seller's recovery of consequential damages in the sale of goods context.[150] Other cases, however, have relied on styling a seller's damages as incidental and recoverable under Section 2-710, even though these damages were arguably consequential.[151]

- Buyer's Remedies:
    - If a seller fails to deliver, or repudiates, or if the buyer rightfully rejects or justifiably revokes acceptance, then buyer may (with respect to the given shipment or, if the breach goes to the whole contract, with respect to the whole)[152]:
        - opt to cancel the agreement or order;[153] ***and***
        - recover any deposits or portion of the price paid to seller;[154] ***and***
        - if buyer still needs the goods, seek to "cover" by obtaining substitute products and then recover from seller its costs of cover;[155] ***or***

149. *Id.* § 1-305.

150. *See* ROY R. ANDERSON, § 2:15. CRITICISM OF RULE DENYING SELLERS' RECOVERY OF CONSEQUENTIAL DAMAGES, 1 DAMAGES UNDER UCC (Sept. 2025 update), https://www.westlaw.com/Document/Iff7d0a3a213c11dab58df27ba5f50379/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0; § 8:29. SELLER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES—CONSEQUENTIAL DAMAGES, 1 WHITE, SUMMERS, & HILLMAN, UNIFORM COMMERCIAL CODE § 8:29 (6th ed.) https://www.westlaw.com/Document/Iaf1f5ea21e0311e2bcd10000837bc6dd/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

151. *See* ANDERSON, § 2:15, *supra* note 150, at footnotes 15 through 20 and accompanying text.

152. *See* U.C.C. § 2-711 (AM. LAW INST. & UNIF. LAW COMM'N 2022) (indexing buyer's remedies under Article 2 for unaccepted goods).

153. *Id.* § 2-711(1).

154. *Id.*

155. *Id.* §§ 2-711(1), 2-712. *See infra* Part 3.1(iii)(2) (Costs of Cover).

- if the buyer no longer needs the goods, seek to recover its damages for non-delivery, as measured by "hypothetical" cover—the difference between (i) the market price at the place of tender (or of arrival, if dealing with a rejection or revocation of acceptance) and at the time that buyer learned of the breach, and (ii) the contract price, plus incidental and consequential damages (but less the expenses saved in consequence of seller's breach).[156]

- Further, where a seller fails to deliver or repudiates (but not when a buyer does not have the goods following a rejection or revocation of acceptance), buyer may seek to recover the goods from the seller if permitted under Section 2-502 in connection with seller's insolvency[157] or seek specific performance.[158]

- If a seller delivers defective goods and buyer opts to accept, the aggrieved buyer may recover for "any nonconformity", measured by the difference between the value of the goods as accepted and the value of the goods as warranted under the contract.[159]

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156. U.C.C. § 2-711(1) (AM. LAW INST. & UNIF. LAW COMM'N 2022); *id.* § 2-713. Note that the market price for the goods is determined when buyer "learned" of the breach. *Id.* § 2-713, cmt. 1. However, "[c]ourts have taken three different approaches to th[e] question [of when a buyer "learns" of a breach], . . . (1) when the buyer received notice of the seller's repudiation; (2) a commercially reasonable time after the buyer received the notice of seller's repudiation; or (3) when seller's performance would have been due." MARTIN, *supra* note 88, ch. 11 (discussing Ruggiero v. Nocenti, 556 F. Supp. 3d 512 (E.D. Pa. 2021)).

157. U.C.C. §§ 2-501, 502, and 711(2) (AM. LAW INST. & UNIF. LAW COMM'N 2022) (providing that a buyer has a "special property" and "insurable interest" in existing goods when identified to the contract (or future goods, when they are shipped, marked, or otherwise designated by seller as goods identified to the contract), and permitting buyer's recovery of the goods upon seller's insolvency if buyer has prepaid a portion of the price and tenders any unpaid portion of the price).

158. *Id.* §§ 2-711(2), 2-716. Importantly, Article 2 does not necessarily follow the common law rule with respect to specific performance; instead, Article 2 employs a "more liberal attitude" in permitting buyer's specific performance by a seller where the goods are unique or in "other proper circumstances." *Id.* § 2-716, cmt. 1. This "is no longer limited to goods which are already specific or ascertained at the time of contracting" but instead, "[t]he test of uniqueness . . . must be made in terms of the total situation which characterizes the contract." *Id.* § 2-716, cmt. 2.

In this context, "unique" means goods that are identified to the contract (that is, goods that are distinguishable from the world of similarly-situated goods and not capable of ready substitute); and "in other proper circumstances" expands the applicable of specific performance further to include goods that are not unique, but that the buyer has a significant degree of difficulty in covering based on the context.

159. *Id*. § 2-714. Buyers can deduct its damages from the price owed to the seller for goods under the same contract, following notice of buyer's intention to do so to seller. *Id.* § 2-717.

- Plus, incidental and consequential damages, in most cases.[160]

Franchisors and supply chain administrators should keep in mind that buyer's remedies under the Uniform Commercial Code are "to be liberally administered"[161] and are cumulative in nature. These available remedies include market-based damages, which are calculated either by actually engaging with the market for the goods via cover or by determining the market price and recovering general damages under Section 2-714. Further, unlike sellers, buyers are also entitled to consequential damages if those damages were foreseeable and could not be prevented (such as by cover).[162] As discussed earlier in Part 3.1(iii), these routes to recovery may be unjustly (at least in the view of franchisors and purchasing cooperatives) limited or disclaimed by the inclusion of limitation of liability clauses and the inclusion of terms like "consequential," "incidental," "incremental," "indirect," or "special."

6. *Conclusion*

Supply-chain resilience is not a matter of optimism, improvisation, or organizational form. It is the product of disciplined contracting, operational readiness, and systemwide alignment before the disruption occurs. In franchise systems, where brand value and unit level economics depend, at least in significant part, on consistency across hundreds or thousands of locations, the consequences of supply failure are rarely confined to a single product, vendor, or outlet. They are absorbed by the system as a whole through lost sales, damaged goodwill, regulatory exposure, and fractured franchisee confidence.

The lesson presented here is straightforward: resilience must be built into the architecture of the supply chain itself. This includes recall authority being capable of exercise and execution without hesitation; the system being protected through indemnity and insurance provisions that actually transfer risk; preservation of continuity and foreclosure of excuse opportunism through favorable allocation and force majeure clauses; and contractual frameworks that "tie out" suppliers, distributors, and franchisees into a coherent structure empowered to respond and plan for emergencies. This also includes operational discipline—traceability, alternate sourcing, crisis planning, financial monitoring, and the institutional willingness to act decisively when a disruption emerges.

Further, courts have used the amount of a settlement between the buyer and its customer as the basis for warranty damages. *See* Wayne Mfg., LLC v. Cold Headed Fasteners & Assemblies, Inc., 694 F. Supp. 3d 1064 (N.D. Ind. 2023) (applying §§ 2-714 and 2-715 in granting summary judgment in favor of the buyer, with damages tied to a third party settlement ($243,000.00), plus buyer's own sorting, testing, and scrapping costs ($60,453.76), but minus a credit to seller for its unpaid invoices ($49,059.56) relating to bolts that could no longer be used).

160. *See supra* Part 3.1(iii)(1) (Consequential and Incidental Damages).

161. U.C.C. § 2-711, cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 2022); *see also id.* § 1-305.

162. *See supra* Part 3.1(iii)(1) (Consequential and Incidental Damages).

Disruption will come. The only real question is whether the franchise system will meet it with confusion or with command. The systems that endure will be those that understand a simple commercial truth: fortitude in supply-chain planning is not merely defensive. Properly built, it is a competitive asset, a governance discipline, and ultimately a source of enterprise value.