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# Hidden Gems or Devils in the Details: The Gift (or Curse) of Oft-Ignored Franchise Agreement Provisions

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# Ignorance Isn't Always Bliss

- A franchisee loses its claim — even though the statute of limitations hasn't run.
- A franchisor wins a \$2M indemnity — but can't recover a dollar of attorneys' fees.
- A post-term non-compete is unenforceable — because the agreement expired rather than terminated.
- After the relationship ends, the franchisee walks away with the brand's Instagram account.
- A Notice of Default is thrown out — because it was sent by email.

# The Agreement You Think You Have vs. the One a Court Will Enforce

- Every court enforced the contract as written.
- The problem wasn't hidden.
- “Standard” does not necessarily equal “safe.”
- The theme: courts enforce what's written, not what was intended or assumed.

# Indemnification

- The primary risk-allocation mechanism in the franchise agreement – but routinely treated as boilerplate.
- Franchisors: shifts third-party liability from brand owner to operator.
- Franchisees: protection against claims arising from authorized IP use.

# Indemnification: Scope and Attorneys' Fees

- **Broad “arising out of” language is enforced literally.**
  - Aaron’s Inc. v. MKW Investments (11th Cir. 2019): Franchisor enforced indemnity for employment dispute, replaced franchisee’s chosen counsel.
  - Philadelphia Indemnity v. Markel (D. Md. 2023): “Arising out of” franchise operations = \$2M settlement recovered.
- **Attorneys’ fees: silence = no recovery.**
  - Patel v. 7-Eleven (D. Mass. 2023): “All losses arising out of your Store” did not include attorneys’ fees. The clause was otherwise broad but silent on fees.

# Indemnification: Fault Allocation and Defense Control

- **Franchisor’s own negligence: carve-outs matter, but so does their exact wording.**
  - Cohen v. Steve’s Franchise (1st Cir. 1991): No carve-out = franchisee indemnified franchisor even for franchisor’s sole negligence.
  - Sunoco v. Penn. Nat’l Mutual (Pa. 2024): Carve-out for “solely” franchisor’s negligence left franchisee on the hook for partial fault.
- **“Indemnify, defend, and hold harmless” — who actually controls the litigation?**
  - AXIS Insurance v. American Specialty (7th Cir. 2024): Indemnitor got notice but didn’t participate. Lost right to challenge settlement later.
  - Kenworth of South Louisiana v. Bristow (La. 2010): Broad settlement agreement extinguished indemnification rights entirely.

# Indemnification: Takeaways

- Expressly address **attorneys' fees** and whether they cover first-party disputes or only third-party claims.
- Define **fault allocation** explicitly.
- Specify **defense control**: tender, notice, participation rights, and settlement consent.
- Include a **survival clause**: many claims arise after the relationship ends.
- **Franchisees**: push back on clauses with no fault carve-out. You could end up indemnifying the franchisor for its own negligence.

# Renewal

- Comes into play at the end of the initial term (usually 10-20 years in the future at the time of signing the Franchise Agreement)
- Impact of State Relationship Laws
  - New Jersey Franchise Practices Act
  - California Corp. Code. 20000
  - Illinois Franchise Disclosure Law
  - Michigan Franchise Investment Law
- Renewal conditions

# The “Then-Current” Agreement Dilemma

- Conflicting provisions may give rise to unintended consequences.
  - *Home Instead, Inc. v. Florance*, 721 F.3d 494 (8th Cir. 2013): Court found agreement ambiguous where minimum performance language conflicted with requirement to sign “then-current” agreement on renewal.
- Waiver during initial term may not carry over to renewal term.
  - *Robinson v. Charter Practices Int’l, LLC* (9<sup>th</sup> Cir. 2017) – Franchisor allowed to enforce in-term non-compete after renewal despite not enforcing during initial term.
- Renewal agreements may be permitted to make material changes.
  - *Terrier, LLC v. HCA Franchise Corp.* (D. Nev. 2022)

# Renewal: Takeaways

- Precisely define key terms like termination and expiration;
- Require execution of the then-current agreement if a franchisor wishes to reserve the right to modify relationship terms following completion of the initial agreement;
- Impose clear, objective conditions to renewal; and
- Expressly preserve the franchisor's ability to update system requirements, if desired.

# Notice

- Notice provisions define how and when contractual rights may be exercised or forfeited.
  - Default
  - Termination
  - Renewal
  - ROFR / Options
- Courts enforce these provisions strictly. The method, recipient, timing, and content all matter.

# Notice: How Courts Enforce the Fine Print

- **Method and recipient are not interchangeable.**
  - Road King Development v. JTH Tax (E.D. Va. 2023): Notice via internal portal, addressed to no one, held insufficient. Internal responses did not constitute waiver.
  - Mister Softee v. Amanollahi (D.N.J. 2016): Years of oral complaints did not satisfy written notice requirement.
- **Renewal and option deadlines: courts will not save a late notice.**
  - Pizza Inn v. Clairday (5th Cir. 2020): Two months late = renewal forfeited, even with significant economic loss. Courts won't apply equitable exceptions for ordinary lateness.
- **State law overlay:** Dunkin' Donuts v. C3WAIN (3d Cir. 2017): Content of termination notice shaped what issues could be litigated under NJ Franchise Practices Act.

# Notice: Takeaways

- Update notice provisions to include **modern delivery methods**: email, e-portal, and overnight courier, alongside any legacy requirements.
- Specify **who receives notice**: a named officer or role, not just the company.
- Address **content requirements**: what must a notice say to preserve rights or trigger obligations?
- Check **state law overlay**: many franchise relationship statutes impose notice requirements that supplement — or override — the agreement.
- **Franchisees**: calendar every contractual deadline. Courts will not rescue a late renewal notice based on economic hardship alone.

# Transfer

- Frequently overlooked until the time for a proposed transfer arises
- Often contain numerous conditions that must be met to trigger a franchisor to reject or approve
  - Buyer qualifications
  - Franchisee operational compliance
  - Release
  - Equity change vs. third-party sale
  - ROFR
- Impact of any state relationship laws

# Practical Effects of Transfer Language

- Defining what actions constitute a “transfer”
  - *In re Chicago Investments, LLC*, 470 B.R. 32 (Bankr. D. Mass. 2012)
  - No ROFR for a franchisee entity stock sale
- Addressing limitations on what a franchisee may sell
  - *Picktown Foods, LLC v. Tim Hortons USA, Inc.*, 2018 WL 11664213 (S.D. Fla. Sept. 11, 2018)
  - Agreement limited a sales price to the depreciated value of the franchisee’s assets

# Transfer: Takeaways

- Carefully define the franchisor's discretion to approve or deny a proposed transfer.
- Identify objective, consistent criteria for approval.
- Consider the impact of any state relationship laws
- Be sure to address ancillary elements
  - ROFR
  - Outstanding defaults
  - Partial transfers or transfers by operation of law
  - Consequences of unauthorized transfers

# Construction and Definitions

- Contract construction rules and defined terms are often treated as background noise — but they actively determine outcomes.
- Courts apply interpretive canons (surplusage, last antecedent, series-qualifier) to resolve every ambiguity.
- **The drafting lesson:** punctuation and word choice are not (just) stylistic choices. They are operative legal decisions.

# O'Connor v. Oakhurst Dairy (1st Cir. 2017): A \$5 Million Oxford Comma

- **Maine overtime exemption statute excluded:** *“the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of” certain food products.*
- Question: Does the exemption cover **distribution** as a standalone activity, or only “packing for shipment or distribution” as a combined phrase?
- The 1st Circuit: **No Oxford comma before “or distribution” = ambiguous.**
- **The franchise application:** Days Inn Worldwide v. Shri Ganesai (D.N.J. 2025):
  - Franchisor’s grammatical interpretation of a force majeure clause was not supported by construction canon.

# Construction & Definitions: Franchise Pitfalls

- **Competing interpretations ≠ ambiguity.**
  - *Board of Regents v. IDEXX Laboratories* (Tex. 2024): “one other” vs. “one or more.”
- **Cross-referenced definitions travel with their exclusions.**
  - *Road King v. JTH Tax* (E.D. Va. 2023): Area development agreement incorporated franchise agreement’s definition of “Gross Receipts.”
- **Internal inconsistency invites litigation.**
  - *Calzone King v. Midwest Dough Guys* (D. Neb. 2025): Agreement said 8-year term in one section, 10-year in another.
- **Silence does not restrict rights.**
  - *D.H. Pace v. OGD Equipment* (11th Cir. 2023): Licensing agreement’s silence on trademark claims.

# Construction and Definitions: Takeaways

- Use **defined terms consistently** across all related agreements and remember that cross-referenced definitions carry their embedded exclusions.
- Locate and resolve **internal inconsistencies** before signing.
- Review **punctuation and serial structure** in operative clauses. The Oxford comma lesson applies to franchise agreements too.
- If you want to **restrict a right, say so expressly**. Courts will not infer limitations from silence.
- **Franchisees:** ask for clarification when language is ambiguous. Before signing is the only time you have leverage.

# Don't Miss These: Other Oft-Overlooked Issues

- **Shortened Limitations Periods:** Many states void them entirely (FL, MO, AL, ID). Verify before you rely on one.
- **Severability:** One overreaching provision can void an entire arbitration clause. Pervasive overreach = no saving through severance (Castillo v. CleanNet, N.D. Cal. 2018).
- **Survival:** Non-competes tied only to “termination” may not survive expiration. Specify all triggering events.
- **Social Media / Digital Assets:** Who owns the Instagram account? Courts look at documented property interests, access control, and actual use. Silence favors whoever has the login.

# Don't Miss These: Other Oft-Overlooked Issues

- **Choice of Law / Venue:** “County” = state court only. Confirm whether the forum clause allows federal jurisdiction (*JHRV v. Edible Arrangements*, C.D. Cal. 2010).
- **Termination — Tiered Provisions:** Immediate termination rights are enforced where clearly articulated, but courts won't imply them. Ambiguity between “immediate” and “cure required” categories invites litigation (*CorpCar v. Carey Licensing*, D.C. 2024).
- **Remodel:** Extensions or modifications of requirements can lead to waiver of the right to enforce or ambiguity in the obligations (*KFC Corp. v. JRN, Inc.*, W.D. Ky. 2012).

# Key Takeaways: For Franchisors

1. Don't carry forward boilerplate.
2. Silence creates risk.
3. Modernize notice provisions.
4. Consistent definitions = predictable outcomes.
5. Know your state law overlay.

# Key Takeaways: For Franchisees

1. Nothing in the agreement is truly boilerplate.
2. Calendar every deadline.
3. Ask what the ambiguous language means — before you sign.
4. Know your state's franchise relationship law.