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Franchise Registration and Renewal Requirements

Franchise Law and Registration Review for January 2006

Welcome to Mohajerian Law Corp's monthly Franchise Newsletter. Each month we will provide our readers with pertinent industry, legal, and business information related to the Franchise industry. Your suggestions and interests are always valued; please forward all comments or suggestions to: newsletter@mohajerian.com.

Franchise Registration & Renewal Requirements

BASED ON A SUMMARY OF FEDERAL AND STATE FRANCHISE REGISTRATION AND RENEWAL LAWS.

"This is a quick summary of the registration and renewal provisions of federal and state requirements. For an in-depth analysis of the specific requirements applicable to you, please contact Mohajerian Law Corp. at www.mohajerianlawcorp.com. This newsletter is not intended to be legal advice and is for informational purposes only."

In states that mandate presale registration, franchises cannot lawfully be granted until the franchisor has complied with the registration requirements. Failure to comply can result in administrative proceedings, public or private civil actions, or even criminal prosecution.

What are Registration and Renewal Requirements?

All registration states accept the Uniform Franchise Offering Circular format. Some also accept the FTC disclosure format. However, the laws and regulations of each state must be consulted in order to ensure compliance with its individual registration and disclosure provisions. These laws and regulations are included in the GUIDE, as are the UFOC and FTC forms.

Registrations are not necessarily immediately effective; instead, waiting periods of up to 30 days might be imposed in order to give the regulators the opportunity to review the filed documents for completeness. By law or regulation, many states require franchisors to renew a registration, or file a report, annually.

The North American Securities Administrators Association (NASAA) has developed a coordinated review procedure for franchise registrations in multiple states. The procedure is designed to

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streamline the franchise registration process by funneling communication and comments on registration applications through a "lead state" chosen to coordinate the review. In order to be eligible for coordinated review, a franchisor must file applications in two or more participating states and must provide audited financial statements with its registration application. The franchisor must be filing an initial registration application in each participating state. There is no additional fee for coordinated review; however, the franchisor still must pay the applicable registration fees for each state in which it is registering.

A franchisor could not be refused registration of an offering prospectus on the grounds that the franchisor's felony conviction created an unreasonable risk to prospective franchisees without the procedural due process rights of a fair hearing, cross-examination of witnesses, and notice of evidence to be considered. *Lee Myles Associates Corp. v. Abrams* (NY S Ct 1982).

An offer to sell a franchise need not qualify as an "offer" under ordinary contract law standards. "Offer to sell" is often defined broadly enough to include the attempt to offer to sell or the solicitation of an offer to buy a franchise or an interest in a franchise. The Illinois statute specifically includes coverage of the offer or sale of an option to purchase a franchise.

However, the renewal or extension of an existing franchise is not generally considered a sale if there has been no interruption in the franchisee's business.

Furthermore, the effect of registration laws is not restricted to what are commonly thought of as sales. "Sale" normally includes any disposition of a franchise for value.

What Affect does Non-Compliance have on these Requirements?

State laws frequently give officials the authority, without a prior hearing, to order a halt to franchise sales if there has been a failure to register successfully. The violation of such a stop order could constitute a criminal offense. In some states, any violation of the registration laws is a crime, regardless of whether there is a stop order in effect.

Whether a franchisee can rescind an agreement that was not properly registered before the sale varies from state to state. Some always allow a rescission, while others provide the remedy if there was a willful violation of the state laws or regulations. A "willful" violation is usually considered to be one that was performed knowingly or willingly, not necessarily one that was intended to injure or defraud another. Liability for a failure to register is not limited to the franchisor. Owners, shareholders, officers, and others who control the franchise seller, directly or indirectly, can be liable.

Who Regulates the Registration and Renewal Requirements?

State franchise registration regulators have been given broad enforcement and rulemaking authority. In various states, their powers include the ability to: sue for equitable relief or damages; undertake investigation inside or outside of the state; hold hearings; administer oaths, subpoena witnesses, and compel the production of evidence; order franchise sales stopped pending a hearing; accept service of



process for nonresidents; make rules; prescribe forms; issue interpretive opinions; grant exemptions from registration or disclosure requirements; and deny, suspend, or revoke registrations.

Of course, the powers --both rulemaking and enforcement --must be exercised within constitutional limitations.

Are there Exemptions to the Requirements?

Franchise offerings can be exempt from the registration requirements of state laws based on characteristics of the franchisor, the franchisee, or the offering. Exemptions can be conferred by statute, by regulation, or by a state regulator. Exemptions must be considered in light of a state's registration requirements --one state might declare an offering to be exempt from registration while another simply does not include it within those transactions that must be registered. For example, Illinois excludes from the definition of a franchise a transaction requiring the payment of a fee of less than \$500, while Michigan defines the arrangement as a franchise but exempts it from registration.

Registration exemptions based on the net worth of the franchisor or the franchisor's corporate parents are perhaps the most important, existing by statute in eight states. The experience of the franchisor and the sophistication of the prospective franchisee are other factors that might qualify an offering for an exemption.

A franchisee's sale of a franchise, for its own account and not through the franchisor, is generally exempt from registration, as are offers to sell an additional franchise to an existing franchisee and renewals of existing franchises. Offers and sales to banks and other financial institutions are frequently covered by statutory exemptions.

Isolated sales --sometimes described as no more than one sale in 12 months --that are not part of a franchise distribution plan are exempt under some state laws. Franchise sales by executors or administrators and by bankruptcy trustees are frequently exempt from registration.

A franchisor must file a request with the state regulator in order to secure an exemption from registration. Prospective franchisees are entitled to notice and disclosures as provided by the various state statutes. It has been held that strict compliance with exemption requirements is necessary or the exemption will be lost.

Since each state that requires registration has unique criteria determining which offerings are subject to registration, and which of those are eligible for exemption from registration, close attention to state statutes and regulations is necessary.

ALL SUMMARY INFORMATION FOUND AT [HTTP://BUSINESS.CCH.COM/](http://BUSINESS.CCH.COM/)

CCH BUSINESS GUIDE, FRANCHISE AND DISTRIBUTION #315, JANUARY 20, 2006.

General Recommendations:



Franchisors and franchisees need to be certain they comply with all local, state, and federal laws. The very complex nature of franchise and distribution laws can make compliance and success difficult. Experienced legal counseling is best to ensure your rights and obligations are being protected – protecting your future. Mohajerian Law Corp. can help you understand the law, how it affects you, and actively protect your rights.

January 2006 Franchise Law and Legislative Review

New York Beer Law's Arbitration Ban Preempted

[John G. Ryan, Inc. v. Molson USA, Inc., DC N.Y.](#)

The New York beer law's provision banning pre-dispute arbitration clauses between beer brewers and wholesalers was preempted by the Federal Arbitration Act (FAA) and its implementation of a national policy in favor of arbitration notwithstanding conflicting state laws, a federal district court in New York City has decided. Therefore, a brewer and a wholesaler were required to arbitrate their dispute over termination. The wholesaler sought a dismissal or permanent stay of the arbitration of the parties' dispute.

The wholesaler contended that the anti-arbitration provision of the beer law was "saved" from FAA preemption by the Twenty-first Amendment which bestowed on the states virtually complete control over the importation and sale of liquor and the structure of their liquor distribution systems. However, the statute's ban on pre-dispute arbitration clauses was a purely procedural matter and did not implicate the core concerns of the Twenty-first Amendment, the court held. The anti-arbitration provision was not a necessary component of the beer law's regulatory scheme. Moreover, and importantly, it was not disputed that the substantive provisions of the state law would apply in any arbitration that occurred, in accord with the choice of law provision in the parties' agreement, the court noted. Because a core concern of the Twenty-first Amendment was not implicated, the balance between the federal and state issues involved tipped decidedly in favor of FAA preemption of the statutory ban.

High Court Rejects Truck Dealer's Price Discrimination Claim

[Volvo Trucks North America v. Reeder-Simco GMC, U.S. Sup. Ct.](#)

Heavy-duty truck manufacturer Volvo Trucks North America, Inc. (Volvo) was not shown to have engaged in price discrimination in violation of the Robinson-Patman Act by providing more favorable discounts or price concessions to some of its regional dealers than to others, the U.S. Supreme Court has ruled. A decision of the U.S. Court of Appeals in St. Louis upholding a jury verdict in favor of a complaining dealer was reversed. The jury had concluded that the complaining dealer's damages from Volvo's Robinson-Patman violation amounted to \$1,358,000.

The dealer filed suit against the manufacturer after learning that the manufacturer had given another dealer a price concession greater than the concessions it normally received, causing the dealer to suspect that it was one of the dealers it sought to eliminate in an announced plan to reduce its number of dealers from 146 to 75.

Writing for the majority, Justice Ruth Bader Ginsburg explained the scope of the Robinson-Patman Act in a secondary-line price discrimination case: "The Act centrally addresses price discrimination in cases involving competition between



different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process." Looking closely at the facts of the underlying transactions, the Court concluded that the Act did not extend to the case presented by the complaining dealer.

The heavy-duty truck market was characterized by a competitive bidding process. In this process, retail customers stated their specifications and invited bids, generally from dealers franchised by different manufacturers. Only when a Volvo dealers' bids were accepted did the dealers arrange to purchase the trucks, which Volvo then built to meet the customers' specifications.

The complaining dealer failed to establish the competitive injury required under the Act. In order for a manufacturer to be held liable for secondary-line price discrimination under the Robinson-Patman Act, it must have discriminated between dealers competing to resell its product to the same retail customer, the Court held. The complaining dealer offered three categories of evidence: (1) comparisons of concessions it received for four successful bids against non-Volvo dealers, with larger concessions other successful Volvo dealers received for different sales on which it did not bid (purchase-to-purchase comparisons); (2) comparisons of concessions offered to it in connection with several unsuccessful bids against non-Volvo dealers, with greater concessions accorded other Volvo dealers who competed successfully for different sales on which it did not bid (offer-to-purchase comparisons); and (3) evidence of two occasions on which it bid against another Volvo dealer (head-to-head comparisons). The complaining purchaser did offer evidence that Volvo charged it higher prices than other dealers. However, its purchase-to-purchase and offer-to-purchase comparisons fell short, because in none of the discrete instances on which the complaining purchaser relied did it compete with beneficiaries of the alleged discrimination for the same customer. With respect to the evidence of head-to-head competition, the complaining dealer did not establish that it was disfavored vis-à-vis other Volvo dealers in the rare instances in which they competed for the same sale --let alone that the alleged discrimination was substantial. If price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between the complaining dealer and the "favored" Volvo dealer, the Court explained. Satisfied that the complaining dealer did not support its case, the Court refused to go so far as to hold that the Act did not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory, an argument raised by the United States as *amicus curiae*.

In closing, the Court noted that interbrand competition was the "primary concern of antitrust law." It added that the rejection of the complaining dealer's claim was consistent with the broader policies of the antitrust laws --protecting competition rather than competitors.

Dissent

A dissenting opinion, written by Justice John Paul Stevens and joined by Justice Clarence Thomas, contended that the majority's "novel, transaction-specific concept of competition" eliminated Robinson-Patman Act protections for dealers who routinely engage in negotiations with prospective purchasers. Moreover, it was unclear whether the majority's holding was limited to franchised dealers who did not maintain inventories or excluded all franchisees from the effective protection of the Act, according to the dissent.

Auto Dealers Had Standing to Challenge Certification Program

[Danvers Motor Co., Inc. v. Ford Motor Co., CA-3](#)

Eight motor vehicle dealers had standing to sue their franchisor for the introduction of its Blue Oval Program (BOP), a nationwide customer service and satisfaction incentive program designed to improve dealer performance, the U.S. Court of Appeals in Philadelphia has ruled. A decision by a federal district court in Newark, New Jersey, holding that the dealers failed to allege that they suffered a concrete and particularized injury-in-fact was reversed.

The dealers alleged that the manufacturer's imposition upon them of the BOP certification and re-certification processes



violated the Automobile Dealer's Day in Court Act, several state franchise statutes, and the Robinson-Patman Act. In addition, they alleged claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Although participation in the program was technically voluntary, all of the franchisor's dealers were required to bear the costs of the program, while only those who were "BOP certified" could reap the program's benefits. In order to finance its BOP, the franchisor charged an additional 1% for its automobiles, leaving the Manufacturer's Suggested Retail Price unchanged. Certification required dealers to meet standards under a number of performance criteria, including leadership, concern resolution, sales, service, facilities, and customer service.

To state an injury-in-fact sufficient to survive the franchisor's motion to dismiss on the basis of lack of standing, the dealers were simply required to plead that they suffered some kind of concrete harm because of the BOP, according to Circuit Judge Samuel A. Alito, writing for a unanimous panel of the appellate court. The dealers' complaint was replete with assertions of cognizable harm, the court observed. The dealers alleged that each of them made very significant investments to comply with the BOP certification requirements and specified the amount of money spent by each dealership. There was no doubt that the financial harm alleged by the dealers counted as injury-in-fact, the court reasoned. Additionally, the dealers alleged that the certification process illegally intruded into the dealers' operations and that the BOP's facilities criteria included all the ordinary routine aspects of running the dealerships, which had always been the normal responsibilities and concerns of the dealer, without the franchisor's intrusion. Although this type of injury was more difficult to monetize, it was no less cognizable under Article III standing, the court determined. At its heart, the alleged injury was an invasion of the dealers' property rights, the court noted.

Staffing Office Enjoined from Post-Rescission Trademark Use

Manpower, Inc. v. Mason, DC Wis.

A temporary staffing business franchisor was highly likely to succeed on the merits of its claim that one of its franchisees breached its franchise agreement for its Columbus, Ohio, area franchisee in material ways that destroyed the essential object of the agreement and justified the franchisor's rescission of the agreement, a federal district court in Milwaukee has ruled. In addition, the franchisor would be irreparably harmed if the Columbus franchise continued to use the franchisor's name and trademark and the balance of the harms favored the grant of an injunction enjoining the Columbus franchise's continued use. Therefore, the franchise was prohibited from further use of the franchisor's trademarks. However, the franchisor was denied injunctive relief with respect to the continued use of its trademarks by the franchisee's other two franchises and was preliminarily enjoined from rescinding its agreements for the other two franchises pending the outcome of the litigation between the parties.

After becoming dissatisfied with the operation of the Columbus franchise, the franchisor notified the franchisee that it was rescinding all three of their agreements, and moved for a preliminary injunction barring the franchisee from using its trademark in connection with the three businesses. The franchisee cross-moved to enjoin the rescission of the three agreements.

Likelihood of Success

The Columbus franchise violated the territorial restriction in its agreement and did so repeatedly, after numerous warnings and with the intent to deceive the franchisor and the franchisor's other franchisees, the court determined. The Columbus business became a rogue franchise doing business all over the country in violation of its agreement and the rights of other franchisees, according to the court. Its extra-territorial activities generated numerous complaints and compelled the franchisor to constantly attempt to police its conduct. In sum, the operation of the Columbus franchise displayed a lack of commitment to the franchise relationship and destroyed one of its essential objects. Therefore, it was highly likely that the franchisor would prevail on the merits of its claim that it justifiably rescinded the agreement for the Columbus franchise.

Balance of Harms

The balance of harms favored enjoining the franchisee from operating its Columbus business in the franchisor's name, the court ruled. Applying a sliding scale approach taking into consideration the franchisor's high likelihood of success on the merits and the degree of irreparable harm to both parties, the franchisor was entitled to preliminary relief.



Other Two Franchises

The franchisor was not entitled to an injunction prohibiting the franchisee's other two franchises from continuing to use its trademark and was enjoined from rescinding its agreements for those franchises, the court decided. The franchisor did not claim that either of the two franchises were operating in material breach of their agreements. The fact that a franchisee operating a number of franchises breached one agreement did not mean that it breached another, the court reasoned.

Franchise Agreement's Renewal Option Strictly Enforced

Keelboat Concepts, Inc., Ala. Sup. Ct.

A restaurant franchisee failed to effectively renew its agreement with a franchisor pursuant to a renewal option in the parties' agreement, the Alabama Supreme Court has decided. The franchisee's notice of renewal was sent after the expiration of the six-month period provided in the agreement for exercise of the renewal option. The terms of the agreement required the franchisee to send the franchisor written notice of his election to renew his franchise for an additional 20-year term between July 3, 2002, and January 3, 2003. However, the franchisee did not send the franchisor his written notice that he was exercising the option to renew the agreement until January 22, 2003.

On January 30, 2003, the franchisor notified the franchisee that the agreement had not been validly renewed, and that the agreement had terminated. Under Alabama law, because time was of the essence in option contracts and because option contracts were to be strictly construed, the notice of renewal sent by the franchisee on January 22, 2003, was not effective, the court held. Nothing in the evidence indicated that the franchisor either failed to object to the franchisee's untimely attempt to exercise the option or that the franchisor waived the timely exercise of the option, the court reasoned. Moreover, there was no evidence that the franchisor took any action to prevent the franchisee from exercising the option to renew within the required six-month period. Therefore, the facts did not support the franchisee's argument that the terms of the option provision should not be strictly enforced.

A trial court had examined the intent of the parties and held that strict adherence to the terms of the franchise agreement was not required. It held that the franchisee had validly exercised the option. However, because the option provision was unambiguous, the trial court erred by looking outside the terms of the agreement, according to the Alabama Supreme Court. Although the trial court explained its judgment in terms of substantial compliance, the judgment could also be construed as holding that the franchisor waived its right to timely performance of the option provision by not requiring the franchisee to strictly adhere to other terms of the franchise agreement, the court observed. However, even if the franchisor did not require the franchisee to strictly adhere to other terms of their agreement, the agreement contained an anti-waiver provision, and pursuant to that provision the franchisor's failure to strictly enforce the terms of the agreement relating to the day-to-day operation of the restaurant could not amount to a waiver of the requirement that notice of the election to renew be timely given.

Donut Shop Terminations Did Not Violate Illinois Act

Dunkin' Donuts, Inc. v. N.A.S.T., Inc., DC Ill.

A donut shop franchisee failed to sufficiently allege damages resulting from a franchisor's alleged termination of four franchise agreements without "good cause" and without an opportunity to cure, a federal district court in Chicago has ruled. Therefore, the franchisor did not violate the Illinois Franchise Disclosure Act by terminating the agreements. Although Massachusetts law governed the dispute pursuant to an enforceable choice of law provision and the parties' agreements, the franchisee's claim under the Illinois statute was entertained because: (1) the agreements provided that state statutory cure periods, if longer than the one provided for in the agreement, were to be applied; and (2) the Illinois Act's non-waiver provision prevented parties to Illinois franchise agreements from opting out of the Act's coverage via choice of law provisions, according to the court.

Illinois Franchise Disclosure Act

In providing a private right of action for a franchisor's violation of the Act, Section 26 of the statute required that there be



"damages caused thereby," the court noted. Some of the franchisee's claimed injuries, such as losses due to the franchisor's alleged failure to provide adequate training and supervision, were clearly not caused by the asserted violations of the Act and thus could not support the claim. Other claimed injuries, such as the franchisee's inability to relocate his franchises, were negated by the express terms of the agreements which each specifically granted the franchisee a franchise at "one location only." As to the franchisee's other asserted grounds for damages, losses caused by his inability to sell or remodel his franchises, the franchisee failed to offer any more than vague and unsubstantiated conjecture or speculation. Instead, the franchisee proffered a blithe statement of his purported damages, assertedly based on "the value of [the] business, lost opportunity costs and related damages," and said to be "in excess of \$2,000,000." No attempt was made to allocate the purported \$2,000,000 lump sum among the value of the business lost, the lost opportunity costs, and the franchisee's unspecified related damages, according to the court. Even more fundamentally, the franchisee stated vaguely that his determination was "based on an analysis of sales at the [franchisor's] shops and the sales at the shops in the area with whom [the franchisor] has provided favored status," with no effort at further explanation. As to documentary support, the franchisee made no attempt to specify which documents were relevant or at which of several locations they could be found.

Breach of Contract

Despite the franchisee's failure to raise a substantial question of material fact as to any damages it might have suffered due to the terminations, the terminations could have breached the parties' agreements, the court held. Under Massachusetts law, a breach of contract carried with it at least nominal damages. The franchisor failed to meet its burden of demonstrating that the franchisee engaged in intentional underreporting of sales or falsification of financial data that would have permitted termination without an opportunity to cure. However, only nominal damages could be awarded to the franchisee even if it prevailed on the merits of its breach of contract claim at trial, the court reasoned.

FTC STAFF COMMENT

Ohio

Alcoholic beverages legislation.

The staffs of the FTC Office of Policy Planning, Bureau of Competition, and Bureau of Economics commented on December 12, 2005, that proposed Ohio House Bill No. 306 was likely to increase competition among wine wholesalers and decrease the costs of wine distribution. The measure would repeal current statutory requirements prohibiting a manufacturer or distributor of wine from canceling or failing to renew a franchise or substantially change a sales area or territory without the prior consent of the other party for other than just cause and without at least 60 days' written notice to the other party setting forth the reasons for the action. Overly restrictive termination requirements prevented suppliers from reacting quickly and efficiently to changes in market conditions and consumer preferences, the staffs commented. In addition, the bill would eliminate mandatory exclusive territories for the wholesale distribution of wine and eliminate the mandatory minimum wholesale markup for wine. The exclusive territory requirement limited suppliers' freedom to respond to changes in market conditions by, for example, preventing suppliers from combining sales territories to achieve scale efficiencies, according to the FTC staffs. Ohio House Bill No. 306 was being considered by the House Financial Institutions, Real Estate, and Securities Committee as of October 27, 2005. Further details will be available in a forthcoming report.

JURY TRIAL WAIVERS

[Bakrac, Inc. v. Villager Franchise Systems, Inc., CA-11](#)

Enforceability

**Knowing and voluntary.**

A jury trial waiver in a hotel franchise agreement was valid and enforceable. The franchisee's ability to negotiate with the franchisor for an addendum to the agreement providing for a reduced franchise fee, reduced royalty fees, a credit, and multiple no-penalty termination rights indicated that the parties' agreement was negotiable. The waiver was conspicuously set forth in the franchise agreement in large type and in bold language. The franchisee was a college-educated mechanical engineer who had 11 years experience as a hotel operator. There was no indication that the franchisee was under duress at the time of the agreement's execution or that the franchisor pressured him to sign it. The franchisor merely offered the franchisee what he thought was a good deal and he had ample time to consider the terms. Under the circumstances, the franchisee knowingly and voluntarily waived his right to a jury trial.

MOTOR VEHICLE DEALERS

[Arciniaga v. General Motors Corp., DC N.Y.](#)

Federal Dealer Law**Good faith.**

A motor vehicle manufacturer did not violate the Automobile Dealer's Day in Court Act (ADDCA) by pressuring a dealer to purchase a dealership near its existing location when the manufacturer knew all along that it intended to establish another competing dealership nearby. In order to sustain a claim under the ADDCA, a plaintiff was required to allege and prove a breach of a manufacturer's duty to act in "good faith," which was defined in terms of "coercion, intimidation, or threats of coercion or intimidation." The statute explicitly provided that "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute lack of good faith." The dealer complained of the manufacturer's lack of good faith and pressure, but failed to aver any coercion or intimidation or any activity on the part of the manufacturer that could rise to the level of such coercion or intimidation under the statute and the relevant case law. Rather, the essence of the dealer's claim was unfairness, "a far cry from the basis for a claim under the ADDCA" ([Cutrone v. Daimler-Chrysler Motors Co., LLC, CA-3](#)).

Stockholder agreement.

A stockholder agreement between a motor vehicle manufacturer and a dealer to jointly invest in a dealership was a "motor vehicle franchise contract" under the meaning of the Automobile Dealer's Day in Court Act (ADDCA). The dealer filed suit against the manufacturer after the dealership's reported losses triggered a provision in the agreement permitting the manufacturer to call the balance of the dealer's stock under the agreement. The parties also entered into a second, separate agreement, a Dealer Sales and Service Agreement (dealer agreement), at the same time they entered into the stockholder agreement. The dealer alleged claims relating to the stockholder agreement (but not the dealer agreement) for discrimination, breach of express and implied contract rights, and fraud pursuant to the ADDCA. The manufacturer sought to stay the dealer's claims and to proceed to arbitration. Under the ADDCA, whenever arbitration was contemplated in a motor vehicle franchise contract both parties were required to consent to arbitration after the dispute arose.

The manufacturer contended that the ADDCA did not apply because the stockholder agreement was not a motor vehicle franchise contract. However, nowhere in the ADDCA was a franchise contract limited to one piece of paper. Taking into account the policy behind the ADDCA and the fact that it was a remedial statute that should be construed broadly,

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Congress did not intend to limit the definition of motor vehicle franchise contract so as to exclude instances like the current dispute where the corporate structure was not strictly a franchise agreement in form but closely resembled one in substance. In enacting the ADDCA, Congress was concerned about manufacturers using side agreements such as the stockholder agreement at issue to sidestep the Act.

TRADEMARK INFRINGEMENT

[R..J. Gators Franchise Systems, Inc. v. MBC Restaurants, Inc., DC Fla.](#)

Lanham Act

Post-termination use.

A hotel franchisee violated the Lanham Act by continuing to display a franchisor's trademarks without authorization following the franchisor's termination of their relationship. The franchisee's contention that it did not intentionally use the franchisor's marks following the termination and that it made every effort to have a sign bearing the franchisor's mark removed as soon as possible was without merit. Specifically, the franchisor terminated the agreement on November 22, 2002, and the franchisee alleged that it entered into a contract with a sign company to remove the sign, but the company would not remove the sign during the winter months. According to the franchisor, the signs bearing its marks were not removed from the facility until March 8, 2004, when it contacted a sign removal company itself. Although the franchisee contended it made every effort to remove the signs, it only contacted one removal company. Even if the franchisee was found to be the non-breaching party in the dispute, it would still have been obligated to remove the signs. The franchisee's actions in failing to have the signs removed could not be reasonably viewed as anything but intentional ([Travelodge Hotels, Inc. v. Elkins Motel Associates, Inc., DC N.J.](#)).

Injunctive relief.

A restaurant franchisor was likely to succeed on the merits of its Lanham Act claims of trademark infringement and unfair competition against a franchisee that continued to display the franchisor's trademarks and operate its restaurant following the termination of its franchise. The franchisor would be irreparably harmed if it was not granted its requested relief of a preliminary injunction enjoining the franchisee's continued unauthorized display of the franchisor's trademarks. In addition, the requested injunctive relief would further the public interest because it was in the public interest to prevent confusion over the source or origin of products provided to the public. Therefore, the franchisee was enjoined from displaying or otherwise infringing the franchisor's trademarks and from causing a likelihood of confusion as to the source or sponsorship of its business, products, or services. The franchisor sued the franchisee after the franchisor terminated the parties' agreement and the franchisee continued the unauthorized use of the franchisor's trademarks and continued to hold its business out to the public as an authorized member of the franchisor's system. The overwhelming likelihood of consumer confusion caused by the terminated franchisee's unauthorized use alone established the franchisor's irreparable injury and entitlement to an injunction.

ANTITRUST LAWS

[Cumberland Truck Equipment Co. v. Detroit Diesel Corp., DC Pa.](#)

Price Fixing

**Venue.**

In an antitrust action against a Michigan-based truck engine manufacturer and its distributors in which personal jurisdiction was based solely on the nationwide service of process clause of Sec. 12 of the Clayton Act, venue had to be established pursuant to Sec. 12. The complaining truck dealers alleged that the manufacturer and its distributors engaged in price fixing and a group boycott in violation of Section 1 of the Sherman Act. The dealers, who were either terminated or downgraded in dealer classification by the manufacturer, unsuccessfully argued that Sec. 12's venue provision could be supplemented by any venue statute. They contended that venue was proper in any district in the United States because Sec. 12 allowed for nationwide service of process. Sec. 12's venue clause could only be supplemented for alien defendants and not for domestic defendants. Because venue was improper in a federal district court in Pennsylvania (the moving defendants were not incorporated in Pennsylvania and did not have a presence in the district or engage in continuous local activities in the district), the case was transferred to a federal district court in Michigan.

RELATIONSHIP/TERMINATION

[Int'l House of Pancakes, Inc. v. Hajloo, DC Colo.](#)

California Franchise Act**Arbitration awards.**

An arbitrator's award which determined that four restaurant franchise agreements could be terminated by the franchisor without notice and an opportunity to cure did not violate California public policy embodied in the California Franchise Relations Act. The franchisee of the four restaurants argued that Sections 20020 and 20021 supported the proposition, with limited exceptions, that there was a California public policy against terminating franchise agreements without advance notice and an opportunity to cure. However, California limited the scope of that public policy to franchisees and franchised businesses operating in California. The Act applied "to any franchise where either the franchisee is domiciled in this state or the franchised business is or has been operated in this state." The franchisee was not domiciled in California, and the franchised businesses were operated in Colorado. In addition, the franchisee's contention that the arbitrator mischaracterized the issue of the notice of termination because he misrepresented the nature and content of certain evidence was a challenge to the arbitrator's factual findings and was not cognizable under the Federal Arbitration Act.

JUDGMENTS

[7-Eleven, Inc. v. Dar, Ill. Ct. App.](#)

Postjudgment Interest**Arbitration awards.**

A convenience store franchisee was not entitled to an award of postjudgment interest on an arbitration award from the date of its original entry on December 29, 1998, because the entire award had been vacated. In 2001, an Illinois appellate court remanded an appeal of the award to the trial court with directions to enter an order vacating the award and ordering a rehearing before an arbitrator. The appellate court determined that the arbitrator had exceeded his authority when he awarded the franchisee damages for breach of the implied covenant of good faith and fair dealing by its franchisor. On rehearing, the arbitrator determined that since his finding that the franchisor had wrongfully terminated the franchisee had not been overturned, his award of \$195,720 to the franchisee for wrongful termination was not subject to redetermination. The franchisee's contention that he was entitled to postjudgment interest on the \$195,720 awarded for wrongful



termination from December 29, 1998 was rejected because the entire 1998 award had been vacated. The substantive effect of the appellate court's order vacating the entire award was to restore the parties to their original status in the case as though no arbitration award had been entered.

CAUSE FOR TERMINATION

[Dunkin' Donuts, Inc. v. Dough Boy Management, Inc., DC N.J.](#)

New Jersey Franchise Act

Proof of damages.

A donut shop franchisor could have violated the New Jersey Franchise Practices Act by terminating the agreements of four franchisees without "good cause" and by imposing unreasonable standards of performance on the franchisees. Although the franchisees failed to establish damages as an element of their claimed violations, the Act did not explicitly require a showing of damages in order to establish a violation. Given the importance of the Act in protecting franchisees, its civil remedy provision specifying that a franchisee could bring an action against a franchisor for a violation to "recover damages," could not be read so restrictively as to preclude the franchisees' claims. There were issues of fact with respect to each of the claimed violations of the Act. A reasonable jury could conclude that the franchisees' businesses were operated in accordance with the franchisor's standards and procedures and that there was no substantial breach that justified the termination of the franchises under the Act. Similarly, whether the standards imposed on the franchisees by the franchisor were unreasonable was a question for a jury.

COLLATERAL ESTOPPEL

[Ford Motor Credit Co. v. Daugherty, DC Cal.](#)

Bar to Claims

Vehicle board proceedings.

A motor vehicle dealer's claims for breach of contract and the implied covenant of good faith and fair dealing, unfair business practices, interference with contractual and prospective contractual relations, and misrepresentation against a franchisor were barred by the doctrine of collateral estoppel under California law. The identical factual allegations supporting the dealer's claims were raised and decided in an administrative hearing before the California New Motor Vehicle Board as a result of a protest filed with the board by the dealer. The dealer's protest challenged whether the franchisor had "good cause" under the meaning of the California motor vehicle dealer law to terminate the dealer's franchise. The board concluded that the franchisor had good cause for the termination based on findings that the dealer ordered an excess number of cars causing the dealership to fail and that the dealership was not conducting an adequate amount of business. The proceedings before the board were adjudicatory in nature. It was an adversary proceeding in which opposing parties were present and represented by counsel. Moreover, the dealer had the opportunity for judicial review of the board's decision and did in fact appeal it to a California trial court. Moreover, judicial economy and public policy against vexatious litigation weighed in favor of applying collateral estoppel to the claims.

CONTRACT LAW

[Dalton v. General Motors Corp., DC N.J.](#)

*Release of Claims***Enforceability.**

A motor vehicle manufacturer was entitled to summary judgment on the claims of a motor vehicle dealer that was the proposed representative of a putative class of dealers because the dealer was granted leave to withdraw his affidavit in support of his claims. However, summary judgment against the dealer's claims was proper whether or not his affidavit was withdrawn because the claims were barred by an enforceable release agreement he entered into with the manufacturer as part of a 2002 reorganization of his dealership. Pursuant to the reorganization, the manufacturer agreed to forgive certain debts of the dealership, made a donation of additional capital to the dealership in exchange for the general release of the dealer's claims against the manufacturer. The dealer's contentions that the release of claims was unenforceable due to lack of consideration, unconscionability, fraud, and duress were without merit. The dealership reorganization, and the parties' respective consideration given, did not shock the conscience. Consideration in the form of \$3.4 million flowed from the manufacturer to the dealership, an entity in which the individual dealer had an economic interest as shareholder and president. In addition, the release was not procedurally unconscionable because, instead of signing it, the dealer could have refused the reorganization and sued the manufacturer.

GASOLINE DEALERS

[Chevron U.S.A., Inc. v. SSD & Associates, DC Cal.](#)

*PMPA***Dealer termination.**

Because a gasoline station franchisor could have properly terminated a franchisee in compliance with the Petroleum Marketing Practices Act, therefore, the franchisee's motion to dismiss the franchisor's action for a declaratory judgment that the termination was proper was denied. The franchisor alleged that the franchisee failed to maintain and produce particular business records in breach of the parties' agreement. It claimed that the requirement to maintain and produce the records was "reasonable and of material significance to the franchise relationship" under the meaning of the Act because without that provision it would have no way to ensure that it was not being cheated by the franchisee. The dispute presented a factual dispute over the materiality of the documents the franchisee failed to provide. The franchisor's side of the dispute was adequately presented by its evidence, hence. Hence, there was no basis for dismissal.

HOTELS

[Best Western Int'l, Inc. v. Oasis Investments, LP, DC Ariz.](#)

*Liquidated Damages***Enforceability.**

Under Arizona law, a liquidated damages provision in a hotel franchise agreement awarding the franchisor daily damages for each day during which any of the franchisor's trademarks was displayed in connection with the hotel, after 15 days following the termination of the agreement in an amount equal to 15 percent of the mean of the hotel's room rates per room per day multiplied by the total number of rooms was enforceable. It would be very difficult for the franchisor to estimate accurately the loss it suffered due to the franchisee's unauthorized post-termination use of its trademarks. Therefore, the court gave great weight to the agreement's formula for the calculation of liquidated damages. The

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franchisee did not contest the reasonableness of the liquidated damages formula and, therefore, there was no issue of material fact regarding liquidated damages. The franchisor was entitled to recover liquidated damages from the franchisee in the amount of \$50,976.00 as calculated by the agreement's formula.

ARBITRATION AWARDS

[Realshare Int'l, Inc. v. Coldwell Banker Real Estate Corp., DC N.Y.](#)

Confirmation

Manifest disregard of the law.

A real estate office franchisor failed to satisfy its "very stringent burden" to show that an arbitrator manifestly disregarded the law by determining that the franchisor had breached its agreement with a franchisee by permitting and sanctioning the use of the franchisor's trademarks in Manhattan in connection with real estate brokerage. Therefore, the award was confirmed. The parties' agreement provided that, with respect to its exclusive territory of Manhattan: "neither Franchisor nor any of its Related Parties shall open or operate, or license any other Person to open or operate, any office engaged primarily in a residential real estate brokerage business using the [franchisor's trademarks] within the Territory during the original ten year" term of the agreement. The franchisor's contentions that the arbitrator's determination was premised solely on a generalized finding that the franchisor promoted, directly or through corporate affiliates, the business of a head-to-head competitor of the franchisee was without merit. Rather, the arbitrator specifically found that the franchisor had violated the parties' agreement by permitting its corporate affiliate, a brokerage operating in the City of New York, including Manhattan, to use the franchisor's marks in connection with residential real estate brokerage. It was not a manifest disregard of the law to conclude that it was a breach of the agreement for the franchisor, by and through its affiliate, to substantially undercut the economic value of the exclusive grant of the contract.

NEW FRANCHISING LAWS

New Jersey

Malt alcoholic beverages.

New Jersey has recently enacted The Malt Alcoholic Beverages Protection Act regulating the relationships between brewers and wholesalers of malt alcoholic beverages. The Act provides that the terms of an agreement between a brewer and a wholesaler shall not permit a brewer to terminate, cancel or refuse to renew a contract, agreement or relationship with a wholesaler: (1) except where the brewer establishes that it has acted for good cause and in good faith; (2) because the wholesaler refuses or fails to accept an unreasonable amendment to the contract, agreement or relationship; and (3) without first giving the wholesaler written notice setting forth all of the alleged deficiencies on the part of the wholesaler and giving the wholesaler a reasonable opportunity of cure. Further, an agreement between a brewer and a wholesaler shall not: (1) require the brewer's consent to the acquisition, sale or transfer of distribution rights for products other than those of the brewer; (2) unreasonably withhold consent to a proposed sale or transfer of any ownership interests in the wholesaler to certain individuals; (3) unreasonably withhold consent to a proposed sale or transfer of any ownership interests in the wholesaler or the distribution rights for the brewer's products under certain circumstances; (4) allow more than one wholesaler to sell any of the brewer's product lines or brands within the same territory or area at the same time under certain circumstances; and (5) fail to act, during the term of the contract, in a manner consistent with the covenant of good faith and fair dealing; among other things. In addition, the new law specifies that the New Jersey Franchise Practices Act does not apply to those agreements that are subject to this new Act. Assembly Bill No. 3619 was approved December 15, 2005, and becomes effective March 1, 2006 (*Malt alcoholic beverages*).

**Fermented malt beverages.**

A new Wisconsin law prohibits a wholesaler (including a brewer or out-of-state shipper that holds a wholesaler's license) from selling, transporting, or delivering any brand of fermented malt beverages unless the wholesaler has entered into a written agreement with the brewer or out-of-state shipper supplying the brand that grants to the wholesaler the distribution rights for the brand and precisely identifies the designated sales territory for which such rights are granted. Additionally, a brewer or out-of-state shipper may not grant to more than one wholesaler distribution rights for the same brand in the same designated sales territory. Within a wholesaler's designated sales territory for any brand, the wholesaler may not refuse to sell the brand, or refuse to offer reasonable service related to the sale of the brand, to any retailer. With specified exceptions, the bill prohibits a wholesaler from selling, transporting, or delivering, or causing to be sold, transported, or delivered, any brand of malt beverages to any retailer outside the wholesaler's designated sales territory. Assembly Bill No. 787 was approved January 5, 2006, and becomes effective August 1, 2006. (*Fermented malt beverages*).

ENCROACHMENT*Bloomington Chrysler v. DaimlerChrysler, DC Minn.*

Motor vehicle dealers. A motor vehicle manufacturer did not breach the Minnesota motor vehicle dealer law by establishing a new dealership for one of its vehicle lines at a dealership location within the relevant market area of another dealer without proper notice, according to a federal district court in St. Paul, Minnesota. The dealer law required a manufacturer seeking to establish or relocate a dealership to notify each dealer of the same vehicle line within the relevant market area, defined as a radius of ten miles around an existing dealership, of the proposed new dealership. However, the establishment of the new dealership fell within the dealer law's relocation exception which eliminated the notice requirement if the relocation was "within five miles of its existing location" and "not within a radius of five miles of an existing dealer of the same line make," the court determined.

The protesting dealer contended that the manufacturer should be prohibited from using the relocation exception to do indirectly that which it was prohibited from doing directly. Specifically, the dealer argued that the manufacturer manipulated the relocation exception to evade the law's notice requirement by relocating three dealerships over a five-year period to finally establish a new dealership at a location 5.9 miles away from the dealer without affording the dealer a statutory right of protest. The dealer alleged that the manufacturer never intended to permanently establish the new dealership at any of the locations other than the final one, making each of the prior relocations as an interim step to its ultimate goal and frustrating the purpose of the dealer law. However, the dealer did not provide any caselaw directly interpreting the Minnesota law, and its reliance on an opinion in which a Massachusetts appellate court interpreted the Massachusetts dealer law was unpersuasive because the two laws were markedly different, the court stated.

Good Faith/Fair Dealing

The manufacturer could have breached the implied covenant of good faith and fair dealing in its agreement with the dealer by its actions in the establishment of the new dealership, the court held. The manufacturer contended that the parties' agreement expressly authorized it to add dealerships within the protesting dealer's sales territory as "appropriate." However, that provision was ambiguous, the court ruled. The facts alleged by the dealer called into question whether the manufacturer breached the implied covenant by allowing multiple relocations throughout the sales locality of the protesting dealer.

CHOICE OF FORUM

[Hellex Car Rental Sys., Inc. v. Dollar Sys., Inc., DC N.Y.](#)

Franchise assignment agreement. A forum selection clause in a rental car office franchise assignment agreement encompassed a dispute between the franchisor and the assignee-franchisee in which the franchisee sued the franchisor for alleged breach of the underlying franchise agreement, a federal district court in New York City has decided. The assignment agreement specified that "any suit, action or proceeding with respect to" the assignment was required to be brought in Oklahoma, and that the parties waived all objections to venue in "any suit, action or proceeding arising out of or relating to" the assignment "or any other agreements by and among" the parties. The franchisee's action against the franchisor for breach of the franchise agreement was an action "with respect to" the assignment agreement because the existence of the franchisee's claim was dependent upon its succession to the rights, responsibilities, and obligations under the original franchise agreement between the assignor-franchisee and the franchisor, according to the court. Moreover, it was the assignment that gave the assignee-franchisee standing to bring suit against the franchisor. The assignee-franchisee was not a party to the underlying franchise agreement and could not pursue its action on the basis of it alone, the court reasoned.

Enforceability

The forum selection clause was not unreasonable or contrary to public policy, the court determined. The New York franchisee argued that the clause was unreasonable because it did not reserve to the franchisee the protections provided by the New York Franchises Law, and that the unqualified designation of the law of a foreign state as the law governing an agreement subject to the New York Franchises Law was not permitted under New York public policy. However, the failure of the clause to explicitly reserve to the franchisee the protections of New York law was irrelevant to its enforceability, the court held. The substantive law applicable to the franchisee's claims was not presently at issue, and any restrictions New York law placed on the underlying dispute were distinct from the parties' ability to contract for the place where the legal actions were brought. Furthermore, the argument that New York franchise law prevented the parties from designating a forum other than New York in which to resolve their disputes was entirely without support.

INJUNCTIVE RELIEF

[Pirtek USA, LLC v. Zaetz, DC Conn.](#)

Trademark infringement. A franchisor of industrial and hydraulic hose businesses would not be irreparably harmed by the denial of a preliminary injunction enjoining a terminated franchisee and his business, the franchisee's son, and a competing business run by the son from infringing the franchisor's trademarks in violation of the Lanham Act, or from violating a noncompetition covenant in the terminated agreement, a federal district court in Hartford, Connecticut, has decided. The requested injunctive relief was denied.

Of the several infringements alleged by the franchisor, only two, the use by the son's business of the phrase "hose and assemblies" and its use of a symbol, a "Cog," appeared to be ongoing and therefore appropriate objects for preliminary injunctive relief, according to the court. However, the franchisor did not assert that the phrase "hose and assemblies" was part of its trademark and they were too general to plausibly engender confusion among consumers. In addition, although the franchisor's "Cog" symbol did have some resemblance to a symbol used by the son's business, the figures were not so similar as to cause confusion and harm to the franchisor.

Noncompetition Covenant

The franchisor alleged that when the franchisee was winding down his business, his son and his son's business violated, and aided and abetted the father in violating, a covenant not to compete in the terminated agreement. A Florida statute specified that, in the event a noncompetition covenant was breached, a presumption of irreparable harm was created. However, the statute also stated that a noncompetition covenant could only be enforced unless it was in a writing signed by the person against whom enforcement was sought and the franchisee's son was not a signatory to the covenant. Even if



the statute applied, the requisite irreparable harm was still not present, the court determined. In light of the franchisor's admissions that: (1) the franchisee and his business were not currently involved in the operation of the son's business or any other competing business; and (2) that the son and his business were not currently illegally competing with the franchisor, there was no continuing harm. In addition, denying the injunction would not encourage other franchisees in the franchisor's system to abandon their franchise agreements as they could be held liable for doing so, the court noted.

ARBITRATION AGREEMENTS

[English v. Cornwell Quality Tools Co., Inc., Ohio Ct. App.](#)

Unconscionability. Because the arbitration clause in the franchise agreements for several automotive tools and equipment businesses was not substantively or procedurally unconscionable under Ohio law, an Ohio appellate court has required arbitration of several causes of action against the franchisor. The franchisees alleged that the franchisor had misled them as to numerous aspects of their businesses, including startup and recurring costs, potential income, and the risks and chances of their success. The franchisees all suffered the failure of their franchises, resulting in substantial losses. The franchisor filed a motion to arbitrate the claims pursuant to the arbitration clauses in the parties' agreements.

Substantive Unconscionability

The franchisees argued that the costs associated with arbitration made the clause substantively unconscionable because arbitration imposed undisclosed, excessive, and prohibitive costs. The franchisees stated that they were unaware of the fees charged to pursue arbitration, as there was no language in the arbitration clause itself that gave notice as to the costs involved, thus, the clause was not a commercially reasonable term. However, the costs of arbitration could easily be exceeded by litigation expenses, both at the trial and appellate level. Therefore, the potential cost of arbitration, by itself, was not enough to render the clause unenforceable, the court decided.

Procedural Unconscionability

The franchisees contended that there was no meeting of the minds between themselves and the franchisor regarding arbitration, rendering the clause procedurally unconscionable. They franchisees alleged that the franchisor discouraged them from even reading the contract before signing it and that the bargaining power between the two sides was disparate enough to create procedural unconscionability. However, the franchisees' arguments were without merit, the court determined. All of the franchisees could have sought out professional advice prior to signing their contracts. Additionally, the franchisor was not under an obligation to explain the arbitration clause, and was not remiss when it failed to suggest that each franchisee read the contract fully or retain counsel.

RELATIONSHIP/TERMINATION

[Tippecanoe Beverages, Inc. v. Heineken USA, Inc., DC Ind.](#)

Indiana beer law. The Indiana Beer Wholesaler Protection Statute did not apply to a contract between a beer importer and a beer wholesaler because the statute applied only to brewers and wholesalers, but not to importers, a federal district court in South Bend, Indiana, has ruled. Therefore, the wholesaler's claim that the importer violated the statute by terminating the distribution contract in 2002 without providing appropriate compensation was without merit.

Using the plain and ordinary meaning of the statutory terms "brewer" and "importer," the statute was unambiguous on its face. A brewer --one that manufactured brewed beverages --and an importer --one whose business was the importation and sale of goods from another country --were separate and distinct entities within the distribution process and were not

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interchangeable. Because the statute was unambiguous, it was required to be interpreted to mean what it plainly expressed and interpreted literally so as to carry the law into effect without limiting its extent or extending its operation. The wholesaler's argument that a strict interpretation undermined the statute's purpose and created an absurd result since there was no logical reason to protect the wholesaler who dealt with a brewer, but not protect the wholesaler who happened to deal with an importer was rejected. The Indiana General Assembly's choice to protect only contracts with brewers did not produce an absurd result requiring judicial modification, the court held.

ARBITRATION AWARDS

[Handel's Enterprises, Inc. v. Wood, Ohio Ct. App.](#)

Confirmation. An Ohio trial court did not err by failing to vacate an arbitration award granting damages to an ice cream shop franchisor in its dispute with a franchisee on the franchisee's asserted grounds that the award was contrary to public policy, an Ohio appellate court has determined. The franchisee contended that the parties' franchise agreement was unenforceable because the franchisor failed to comply with numerous requirements of the Ohio Business Opportunity Purchasers Protection Act. However, since the franchisee voluntarily submitted to arbitration of the dispute without raising, prior to the arbitration's completion, the defense that the agreement was unenforceable, it could not later argue to a trial court that the award should be vacated for that reason.

Even if the fact that the franchisee did not address its unenforceability contention to the arbitration panel was ignored, its argument would still fail because the alleged public policy would not justify reversing the award's confirmation, according to the court. The fact that an arbitration panel granted an award on a franchise agreement which did not allegedly conform to Ohio law was not clearly against public policy. There was no case to support the proposition that failing to comply with the Ohio business opportunity statute was against public policy, the court observed.

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