To: New Jersey Law Revision Commission
From: Jayne Johnson
Re: New Jersey Franchises Practices Act
Date: November 7, 2016

EXECUTIVE SUMMARY

Last month, the Commission considered the Draft Tentative Report proposing revisions to the New Jersey Franchises Practices Act (NJFPA), based on the case law developments concerning forum-selection and choice-of-law clauses. The draft language seeks to extend the anti-waiver provision for motor vehicle franchises in section 7.3 to all franchises governed by the NJFPA. This Memorandum considers the state and federal case law guiding the direction of the proposed revisions.

BACKGROUND

The NJFPA was designed to "level the playing field for New Jersey franchisees and prevent their exploitation by franchisors with superior economic resources."[1] In accord, case law interpreting the NJFPA recognizes the legislative intent to provide franchisees the "shelter of favorable state law."[2] New Jersey state law, in keeping with the early U.S. Supreme Court decisions in this area of the law, provides broad protection to franchisees when reviewing forum-selection and choice-of-law provisions.[3]

The United States Supreme Court, in *Bremen v. Zapata Off-Shore Co.*, acknowledged that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[4] Indeed, the Court acknowledged that its "decision establishe[d] a new rule of law," noting that "settled principles dictate" that the ruling should "apply retroactively to franchise agreements entered into prior to the filing" of the opinion.[5]

This long-standing precedent established in *Breman* was "refined" by the U.S. Supreme Court decision in *Carnival Cruise Lines v. Shute*, where an injured cruise line passenger, whose ticket contained a Florida forum-selection clause, filed suit in Washington State.[6] The Court of

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[1] *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 146 N.J. 176, 195 (1996).
[2] *See* Earsa Jackson & Jim Meaney, *Forum Selection After Atlantic Marine*, AMERICAN BAR ASSOC. 12 (Oct. 15, 2014), http://www.americanbar.org/content/dam/aba/administrative/franchising/materials2014/w4.authcheckdam.pdf.
[3] *See id.* at 26-27.
[4] *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), *quoted in Kubis*, 146 N.J. at 188.
[5] *Id*. at 197.
[6] *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593 (1991).

Appeals concluded "that the forum-selection clause should not be enforced because it 'was not freely bargained for.' The Court of Appeals ruled that the passengers were " 'physically and financially incapable of pursuing this litigation in Florida' and that the enforcement of the clause would operate to deprive them of their day in court and thereby contravene this Court's holding in [*t*]*he Bremen*.' "[7]

The U.S. Supreme Court held that

> '[b]y its plain language, the forum-selection clause [sic] does not take away respondents' right to 'a trial by [a] court of competent jurisdiction' and thereby contravene the explicit proscription of 46 U.S.C. § 183c. Instead, the clause states specifically that actions arising out of the passage contract shall be brought "if at all," in a court 'located in the State of Florida,' which, plainly, is a 'court of competent jurisdiction' within the meaning of the statute.[8]

By reversing the Court of Appeals decision based on *Breman*, the U.S. Supreme Court narrowed the protections previously afforded consumer form contracts and established that forum-selection clauses are presumed valid, unless the party challenging the clause demonstrates one of the exceptions established in *Breman*.[9]

STATE CASE LAW

Following the *Carnival* decision, the New Jersey Supreme Court decided *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc*., where a New Jersey franchise that distributed computing products challenged a forum-selection and choice-of-law clause requiring that all disputes must be governed by California law and heard in California courts.[10] Contrary to the presumption established by the U.S. Supreme Court, the enforceability of this forum-selection and choice-of-law clause was presumed invalid under N.J.S. 56:10-7.3.[11]

The Court expressly rejected an argument that the 1989 amendment indicated that the Legislature intended for the prohibition to apply strictly to motor-vehicle franchise agreements.[12] Instead, the Court found that the forum-selection clauses "fundamentally conflict with the basic

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[7] *Carnival Cruise Lines v. Shute*, 897 F.2d 377 (9th Cir. 1988), *quoted in Carnival*, 499 U.S. 585, 585 (1991).
[8] *Id*. at 596.
[9] *Id*.
[10] 146 N.J. 176, 178-79 (1996). *See generally* James I. McClammy, *Forum Selection Clauses in Contracts Governed by the New Jersey Franchise Practices Act Are Presumptively Invalid*, 28 Seton Hall L. Rev. 213 (1997) (featuring a breakdown of *Kubis* and its relation to other New Jersey case law regarding the enforceability of forum-selection clauses).
[11] *Kubis*, 146 N.J. at 178-79.
[12] *Id*. at 185.

legislative objectives of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act." [13]

While noting that automobile dealerships were clearly considered, the Court further explained that:

> the Legislature considered [forum-selection] clauses in general to be inimical to the rights afforded all franchisees under the Act. The Legislature apparently elected to limit their express prohibition only to motor-vehicle franchises based on its determination that the use of unequal bargaining power to compel the inclusion of such clauses was largely confined to motor-vehicle franchise agreements.[14]

The Court based its reasoning heavily on the presumption that

> the Legislature's avowed purpose . . . [is] to level the playing field for New Jersey franchisees. . .The general enforcement of forum-selection clauses in franchise agreements would frustrate that legislative purpose, and substantially circumvent the public policy underlying the Franchise Act.[15]

The concern was not whether other jurisdictions would "faithfully and fairly apply the Franchise Act," but rather that franchisee rights guaranteed by the NJFPA could be materially diminished because the "economically weaker franchisees . . . often lack the sophistication and resources to litigate effectively a long distance from home."[16]

The Court held that

> [F]orum-selection clauses in franchise agreements are presumptively invalid, and should not be enforced unless the franchisor can satisfy the burden of proving that such a clause was not imposed on the franchisee unfairly on the basis of its superior bargaining position. Evidence that the forum-selection clause was included as part of the standard franchise agreement, without more, is insufficient to overcome the presumption of invalidity.[17]

This *Kubis* decision harmonized with a 2009 amendment which provided that "the Legislature declares that the courts have in some cases more narrowly construed the Franchise

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[14] *Id.* at 185-86.
[15] *Id.* at 195.
[16] *Id.* at 194, 196.
[17] *Id.* at 195.

Practices Act than was intended by the Legislature."[18] Subsequently, other states presumed forum-selection clauses invalid applying the reasoning in *Kubis*. State and federal decisions interpreting the NJFPA continue to interpret *Kubis* as expanding the restriction on forum-selection clauses to all franchises.[19]

RECENT FEDERAL CASE LAW

More recently, the U.S. Supreme Court had the opportunity to affirmatively address whether courts should apply state or federal law when considering the validity of a forum-selection clauses. Instead, the Court established a procedural ruling establishing the steps to determine whether a *valid* forum-selection clause warrants a transfer under § 1404(a).[20] The U.S. Supreme Court, in *Atlantic Marine Construction Company, Inc. v. U.S. Dist. for the W. Dist. Texas.*, considered the forum-selection clause of a construction subcontract.[21] Justice Alito, writing for a unanimous court, held that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases" and will be enforced under the transfer provisions of 28 U.S.C. § 1404(a)."[22]

In *Atlantic Marine*, the U.S. Supreme Court provided the following procedures for considering a § 1404(a) transfer, where a valid forum-selection clause is offered: (1) The party challenging the forum-selection clause has the burden of demonstrating that the transfer to the bargained-for venue does not satisfy the statutory requirements;[23] (2) The court must consider only the public-interests of the parties, their private interests should not be given weight; (3) If a party rebuffs its contractual obligations and commences an action, "a § 1404(a) transfer will not carry the original forum's choice-of-law rules."[24]

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[18] N.J. STAT. ANN. 56:10-2 (West 2016). The amendment which added this language also sought to expand the definition of "place of business" for entities that "do not make a majority of their sales directly to consumers" as a condition for applicability of the FPA. *Id.* The debate on the amendment focused seemingly exclusively on this aspect of the proposed change, and Staff's research into the history of this legislative effort did not reveal which cases, in particular, led to the claim they the FPA was construed more narrowly than the Legislature had intended. A news agency targeting franchise owners published an article at the time regarding the bill effecting this change, and Justin Klein, a New Jersey franchisee attorney, explained: "The courts have narrowly interpreted the franchise practice act to exclude certain franchise owners and consumers from protection. The legislation is instructing courts that when evaluating a particular situation, err on the side of inclusion rather than exclusion." Don Sniegowski, *IFA Stifles Broadening of New Jersey Franchisee Protection Law*, BLUE MAU MAU, June 22, 2008, http://bluemaumau.org/5725/ifa_stifles_broadening_new_jersey_franchisee_protection_law. Given the context, the Legislature may not have been talking expressly about application of certain FPA provisions solely to the motor vehicle franchise industry as having been interpreted "narrowly," but might, at the very least, demonstrate a general comment by the Legislature on the Judiciary's general approach.

[19] *See Allen v. World Inspection Network Int'l, Inc.*, 389 N.J. Super. 115, 120 (App. Div. 2006) ("this prohibition extends to all franchise agreements").

[20] 28 U.S.C. § 1404(a) (West 2016).

[21] *Atlantic Marine Construction Co., Inc. v. U.S. Dist. for the W. Dist. Texas.*, 134 S. Ct. 568, 573 (2013).

[22] *Atlantic Marine*, 134 S. Ct. at 574.

[23] 28 U.S.C. § 1391(West 2016) (providing general venue requirements).

[24] *Atlantic Marine*, 134 S. Ct. at 574.

While the threshold issue is whether the forum-selection clause is valid and enforceable, the U.S. Supreme Court did not identify whether state or federal law is controlling when determining the validity of a forum-selection clause.[25] Often courts evaluate forum-selection clauses as a matter involving contract law; and in accord, view the issue as one of substantive law, where state law applies.[26] On the other hand, courts may consider the forum-selection clause as an agreement of jurisdiction or venue, which is an issue concerning federal procedure governed by federal statutes.[27]

FORUM-SELECTION CLAUSES AFTER *ATLANTIC MARINE*

Following *Atlantic Marine,* the state laws governing forum and choice-of-law provisions are still considered by state and federal courts, and the well-settled law of New Jersey continues to advance the policy favoring franchisees.[28] As established in the decision of the District of New Jersey in *Ocean City Express Co. v. Atlas Van Lines, Inc.*, forum-selections clauses are presumed invalid, where the Court held that "if [the] Plaintiff can plead a valid NJFPA claim, the forum-selection clause will be [found] presumptively invalid."[29]

Proposals to revise the NJFPA should follow the legislative intent of the statute and the line of cases interpreting the Act. Determining whether to codify the case law, by extending the anti-waiver provisions to all franchise agreements governed by the NJFPA, should be viewed in light of this background.

Some states, including Iowa and Louisiana, enacted provisions with relaxed anti-waiver provisions, presuming that certain forum-selections are valid, where the clauses are bargained for and are not unfairly imposed due to the superior bargaining position of the franchisor:

Louisiana - La. Rev. Stat. 12 § 1042

> Unless provisions of a business franchise agreement provide otherwise, when the business to be conducted pursuant to the agreement and the business location of the

[25] *See* Jackson & Meaney at 12.
[26] *Id*. at 27-28.
[27] *Id.*
[28] *See* Jackson & Meaney at 27-29.
[29] *Ocean City Express Co. v. Atlas Van Lines, Inc*, 2014 WL 654589 at *7 (Feb. 19, 2014), *mtn. granted, Ocean City Express Co. v. Atlas Van Lines, Inc*, 2016 WL 3921165 (July 12, 2016)(motion to file an amended complaint was denied, and for the NJFPA claim, motion to dismiss was granted with prejudice, allowing the plaintiff to cure deficiencies in its NJFPA claim by alleging "that its principal office in N[ew] J[ersey] is a qualifying place of business").
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franchisee are exclusively in this state, disputes arising under a business franchise agreement shall be resolved in a forum inside this state and interpretation of the provisions of the agreement shall be governed by the laws of this state.

Iowa - Iowa Code § 523H.3(1)

1. A provision in a franchise agreement restricting jurisdiction to a forum outside this state is void with respect to a claim otherwise enforceable under this chapter.
2. A civil action or proceeding arising out of a franchise may be commenced wherever jurisdiction over the parties or subject matter exists, even if the agreement limits actions or proceedings to a designated jurisdiction.

In the appendix that follows, the existing statutory language of the NJFPA in section 7.3 is listed, along with the anti-waiver provisions of seventeen other jurisdictions.

CONCLUSION

In light of this background, Staff seeks any input that the Commission wishes to provide at this time regarding draft language in keeping with the legislative intent of the NJPFA and the line of cases interpreting the statute. Staff will continue to work toward drafting such language and to seek comment from practitioners specializing in this area of practice throughout the drafting process.

APPENDIX[30]

STATE/CITATION	STATUTORY PROVISION
Arkansas Arkansas Franchise Practices Act (AFPA), Ark. Code Ann. § 4-72-206	"It shall be a violation of this subchapter for any franchisor, through any officer, agent, or employee to engage directly or indirectly in any of the following practices: (1) To require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by this subchapter; (2) To prohibit directly or indirectly the right of free association among franchisees for any lawful purpose;. . ."
California California Franchise Investment Law (CFIL), Cal. Corp. Code § 31512	"Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."
Connecticut Connecticut Franchise Act (CFA), Conn. Gen. Stat. § 42-133f(f)	"Any waiver of the rights of a franchisee under sections 42-133f or 42-133g which is contained in any franchise agreement entered into or amended on or after June 12, 1975, shall be void." Note: § 42-133f: Termination, or cancellation of, or failure to renew a franchise. § 42-133g: Action for violation. Right to occupy franchise premises whose lease expires upon termination of franchise. Items filed with court by franchisor seeking possession of franchise premises.
Delaware	None
Florida	None
Hawaii Hawaii Franchise Investment Law (HFIL), Haw. Rev. Stat. § 482E-6	"Without limiting the other provisions of this chapter, the following specific rights and prohibitions shall govern the relation between the franchisor or subfranchisor and its franchisees: (1) The parties shall deal with each other in good faith; (2) For the purposes of this chapter and without limiting its general application, it shall be an unfair or deceptive act or practice or an unfair method of competition for a franchisor or subfranchisor to: . . . (F) Require a franchisee at the time of entering into a franchise to assent to a release, assignment, novation, or waiver which would relieve any person from liability imposed by this chapter. Any condition, stipulation or provision binding any person acquiring any franchise to waive compliance with any provision of this chapter or a rule promulgated hereunder shall be void. This paragraph shall not bar or affect the settlement of disputes, claims or civil suits arising or brought under this chapter. (G) Impose on a franchisee by contract, rule, or regulation, whether written or oral, any unreasonable and arbitrary standard of conduct. . ."

[30] *See See* Earsa Jackson & Jim Meaney, *Forum Selection After Atlantic Marine*, AMERICAN BAR ASSOC. 19-21 (Oct. 15, 2014), http://www.americanbar.org/content/dam/aba/administrative/franchising/materials2014/w4.authcheckdam.pdf.

Illinois Illinois Franchise Disclosure Act of 1987 (IFDA), Ill. Comp. Stat. 705/41.	"Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this Act or any other law of this State is void. This Section shall not prevent any person from entering into a settlement agreement or executing a general release regarding a potential or actual lawsuit filed under any of the provisions of this Act, nor shall it prevent the arbitration of any claim pursuant to the provisions of Title 9 of the United States Code."
Indiana Indiana Franchise Act (IFA), Ind. Code § 23-2-2.7-1	"It is unlawful for any franchise agreement entered into between any franchisor and a franchisee who is either a resident of Indiana or a nonresident who will be operating a franchise in Indiana to contain any of the following provisions: . . . (5) Requiring the franchisee to prospectively assent to a release, assignment, novation, waiver, or estoppel which purports to relieve any person from liability to be imposed by this chapter or requiring any controversy between the franchise and the franchisor to be referred to any person, if referral would be binding on the franchisee. This subdivision does not apply to arbitration before an independent arbitrator. . . . (10) Limiting litigation brought for breach of the agreement in any manner whatsoever. . . ."
Iowa Iowa Code § 523H.4 Iowa Code § 537A.10(4) (2000)	Waivers Void. A condition, stipulation, or provision requiring a franchisee to waive compliance with or relieving a person of a duty or liability imposed by or a right provided by this section or a rule or order under this section is void. This subsection shall not affect the settlement of disputes, claims, or civil lawsuits arising or brought pursuant to this section." Iowa Code § 523H.4 (1992) Applies to agreements entered before July 1, 2000) "A condition, stipulation, or provision requiring a franchisee to waive compliance with or relieving a person of a duty or liability imposed by or a right provided by this chapter or a rule or order under this chapter is void. This section shall not affect the settlement of disputes, claims, or civil lawsuits arising or brought pursuant to this chapter."
Maryland Maryland Franchise Registration and Disclosure Law, Md. Code Ann., Bus. Reg. § 14-226	"As a condition of the sale of a franchise, a franchisor may not require a prospective franchisee to agree to a release, assignment, novation, waiver, or estoppel that would relieve a person from liability under this subtitle."
Michigan Michigan Franchise Investment Law (MFIL), Mich. Comp. Laws § 445.1527	"Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise: (b) A requirement that a franchisee assent to a release, assignment, novation, waiver, or estoppel which deprives a franchisee of rights and protections provided in this act. This shall not preclude a franchisee, after entering into a franchise agreement, from settling any and all claims. . . ."

Minnesota Minnesota Franchise Act (MFA), Minn. Stat. § 80C.21	"Any condition, stipulation or provision, including any choice of law provision, purporting to bind any person who, at the time of acquiring a franchise is a resident of this state, or, in the case of a partnership or corporation, organized or incorporated under the laws of this state, or purporting to bind a person acquiring any franchise to be operated in this state to waive compliance or which has the effect of waiving compliance with any provision of sections 80C.01 to 80C.22 or any rule or order thereunder is void."
Mississippi	None
Missouri	None
Nebraska Nebraska Franchise Law, Neb. Rev. Stat. § 87-406	b. "It shall be a violation of sections 87-401 to 87-410 for any franchisor, directly or indirectly, through any officer, agent, or employee, to engage in any of the following practices: (1) To require a franchisee at the time of entering into a franchise arrangement to assent to a release, assignment, novation, wavier, or estoppel which would relieve any person from liability imposed by sections 87-401 to 87-410; . . . ."
New Jersey New Jersey Franchise Practices Act, N.J. Stat. Ann. § 56:10-7	"It shall be a violation of this act for any franchisor, directly or indirectly, through any officer, agent or employee, to engage in any of the following practices: a. To require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this act. . . ."
New York New York Franchise Sales Act, N.Y. Gen. Bus. Law § 687(4)-(5)	"4. Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law, or rule promulgated hereunder, shall be void." "5. It is unlawful to require a franchisee to assent to a release, assignment, novation, waiver or estoppel which would relieve a person from any duty or liability imposed by this article."
North Dakota North Dakota Franchise Investment Law, N.D. Cent. Code § 51-19-16(7)	"Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this chapter or any rule or order hereunder is void."
Oregon	None
Puerto Rico The Puerto Rico Dealer's Act of 1964 (Law 75), P.R. Laws Ann. tit. 10, § 278c	"A condition, stipulation or provision requiring a franchisee to waive compliance with or relieving a person of a duty of liability imposed by or a right provided by this Act or a rule or order under this Act is void. An acknowledgment provision, disclaimer or integration clause or a provision

	having a similar effect in a franchise agreement does not negate or act to remove from judicial review any statement, misrepresentations or action that would violate this Act or a rule or order under this Act. This section shall not affect the settlement of disputes, claims or civil lawsuits arising or brought under this Act."
South Dakota	None
Virginia Retail Franchising Act, Va. Code Ann. § 13.1-571(c)	"Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or order thereunder shall be void; provided, however, that nothing contained herein shall bar the right of a franchisor and franchisee to agree to binding arbitration of disputes consistent with the provisions of this chapter." herein shall bar the right of a franchisor and franchisee to agree to binding arbitration of disputes consistent with the provisions of this chapter."
Washington Washington Franchise Investment Protection Act (FIPA), Wash. Rev. Code § 19.100.180	"Relation between franchisor and franchisee—Rights and prohibitions. Without limiting the other provisions of this chapter, the following specific rights and prohibitions shall govern the relation between the franchisor or subfranchisor and the franchisees: . . . (2) For the purposes of this chapter and without limiting its general application, it shall be an unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to: . . . (g) Require franchisee to assent to a release, assignment, novation, or waiver which would relieve any person from liability imposed by this chapter, except as otherwise permitted by RCW 19.100.220. . . ."
Washington Franchise Investment Protection Act (FIPA), Wash. Rev. Code § 19.100.220(2)	"Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is void. A release or waiver executed by any person pursuant to a negotiated settlement in connection with a bona fide dispute between a franchisee and a franchisor, arising after their franchise agreement has taken effect, in which the person giving the release or waiver is represented by independent legal counsel, is not an agreement prohibited by this subsection."
Wisconsin Wisconsin Franchise Investment Law (WFIL), Wis. Stat. § 553.76	"Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this chapter or any rule or order under this chapter is void. This section does not affect the settlement of disputes, claims or civil lawsuits arising or brought under this chapter."