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From FDD to the Courtroom: Drafting and Litigating Franchise Disclosure Claims

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I. Introduction

When regulators implement changes, either to policy interpretations or enforcement priorities, and those changes impact historic practices, lawyers often encounter a period of uncertainty and turmoil. It can be difficult to advise clients on how to respond to regulatory changes until the dust settles, and the new legal landscape and terrain is clearly visible and defined by judicial rulings. This paper is intended to address precisely this type of uncertainty in the context of the January 1, 2023 Statement of Policy adopted by the North American Securities Administrators Association ("NASAA"),[1] which opined that franchise questionnaires and acknowledgements violate state anti-waiver provisions when they are used as contractual disclaimers that release or waive a franchisee's rights under a state franchise law.[2] While the NASAA SOP does not have the force of law,[3] NASAA''s "recommendations and policy initiatives have traditionally been given great weight by the states that regulate franchises."[4] As a result, some states have begun adopting the NASAA SOP as official policy.[5] Consequently, franchisors are facing an array of new questions on how to navigate these policy adoptions in the drafting of documents, and in post-sale litigation with franchisees.

II. Historical Background of Franchise Questionnaires & Acknowledgements

Contractual disclaimers, designed to hold parties to their contractual agreements and defeat subsequent fraud claims, appear to have been around for as long as franchise regulation.[6] Initially, these mostly took the form of generalized disclaimers;

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[1] Caroline B. Fichter & Frank J. Sciremammano, *The North American Securities Administrators Association's Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgements*, 42 FRANCHISE L.J. 351, 355 (2023) ("NASAA is an organization that describes itself as a voluntary association of sixty-seven state, provincial, and territorial securities administrators in the United States, Canada, and Mexico. It claims to be the oldest international investor protection organization and the voice of state securities agencies responsible for efficient capital formation and grass-roots investor protection. NASAA's self-professed goal is protecting consumers who purchase securities or investment advice.") (internal quotations omitted).

[2] N. AM. SEC. ADM'R ASS'N, NASAA STATEMENT OF POLICY REGARDING THE USE OF FRANCHISE QUESTIONNAIRES & ACKNOWLEDGEMENTS (Sept. 18, 2022), https://www.nasaa.org/wp-content/uploads/2022/09/NASAA-Franchise-Questionnaires-and-Acknowledgments-Statement-of-Policy-9-18-2022.pdf [hereinafter the NASAA SOP].

[3] Mike Drumm, Matthew Kreutzer & John Moore, *Why Is the State Examiner Making Me Change That Disclosure? Dealing with the Unusual, Uncommon, or Atypical Comments that State Examiners Raise*, INT'L FRANCHISE ASS'N 52ND ANNUAL LEGAL SYMPOSIUM 1 (2019); *see also e.g.,* Platsis v. E.F. Hutton & Co. Inc., 642 F. Supp. 1277, 1294 (W.D. Mich. 1986).

[4] Fichter & Sciremammano, *supra* note 1, at 355 (citing Drumm, Kreutzer & Moore, *supra* note 3).

[5] *See, e.g.,* WASH. ADMIN. CODE § 460-80-325 (2023).

[6] *See* L. Seth Stadfeld, *Franchising Currents*, 1 FRANCHISE L.J. 29 (1980) (summarizing Slater v. KFC Corp., 621 F.2d 932 (8th Cir. 1980). The disclaimer at issue in *Slater* was a generalized disclaimer that applied to any statements made by the franchisor outside the franchise agreement; not to be confused with questionnaires and acknowledgements that do not necessarily disclaim liability, but established facts that might later be used to preclude liability. At least one commentator has suggested that this is a

i.e., contractual provisions akin to integration clauses, that expressly disclaim reliance on information or statements outside the parties' agreements.[7] Over time, the use of disclaimers morphed into questions and affirmative statements, signed by the franchisee, acknowledging, confirming, or disclosing if any information other than what was contained in the parties' documents was provided to the franchisee before closing.[8]

As such, franchise questionnaires or acknowledgements are not disclaimers; rather, they are documents that franchisors have historically used for the purpose of obtaining franchisee agreement to the existence (or nonexistence) of certain facts that are material to a franchise sale.[9] Most typically, this includes statements that the franchisee acknowledge before closing that it received or relied upon no representations outside those contained in the parties' franchise agreement or the franchise disclosure document ("FDD").[10] These questionnaires and acknowledgments serve a variety of purposes. For example, franchisors sometimes use them to ferret out improper practices by franchise sales personnel prior to closing a franchise transaction.[11] They can also be used as educational tools, so that the franchisor can explain to prospective franchisees that information from third parties (such as other franchisees) has not been

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material difference that warrants consideration in determining whether the "disclaimer" is effective to disprove fraud. *See* Erin E. Conway, *No Fair! Finding an Equitable Balance in Enforcement of Disclaimer Provisions in Franchise Agreements and Franchise Disclosure Documents*, 33 FRANCHISE L.J. 323 (2014) (noting that generalized disclaimers of liability, as opposed to specific, directed disclaimers, or questionnaires and acknowledgments, have historically been treated less favorably by courts). Regardless, by at least the mid-1980s, pre-sale acknowledgments became recommended procedure by seasoned franchise practitioners. *See, e.g.,* Richard M. Asbill & F. Steven Starling, *Recurring Themes in Franchise Termination Litigation*, 7 FRANCHISE L.J. 1, 19 (1988) (noting that it was critical in litigation with franchisees that "[t]he franchisor should retain signed acknowledgments in its franchise files for each franchisee. . .").

[7] *See* Stadfeld, *supra* note 6; *see also* Asbill & Starling, *supra* note 6.

[8] According to at least one commentator, the transition from traditional disclaimers to questionnaires and acknowledgments was done at the instigation of a Maryland regulator. *See* Fed. Trade Comm'n, Reviewing the Franchise Rule Workshop: A Discussion of Disclaimers, Waivers & Questionnaires (Nov. 10, 2020) (statement of Lee Plave), https://www.ftc.gov/system/files/documents/videos/reviewing-franchise-rule-workshop-discussion-disclaimers-waivers-questionnaires/franchise_rule_workshop_transcript_-_discussion_of_disclaimers.pdf ("[I]ronically, it was the instigation of the Maryland examiner roughly 20 years ago that suggested it would be a great way to handle things other than using disclaimers. And that suggestion seems to have led to the use of these questionnaires.") [hereinafter Franchise Rule Workshop].

[9] Fichter & Sciremammano, *supra* note 1, at 352.

[10] John R. F. Baer, Shelley Harris-Horn & Steven Toporoff, *Practical Disclosure Issues Under the Amended FTC Franchise Rule: The Final Word?*, ABA 30TH ANNUAL FORUM ON FRANCHISING W8, at 25 (2007) ("Some franchisors use franchise disclosure questionnaires and similar documents that require a franchisee to certify before closing that there were no extraneous representations made to them outside the terms of the franchise agreement.").

[11] Anthony Marks, Dawn Newton & Gerald Wells*, "Oh No, They did What?! What Do we Do Now?"*, ABA 41ST ANNUAL FORUM ON FRANCHISING W16, at 29 (2018) ("The use of the questionnaire. . . is a way that a franchisor can become aware of potential violations before the franchise sale is completed.").

vetted and may not be reliable.[12] Alternatively, they can also be used to prove that the franchisee did not rely on statements outside the FDD when it purchased the franchise, or that statements outside the FDD were not material to the franchisee's decision to purchase the franchise.[13] Both of these issues (reliance and materiality) are elements of fraud claims.[14]

As a result, over the last few decades, the courts developed a robust case law assessing the effect that questionnaires, acknowledgements, and disclaimers have on post sale litigation between franchisors and franchisees.[15] Some courts held that questionnaires and disclaimers are effective to preclude claims, even in the context of anti-waiver franchise statutes.[16] Others analyzing disclaimers, questionnaires, or acknowledgments found that they are not a panacea to avoid fraud, misrepresentation, or rescission claims.[17] Often it is a very fact specific analysis, and depends on the language of applicable state statutes, including statutory anti-waiver provisions.[18] The next section discusses the development of this case law, and the competing narratives and rulings that ultimately informed NASAA in its development and promulgation of the NASAA SOP in 2022.

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[12] Franchise Rule Workshop, *supra* note 8 (statement of Amy Cheng) ("[T]he franchisor was able to sit down with the prospective franchisee and explain, you obtained the information from our existing franchisee, right? But you have to understand that this information did not come from us, right? There is not information that you should be relying on or [INAUDIBLE] information coming from the franchisor. . . A franchisor cannot verify the financial information that they received. And they will tell the prospective franchisee, make sure that you do your due diligence.").

[13] *See* Himanshu M. Patel & Scott McIntosh, *The Absentee Franchisor: When Franchisors Don't Live Up to Their Obligations*, ABA 44TH ANNUAL FORUM ON FRANCHISING W4 (2021) ("These questionnaires can be helpful in defeating claims that additional services were agreed or promised.").

[14] Frank J. Sciremammano & Hon. Nicole S. Zellweger, *When is a Lie Actionable? Litigating Misrepresentation Claims and the Requirement of Reasonable Reliance*, ABA 41ST ANNUAL FORUM ON FRANCHISING W1, at 29–45 (2018).

[15] *See* discussion, *infra* Section III, and cases cited therein.

[16] *See* Governara v. 7 Eleven, Inc., No. 13-cv-6094, 2014 WL 4476534 (S.D.N.Y. Aug. 20, 2014) (granting franchisor's motion to dismiss plaintiff's claims under the anti-fraud provisions of the New York Franchise Act based in part on non-reliance disclaimers executed by the plaintiff); *see also* Emfore Corp. v. Blimpie Assocs., Ltd., 51 A.D.3d 434, 435 (N.Y. App. Div. 2008) (noting that questionnaires and acknowledgments can help franchisors "root out dishonest sales personnel and avoid sales secured by fraud. . .").

[17] *See* Coraud LLC. v. Kidville Franchise Co., LLC, 109 F. Supp. 3d 615, 621 (S.D.N.Y. 2015) (holding that disclaimers could not bar a fraud action under the NYFSA's anti-waiver provision); Hanley v. Doctors Express Franchising, LLC, No. 12-cv-794, 2013 WL 690521, at *29 (D. Md. Feb. 25, 2013) (holding that a franchisee's acknowledgments amounted to a disclaimer in violation of the Maryland franchise anti-waiver laws).

[18] *See* discussion, *infra* Section III, and cases cited therein.

III. Relevant Litigation Issues Associated with Franchise Questionnaires & Acknowledgements.

Franchisees who bring claims against franchisors related to disclosures typically have to prove that the franchisor made a material misrepresentation or omission of fact, reasonable reliance by the franchisee, and resulting damage to the franchisee. If the franchisee is claiming fraud, it will also have to prove that the franchisor knew the material representation or omission was false and that the franchisor had an intent to defraud the franchisee.

While not all franchisors required prospective franchisees to respond to questionnaires, the NASAA SOP states that, "Franchisors routinely seek to use Questionnaires, Acknowledgments (collectively Q&As), and other forms of contractually required disclaimers to insulate themselves from potential liability by franchisees alleging fraud and misrepresentations in the offer and sale of a franchise."[19] The NASAA SOP defines Acknowledgments as "a series of acknowledgements ("Acknowledgements") in the franchise agreement regarding the franchise offering."[20] The SOP "applies to Questionnaires, Acknowledgements, and similar documents that appear in FDDs and applicable attachments and exhibits used in the offer and sale of franchises where an Anti-Waiver Provision or Anti-Fraud Provision applies to the offer or sale."[21] As discussed in more detail *infra,* for decades, courts in many jurisdictions have held franchisees bound by the pre-sale acknowledgements and disclaimers found in questionnaires and elsewhere in franchise documents.

Similarly, courts traditionally enforce merger and integration clauses and the effect is often to prevent franchisees from demonstrating reasonable reliance on representations made by the franchisor prior to execution of the agreement, which in most cases makes it impossible for the franchisees to establish causes of action for fraud or misrepresentation. The NASAA SOP is silent on merger clauses and mentions integration clauses in the context of two cases, one in which "the court noted that integration clauses and waivers are not necessarily wholly irrelevant, citing the issue of reliance."[22]

Questionnaires, acknowledgments, and integration clauses are important considerations for litigation of disclosure claims because courts often refuse to hear evidence of pre-contract representations finding the evidence barred by the parol

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[19] NASAA SOP, *supra* note 2, at 1. The same language was included in the 2021 Proposed SOP. N. AM. SEC. ADMR'S A'SSN, REQUEST FOR PUB. CMT.: PROPOSED STMT. OF POLICY REGARDING THE USE OF FRANCHISE QUESTIONNAIRES AND ACKNOWLEDGMENTS, at 2 (Dec. 6, 2021), https://www.nasaa.org/wp-content/uploads/2021/12/Request-for-Public-Comment-SOP-on-Franchise-Questionnaires-12-6-2021.pdf [hereinafter Request for Public Comment].

[20] *Id.*

[21] *Id.* at 5.

[22] *Id.* at 4, n. 13 (citing Hanley v. Doctor's Express Franchising, LLC, No. 12-cv-794, 2013 WL 690521, at *29 (D. Md. Feb. 25, 2013)).

evidence rule. Consider *Williams v. Aire Serv, LLC*,[23] in which the court held the parol evidence rule barred a franchisee's claims for common law misrepresentation and fraud because the alleged misrepresentations contradicted the franchise agreement and:

> The Franchise Agreement precludes claims based on alleged misrepresentations outside the Franchise Agreement. For example, in Section II of the Franchise Agreement, Plaintiff affirmed he was not relying on any representations outside the Franchise Agreement. Similarly, Plaintiff filled out a detailed questionnaire affirming he was not relying on statements or representations outside the Franchise Agreement. The questionnaire provided a space for Plaintiff to list any representations made outside the Franchise Agreement, and he listed no other representations.[24]

The franchisee was not represented by counsel in the acquisition of the franchise agreement, so its claim for punitive damages under the Texas Deceptive Trade Practices Act survived based on requirements for an enforceable waiver of those damages under the statute. But claims for fraudulent misrepresentation, fraud, intentional misrepresentation, and negligent representation were dismissed with prejudice.[25]

Similarly, in *Williams*, the court noted that the franchisee "waived any reliance on representations made outside the Franchise Agreement."[26] The court wrote approvingly:

> The provisions stipulating Plaintiff's non-reliance were not hidden in the Franchise Agreement. Instead, the questionnaire included a checklist of yes or no questions to ensure that Plaintiff understood the terms and was not relying on any representations outside the Franchise Agreement. Additionally, where Plaintiff could have listed representations made to him outside the contract, he listed none. Thus, the Parties were careful to address the issue of reliance on each other's representations at the time they executed the Franchise Agreement.[27]

This is precisely what the NASAA SOP addresses in Section C.3. But one wonders whether the outcome in *Williams* would be different if the franchisor eliminated the questionnaire and included the required non-waiver language of the NASAA SOP.

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[23] No. 618CV00304ADAJCM, 2019 WL 13150027 (W.D. Tex. July 25, 2019).

[24] *Id.* at *3.

[25] *Id.* at *6.

[26] *Id.* at *1.

[27] *Id.*

Based on the holdings in *Williams* and the cases discussed below, probably not. The alleged oral promises made by the franchisor related to topics addressed in the Franchise Agreement. Notwithstanding the questionnaire and non-reliance affirmations, the court most likely would have still held that claims based on those alleged oral promises were precluded by the parol evidence rule and dismissed the claims. A review of cases decided pre-NASAA SOP reveals similar results. Franchisees' difficulty proving reasonable reliance, integration clauses, and the parol evidence rule result in dismissal of franchisees' claims regardless of questionnaires and acknowledgments. In some instances, state franchise protection laws and unfair and deceptive practices acts safeguard claims at least through preliminary motions to dismiss.

The next three sections explain how courts addressed issues of reasonable reliance, integration clauses and disclaimers, and the parol evidence rule, when franchisees brought claims for misrepresentation and fraudulent inducement in connection with their purchase of a franchise prior to the NASAA SOP. The fourth section describes cases that analyzed contractual waivers in the context of a state franchise protection law with an anti-waiver provision during the same period. Reliance is a thread through all four sections, because, as described above, it is a critical element of franchisees' claims. For example, if a fully integrated franchise agreement precluded reliance on prior representations and a jurisdiction strictly enforced the parol evidence rule, even representations in the FDD could be inadmissible and the franchisee's claims dismissed. To start, the next session offers an overview of reliance and context for the discussions of reliance that follow.

A. Reasonable Reliance

Typically, necessary elements of fraudulent misrepresentation claims are: misrepresentation of a material fact; knowledge that the fact is untrue; intent that the other party rely on the misrepresentation; reasonable reliance on the misrepresentation under the circumstances; and damage as a result of the reliance. Reasonable reliance is a requirement of common law fraud claims and is frequently addressed by courts in cases where franchisees assert claims against franchisors related to disclosures. Courts have held that it is not reasonable or justifiable for a franchisee to have relied on an oral representation of the franchisor where the subject is part of the written contract.[28]

"Determination of the element of reasonable reliance requires a court to review 'the entire context of the transaction, including . . . its complexity and magnitude, the

[28] *See, e.g.*, Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So. 2d 74, 76 (Fla. Dist. Ct. App. 1997) ("The terms of the contract are clear and unambiguous, and the plaintiffs' complaint fails to state a cause of action."); *id.* at 76 ("We write further because the issue of the scope of the economic loss doctrine as it relates to allegations of fraud requires additional explanation."). *See also* Englezios v. Batmasian, 593 So.2d 1077, 1078 (Fla. Dist. Ct. App. 1992) ("A party may not recover in fraud for an alleged oral misrepresentation which is adequately dealt with in a later written contract."); FDIC v. High Tech Med. Sys. Inc., 574 So.2d 1121 (Fla. Dist. Ct. App. 1991) (reliance on oral representations in light of disclaimer in written contract was not justifiable and thus there can be no actionable fraud).

sophistication of the parties, and the content of any agreements between them.'"[29] "As it relates to the sophistication of the parties, the court must also consider the aggrieved party's intelligence, experience, and opportunity to investigate the facts at issue."[30] Courts consider other factors, as well, such as the franchisee's actual knowledge.[31]

The SOP claims that, "It should be the franchisor's burden to police its own sales personnel and agents; franchisees should not have to confirm that no violations of law have occurred during their own sales process."[32] But in his article, *Unreasonable Reliance – Defending a Claim for an Alleged Item 7 Misrepresentation*, Marshall Kizner tells franchisors that a strategy for defending against claims of misrepresentation focused on Item 7 disclosures is to "focus on the steps that franchisees took to conduct their own due diligence."[33] This follows from many court's conclusions about reasonable reliance. Mr. Kizner paints it as a sort of can't lose inquiry:

> The greater the extent of the due diligence engaged in, or opportunity to conduct due diligence, the more difficult it will be for a claimant to argue its reliance on estimates was reasonable. Perhaps paradoxically, showing the franchisee engaged in little to no due diligence despite having the opportunity to do so may also strengthen a defense to a fraud claim because the franchisee will appear careless.[34]

In *Hockey Enterprises, Inc. v. Talafous* the plaintiff franchisee completed a franchise questionnaire, but the court's focus was on disclaimer and integration clauses contained in the franchise agreement. The court denied the franchisor's motion for summary judgment as to the franchisee's negligent misrepresentation claim because justifiable reliance was a necessary element of the claim under applicable Florida law, and the disclaimer and integration clauses "present evidence that could refute the reasonableness of [franchisee's] reliance on the alleged misrepresentations." The court held that was an issue of fact for the jury.[35] To Mr. Kizner's points in his Franchise Law

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[29] Marshall Kizner, *Unreasonable Reliance – Defending a Claim for an Alleged Item 7 Misrepresentation*, 42 FRANCHISE L.J. 419, 422 (2023) (quoting FIH, LLC v. Found. Cap. Partners LLC, 920 F.3d 134, 141 (2d Cir. 2019) (quoting Crigger v. Fahnestock & Co., 443 F.3d 230, 235 (2d Cir. 2006))).

[30] *Id.* (quoting Valspar Refinish, Inc. v. Gaylor's, Inc., 764 N.W.2d 359, 369 (Minn. 2009)).

[31] *See, e.g.,* Coraud LLC v. Kidville Franchise Co., 121 F. Supp. 3d 387, 395 (S.D.N.Y. 2015).

[32] NASAA SOP, *supra* note 2, at 2.

[33] Kizner, *supra* note 29, at 431.

[34] *Id.*

[35] Hockey Enters., Inc. v. Talafous, No. CIV. 10-2943 DWF/JSM, 2012 WL 72979, at *9 (D. Minn. Jan. 10, 2012) (citing Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., 607 F.3d 742, 747 (11th Cir. 2010)); *see also* Rose v. ADT Servs., Inc., 989 So.2d 1244, 1247 (Fla. Dist. Ct. App. 2008) (party claiming fraudulent inducement cannot establish justifiable reliance when disclosure of the truth is revealed in the parties' written agreement). For the purposes of disclosure, the authors note that co-author Nicole Micklich's law firm, Dady & Gardner, P.A., represented one of the parties in this matter.

Journal article, the court wrote, "[t]he Court does not deny that Comeau failed to do his due diligence in evaluating the prospects of success of its proposed Florida franchise."[36] And while the court noted that both parties bore responsibility for the situation, it was "the Court's view that Plaintiff will have a difficult time prevailing in any significant way if this case proceeds to trial."[37]

Similarly, in the earlier case of *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, another case where the franchisee brought claims under the Florida Franchise Act and other common law claims, the court held that licensees failed to state a claim for fraud, breach of implied covenant, rescission, or violation of the Florida Franchise Act where they could not have justifiably relied on the franchisor's alleged representations because the terms of the contract were clear and unambiguous and the contract contained an integration clause.[38] In that case the court held that the franchisee's evidence of misrepresentations was also further barred by the parole evidence rule.[39]

Mr. Kizner also writes in his article, among other things, "[t]o the extent available, franchisors should rely on strong disclaimers concerning the nature of Item 7 disclosures, as mere estimates."[40] Although a powerful factor, however, disclaimers are just one consideration among many in litigation regarding franchisor disclosures. In one case, a court considered not only disclaimers in the FDD but also the franchisee's "business acumen" in holding that a question of fact regarding whether it was reasonable for the franchisee to rely on the start-up cost estimates in the FDD precluded summary judgment for the franchisor on the franchisee's claims for fraud under the Maryland Franchise Registration and Disclosure Law, the New York Franchise Sales Act, and District of Columbia common law.[41]

The fact is, franchisors have various available defenses and reasonable reliance remains a strong factor in most franchise cases.[42] For example, In *Trident Atlanta, LLC v. Charlie Graingers Franchising, LLC*, the court granted summary judgment for the franchisor on the franchisee's misrepresentation, RICO, and unfair and deceptive trade practices act claims because the plaintiffs, "all corporate entities, did not rely on the

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[36] *Hockey Enterprises*, 2012 WL 72979, at *12.

[37] *Id.*

[38] Hotels of Key Largo, Inc. v. RHI Hotels, Inc., No. 96-328P, 694 So. 2d 74, 76–78 (Fla. Dist. Ct. App. 1997).

[39] *Id.*

[40] *Id.*

[41] A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., 70 F. Supp. 3d 376, 403 (D.D.C. 2014).

[42] *See, e.g.,* Siemer v. Quizno's Franchise Co., No. 07-cv-2170, 2008 WL 904874 (N.D. Ill. Mar. 31, 2008) (dismissing federal and state antitrust claims by class of franchisees holding that plaintiffs' market definition was too narrow; franchisor based its defense in part on disclosure acknowledgement where franchisees acknowledged notice of potential business risks).

defendants' representation."[43] The court wrote, "[i]n order to show actual reliance, there must be proof that plaintiffs 'affirmatively incorporated the alleged misrepresentations into [their] decision making process.'"[44] The court concluded that the plaintiffs could not have relied on the defendants' representations but went on to conclude that "even if plaintiffs did rely on defendants' statements, that reliance was unreasonable."[45] "Furthermore," the court wrote, "each plaintiff responded to a questionnaire used by defendants stating it had the opportunity to discuss the benefits and risks of being an area representative with a professional advisor and understood those risks and that no person on behalf of defendant had made any promise regarding the amount of money plaintiffs may earn, the amount of success plaintiffs could expect, or the support service or assistance that defendants would provide to plaintiffs."[46] The court did not end its inquiry with the questionnaire though. It continued on to note that, "many of the alleged 'representations' are mere puffery."[47] "A person cannot reasonably rely on mere puffery."[48] Other courts have relied on the rule that predictions or promises regarding future events are not generally actionable, which Mr. Kizner also points out in his article.[49]

Perhaps most often, courts have held that it is not reasonable to rely on representations contradicting the plain terms of a fully integrated contract. In *Guesthouse International Franchise System, Inc. v. British American Properties MacArthur Inn, LLC*, the court found it unreasonable for a licensee to rely on representations contradicting terms plainly expressed in the license agreement, where the license agreement had a "very clear" integration clause.[50] The court reached the same conclusion in *Yogo Factory Franchising, Inc. v. Ying*.[51] There, the court held that reliance was "not reasonable based upon the integration clause in the franchise agreements and the franchise questionnaire."[52] The court went on to note that other courts have held that integration clauses or disclaimers in franchise agreements make

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[43] Trident Atlanta, LLC v. Charlie Graingers Franchising, LLC, No. 7:18-CV-10-BO, 2020 WL 6889208, at *5 (E.D.N.C. Nov. 23, 2020).

[44] *Id.* (citing Bumpers v. Comm'y Bank of N. Va., 367 N.C. 81, 90 (2013)).

[45] *Id.* at *5–6.

[46] *Id.* at *6.

[47] *Id.* at *7.

[48] *Id.* (citing Solum v. CertainTeed Corp., 147 F. Supp. 3d 404, 412 (E.D.N.C. 2015)).

[49] Kizner, *supra* note 29, at 427.

[50] Guesthouse Int'l Franchise Sys., Inc. v. British Am. Props. MacArthur Inn, LLC, No. 3:07–0814, 2009 WL 278214, at *6–7 (M.D. Tenn. Feb. 5, 2009) (citing Burton v. Hardwood Pallets, Inc., No. 200301439COAR3CV, 2004 WL 572350, at *2 (Tenn. Ct. App. Mar. 22, 2004)).

[51] Yogo Factory Franchising, Inc. v. Ying, No. CIV.A. 13-630 JAP TJ, 2014 WL 1783146 (D.N.J. May 5, 2014).

[52] *Id.* at *8.

"alleged reliance on any prior representations not contained in the Franchise Agreements . . . unreasonable as a matter of law."[53] The *Ying* court held, "[l]ikewise, here, Ying cannot reasonably allege that he relied on any prior oral representations that may have been made to him, as the franchise agreement he signed contained an integration clause that specifies that it is the entire agreement between the parties, that no other representations induced him into signing the agreement, and that the agreement superseded all earlier agreements."[54] "Furthermore," the court wrote, "he represented and acknowledged that no other promises or warranties had been made to him regarding the possible success or profitability of his stores, and that he understood the great amount of risk and speculation involved with undertaking this business venture."[55] Other courts have also held that the integration clauses in franchise agreements made reliance on prior representations unreasonable.[56]

B. The Effect of Integration Clauses or Disclaimers in Franchise Agreements

As a recent paper regarding the NASAA SOP explained, "courts in many jurisdictions have held franchisees to these pre-sale acknowledgments, representations, and disclaimers, particularly when coupled with standard merger and integration clauses."[57] One of the cases cited by the paper, *Cook v. Little Caesar Enterprises,* held that reliance on prior oral representations and documents, even if false, is unreasonable, and therefore precluded the plaintiff's fraud claim.[58] Specifically, in *Cook*, the court held that because of the integration clause in the parties' franchise agreement, any reliance by the franchisee was unreasonable, which also precluded the franchisee's claim for violation of the Michigan Franchise Investment Law.[59]

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[53] *Id.* (internal quotation omitted); *see also* Wingate Inns Int'l, Inc. v. Swindall, No. 12–248, 2012 U.S. Dist. LEXIS 152608, at *5–7, 2012 WL 5252247 (D.N.J. Oct. 23, 2012); Ramada Franchise Sys. v. Eagle Hospitality Grp., No. 03–3585, 2005 U.S. Dist. LEXIS 45102, at *27 (D.N.J. June 24, 2005).

[54] *Id.*

[55] *Id.*

[56] *See, e.g.,* Hall v. Burger King Corp., 912 F. Supp. 1509, 1529 (S.D. Fla. 1995) (franchisees could not have relied on pre-contract representations at odds with their acknowledgments in franchise agreement and in light of merger and integration clause); Jackson Hewitt Inc. v. Childress, No. CIVA 06-CV-0909 DMC, 2008 WL 834386, at *11 (D.N.J. Mar. 27, 2008) (integration clauses or disclaimers in franchise agreements make "alleged reliance on any prior representations not contained in the Franchise Agreements. . . unreasonable as a matter of law.").

[57] Bethany Appleby & Abishek Dube, *Complying with New Prohibitions of Questionnaires and Acknowledgements While Protecting a Franchisor's Legitimate Interests*, ABA 46TH ANNUAL FORUM ON FRANCHISING W14 at 6, n.15 (2023) (collecting cases).

[58] Cook v. Little Caesar Enters., Inc., 210 F.3d 653 (6th Cir. 2000).

[59] *Id.*

Similarly, the Georgia Court of Appeals ruled in 2003 that, "[a]n entire agreement clause operates as a disclaimer, establishing that the written agreement completely and comprehensively represents all the parties' agreement," and therefore franchisees are "barred from claiming that [they] relied on an alleged misrepresentation not contained within the agreement."[60] Since the franchisees in that case could not demonstrate reliance on any alleged misrepresentations, the court held that they could not recover damages predicated on those misrepresentations and reversed the lower court's directed verdict and j.n.o.v. decision on the franchisees' claim for negligent misrepresentation.[61]

A lesson for litigators from one case is to be attentive to information in the disclosure document, as opposed to representations outside the disclosure. Reviewing disclosures that were made to prospective franchisees who purchased franchises from the system at issue after the client's purchased can be particularly informative. In *Motor City Bagels, L.L.C. v. American Bagel Co.*, the court denied the franchisor's motion for summary judgment on franchisees' claims for fraud and violation of the Indiana Franchise Act where the franchisor allegedly included start-up costs in its UFOC that the franchisor knew were low. The franchisees asserted that they never would have entered into the agreements at issue if they had been aware of the actual cost estimates, which the franchisor included in later disclosures.[62] However, the franchisor was granted summary judgment on the franchisees' claims that the franchisor and its agents made statements misrepresenting the chain's average store sales, because the franchise agreement contained an integration clause.[63]

As always, counsel is cautioned to consider the law of the jurisdiction. In many jurisdictions an integration clause will not per se bar a fraudulent inducement claim.[64] But, even where the court does not analyze merger or integration clauses, disclaimers can result in dismissal of franchisees' claims. For example, in *Braatz, LLC v. Red Mango FC*, *LLC*, the franchisor required the prospective franchisees to change their answers to two questions on the franchisor's questionnaire as a condition of the franchise sale. Notwithstanding that fact, the court still held that the plaintiffs could not rescind the franchise agreement because the revised answers to the two questions "did not present any new requirements for franchise ownership" since the changes were required "to ensure consistency between the [franchise] agreement and

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[60] Legacy Acad., Inc. v. Doles-Smith Enters., Inc., 337 Ga. App. 575, 583, 789 S.E.2d 194, 201–02 (2016) (citing Savage v. KGE Assoc. Ltd. P'ship, 260 Ga. App. 770, 776, 580 S.E.2d 591 (2003)).

[61] *Id.*

[62] Motor City Bagels, LLC v. Am. Bagel Co., 50 F. Supp. 2d 460, 470 (D. Md. 1999).

[63] *Id.* at 471.

[64] *See* John Glenn & Karl Oakes, *Defenses to action for fraud – Stipulations in contract relieving parties from liability for fraud*, 37 C.J.S. FRAUD § 116 (collecting cases); *see also* Maltz v. Union Carbide Chems. & Plastics Co., Inc., 992 F. Supp. 286 (S.D.N.Y. 1998).

questionnaire."[65] The franchise agreement itself already included a representation that, "[e]xcept for representations contained in Mango's Franchise Disclosure Document provided to you in conjunction with this franchise offering, you represent that neither Mango nor its agents or representations [sic] have made any representations, and you have not relied on representations made by Mango or its agents or representatives, concerning actual or potential gross revenues, expenses or profit of a RED MANGO Store."[66] Therefore, the court reasoned, the franchisor's failure to give the franchisees the fourteen days to consider the request to revise the questionnaire required by the Wisconsin Franchise Investment Law could not be material, and therefore the law was not violated.[67]

C. The Parol Evidence Rule

As noted above, the parol evidence rule can also prevent franchisees from successfully proving the franchisor made actionable pre-contract misrepresentations. In some jurisdictions, the rule is nearly absolute. For example, the Eastern District of Pennsylvania gathered cases and concluded in *Cottman Transmission Systems v. Kerschner*:

> Where the parties . . . have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. . . . [U]nless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to nor subtracted from by parol evidence. Notably, while parol evidence may be introduced based on a party's claim that there was fraud in the execution of the contract, i.e., that a term was fraudulently omitted from the contract, parol evidence may not be admitted based on a claim that there was fraud in the inducement of the contract, i.e., that an opposing party made false representations that induced the complaining party to agree to the contract."[68]

In *Cottman*, the franchisees argued that Cottman made misrepresentations in its UFOC, including with respect to the average profit made by franchisees, store closures, and average sales. The court dismissed the franchisees' fraudulent inducement and negligent misrepresentation claims because the fully integrated franchise agreement precluded reliance on prior representations, including those in the UFOC. Claims related to the breach of contract and covenant of good faith survived. On the other hand, the Southern District of New York historically has held that the parol evidence rule

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[65] Braatz, LLC v. Red Mango FC, LLC, Civil Action No. 3:14-CV-4516-G, 2015 WL 1893194, at *6 (N.D. Tex. Apr. 27, 2015).

[66] *Id.*

[67] *Id.*

[68] Cottman Transmission Sys., LLC v. Kershner, 536 F. Supp. 2d 543, 552–53 (E.D. Pa. 2008) (quoting Yocca v. Pittsburgh Steelers Sports, Inc., 578 Pa. 479, 854 A.2d 425, 436 (2004)).

cannot be used to frustrate the policy of the New York Franchise Sales Act, and thus could not be used to bar proof of omissions from a franchise disclosure.[69] The policies underlying state franchise laws and unfair trade practices acts are important considerations for franchisors and franchisees litigating disclosure issues.[70]

D. Waiver and the Effect of Anti-waiver Provisions in State Franchise Protection Laws

Even when state franchise protection laws apply, the facts of a case can be most critical. For example, in *Governara v. 7-Eleven, Inc.*, the court dismissed the franchisee's claims under the anti-fraud provisions of the New York Franchise Sales Act ("NYFSA") based in part on non-reliance disclaimers executed by the franchisee. As the court explained, the parties' franchise agreement included a provision in which the franchisees "represent and warrant that [they] have not relied on and [franchisor has not made] any representations relating to the [franchise] except as expressly contained in this agreement, or (1) as to the future or past income…except as provided in [the FDD]."[71] This decision flows from a similar decision also decided in favor of 7-Eleven just a few months earlier, *Solanki v. 7-Eleven, Inc.*, where the same court held that the anti-waiver provision in the NYFSA was not implicated by the facts of that case and enforcing non-reliance disclaimers because "[r]efusing to enforce nonreliance disclaimers would violate the sanctity of contracts and discourage their use," which, in turn, "would undermine the goals of the [NYFSA]."[72] There the court acknowledged and distinguished an earlier decision where a New York state court held that a contractual statement of non-reliance could not be the basis for dismissing fraud claims under the NYFSA.[73] The earlier state court case held that the waivers were barred by the NYFSA and therefore rejected the attempt of the franchisor in that case to utilize the non-reliance representations as a defense to the franchisee's claims.[74] After the two *7-Eleven* cases were decided, another court in the Southern District of New York later changed course and declined to follow them, writing:

> This Court declines to follow *Governara's* lead. Section 687(4) of the NYSFA does not, on its face, prohibit the waiver of any "rights" created by the NYSFA; thus, the fact that the NYSFA does not create a right to **"rely[ ] on verbal representations outside of a written contract"** is not

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[69] *See, e.g.*, Mon-Shore Mgmt., Inc. v. Fam. Media, Inc., 584 F. Supp. 186 (S.D.N.Y. 1984) (holding that allowing the parol evidence rule to bar proof of omissions would frustrate the policy of the NYFSA).

[70] Although, in *Governara v. 7 Eleven, Inc.*, No. 13-cv-6094, 2014 WL 4476534 (S.D.N.Y. Aug. 20, 2014), cited in the NASAA SOP, the franchisor's motion to dismiss was granted despite the anti-waiver protections of the New York Franchise Sales Act.

[71] *Id.* at *1.

[72] Solanki v. 7–Eleven, Inc., No. 12–CV–27(LGS), 2014 WL 320236, at *5 (S.D.N.Y. Jan. 29, 2014).

[73] *See id*. at *6.

[74] *Id.* (citing Emfore Corp. v. Blimpie Assocs., Ltd., 51 A.D.3d 434, 860 N.Y.S.2d 12(2008)).

> dispositive. What Section 687(4) does do, though, is prohibit waivers of "compliance with any provision" of the NYSFA, and Section 687(2), one such provision, makes it "unlawful for a person, in connection with the offer, sale or purchase of any franchise," to make a fraudulent statement. Thus, the disclaimer, if given effect in the manner defendants here request and that *Governara* allowed, accomplishes what Section 687(4) aims to prevent, namely, freedom from compliance with the NYSFA's anti-fraud provision.[75]

Governara also was disregarded by a New York court applying New York and Rhode Island law and holding that merger clauses did not bar a franchisee's fraudulent inducement claim under the NYFSA or, in what the court believed was a matter of first impression, under the Rhode Island Franchise Investment Act ("RIFIA").[76] "Although the New York court believed this was a question of first impression under Rhode Island law, in a 2010 case, the District of Rhode Island granted summary judgment to a defendant franchisor based on an integration clause in the franchise agreement, which disclaimed representations and reliance and required the plaintiff franchisee to release claims against the defendant.[77] In the 2010 Rhode Island case, the court focused on the facts that "the plaintiff initialed those provisions and was represented by counsel, and there was no ambiguity in the contract language."[78] "This decision appears to overlook the RIFIA provision that voids such clauses."[79]

Similarly, in the oft-cited *Lady of America Franchise Corp. v. Malone* case, a Florida court also focused on the factual record and dismissed the franchisee's Florida Franchise Act claim because the franchisee did not establish any facts that circumvented the disclaimer in the franchise agreement, which the court found was not ambiguous.[80] On the other hand, in *Randall v. Lady of America Franchise Corp.*, a Minnesota court stated, "The disclaimer cannot change the historical facts; if the dishonest franchisor made misrepresentations, then he made misrepresentations, no matter what the franchise agreement says. Thus, the disclaimer can only be an attempt

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[75] Coraud LLC v. Kidville Franchise Co., LLC, 109 F. Supp. 3d 615, 621 (S.D.N.Y. 2015) (emphasis in original).

[76] EV Scarsdale Corp. v. Engel & Voelkers N.E. LLC, 13 N.Y.S.3d 805, 820 (N.Y. Sup. Ct. 2015).

[77] Nicole L. Micklich, *Rhode Island*, in FRANCHISE RELATIONSHIP LAWS: A PRACTICAL GUIDE 469 (Julianne Lusthaus & Elliot Ginsburg eds., 2025) (citing Sandonato v. Days Inn Worldwide, Inc., C.A. No. 07-451S, 2010 WL 8461122, at *6 (D.R.I. July 21, 2010) *R. & R. adopted*, 2012 WL 718720 (D.R.I. Mar. 5, 2012)).

[78] *Id.*

[79] *Id.*

[80] Lady of Am. Franchise Corp. v. Malone, No. 05-61304-CIV, 2006 WL 7354110, at *5 (S.D. Fla. Feb. 13, 2006).

to change the legal effect of those misrepresentations. That is precisely what [the Minnesota] anti-waiver language forbids."[81]

Finally, and underscoring the fact that regardless of applicable statutory law, a court will look to the factual record, in *Hanley v. Doctor's Express Franchising, LLC*,[82] discussed in the NASAA SOP,[83] "the court held that disclaimers and acknowledgements contained in a franchise agreement and FDD were legally inoperative to bar a franchisee's claims under the Maryland Franchise Law based on the Anti-Waiver Provision of that **law to the extent that they would operate as a release, waiver, or estoppel**."[84] The *Hanley* court also "noted that integration clauses and waivers are not necessarily wholly irrelevant, citing the issue of reliance."[85] According to the court, "the disclaimers remain factually relevant, and might be persuasive to a fact finder with respect to the materiality of the alleged misrepresentations and omissions and the reasonableness of plaintiffs' reliance on them."[86]

IV. NASAA Statement of Policy on Questionnaires and Acknowledgments

Within the context of the developed case law addressing issues like fraud, reliance, integration clauses, the parol evidence rule, and questionnaires and acknowledgments on franchise relationships and franchisee claims, anecdotal reports suggested that the use of questionnaires and acknowledgments began increasing dramatically after the revised FTC franchise rule was promulgated in 2007.[87] By the early 2020s, commentators described the use of questionnaires as "pervasive in the industry."[88] This began raising concerns among some regulators, as the FTC Franchise

[81] Randall v. Lady of Am. Franchise Corp., 532 F. Supp. 2d. 1071, 1088–89 (D. Minn. 2007).

[82] No. 12-cv-794, 2013 WL 690521 (D. Md. Feb. 25, 2013).

[83] NASAA SOP, *supra* note 2, at 4.

[84] *Id.* (emphasis added).

[85] *Id.* at 4, n.13.

[86] *Hanley,* 2013 WL 690521, at *29.

[87] Franchise Rule Workshop, *supra* note 8 (statement of Howard Bundy) ("[W]e've seen an increase in the use of what I would generally characterize as disclaimers since 2007.").

[88] Maral Kilejian, *Regulatory Update*, ABA 44TH ANNUAL FORUM ON FRANCHISING W13, at 10 (2021) ("The use of a questionnaire is pervasive in the industry, but it is not a process that was formally included in the FTC Franchise Rule, or any state franchise law or regulation, or NASAA guidance.").

Rule did not expressly contemplate the use of questionnaires or acknowledgments, and their use had never gone through a rulemaking process.[89]

In 2021, the NASA Franchise and Business Opportunity Project Group[90] issued a request for public comment on a proposed statement of policy relating to the use of franchise questionnaires and acknowledgements.[91] Echoing the concerns of some regulators, the request for public comment noted that "[q]uestionnaires and [a]cknowledgments are not the most effective mechanisms for preventing fraud," and instead more frequently "allow unscrupulous franchisors to avoid the consequences of franchise fraud."[92] Core to this line of argument was NASAA's conclusion that questionnaires and acknowledgments improperly shift the compliance burden from franchisors to prospective franchisees.[93] As a result, the proposed SOP determined that "[i]n the opinion of the Section and the Project Group, [q]uestionnaires and acknowledgements violate state Anti-Waiver Provisions when they are used as contractual disclaimers that release or waive a franchisee's rights under a state franchise law."[94]

The Proposed SOP contained in the Request for Public Comment included the following prohibitions on statements contained in questionnaires or acknowledgments:

- Statements that would cause a reasonable prospective franchisee to surrender or believe that they have surrendered rights to which they are entitled under federal or state law;
- Statements that would have the effect of shifting the franchisor's disclosure duties to the prospective franchisee;
- Statements that are otherwise prohibited by the SOP, which include by example, the following non-exhaustive list:
    - That the prospective franchisee has read or understands the FDD;

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[89] *Id.*; *see also* Franchise Rule Workshop, *supra* note 8 (statement of Theresa Leets) ("I question how this questionnaire got into this document. It definitely didn't go through a rulemaking process and was less vetted than the NASAA FPR commentary, for instance.").

[90] The NASAA Franchise Project Group is an arm of NASAA that takes input from an advisory committee, made up of a collection of six to twelve members, each with expertise in franchising or the business opportunity industry. N. AM. SEC. ADMR'S A'SSN, ADVISORY COMM. TO THE NASAA FRANCHISE & BUS. OPP. PROJECT GRP. CHARTER (Sept. 6, 2025), https://www.nasaa.org/wp-content/uploads/2025/09/Franchise-Advisory-Committee-Charter.pdf. Members are appointed by NASAA's Franchise Project Group based on submitted applications for a term of one year. *Id.*

[91] Request for Public Comment, *supra* note 19.

[92] *Id.* at 3.

[93] *Id.*

[94] *Id.* at 5. The Request for Public Comment dismissed the court decisions holding that questionnaires and acknowledgments do not violate state anti-waiver laws, *see* cases cited *supra* Section III, arguing that these courts "have not recognized or appreciated the history and purpose of state franchise registration and disclosure laws. . ." *Id.*

- That the prospective franchisee understands or comprehends the risks associated with the purchase of the franchise;
- That the prospective franchisee is qualified or suited to own and operate the franchise;
- That, in deciding to purchase the franchise, the prospective franchisee has relied solely on the FDD and not on any other information, representations, or statements from other persons or sources;
- That neither franchisor nor franchise seller has made any representation, including any financial performance representation, outside of or different from the FDD;
- That the success or failure of the franchise is dependent solely or primarily on franchisee;
- That the franchisor bears no liability or responsibility for franchisee's success or failure;
- That reiterates or duplicates any representation or statement already made elsewhere in the FDD;
- That the prospective franchisee has had the opportunity to or has/has not actually consulted with professional advisors or consultants or other franchisees;
- That the prospective franchisee agrees or understands that the franchisor is relying on the qestionnaire, acknowledgments, or similar documents;
- That requires or suggests that the prospective franchisees must agree to any questionnaires, acknowledgments, or similar documents as a condition to the purchase of the franchise.[95]

The proposed NASAA SOP also required franchisors to include a statement in the state specific addenda of its FDD that no statement, questionnaire, or acknowledgment can have the effect of waiving any claims, or disclaiming reliance on any statements.[96] NASAA received thirty-nine comments to the proposed SOP,[97] some in support, some opposed.[98] After consideration of these comments, on September 18, 2022, NASAA adopted the proposed SOP with some small changes.[99] Chief among the changes, however, was an acknowledgment that the policy was not intended to prohibit a franchisor from conducting factfinding or asking prospective franchisees questions about the sales process.[100] Rather, franchisors are only prohibited from requiring prospective franchisees to sign statements and documents that act as a waiver of state

[95] *Id.* at 7.

[96] *Id.* at 8.

[97] Fichter & Sciremammano, *supra* note 1, at 358.

[98] N. Am. Sec. Adm'r A'ssn, Comment Letters on NASAA Proposed SOP (Dec. 2021-Jan. 2022), https://www.nasaa.org/nasaa-proposals/page/2/.

[99] NASAA SOP, *supra* note 2.

[100] *Id.* at 6 n.15.

law.[101] This left a degree of ambiguity to the NASAA SOP, as whether a statement has the effect of a "waiver" under state franchise laws is often a factual question that can only be determined following development of a full record.

Nonetheless, following issuance of the NASAA SOP, several states began adopting it as formal policy.[102] Although the NASAA SOP has yet to see widespread formal adoption, there is no doubt it has had an effect, with practitioners advising clients to come into compliance lest they face delays in obtaining registration for franchise sales, and anecdotal reports indicating that state regulators are applying the policy even in states that have made no formal policy determinations.[103] Although still early, the next section of this paper assesses the impact of the NASAA SOP on post-sale litigation between franchisors and franchisees: litigation functioning in a world without questionnaires.

V. Case Law Developments Since Adoption of the NASAA SOP

A. Parol Evidence Rule and Integration Clauses

While questionnaires and specific disclaimers will likely not appear as much in post-NASAA SOP case law cases involving franchise fraud claims, integration and merger clauses of course will continue to appear as standard parts of most contracts. And it appears that courts continue to rely on these clauses. While the intersection between integration clauses and franchise sales laws continues to limit defense strategies at times, that is not really different than pre-NASAA SOP case law.

An example is *South Shore D'Lites, LLC v. First Class Products Group, LLC*, a 2025 New York state case.[104] In that case, franchisee sued franchisor for violation of

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[101] *Id.*

[102] WASH. ADMIN. CODE § 460-80-325 (2023); CAL. CORP. CODE § 31512.1; *see also* Md. Off. of the Att'y Gen., Sec. Div., Interpretive Opinion/No Action Position Adopting NASAA Statement of Policy Regarding the Use for Franchise Questionnaires and Acknowledgments (Jan. 23, 2023), https://www.marylandattorneygeneral.gov/Securities%20Documents/Franchise%20_SOP_Revised_022323.pdf. At least one commentator has questioned the enforceability of the Maryland interpretive opinion. Fichter & Sciremammano, *supra* note 1, at 368–69.

[103] Eleanor Vaida Gerhards, Natalma M McKnew, Craig Tractenberg & John Gotaski, *Update: This New Year's Eve say Auld Lang Syne to Old Franchise Questionnaires and Acknowledgements* (Dec. 28, 2022), https://franchiselaw.foxrothschild.com/2022/12/articles/regulatory-compliance/this-new-years-eve-say-auld-lang-syne-to-old-franchise-questionnaires-and-acknowledgements/ ("[A] franchise system is risking comment letters and a delay in renewal if it does not proactively comply with the [NASAA] SOP for all registration states."); HuckBouma, *Further Developments Relating to NASAA Statement of Policy on Franchisors' Use of Franchise Questionnaires and Acknowledgments* (Feb. 10, 2023), https://www.huckbouma.com/blog/2023/02/further-developments-relating-to-nasaa-statement-of-policy-on-franchisors-use-of-franchise-questionnaires-and-acknowledgements/ ("Beyond these 3 states, we have already received comments from a couple of other state regulators on filings submitted after January 1, 2023 requiring changes to our filings consistent with the NASAA Statement of Policy even though we have not received any word from the states about formal steps to adopt the policy.").

[104] S. Shore D'Lites, LLC v. First Class Prods. Grp., LLC, 237 A.D.3d 487 (N.Y. App. 2025).

the NYFSA, as well as for fraudulent inducement. The court noted the existence of "the boilerplate merger and no-oral modification clauses in the franchise agreement" and found them to be "invalid and unenforceable as a defense to the [NYFSA claim].[105] That said, the court took the opposite approach for the common-law fraud claim:

> However, outside of the franchise context, plaintiffs cannot maintain a claim for common-law fraudulent inducement in the face of the aforementioned nonreliance disclaimers. . . . For that reason, the common-law fraudulent inducement claims should be dismissed.[106]

It is interesting to see that the court in *South Shore D'Lites* relied on a pre-NASAA SOP case that relied on a franchise questionnaire—*Emfore Corp. v. Blimpie Associates, Ltd*.[107] *Emfore* found that the franchisor's questionnaire did not violate the NYFSA itself, and even noted how useful such questionnaires could be in "root[ing] out dishonest sales personnel and avoid[ing] sales secured by fraud."[108] But the court noted that the franchisor took it a step too far in using the questionnaire to waive or bar the fraud claim in light of the anti-waiver provisions of the NYFSA.[109] The court recognized that "reliance is an element of a fraud claim under the Franchise [Sales] Act," and issues of fact remained about the reasonableness of the franchisee's reliance.[110]

Recent court decisions have found that integration clauses, without questionnaires or larger disclaimers, barred fraud and other claims in franchise cases. In *TJM Columbus, LLC v. Holiday Hospitality Franchising, LLC*, the court enforced an integration or merger clause to bar franchisee parties' fraud and RICO claims on a motion to dismiss brought by franchisor parties.[111] This case was post-NASAA SOP and, while it involved a pre-NASAA SOP franchise agreement, there was no discussion of a questionnaire or larger disclaimer. Rather the court instead relied on a basic integration clause. Among other things, the franchisee parties argued that they were fraudulently induced to enter into the franchise agreements based on misrepresentations about selecting vendors and the franchisor's receipt of rebates.[112] The defendant franchisor parties moved to dismiss two claims for RICO violations and a

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[105] *Id*. at 488.

[106] *Id*. (citation omitted).

[107] 51 A.D.3d 434, 435 (N.Y. App. Div. 2008).

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] TJM Columbus, LLC v. Holiday Hosp. Franchising, LLC, No. 1:22-cv-02541-VMC, 2023 WL 10407054 (N.D. Ga. March 29, 2023).

[112] *Id.* at *4.

claim for fraudulent inducement based on the integration or merger clause.[113] The integration clause was fairly standard and provided:

> This is the entire agreement between the parties pertaining to the licensing of the Hotel and supersedes all previous negotiations and agreements between the parties pertaining to the licensing of the Hotel as a Crowne Plaza brand hotel. Nothing in the preceding sentence is intended, however, to disclaim any representations Licensor made in the franchise disclosure document that Licensor provided to Licensee.[114]

The court found such a clause can prevent proving the element of reasonable reliance on fraud claims, and indeed found that representations outside of the FDD or the franchise agreements could not be the basis of the fraudulent inducement claim.[115] The court also examined the FDD and found that it also contradicted the claimed misrepresentations about vendors and rebates—disclosing the restriction to use particular vendors and disclosing franchisor's receipt of rebates—barring the claim.[116] And because the particular RICO claims required a showing of reasonable reliance on the alleged misrepresentations, the court found that the integration clause also barred those claims and dismissed them too.[117]

Ultimately, courts' reasoning remains quite similar both before and after the NASAA SOP. Whether the defense is the contract's integration clause or a questionnaire, those defenses are likely going to apply to common-law claims, but are of lesser value for claims under franchise sales laws. That is not to say that there is no use or benefit to integration clauses in franchise sales law claims. Such clauses are likely going to be and remain one evidentiary-leg of the defense chair, among other facts that can be developed in discovery.

B. Reasonable Reliance Standard

Even without questionnaires, courts continue to focus on the reasonable reliance element of franchise fraud claims. The recent case, *Schaefer v. HPB Foam LLC*, illustrates this principle and focused in part on a limited disclaimer within the franchise agreement, limited by the now-common statement that nothing in the FDD was disclaimed.[118] The franchisee plaintiffs sued their franchisor for violations of the Texas Deceptive Trade Practices Act and the Pennsylvania Unfair Trade Practices &

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[113] *Id*.

[114] *Id*.

[115] *Id*. at *4–5.

[116] *Id*. at *5.

[117] *Id*.

[118] Schaefer v. HPB Foam LLC, Case No. CV 24-6298, 2025 WL 1888207 (E.D. Pa. July 8, 2025).

Consumer Protection Law, as well as for common law fraud and breach of contract, based in part on alleged misrepresentations in Items 7, 8, and 19 of the FDD.[119]

The franchisor parties moved to dismiss the common law fraud and negligent misrepresentation claims based on a lack of reasonable reliance due to the integration clause in the Franchise Agreement, which the court called a disclaimer.[120] The integration clause provided:

> This Agreement contains the entire agreement of the parties. There are no representations either oral or written, except those contained in this Agreement. This Written Agreement includes all representations between the parties.... Nothing in this Agreement or any related agreement is intended to disclaim the representations Franchisor made in the franchise disclosure document furnished to Franchisee.[121]

Discussing the common law claims, the court found that despite the franchisees pleading their reliance on alleged oral statements and misrepresentations in the FDD, the disclaimer in the franchise agreement barred these claims.[122] The court granted the motion to dismiss those claims "to the extent that plaintiffs' claims rely on misrepresentations made outside of the FDD and the Franchise Agreements."[123] From the court's ruling, it appears that the claims could survive to the extent the FDD language itself was found to be a misrepresentation.

But integration clauses are not always a silver bullet to eliminate franchisee fraud claims, as shown in the recent case *DG Gas, LLC v. TA Franchise Systems LLC*.[124] Franchisees asserted a claim for fraud after the parties entered into a franchise agreement for the operation of certain truck stop centers. The franchisees alleged misrepresentations in the FDD and fraudulent omissions.[125] The franchisor brought a motion to dismiss, based in part on the lack of reasonable reliance due to the existence of non-reliance and integration clauses in the franchise agreement.[126] In opposition, the franchisees asserted that the franchisor's arguments were not a proper subject for a motion to dismiss and, in any case, that they were not just relying on "representations 'that are contrary to the statement made' in the FDDs or FA" but were based on

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[119] *Id* at *2.

[120] *Id*. at *8.

[121] *Id*. at *4.

[122] *Id*. at *8.

[123] *Id*.

[124] Case No. 1:24-cv-01002-PAB, 2025 WL 814928 (N.D. Ohio March 14, 2025).

[125] *Id*. at *8–9.

[126] *Id.* at *37.

statements made in addition to those in the franchise agreement.[127] The court agreed with this argument, finding both that the fraud claims were based on statements made "in addition to the statements in the FA" and that a finding as to the reasonableness of the franchisees' reliance on those statements would be premature at that stage of the case.[128]

But, again, these cases are really no surprise and are not really different from what courts would have found pre-NASAA SOP. The basic building blocks of a reasonable reliance claim or defense remain unchanged. If the circumstances of the case, including without limitation provisions of the parties' FDD and franchise agreements, impact the reasonableness factor, then defendants can argue those evidentiary items against a fraud claim.

C. Overall Take

The NASAA SOP says franchisees cannot waive claims under franchise relationship laws or disclaim reliance on statements made by the franchisor, franchise seller, or those acting on behalf of the franchisor. But there is no indication that the NASAA SOP was trying to change more than a century or more of basic contract law on integration of contracts. Logically, it can seem hard to reconcile these two matters, and it is unclear what, if any, consideration NASAA gave to long-standing contract law. It seems the intention of the NASAA SOP was to stop the use of questionnaires and possibly detailed or franchise-specific disclaimers in franchise agreements. This question is created then: if that was the intention, and such items are not used, and integration law is not changed, how will courts rule on modern franchise fraud cases?

Because the seeming-elimination of the use of questionnaires is so recent, and many cases are still dealing with pre-NASAA SOP facts (that may include the use of questionnaires), the answer to this question is still developing.[129] That said, as seen in case law discussed above, we are still seeing reliance on integration clauses and the reasonable reliance standard in relation to those clauses. We are also seeing continued differentiation between common-law fraud claims and statutory franchise sales fraud claims, in that courts have found that integration clauses are not fatal to statutory franchise sales fraud claims in light of anti-waiver provisions, but they still may be fatal to common-law claims. And even in statutory franchise sales fraud claims, the issue of the reasonableness of alleged reliance can still be developed using the panoply of facts that exist in franchise cases, which include, among many other things, the integration clause and reasonable reliance principles. Bottom line—the elimination of the questionnaire has not ended contract-based defenses to fraud claims.

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[127] *Id*. at *38.

[128] *Id*. at *38–39.

[129] This author writes "seeming" because questionnaires do not appear to be illegal, especially in states without franchise sales laws. But it appears that the elimination of questionnaires is wide-spread.

VI. Drafting Alternatives to Questionnaires and Acknowledgments.

The NASAA SOP is fairly definitive in terms of its prohibitions on any attempts by franchisors to incorporate questions or disclaimer statements into the parties' contracts. But generally speaking, three states have taken steps to adopt it,[130] and only one, California, has codified its concepts into law.[131] As a result, as a practical matter, franchisors are free to continue using questionnaires and acknowledgements in most jurisdictions.[132] Based on the authors' experience, that is generally the case, especially in non-registration states. This may carry some risk for multi-unit franchise locations crossing state lines into states that have adopted some form of the NASAA SOP. Accordingly, franchise systems that wish to continue to use questionnaires and acknowledgements should be careful in crafting agreements with multi-unit operators that have franchise locations both in and out of such jurisdictions.

What is clear, based on the recent case law, however, is that courts generally continue to enforce integration clauses with the same frequency as prior to the issuance of the NASAA SOP.[133] One potential issue with placing greater emphasis on integration clauses, however, is that they are primarily useful in tandem with the parol evidence rule, as they are a mechanism for excluding evidence of communications outside the parties' contracts. However, given that much evidence of alleged fraud is in the form of emails, text message, social media posts, and other written and memorialized forms of communication as opposed to oral representations that are more easily contested, courts are often less willing to strictly apply the parol evidence rule to bar consideration of extra-contractual statements. The increasing reliance on arbitration provisions in franchise agreements may also undermine the power of the integration clause, as the loose evidentiary rules that often apply in arbitration may militate in favor of admission of evidence that would otherwise be excluded under the parol evidence rule. Accordingly, franchisors may need to balance their need for confidentiality and

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[130] WASH. ADMIN. CODE § 460-80-325 (2023); *see also* Md. Off. of the Att'y Gen., Sec. Div., Interpretive Opinion/No Action Position Adopting NASAA Statement of Policy Regarding the Use for Franchise Questionnaires and Acknowledgments (Jan. 23, 2023), https://www.marylandattorneygeneral.gov/Securities%20Documents/Franchise%20_SOP_Revised_022323.pdf.

[131] CAL. CORP. CODE § 31512.1.

[132] In addition, with the exception of California, which has actually codified the NASAA SOP principles into law, there is technically nothing that legally prevents a franchisor from using a questionnaire or acknowledgment. The NASAA SOP does not carry with it the force of law. Nonetheless, it is likely that a franchisor that continues to use questionnaires in some registration states may face regulatory scrutiny from continued use, including potential interference with their registration status. The authors have yet to see any evidence of franchisors bringing administrative claims against states that are seeking to enforce the NASAA SOP through registration denials or administrative enforcement actions.

[133] *See, e.g.*, Schaefer v. HPB Foam LLC, Case No. CV 24-6298, 2025 WL 1888207 (E.D. Pa. July 8, 2025).

expediency in arbitration with their ability to prevent admission of evidence of possible claims based on representations made outside the parties' contracts.

Finally, with the increasing vigilance and oversight by regulatory authorities over traditional franchise sales, franchisors may want to revisit exemption-based franchising as a means of avoiding claims. Franchisors can avoid many of the burdens that arise in a questionnaire-free world by meeting exemption sales requirements, which in many cases bring them out of the realm of regulatory scrutiny.[134]

VII. Conclusion.

The NASAA SOP may mark the end of an era, or it may amount to nothing of import. While it remains to be seen whether additional states will move to aggressively adopt restrictions on questionnaires and disclaimers, the reality of the jurisprudence appears to suggest that it has resulted in little concrete change. Rather, it presents an opportunity for franchisors to improve their existing franchise agreements, draft strong integration clauses, and potentially reconsider whether arbitration is in fact the best venue for most franchise disputes. Otherwise, courts continue to apply the same tests for materiality and reasonable reliance in connection with fraud claims.

[134] *See generally* EXEMPTIONS AND EXCLUSIONS UNDER FEDERAL AND STATE FRANCHISE REGISTRATION AND DISCLOSURE LAWS (Leslie Curran & Beata Krakus eds., 2019).