

# **Table of Contents**

## **PART I. INTRODUCTION**

### **CHAPTER 1. INTRODUCTION**

#### **I. OVERVIEW**

- § 1:1 Importance of franchising and distribution
- § 1:2 Distinction between franchising and distribution
- § 1:3 Advantages of franchising
- § 1:4 Disadvantages of franchising
- § 1:5 Policy considerations raised by franchising
- § 1:6 Laws affecting franchising
- § 1:7 Lawyer's role in franchising

#### **II. HISTORY OF FRANCHISING AND DISTRIBUTION**

- § 1:8 History of franchising—Early developments
- § 1:9 Post-World War II boom
- § 1:10 Rise of franchise legislation

#### **III. TYPES OF DISTRIBUTION AND FRANCHISE ARRANGEMENTS**

- § 1:11 Distributorships
- § 1:12 Dealerships
- § 1:13 Product franchising
- § 1:14 Business format franchise
- § 1:15 Conversion franchising
- § 1:16 Area franchising or development
- § 1:17 Subfranchising
- § 1:18 Franchise brokerage
- § 1:19 Area representation

#### **IV. ALTERNATIVES TO FRANCHISE RELATIONSHIPS**

- § 1:20 Licenses to make or use
- § 1:21 Trademark licenses

- § 1:22 Business opportunities
- § 1:23 Direct distribution
- § 1:24 Shared ownership; joint stock ownership, limited partnerships, and joint ventures
- § 1:25 Franchisor or third-party management or operation of franchisee-owned premises
- § 1:26 Consignment operations
- § 1:27 Fee-less franchises
- § 1:28 Sale of turnkey operations
- § 1:29 Agency relationships
- § 1:30 Employment relationships
- § 1:31 Manufacturer's representatives
- § 1:32 Sale of goods
- § 1:33 Pyramid scheme
- § 1:34 Franchise broker liability

## **CHAPTER 2. COUNSELING FRANCHISE CLIENTS**

### **I. INTRODUCTION**

- § 2:1 Counseling franchisor or franchisee

### **II. COUNSELING FRANCHISOR**

- § 2:2 Deciding whether to franchise
- § 2:3 Can business concept be franchised?
- § 2:4 Launching franchise program
- § 2:5 Developing effective compliance programs
- § 2:6 —Franchise sales
- § 2:7 —Antitrust laws and related issues
- § 2:8 Termination and nonrenewal
- § 2:9 Negotiating changes in franchise agreement
- § 2:10 Posttermination exercises

### **III. COUNSELING FRANCHISEE**

- § 2:11 Deciding whether to purchase franchise
- § 2:12 Selecting and investigating franchise
- § 2:13 Reviewing disclosure and registration documents
- § 2:14 Negotiating franchise agreement
- § 2:15 Site selection and preparation
- § 2:16 Agreements with other parties
- § 2:17 Legal review of franchisee's operations

TABLE OF CONTENTS

§ 2:18 Monitoring franchisor's performance

§ 2:19 Termination and nonrenewal

## **CHAPTER 3. FORM OF DISTRIBUTION OR FRANCHISE AGREEMENT**

### **I. INTRODUCTION**

§ 3:1 In general

§ 3:2 Drafting considerations

§ 3:3 Construction of other agreements with the franchise  
agreement

§ 3:4 Parties

### **II. DEALER AND DISTRIBUTION AGREEMENTS**

§ 3:5 Dealer and distribution agreements—Generally

§ 3:6 —Typical provisions

### **III. FRANCHISE AGREEMENTS—PREMISES OF AGREEMENT**

§ 3:7 Recitals

§ 3:8 Standard representations, warranties, and covenants of  
franchisor

§ 3:9 Standard representations and covenants of franchisee

### **IV. FRANCHISE AGREEMENTS—TRADEMARKS, TRADE SECRETS, AND OTHER RIGHTS IN FRANCHISE**

§ 3:10 Grant of rights in franchise

§ 3:11 Grants of exclusive rights

§ 3:12 Provisions regarding the Internet

§ 3:13 Representations, warranties, covenants, and other  
provisions regarding trademarks

§ 3:14 Confidentiality provisions

### **V. FRANCHISE AGREEMENTS—DURATION OF AGREEMENT AND RENEWAL**

§ 3:15 Duration of agreement

§ 3:16 Renewal

## **VI. FRANCHISE AGREEMENTS—TERRITORY, SITE SELECTION, AND LOCATION**

- § 3:17 Territory
- § 3:18 Location and site selection—Generally
- § 3:19 —Franchisor's owned or leased site
- § 3:20 —Franchisee's site
- § 3:21 —Site preparation
- § 3:22 —Lease provisions

## **VII. FRANCHISE AGREEMENTS—FEES AND ADVERTISING**

- § 3:23 Fees
- § 3:24 Advertising—Standards and programs
- § 3:25 —Advertising fund

## **VIII. FRANCHISE AGREEMENTS—OPERATIONS**

- § 3:26 Operations—Generally
- § 3:27 Confidential operations manual and information
- § 3:28 Training
- § 3:29 Franchisor support
- § 3:30 Sale of products or services
- § 3:31 Quotas
- § 3:32 Inventory
- § 3:33 Retail prices
- § 3:34 Equipment, fixtures, and supplies
- § 3:35 Employees
- § 3:36 Premises
- § 3:37 Hours of operation
- § 3:38 Accounting, record-keeping, and reporting requirements
- § 3:39 Indemnification
- § 3:40 Covenants not to compete

## **IX. FRANCHISE AGREEMENTS—TERMINATION**

- § 3:41 Termination—Generally
- § 3:42 Notice
- § 3:43 Grounds for termination—Automatic and immediate termination
- § 3:44 Grounds for termination on notice, or after failure to cure a default

## TABLE OF CONTENTS

- § 3:45 Post termination obligations
- § 3:46 Option to purchase assets and take over lease
- § 3:47 Franchise termination: liquidated-damages clauses

## **X. FRANCHISE AGREEMENTS—TRANSFER OR ASSIGNMENT OF FRANCHISE AGREEMENT OR INTERESTS IN IT**

- § 3:48 Assignment and transfer of franchise agreement by franchisor
- § 3:49 Assignment and transfer of franchise agreement by franchisee—Generally
- § 3:50 Conditions upon transfer
- § 3:51 Transfer to corporation owned by franchisee
- § 3:52 Transfer upon death or divorce
- § 3:53 Restrictions on security interests and encumbrances
- § 3:54 Restrictions on transfer of stock of franchisee
- § 3:55 Franchisor's right of first refusal
- § 3:56 Personal supervision
- § 3:57 Limitations on management control
- § 3:58 Relocation

## **XI. FRANCHISE AGREEMENTS— MISCELLANEOUS PROVISIONS**

- § 3:59 Major or national accounts
- § 3:60 Integration clauses
- § 3:61 No-oral-modification clauses
- § 3:62 Choice of law, venue, and jurisdiction
- § 3:63 Alternative dispute resolution—Generally
- § 3:64 —Prerequisites
- § 3:65 —Arbitration clauses
- § 3:66 Waiver of jury trial
- § 3:67 Conditions upon effectiveness
- § 3:68 Damage provisions
- § 3:69 Contractual statutes of limitations
- § 3:70 Attorney's fees
- § 3:71 Antiwaiver provisions
- § 3:72 Relationship of parties as independent contractors
- § 3:73 Materiality
- § 3:74 Force majeure

## **XII. DEVELOPMENT AGREEMENTS**

- § 3:75 Development agreements—Generally

- § 3:76 —Granting clause
- § 3:77 —Development fees
- § 3:78 —Development schedule
- § 3:79 —Site selection
- § 3:80 —Undertakings and covenants of the parties
- § 3:81 —Default
- § 3:82 —Transfers
- § 3:83 —Other provisions

### **XIII. FORMS**

- § 3:84 Explanation of forms
- § 3:85 Form of basic distributorship agreement
- § 3:86 Form of dealer agreement
- § 3:87 Franchise agreement for restaurant
- § 3:88 Franchise agreement for home-cleaning service
- § 3:89 Franchise agreement for eye care center
- § 3:90 Provision of franchise agreement for franchisee's site selection
- § 3:91 Development agreement—Short form
- § 3:92 —Long form
- § 3:93 Plain English form of franchise agreement

## **CHAPTER 4. OTHER AGREEMENTS CONCERNING THE FRANCHISE RELATIONSHIP**

- § 4:1 Introduction
- § 4:2 Preliminary agreements and commitment agreements
- § 4:3 Leases of franchised premises
- § 4:4 Franchisor as lessor
- § 4:5 Third party as lessor
- § 4:6 Purchases or leases of fixtures, signs, and equipment
- § 4:7 Franchisee's purchase of inventory from third parties
- § 4:8 Consignment agreements
- § 4:9 General considerations concerning financing documents
- § 4:10 Loan agreements
- § 4:11 Personal and cross corporate guarantees
- § 4:12 Security agreements
- § 4:13 Stock pledges
- § 4:14 Inventory financing
- § 4:15 Customer purchase financing

## TABLE OF CONTENTS

- § 4:16 Receivables financing
- § 4:17 Form of agreement for option to franchisee to acquire additional units or territory
- § 4:18 Selected provisions of security agreements
- § 4:19 Form of personal guarantee of payment
- § 4:20 Form of employee's covenant not to compete and restriction on use of confidential information
- § 4:21 Selected provisions of lease between third party as lessor and franchisee
- § 4:22 Selected provisions for lease of premises between franchisor as lessor and franchisee as lessee

## **PART II. REGISTRATION**

### **CHAPTER 5. SCOPE AND APPLICATION OF DISCLOSURE AND RELATIONSHIP LAWS**

#### **I. INTRODUCTION**

- § 5:1 In general

#### **II. ELEMENTS OF A FRANCHISE—GENERALLY**

- § 5:2 Definition of a franchise; agreement itself
- § 5:3 —“Right to offer, sell or distribute”
- § 5:4 —Community of interest
- § 5:5 —Marketing plan or system
- § 5:6 —“Prescribed in substantial part”
- § 5:7 —Substantial association with franchisor's trademark
- § 5:8 —Franchise fee

#### **III. DEFINITION OF A FRANCHISE BY JURISDICTION**

##### **A. FTC RULE**

- § 5:9 Product and package franchises
- § 5:10 Continuing commercial relationship
- § 5:11 Trademark
- § 5:12 Significant control or assistance
- § 5:13 Franchise fee

##### **B. INDIVIDUAL STATES**

- § 5:14 Arkansas

§ 5:15	California
§ 5:16	Connecticut
§ 5:17	Delaware
§ 5:18	Florida
§ 5:19	Hawaii
§ 5:20	Illinois
§ 5:21	Indiana
§ 5:22	Iowa
§ 5:23	Maryland
§ 5:24	Michigan
§ 5:25	Minnesota
§ 5:26	Mississippi
§ 5:27	Missouri
§ 5:28	Nebraska
§ 5:29	New Jersey
§ 5:30	New York
§ 5:31	North Dakota
§ 5:32	Oregon
§ 5:33	Puerto Rico
§ 5:34	Rhode Island
§ 5:35	South Dakota
§ 5:36	Virgin Islands
§ 5:37	Virginia
§ 5:38	Washington
§ 5:39	Wisconsin

## **CHAPTER 5A. REGISTRATION AND DISCLOSURE LAWS AND REGULATIONS**

### **I. INTRODUCTION**

§ 5A:1	In general
§ 5A:2	Disclosure guidelines with respect to Covid-19
§ 5A:3	Summary of disclosure and registration issues
§ 5A:4	Relationship between federal and state laws
§ 5A:5	What must be disclosed: Materiality

### **II. DISCLOSURE UNDER FEDERAL TRADE COMMISSION RULE**

§ 5A:6	The lawyer's role in registration and disclosure
§ 5A:7	History and background of FTC Rule
§ 5A:8	Commission's power to regulate franchise sales



## TABLE OF CONTENTS

§ 5A:9	Prohibited acts
§ 5A:10	Exemptions and exclusions
§ 5A:11	Payment less than \$500
§ 5A:12	Fractional franchise
§ 5A:13	Leased departments
§ 5A:14	Relationships governed by the PMPA
§ 5A:15	Sophisticated investor
§ 5A:16	Oral contracts
§ 5A:17	Who makes disclosure
§ 5A:18	To whom disclosure is made: prospective franchisees
§ 5A:19	When disclosure must be made
§ 5A:20	Currency and updating requirements
§ 5A:21	What must be disclosed
§ 5A:22	Electronic disclosure

### **III. ENFORCEMENT**

§ 5A:23	Enforcement under FTC Rule
---------	----------------------------

### **IV. DISCLOSURE AND REGISTRATION UNDER STATE LAW**

§ 5A:24	Introduction to state registration and disclosure laws
§ 5A:25	Civil consequences of failures to disclose or register

### **V. EXEMPTIONS UNDER STATE LAW**

§ 5A:26	Exemptions under state law
§ 5A:27	Blue-chip exemption
§ 5A:28	Franchisee sales exemption
§ 5A:29	Limited offer exemption
§ 5A:30	Exemption for transactions with existing franchisees
§ 5A:31	Exemptions for specified businesses
§ 5A:32	Exemptions by franchise administrators
§ 5A:33	Other exemptions

### **VI. PROCEDURES FOR MAKING DISCLOSURES**

§ 5A:34	Disclosure obligations
§ 5A:35	Procedures for registration of franchise offering
§ 5A:36	Stop orders and deficiency letters
§ 5A:37	Impound and escrow
§ 5A:38	Renewal of registration
§ 5A:39	Changes in franchise offering

- § 5A:40 Franchisor's records of franchise sales
- § 5A:41 Advertising
- § 5A:42 Miscellaneous administrative provisions

## **VII. ENFORCEMENT**

- § 5A:43 Prohibited acts
- § 5A:44 Agency investigation and enforcement
- § 5A:45 Agency actions in court
- § 5A:46 Private right of action
- § 5A:47 Criminal penalties
- § 5A:48 Persons liable

## **PART III. SUBSTANTIVE LAW**

### **CHAPTER 6. BUSINESS OPPORTUNITY LAWS**

- § 6:1 Introduction
- § 6:2 Business opportunities under FTC Rule
- § 6:3 State laws—Generally
- § 6:4 —Summary

### **CHAPTER 7. TRADEMARKS, INTELLECTUAL PROPERTY AND PROTECTION OF BUSINESS IMAGE**

#### **I. INTRODUCTION**

- § 7:1 In general

#### **II. INTELLECTUAL PROPERTY AND FRANCHISE RELATIONSHIP**

- § 7:2 Intellectual property and commercial symbols in franchise system
- § 7:3 Protection of trademarks and intellectual property
- § 7:4 Intellectual property rights in registration and disclosure
- § 7:5 Licensing of trademarks and intellectual property
- § 7:6 Enforcement of trademark and intellectual property rights between franchisor and franchisee
- § 7:7 Trademark and intellectual property rights and competitors

## TABLE OF CONTENTS

- § 7:8 Trademark and intellectual property rights and suppliers
- § 7:9 Trademarks and antitrust
- § 7:10 Geographic protection of franchise system's marks
- § 7:11 Use of family of marks for franchise system
- § 7:12 Protection of trade dress

## III. TRADEMARKS AND SERVICE MARKS

### A. FUNDAMENTAL CONCEPTS

- § 7:13 Scope and nature of trademark protection
- § 7:14 Acquisition of rights in marks at common law
- § 7:15 Strong and weak marks
- § 7:16 Secondary meaning

### B. USE AND PRESERVATION OF TRADEMARKS

- § 7:17 Abandonment and acquiescence

### C. REGISTRATION OF MARKS

- § 7:18 Federal registration
- § 7:19 —Substantive requirements
- § 7:20 —Procedure
- § 7:21 —Consequences of registration
- § 7:22 State registration

### D. INFRINGEMENT ACTIONS

- § 7:23 Introduction
- § 7:24 Elements of infringement—Plaintiff's standing
- § 7:25 —Confusing similarity
- § 7:26 — —Strength of mark
- § 7:27 — —Similarity of products or services
- § 7:28 — —Similarity of markets
- § 7:29 — —Similarity of appearance, sound, or meaning of marks
- § 7:30 — —Similarity of advertising media
- § 7:31 — —Defendants' intent
- § 7:32 — —Actual confusion
- § 7:33 — —Care likely to be exercised by consumers
- § 7:34 Defenses

## IV. UNFAIR COMPETITION

- § 7:35 Defenses—Laches

- § 7:36 Scope of protection against unfair competition
- § 7:37 Palming off and false designation of origin
- § 7:38 Deceptive or unfair advertising
- § 7:39 Product disparagement
- § 7:40 Miscellaneous forms of unfair competition
- § 7:41 Federal unfair competition: section 43 of Lanham Act
- § 7:42 Counterfeiting
- § 7:43 Federal antidilution
- § 7:44 State antidilution statutes
- § 7:45 Remedies—Preliminary injunctions
- § 7:46 —Permanent injunctive relief
- § 7:47 —Damages

## **V. PATENT AND COPYRIGHT PROTECTION**

- § 7:48 Overview of patent protection
- § 7:49 Overview of copyright protection

## **VI. TRADE SECRETS AND KNOW-HOW**

- § 7:50 Overview of law of trade secrets
- § 7:51 Defend Trade Secrets Act
- § 7:52 Basis for protecting trade secrets and know-how
- § 7:53 Enforcement of covenants and contracts regarding trade secrets and know-how

## **VII. FORMS**

- § 7:54 Forms—Cease-and-desist letters
- § 7:55 —Trademark diligence register
- § 7:56 —Consent judgment against infringement

# **Table of Contents**

## **PART III. SUBSTANTIVE LAW (CONTINUED)**

### **CHAPTER 8. LAW OF CONTRACTS AND FRANCHISE RELATIONSHIP**

#### **I. INTRODUCTION**

- § 8:1 Contract principles and franchise relationship
- § 8:2 Relationship of common law of contracts to state and federal statutes
- § 8:3 Applicability of Uniform Commercial Code to franchise and distributorship relationships

#### **II. FORMATION OF CONTRACTS**

- § 8:4 Offer and acceptance
- § 8:5 The requirement of essential terms
- § 8:6 Preliminary agreements
- § 8:7 Terms derived from conduct or course of dealing
- § 8:8 Consideration

#### **III. INTERPRETATION OF CONTRACTS**

- § 8:9 Franchise agreements as integrated contracts
- § 8:10 Interpretation—In general
- § 8:11 —Plain-meaning rule
- § 8:12 Consequences of enforcement
- § 8:13 Relevance of standardized or “form” agreements
- § 8:14 Ambiguity
- § 8:15 Partial integration
- § 8:16 Parol-evidence rule
- § 8:17 Exceptions to the parol-evidence rule
- § 8:18 Relevance of motive

#### **IV. AVOIDANCE OF CONTRACTUAL OBLIGATIONS**

- § 8:19 Modification

- § 8:20 Waiver
- § 8:21 Equitable estoppel
- § 8:22 Statute of frauds
- § 8:23 Promissory estoppel
- § 8:24 Other grounds for avoidance

## **V. “SPECIAL” RELATIONSHIP DOCTRINES AND FRANCHISE RELATIONSHIP**

### **A. IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING**

- § 8:25 Good-faith dealing—In general
- § 8:26 UCC concept
- § 8:27 Open-price terms
- § 8:28 Exercise of discretion
- § 8:29 The implied duty as a rule of construction
- § 8:30 The implied duty as a tort theory
- § 8:31 The implied duty and encroachment
- § 8:32 Bad faith
- § 8:33 Termination and duty of good faith

### **B. “SPECIAL” AND FIDUCIARY RELATIONSHIPS**

- § 8:34 “Fiduciary” relationships
- § 8:35 Tortious breach of contract

### **C. DURESS, UNCONSCIONABILITY, AND ADHESION CONTRACTS**

- § 8:36 Duress
- § 8:37 Unconscionability
- § 8:38 Adhesion contracts
- § 8:39 Unjust enrichment

## **VI. PROVISIONS OF PARTICULAR RELEVANCE TO FRANCHISE RELATIONSHIP**

### **A. EXCLUSIVE ARRANGEMENTS**

- § 8:40 Obligations inherent in exclusive territory or appointment
- § 8:41 Best efforts

### **B. WARRANTIES**

- § 8:42 Express warranties

## TABLE OF CONTENTS

- § 8:43 Implied warranties—Merchantability
- § 8:44 — —Fitness for particular purpose

### C. OTHER PROVISIONS

- § 8:45 Satisfaction and acceptability clauses
- § 8:46 Releases
- § 8:47 Other particular contract terms
- § 8:48 Third-party beneficiary

## VII. COVENANTS NOT TO COMPETE

- § 8:49 Covenants not to compete—In general
- § 8:50 In-term versus postterm covenants
- § 8:51 The basis of enforcement—Generally
- § 8:52 —Lawfulness of the agreement
- § 8:53 —The franchisor’s legitimate interests
- § 8:54 —Reasonableness of the restrictions
- § 8:55 —Public interest
- § 8:56 The “blue pencil” rule
- § 8:57 Enforcement issues
- § 8:58 Special issues for enforcement

## VIII. BREACH AND DAMAGES

- § 8:59 Material breach
- § 8:60 Contract damages
- § 8:61 Liquidated damages
- § 8:62 Lost profits—Franchisee’s recovery
- § 8:63 —Franchisor’s recovery
- § 8:64 Prior material breach

## CHAPTER 9. LAW OF TORTS AND FRANCHISING

### I. INTRODUCTION

- § 9:1 In general

### II. FRAUD AND RELATED CLAIMS

- § 9:2 Fraud and related claims—Introduction

#### A. COMMON-LAW FRAUD

- § 9:3 Traditional elements of fraud—In general

§ 9:4 Fraud distinguished from breach of contract

1. Elements of Common-Law Fraud

§ 9:5 Representations of existing fact

§ 9:6 Opinions

§ 9:7 Promises and predictions

§ 9:8 —Promises of future conduct

§ 9:9 —Predictions of the future

§ 9:10 —Statements of capability

§ 9:11 Omissions

§ 9:12 Scienter-intent to deceive

§ 9:13 —Reckless statements

§ 9:14 Negligent misrepresentation

§ 9:15 Reliance

§ 9:16 —Effect of written agreements and integration clauses

§ 9:17 Fraud and the parol evidence rule

2. Particular Representations

§ 9:18 Representations concerning franchise system

§ 9:19 Predictions of profitability

§ 9:20 Statements about continuation of franchise agreement

§ 9:21 Statements about site selection

§ 9:22 Statements about territory

§ 9:23 Statements about products and product performance

§ 9:24 Statements about prices and costs

§ 9:25 Statements about product availability

§ 9:26 Statements about franchisor assistance

3. Proof and Damages

§ 9:27 Proof of fraud

§ 9:28 Actual damages

§ 9:29 Punitive damages

B. STATE FRANCHISE LAWS

§ 9:30 Violations of franchise law antifraud provisions

C. RACKETEERING OFFENSES

§ 9:31 Introduction

§ 9:32 Federal RICO

§ 9:33 State RICO statutes



TABLE OF CONTENTS

**D. STATE FTC AND DECEPTIVE PRACTICES ACTS**

- § 9:34 State FTC and deceptive practices acts
- § 9:35 Selected states
- § 9:36 Selected issues

**III. TORTIOUS INTERFERENCE WITH CONTRACTS AND BUSINESS RELATIONS**

- § 9:37 Tortious interference with contracts
- § 9:38 Tortious interference with prospective contractual relations
- § 9:39 Particular cases
- § 9:40 —Trade libel

**IV. LIABILITY OF FRANCHISOR FOR FRANCHISEE'S TORTS**

- § 9:41 Franchisor's liability for franchisee's torts
- § 9:42 Actual agency
- § 9:43 Relevance of trademarks
- § 9:44 Apparent authority
- § 9:45 Premises liability
- § 9:46 Product liability
- § 9:47 Americans with Disabilities Act
- § 9:48 Federal Trafficking Victims Protection Reauthorization Act
- § 9:49 Other grounds for franchisor's liability

**V. MISCELLANEOUS TORTS**

- § 9:50 Emotional distress
- § 9:51 Civil conspiracy

**CHAPTER 10. TERMINATION, RENEWAL AND CHANGES IN FRANCHISE RELATIONSHIP**

**I. INTRODUCTION**

- § 10:1 In general
- § 10:2 Constitutionality of state relationship laws
- § 10:3 —Good Cause Statutes and the Lanham Act

- § 10:4 —Impairment of contracts
- § 10:5 —Burden on commerce
- § 10:6 Definition of “franchise”
- § 10:7 Geographical limitations

## II. TERMINATION AND NONRENEWAL

### A. INTRODUCTION

- § 10:8 Termination—Generally
- § 10:9 Nonrenewal—Generally
- § 10:10 Constructive termination

### B. MANAGING TERMINATION AND NONRENEWAL DISPUTES

- § 10:11 Avoiding termination and nonrenewal disputes
- § 10:12 Implementing termination decision
- § 10:13 Termination notice
- § 10:14 The franchisee’s response to the threat of termination

### C. TERMINATION AT COMMON LAW

- § 10:15 At-will relationships
- § 10:16 Recoupment
- § 10:17 Implied notice
- § 10:18 Cause
- § 10:19 Good cause at common law
- § 10:20 Termination in accordance with contractual terms
- § 10:21 Relevance of motive

### D. TERMINATION UNDER STATE STATUTES

- § 10:22 Statutory good cause—Generally
- § 10:23 —Failure to comply substantially with terms of franchise
- § 10:24 System-wide changes
- § 10:25 Severe or incurable breaches
- § 10:26 Voluntary abandonment of franchise
- § 10:27 Conviction of franchisee of crime
- § 10:28 Acts that substantially impair franchisor’s trademarks
- § 10:29 Institution of insolvency or bankruptcy proceedings
- § 10:30 Loss of right to occupy premises
- § 10:31 Failure to pay franchisor for monies due

## TABLE OF CONTENTS

- § 10:32 Fraud or conduct that reflects unfavorably upon franchise system
- § 10:33 Failure of franchisee to comply with law
- § 10:34 Seizure of premises by government or creditor
- § 10:35 Imminent danger to public health or safety
- § 10:36 Repeated defaults
- § 10:37 Limitations

### **E. REMEDIES FOR WRONGFUL TERMINATION OR NONRENEWAL**

- § 10:38 Statutory remedies
- § 10:39 Right of repurchase

### **F. OTHER LIMITATIONS ON TERMINATION AND NONRENEWAL**

- § 10:40 Antitrust laws
- § 10:41 Common-law doctrines

## **III. TRANSFER, SUCCESSION, AND OTHER CHANGES**

- § 10:42 Transfer of franchise at common law
- § 10:43 State statutes—Transfer of franchise or changes in management
- § 10:44 Succession
- § 10:45 Changes in competitive circumstances

## **IV. LIMITATIONS ON CONTRACTUAL TERMS AND FRANCHISOR'S CONDUCT**

- § 10:46 Limitations on contractual terms or franchisor's conduct
- § 10:47 —Antifraud provisions
- § 10:48 —Prohibitions on releases or waivers of liability
- § 10:49 —Prohibitions on right of free association
- § 10:50 —Standards of conduct
- § 10:51 —Arbitration
- § 10:52 —Restrictions on sources of supply
- § 10:53 —Prohibitions on discrimination
- § 10:54 —Prohibition of kickbacks
- § 10:55 —Prohibition of encroachment upon exclusive territory

- § 10:56 —Restrictive covenants
- § 10:57 —Certain immunities
- § 10:58 —Miscellaneous limitations
- § 10:59 —Good faith
- § 10:60 —Forms
- § 10:61 —Termination letters for failure to reach quota
- § 10:62 —Termination letter for repeated defaults
- § 10:63 —Franchisee letters regarding termination

## **CHAPTER 11. ANTITRUST LAW AND TRADE REGULATION**

### **I. INTRODUCTION**

- § 11:1 In general

### **II. THE SHERMAN ACT**

- § 11:2 Section 1 of the Sherman Act
- § 11:3 —Contract, combination, or conspiracy
- § 11:4 —Unreasonable restraint; rule of reason and per se rules
- § 11:5 —Restraint in or affecting interstate commerce
- § 11:6 Section 2 of Sherman Act
- § 11:7 Defining the relevant market

### **III VERTICAL RESTRAINTS**

- § 11:8 In general
- § 11:9 Vertical price restraints—Minimum resale price maintenance; generally
- § 11:10 —Maximum resale price maintenance
- § 11:11 Other vertical price restraints
- § 11:12 Nonprice vertical restraints
- § 11:13 Unilateral refusals to deal

### **IV TYING ARRANGEMENTS**

- § 11:14 In general
- § 11:15 Existence of two or more products
- § 11:16 Sale conditioned upon purchase of both products
- § 11:17 Franchisor's economic power
- § 11:18 Substantial effect on competition
- § 11:19 Actual effect on competition

## TABLE OF CONTENTS

- § 11:20 Defenses
- § 11:21 Full-line forcing

## V. HORIZONTAL CONSPIRACIES

- § 11:22 Agreements concerning price between competitors
- § 11:23 Horizontal agreements concerning matters other than price

## VI. PRICE DISCRIMINATION

- § 11:24 Robinson-Patman Act
- § 11:25 Section 2(a)—Price discrimination in commodities generally
- § 11:26 —Sales to two purchasers
- § 11:27 —Discrimination in price
- § 11:28 —Commodities
- § 11:29 —Like grade and quality
- § 11:30 —Interstate commerce
- § 11:31 —Competitive injury
- § 11:32 — —Primary-line injury
- § 11:33 — —Secondary-line injury
- § 11:34 — —Multitiered distribution; functional discounts
- § 11:35 Defenses to Robinson-Patman Act claims
- § 11:36 Promotional allowances and services
- § 11:37 Section 2(c)—The brokerage provision and rebates

## VII. THE FEDERAL TRADE COMMISSION ACT

- § 11:38 In general

## VIII. ENFORCEMENT

- § 11:39 Private actions under antitrust laws
- § 11:40 Antitrust injury
- § 11:41 Pleading antitrust violations

## CHAPTER 12. SELECTED TAX ISSUES AND FRANCHISING

- § 12:1 Introduction
- § 12:2 General rule: Internal Revenue Code Section 1253
- § 12:3 Significant power; right of continuing interest
- § 12:4 Treatment of contingent payments by franchisee
- § 12:5 Other payments made by transferee

- § 12:6 Personal holding company tax
- § 12:7 Advertising funds
- § 12:8 State tax issues

## **CHAPTER 13. BANKRUPTCY**

### **I. INTRODUCTION**

- § 13:1 In general
- § 13:2 Core vs. related proceedings

### **II. BANKRUPTCY CONCEPTS**

- § 13:3 Reorganization and liquidation
- § 13:4 Executory contract as property
- § 13:5 Section 365—Assumption of contract
- § 13:6 Section 362—“Automatic stay”
- § 13:7 Section 108—Cure of defaults and extension of state limitations periods
- § 13:8 Section 105—Court’s equitable powers

### **III. CHAPTER 11 PROCEEDINGS**

#### **A. FRANCHISEE’S BANKRUPTCY**

- § 13:9 Franchisee’s bankruptcy—In general
- § 13:10 Rights of franchisor and franchisee in property held by franchisee
- § 13:11 Breaches of covenants not to compete as claims under the Code
- § 13:12 Leases and bankrupt franchisee
- § 13:13 Effect of filing for relief upon termination of agreement
  - § 13:14 —Expiration pursuant to agreement’s terms
  - § 13:15 —Notice of termination
  - § 13:16 —Notice of default followed by other events
  - § 13:17 —Ipso facto clause
- § 13:18 Effect of automatic stay upon franchisor’s actions
  - § 13:19 —Actions and proceedings
  - § 13:20 —Property
  - § 13:21 Lifting stay
- § 13:22 Assumption, assignment, and rejection of franchise agreement
  - § 13:23 —Contracts to extend credit or for financial accommodations

## TABLE OF CONTENTS

- § 13:24 —Nondelegable contracts
- § 13:25 —Incurable defaults
- § 13:26 —Assumption: curing of defaults
- § 13:27 —Assignment of franchise agreement
- § 13:28 —Preemption of state law
- § 13:29 Rejection of franchise agreement
- § 13:30 Section 108
- § 13:31 —Section 108(a)
- § 13:32 —Section 108(b)
- § 13:33 Section 105
- § 13:34 Fraudulent and preferential transfers

### B. FRANCHISOR'S BANKRUPTCY

- § 13:35 Overview of franchisor's bankruptcy
- § 13:36 Use of Bankruptcy Code for claim and litigation management
- § 13:37 Effect of automatic stay
- § 13:38 Assumption of agreements by franchisors
- § 13:39 Franchisor's rejection of agreements

## IV. BANKRUPTCY PROCEDURES

- § 13:40 Adoption of plan under Chapter 11
- § 13:41 Liquidation under Chapter 7

# PART IV. SPECIFIC INDUSTRIES

## CHAPTER 14. AUTOMOBILE FRANCHISES

### I. INTRODUCTION

- § 14:1 Introduction to automobile industry

### II. FEDERAL DEALERS' DAY IN COURT ACT

- § 14:2 Introduction to Dealer's Act
- § 14:3 Elements of the Dealer's Act
- § 14:4 Legislative history of Dealer's Act
- § 14:5 Definitions—Automobile dealer
- § 14:6 —Automobile manufacturer or one under manufacturer's control
- § 14:7 —Franchise

- § 14:8 Good faith—In general
- § 14:9 —Compliance with terms of franchise agreement
- § 14:10 —Allocation of automobiles
- § 14:11 —Tying and resale price maintenance
- § 14:12 —Operational requirements
- § 14:13 —Locations and territories
- § 14:14 —Termination
- § 14:15 —Nonrenewal
- § 14:16 —Changes in dealer's business
- § 14:17 —Changes in manufacturer's marketing plans
- § 14:18 —Practice commentary
- § 14:19 Defenses to Dealer's Act Claims
- § 14:20 Damages and equitable relief

### **III. STATE LAWS REGULATING DISTRIBUTOR-DEALER RELATIONSHIP**

- § 14:21 Introduction
- § 14:22 Purpose of state automobile laws
- § 14:23 Constitutionality of state automobile laws
- § 14:24 Definitions
- § 14:25 Licensing statutes
- § 14:26 Termination—In general
- § 14:27 —Cause
- § 14:28 —Good cause
- § 14:29 —Good faith
- § 14:30 —Compensation on termination
- § 14:31 —The impact of bankruptcy
- § 14:32 Regulations concerning transfer of dealership
- § 14:33 Regulation of operations of dealership
- § 14:34 Antienroachment statutes
- § 14:35 Notice periods
- § 14:36 Private rights of action
- § 14:37 State tribunals

## **CHAPTER 15. FRANCHISING IN PETROLEUM PRODUCTS INDUSTRY**

### **I. INTRODUCTION**

- § 15:1 Introduction to petroleum industry
- § 15:2 Applicable laws
- § 15:3 Introduction to Petroleum Marketing Practices Act



## TABLE OF CONTENTS

§ 15:4 Definitions

### **II. TERMINATION OR NONRENEWAL**

§ 15:5 Grounds for termination or nonrenewal—Franchisee’s failure to comply with franchise provisions that are reasonable and of material significance

§ 15:6 Failure to exercise good-faith efforts to carry out provisions of franchise

§ 15:7 Occurrence of event “relevant to franchise relationship”

§ 15:8 Voluntary agreement

§ 15:9 Market withdrawal

### **III. NONRENEWAL**

§ 15:10 Failure to agree to changes in provisions

§ 15:11 Customer complaints

§ 15:12 Failure to operate premises in clean, safe, and healthful manner

§ 15:13 Conversion of premises to another use or material addition to alteration or replacement of premises

§ 15:14 Uneconomical franchises

§ 15:15 Releases and waivers

### **IV. OTHER MATTERS**

§ 15:16 Trial and interim franchises

§ 15:17 Procedures for notification

§ 15:18 Enforcement

§ 15:19 Private actions—Injunction against termination

§ 15:20 —Damages

§ 15:21 Attorney’s fees

§ 15:22 Relationship to state and other federal laws

# **Table of Contents**

## **PART IV. SPECIFIC INDUSTRIES (CONTINUED)**

### **CHAPTER 16. OTHER SPECIAL INDUSTRIES**

- § 16:1 Introduction
- § 16:2 Beer, wine, and liquor distributorships
- § 16:3 —Constitutional issues
- § 16:4 —Summary of beer, wine, and liquor statutes
- § 16:5 Farm implement and related equipment statutes
- § 16:6 Summary of state statutes on farm implements and heavy equipment

## **PART V. LITIGATION**

### **CHAPTER 17. LITIGATING FRANCHISE DISPUTES**

#### **I. INTRODUCTION**

- § 17:1 In general

#### **II. JURISDICTION AND RELATED MATTERS**

##### **A. SUBJECT MATTER JURISDICTION**

- § 17:2 Subject matter jurisdiction—Generally
- § 17:3 Federal court jurisdiction
- § 17:4 Diversity jurisdiction
- § 17:5 Federal question jurisdiction
- § 17:6 Removal jurisdiction in federal court
- § 17:7 Supplemental jurisdiction
- § 17:8 Abstention
- § 17:9 State courts and special tribunals
- § 17:10 Conflicts between different courts with jurisdiction over the same controversy
- § 17:11 Declaratory Judgment Actions

§ 17:12 Standing

## **B. PERSONAL JURISDICTION**

§ 17:13 Personal jurisdiction—Introduction

§ 17:14 Limits of due process

§ 17:15 Diversity cases—State long-arm statutes

§ 17:16 Federal question cases

§ 17:17 Personal jurisdiction over officers and employees

§ 17:18 Service of process

## **C. VENUE**

§ 17:19 Venue—Introduction

§ 17:20 Choice of venue

§ 17:21 Change of venue

§ 17:22 Choice of law—Generally

§ 17:23 Enforcement of choice of law clauses

§ 17:24 Choice of law—Effect of state statutes or policies

## **III. PLEADING AND PARTIES**

§ 17:25 In general

§ 17:26 Pleading fraud and special matters

§ 17:27 Rule 11

§ 17:28 Parties—Necessary joinder

§ 17:29 —Permissive joinder

§ 17:30 Third party practice and intervention

§ 17:31 Associational standing

§ 17:32 Class actions—Generally

§ 17:33 —Numerosity

§ 17:34 —Common questions of law or fact

§ 17:35 —Typicality

§ 17:36 —Adequacy of representation

§ 17:37 —Rule 23(b)(3), requirements

§ 17:38 —Notice and settlement of class actions

## **IV. PROVISIONAL AND PRELIMINARY REMEDIES**

§ 17:39 Preliminary injunction—In general

§ 17:40 —Irreparable injury—Franchisee's perspective

§ 17:41 Irreparable injury—Franchisor's perspective

§ 17:42 Likelihood of success, balance of hardships and public interest

## TABLE OF CONTENTS

- § 17:43 Other aspects of preliminary injunctions
- § 17:44 Motions for seizure or turnover of property or premises

## V. DISPOSITIVE MOTIONS

- § 17:45 Motion to dismiss
- § 17:46 Motion for summary judgment—In general
- § 17:47 —Antitrust cases
- § 17:48 —Contract cases
- § 17:49 —Implied covenant of good faith and fair dealing
- § 17:50 —Tort cases
- § 17:51 —Miscellaneous cases

## VI. DISCOVERY

- § 17:52 Methods and scope of discovery
- § 17:53 Depositions
- § 17:54 Requests for inspection of documents and things
- § 17:55 Interrogatories
- § 17:56 Requests for admissions
- § 17:57 Enforcement of discovery requests

## VII. TRIAL

- § 17:58 Trial—In general
- § 17:59 Elements of trial—Waiver of jury trial
- § 17:60 Elements of trial
- § 17:61 Selected evidentiary issues—Documentary evidence
- § 17:62 —Testimony of other franchisees
- § 17:63 —Unavailable witnesses
- § 17:64 —Expert testimony
- § 17:65 —Termination
- § 17:66 —Tax returns
- § 17:67 —Other issues
- § 17:68 Motions at trial
- § 17:69 Issue preclusion
- § 17:70 Attorneys fees

## VIII. ADMINISTRATIVE PROCEEDINGS AND ARBITRATION

### A. ADMINISTRATIVE PROCEEDINGS

- § 17:71 Administrative proceedings

## B. ALTERNATIVE DISPUTE RESOLUTION

- § 17:72 Alternative Dispute Resolution
- § 17:73 Negotiation as a dispute resolution technique
- § 17:74 Mediation—Generally
- § 17:75 Prerequisites to Arbitration or Litigation—Generally
- § 17:76 Prerequisites to arbitration or litigation—Limitations  
issues
- § 17:77 —Time limits
- § 17:78 —When does mediation end?
- § 17:79 —Emergency relief
- § 17:80 Arbitration—In general
- § 17:81 The Federal Arbitration Act and State Law
- § 17:82 Enforceability of an arbitration clause—Generally
- § 17:83 Challenge to enforcement—Lack of meeting of minds
- § 17:84 —Conflict with statutes
- § 17:85 —Unconscionability
- § 17:86 —Fraud in inducement
- § 17:87 Subject matter encompassed by arbitration  
agreement
- § 17:88 Class or group arbitration
- § 17:89 Non-signatory enforcing arbitration clauses
- § 17:90 Signatory enforcing arbitration against non-signatory
- § 17:91 Arbitration and provisional relief
- § 17:92 Waiver of arbitration
- § 17:93 Procedures in arbitration
- § 17:94 Enforcement of arbitration awards

## IX. FORMS

- § 17:95 Introduction
- § 17:96 Complaint by franchisee for fraud, RICO violations,  
breach of contract and wrongful termination,  
breach of express and implied warranties and  
antitrust law violations
- § 17:97 Counterclaim by franchisor for trademark  
infringement, unfair competition, product  
disparagement, breach of contract and for recovery  
upon note
- § 17:98 Definitions for use in connection with interrogatories  
and document requests
- § 17:99 Checklist of discovery items for document requests  
and interrogatories
- § 17:100 Protective order concerning confidential information

## TABLE OF CONTENTS

§ 17:101	Instructions for witnesses
§ 17:102	Proposed jury instructions—Fraud
§ 17:103	—RICO (mail fraud)
§ 17:104	—Implied duty of good faith and fair dealing
§ 17:105	—Violation of good cause statute
§ 17:106	—Tortious interference with contract or advantageous relations
§ 17:107	—Automobile Dealers' Act

## APPENDICES

APPENDIX A.	Contents of Disclosure and Registration Documents—In General
APPENDIX B.	Disclosure Under FTC Rule—16 C.F.R. Part 436 [Effective July 1, 2008]
APPENDIX B1.	Franchise Rule 16 C.F.R. Part 436 Compliance Guide
APPENDIX C.	2008 Franchise and Disclosure Guidelines
APPENDIX D.	[Reserved]
APPENDIX E.	The Uniform Franchise Offering Circular Guidelines

### Table of Laws and Rules

### Table of Cases

### Index