



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

IFA 26

LEGAL

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Speakers

- **Nicole Micklich**

Managing Partner, Dady & Gardner

- **Dan Oates**

Partner, Miller Nash LLP

- **Elizabeth Weldon**

Partner, Haynes and Boone LLP

Moderator

- **Ben Reed**

Partner, Plave Koch PLC

Introduction



- North American Securities Administrators Association (“NASAA”)
 - voluntary association
 - sixty-seven state, provincial, and territorial securities administrators from the United States, Canada, and Mexico
 - the voice of state securities agencies responsible for efficient capital formation and grass-roots investor protection
 - self-professed goal is protecting consumers who purchase securities or investment advice

Franchise Questionnaires

- History of questionnaires
- Questionnaires and acknowledgements are not disclaimers
 - Multiple purposes
- 2023 NASAA Statement of Policy (“SOP”)



Purpose of Franchise Questionnaires

- Uncover improper practices by franchise sales personnel
- Educational tool
- Prove that the franchisee did not rely on statements outside the FDD
- Prove statements outside the FDD were not material



Elements of Fraud

- 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
- Damage

Franchisees Claiming Fraud – Before the SOP

- Typically bound by pre-sale acknowledgements and disclaimers
 - In questionnaires and elsewhere in franchise documents
- Traditionally held to merger and integration clauses
 - Challenge for franchisees to demonstrate reasonable reliance
 - Challenge for franchisees to establish causes of action for fraud or misrepresentation

Reasonable Reliance – Before the SOP



- It is not reasonable to rely on representations contradicting the plain terms of a fully integrated contract
- 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”

Reasonable Reliance – Before the SOP

- Questionnaires, disclaimers, and integration clauses are evidence that could refute the reasonableness of franchisee's reliance on alleged misrepresentations.
 - May be an issue of fact for jury
- Allows argument that franchisees could not have justifiably relied on the franchisor's alleged misrepresentations because the terms of the contract were clear and unambiguous and the contract contained contrary language.

Reasonable Reliance – Before the SOP

- Lessons for Litigators:
 - Be attentive to information in the disclosure document, as opposed to representations outside the disclosure
 - In many jurisdictions an integration clause will not *per se* bar a fraudulent inducement claim
 - But in many cases disclaimers have resulted in dismissal of franchisees' claims

Parol Evidence Rule – Before the SOP

- Lessons for Litigators:
 - In some jurisdictions, the rule is nearly absolute
 - Consider state franchise laws and unfair trade practices acts

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

- Lessons for Litigators:
 - The facts of a case can be most critical
 - Examine the territorial reach of Anti-Waiver Laws
 - Don't forget the role and potential involvement of regulators
 - Investigations
 - Registration Requirements

January 1, 2023 Statement of Policy

“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.”

January 1, 2023 Statement of Policy

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.”

January 1, 2023 Statement of Policy

- Silent regarding merger clauses
- Says little about integration clauses
- Prohibits statements contained in questionnaires or acknowledgments
- Prohibits franchisors from requiring prospective franchisees to sign waivers of state law

January 1, 2023 Statement of Policy

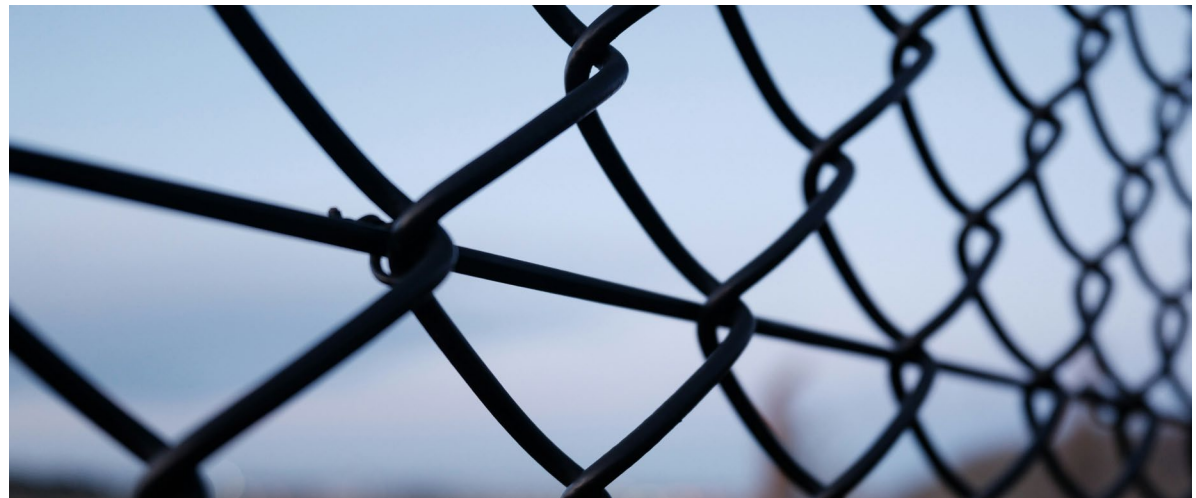
- Not aimed at preventing franchisor fact-finding
- Not aimed at preventing asking franchisees about sales process
- Aimed at not waiving state law

January 1, 2023 Statement of Policy

- Several states adopted as formal policy
- SOP is not law
- What lawyers are saying to their clients
- Anecdotal reports

Integration Clauses – After the SOP

- Integration clauses, without questionnaires or larger disclaimers, bar fraud and other claims in franchise cases
- Courts' reasoning remains quite similar both before and after the NASAA SOP



Integration Clauses – After the SOP



- seeing some different treatment between Franchise Investment claims and common law claims
- but that is not a sea change and really same as pre-SOP

Integration Clauses – After the SOP

- Case Example: *South Shore D’Lites, LLC v. First Class Products Group, LLC*, 237 A.D.3d 487 (N.Y. App. 2025)
- NYFSA and common law fraud in the inducement claims
- Merger clause and no oral modification clause

Integration Clauses – After the SOP

- Case Example: *South Shore D’Lites, LLC v. First Class Products Group, LLC*, 237 A.D.3d 487 (N.Y. App. 2025)
- NYFSA claim survived – citing section 5 of NY Gen Bus Law 637 and pre-SOP case, *Emfore Corp. v. Blimpie Associates, Ltd.*, 51 A.D.3d 434, 435 (N.Y. App. Div. 2008).
- Common law fraud claim dismissed “in the face of the aforementioned nonreliance disclaimers”

Reasonable Reliance – After the SOP

- Question of fact
- Courts' reasoning remains the same before and after the NASAA SOP
- May have evidentiary limitations

Reasonable Reliance – After the SOP

- Case Example: *Schaefer v. HPB Foam LLC*, Case No. CV 24-6298, 2025 WL 1888207 (E.D. Pa. July 8, 2025)
- Deceptive trade act claims and common law claims
- common law fraud and negligent misrepresentation claims dismissed
- Did NOT move to dismiss trade act claims on reasonable reliance grounds

Reasonable Reliance – After the SOP

- Case Example: *Schaefer v. HPB Foam LLC*, Case No. CV 24-6298, 2025 WL 1888207 (E.D. Pa. July 8, 2025)
- Court found lack of reasonable reliance due to the integration clause in the Franchise Agreement
- “to the extent that plaintiffs’ claims rely on misrepresentations made outside of the FDD and the Franchise Agreements”

Reasonable Reliance – After the SOP

- **Contrary** Case Example: *DG Gas, LLC v. TA Franchise Systems LLC*, Case No. 1:24-cv-01002-PAB, 2025 WL 814928 (N.D. Ohio March 14, 2025)
- alleged misrepresentations in the FDD and fraudulent omissions
- non-reliance and integration clauses in the franchise agreement

Reasonable Reliance – After the SOP

- **Contrary Case Example:** *DG Gas, LLC v. TA Franchise Systems LLC*, Case No. 1:24-cv-01002-PAB, 2025 WL 814928 (N.D. Ohio March 14, 2025)
- Court denied MTD
- fraud claims were based on statements made “in addition to the statements in the FA”
- finding as to the reasonableness of the franchisees’ reliance on those statements would be premature at that stage of the case



Conclusion

- How will courts rule on modern franchise fraud cases?
- Will we see less MTDs and more trials?
- Elements of fraud are unchanged
- Will this change pre-FA communications?
- Will we see more evidence from both sides of the transaction about pre-FA communications?

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