

**To: Commission**  
**From: Alexandra Kutner**  
**Re: NJFPA - Forum Selection Clause Prohibition Applies to All Franchises**  
**Date: April 7, 2014**

## MEMORANDUM

### Introduction

This project was brought to the attention of Staff by the District Court decision made in *Navraj Rest. Group, LLC v. Pancho's Franchise Corp.*,<sup>1</sup> which reiterated the holding of the New Jersey Supreme Court in *Kubis & Perszyk Assocs. v. Sun Microsystems*.<sup>2</sup> *Kubis* held that while the New Jersey Franchise Practices Act (NJFPA) voids certain choice of forum clauses specifically for motor vehicle franchises, the applicable restrictions on forum selection and choice of law provisions apply to all types of franchises. Despite *Kubis* having been decided in 1996, the court has still found occasion to grapple with this issue as the statutory language has not been updated to reflect the court's decisions. Revising *N.J.S.A. 56:10-7* to reflect these court decisions might clarify this area of the law. Staff seeks Commission authorization to undertake a project in this area.

In the event the Commission decides to pursue this project, an Appendix has been attached to this Memorandum which contains a brief multi-state survey of forum-selection clauses for franchises.

### A. What is the NJFPA?

The NJFPA addressed concerns relating to both unequal bargaining power and to the unavailability of prompt judicial relief. The Act expressly prohibits franchisors from requiring franchisees to agree to unreasonable standards of performance, or to releases or waivers that would relieve franchisors from liability under the Act.<sup>3</sup> Further, the termination of, or failure to renew, a franchise without good cause constitutes a violation of the NJFPA, and good cause is limited to a franchisee's failure "to substantially comply with those requirements imposed...by the franchise."<sup>4</sup> The Act expressly authorizes franchisees to institute suit against franchisors "in the Superior Court of the State of New Jersey to recover damages sustained by reason of any violation of this act and, where appropriate, [for] injunctive relief."<sup>5</sup>

In 1989 the Legislature amended the NJFPA, specifically to enhance the protection afforded to motor-vehicle franchisees. The amendment provided that a motor-vehicle franchisor violates the Act if it requires a motor-vehicle franchisee to accept a provision in a franchise agreement that specifies the jurisdiction in which disputes shall or shall not be submitted for resolution, or prohibits a motor-vehicle franchisee from instituting suit in a forum otherwise

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<sup>1</sup> 2013 WL 440837 (D.N.J. Aug. 15, 2013).

<sup>2</sup> 146 N.J. 176, 680 A.2d 618 (1996).

<sup>3</sup> N.J.S. 56:10-7.

<sup>4</sup> N.J.S. 56:10-5.

<sup>5</sup> N.J.S. 56:10-10.

available under New Jersey Law.<sup>6</sup> Any such provision may be revoked by the franchisee by notice to the motor-vehicle franchisor within 60 days of receipt of the executed franchise agreement.<sup>7</sup> Forum-selection clauses are presumed to be invalid unless the franchisor can prove that it offered the franchisee the opportunity to sign an identical franchise agreement containing no forum-selection clause.<sup>8</sup>

Structurally, the NJFPA consists of nearly 50 sections of statute (N.J.S. 56:10-1 to N.J.S. 56:10-31), with the original sections enacted in 1971. The Act applies to franchises generally if they meet the statutory criteria set forth in N.J.S. 56:10-4<sup>9</sup> and also (as the result of a later amendment) makes specific reference to the application of the Act to franchises for the sale of motor vehicles.<sup>10</sup> Some of the approximately 50 sections of the Act apply generally to all franchises that meet the criteria set forth in the Act, but other sections of the Act mention motor vehicle franchises specifically (including: N.J.S. 56:10-7.2 to N.J.S. 56:10-7.4; N.J.S. 56:10-13; N.J.S. 56:10-13.1 to N.J.S. 56:10-13.7, and N.J.S. 56:10-14 to N.J.S. 56:10-31).

*Kubis* held that the enforcement of a forum-selection clause in any contracts subject to the NJFPA would substantially undermine the protections that the Legislature intended to afford to all New Jersey franchisees.<sup>11</sup> Therefore, all such clauses are presumptively invalid because they fundamentally conflict with the basic legislative objective of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act.<sup>12</sup> A forum selection clause will only be enforced if 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 provision.”<sup>13</sup>

## **B. Proposal**

N.J.S. 56:10-7.3 lists prohibition of certain terms or conditions, presumption and remedies available to motor vehicle franchises. N.J.S. 56:10-7.4 lists activities deemed violations for motor vehicle franchisors.

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<sup>6</sup> N.J.S. 56:10-7.3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The Act is generally applicable to “a franchise (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded \$35,000.00 for the 12 months next preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise...”

<sup>10</sup> N.J.S. 56:10-4; The Act was later amended: (1) in 1981 to indicate that it is a violation of the act for any franchisor to “prohibit any franchisee engaged in the retail sale of motor gasoline from purchasing any suitable alternate motor fuel”; (2) in 1982 to apply to motor vehicle franchises; (3) in 1985 to prohibit franchisors from engaging in the retail sale of used motor vehicles except through their franchisees; (4) in 1989 to address the disparity in bargaining power between motor vehicle franchisees and franchisors; (5) in 1991; (6) in 1993 to apply to franchises for the sale of new motor vehicles; and (7) in 2009, 2010, and 2011 to address other issues (the retail sale of motor fuels, etc.).

<sup>11</sup> *Kubis*, 146 N.J. at 192.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 195.

N.J.S. 56:10-7 identifies the prohibited practices for all (non-motor vehicle) franchises. The language found in the Motor Vehicle franchise/franchisor's prohibiting forum-selection clauses is not currently present in N.J.S. 56:10-7. To address the issue raised by the Court, Staff proposes to include the relevant language from N.J.S. 56:10-7.3(a)(1) – (3) into N.J.S. 56:10-7. One option for doing so is shown below.

### **N.J.S. 56:10-7 Prohibited practices**

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.

b. To prohibit directly or indirectly the right of free association among franchisees for any lawful purpose.

c. To require or prohibit any change in management of any franchisee unless such requirement or prohibition of change shall be for good cause, which cause shall be stated in writing by the franchisor.

d. To restrict the sale of any equity or debenture issue or the transfer of any securities of a franchise or in any way prevent or attempt to prevent the transfer, sale or issuance of equity securities or debentures to employees, personnel of the franchisee, or spouse, child or heir of an owner, as long as basic financial requirements of the franchisor are complied with, and provided any such sale, transfer or issuance does not have the effect of accomplishing a sale or transfer of control, including, but not limited to, change in the persons holding the majority voting power of the franchise. Nothing contained in this subsection shall excuse a franchisee's obligation to provide prior written notice of any change of ownership to the franchisor if that notice is required by the franchise.

e. To impose unreasonable standards of performance upon a franchisee.

f. To:

(1) Require the franchisee to waive trial by jury in actions involving the franchisor; or

(2) Specify the jurisdictions, venues or tribunals in which disputes arising with respect to the franchise, lease or agreement shall or shall not be submitted for resolution or otherwise prohibits a motor vehicle franchisee from bringing an action in a particular forum otherwise available under the law of this State; or

(3) Require that disputes between the franchisor and franchisee be submitted to arbitration or to any other binding alternate dispute resolution

procedure; provided, however, that any franchise, lease or agreement may authorize the submission of a dispute to arbitration or to binding alternate dispute resolution if the franchisor and franchisee voluntarily agree to submit the dispute to arbitration or binding alternate dispute resolution at the time the dispute arises.

f. g. To provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates this act.

**Conclusion:**

The NJFPA helps level the playing field between qualifying New Jersey business and their suppliers and licensors by providing protection beyond the contractual terms. New Jersey's strong public policy that franchisees in the state have a New Jersey forum in which to litigate claims under the NJFPA. Case law has shown time and time again that forum-selection clauses are presumptively invalid no matter the franchise. If the Commission chooses to authorize a project in this area, Staff would conduct additional research and outreach in order to confirm that the draft language proposed above addresses the concerns raised by the Courts in this area.

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## APPENDIX:

1. **California:** California Franchise Relations Act (CFRA) states that a provision in “a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state”
  - a. While the CFRA as a whole applies to both franchisees domiciled in the state and franchised businesses that operate or have operated in the state, the restriction regarding forum applies solely to franchised businesses operating in the state
  - b. CFRA reflects strong public policy to protect franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue
  - c. CFRA does not speak to enforceability of choice of law provisions. California common law governs the enforceability of such clauses
2. **Connecticut:** franchises may rely on the anti-waiver provision found in the Connecticut Franchise Act (CFA) to challenge the enforcement of forum selection clauses that elect a forum outside of the state, or choice of law clauses that provide for the application of foreign laws
  - a. CFA grants to franchisees the right to bring an action for violation of the CFA in the superior court
3. **Delaware:** Delaware’s Franchise Security Law does not specifically limit forum selection or foreign choice of law provisions. The statute does include two very narrow subsections explicitly stating that it is against public policy of the state for a provision in a franchise agreement to permit a franchisor to either make an unjust termination or fail or refuse to renew a franchise agreement
4. **Hawaii:** Chapter 482E of statute provides that it is an unfair or deceptive practice for a franchisor to require a franchisee, at the time of the franchise agreement signing, to release any person from liability under the chapter. While the statute’s applicability to the enforceability of choice of forum and choice of law provisions still awaits court guidance, it is clear from trends in US courts that parties and courts rely upon such anti-waiver provisions as codification of a state’s public policy
5. **Idaho:** Title 29 outlines limitations of forum selection clauses. Any forum selection provision is void if it waives, “purports to waive, or has the effect of waiving venue or jurisdiction” of the state’s courts. Statute restricts applicability by residency and date.
6. **Illinois:** Illinois Franchise Disclosure Act (IFDA) voids “any provision in a franchise agreement that designates jurisdiction or venue in a forum outside of [Illinois]” with respect to any cause of action that is otherwise enforceable in the state
  - a. IFDA does permit that arbitration take place in a forum outside of the state
  - b. IFDA’s protections are expanded and a franchise agreement may not provide for any choice of law other than Illinois law
7. **Indiana:** Indiana Deceptive Franchise Practices Act (IDFPA) prohibits limiting litigation brought for breach of the agreement in any manner whatsoever. Statute prohibits any

- waiver of its protection, but applies choice of forum and choice of law provisions if determined by case law (so long as it does not violate public policy)
8. **Iowa:** Chapter 537A provides specific prohibitions with respect to choice of forum clauses, “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 section.” Claim can be brought in any court of competent jurisdiction even if the contract designates a specific jurisdiction. Any clause that requires the application of the law of another state in lieu of the protections under state chapter is void.
  9. **Kansas:** Title 12 provides that unless the franchise agreement states otherwise, the forum for a dispute under a franchise agreement will be in Louisiana and the dispute will be governed by the laws of Louisiana. These laws do not restrict the contractual election of an out-of-state forum or law, and such contractual clauses are regularly enforced
  10. **Maryland:** Maryland Franchise Registration and Disclosure Law (MFRDL) does not address enforcement of choice of forum and choice of law provisions as directly as other states. Courts rely on the state’s broad anti-waiver provision which prohibits any waiver that would relieve a person from liability under the MFRDL’s protections. Any waiver of the franchisee’s right to file a lawsuit alleging a cause of action arising under the Maryland Franchise Law in any court of competent jurisdiction is fraudulent and deceitful.
  11. **Massachusetts:** 93B provides that “a clause or provision in a franchise agreement requiring the parties to submit to arbitration, mediation or any other alternative dispute resolution mechanism before filing suit shall be enforceable only if the parties voluntarily entered into an agreement to submit to” such mechanism and the conduct of such mechanism is at a reasonable location within the commonwealth. Clauses or provisions are void and enforceable and against state’s public policy. Exempts binding mediation provisions as long as they are at a reasonable location within the state. Statute is silent on the enforceability of any choice of forum or choice of law provisions found in franchise agreements.
  12. **Michigan:** Michigan Franchise Investment Law (MFIL) states that a provision in any document relating to a franchise is unenforceable if it requires that arbitration or litigation be conducted outside of the state. Expressly excludes any agreement between the parties made at the time of arbitration under which arbitration will be conducted at a location outside of the state.
  13. **Minnesota:** Minnesota Franchise Act (MFA) does not explicitly restrict contractual choice of forum clauses. Minnesota Rules state that it is unfair and inequitable to cause a franchisee to waive any rights relating to the forum. Requires that franchisors include language in Item 17 of their disclosure document and franchise agreement stating that the MFA and Minnesota regulations prohibit the franchisor from requiring litigation be conducted outside of Minnesota
  14. **Nebraska:** NFPA does not specifically restrict the contractual election of a foreign forum or choice of law. Statute does state that it is a violation of the NJFPA for a franchisor to assent to a release assignment novation, waiver, or estoppel, which would relieve any person from liability imposed by the NFPA.
  15. **New York:** NYFSA contains only a general anti-waiver provision stating that 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

16. **North Carolina:** generally applicable statutes that invalidates forum selection provisions in contracts entered into in North Carolina that require the litigation or arbitration of any dispute arising from the contracts in another state. Such provisions are void and unenforceable because they violate the state's public policy
17. **North Dakota:** currently no statutory restrictions regarding choice of forum or choice of law clauses under North Dakota law. Choice of forum provisions requiring out-of-state litigation are considered unfair, unjust, and inequitable within the intent of the North Dakota Franchise Investment Law (NDFIL)
18. **Oregon:** invalidates choice of forum provisions in a franchise agreement, lease or other ancillary agreement if the agreement prevents a franchisee from bringing an action in a particular forum otherwise available under the law or when the agreement specifies the jurisdictions, venues, or tribunals in which disputes shall or shall not be submitted. FAA will in most cases preempt such restrictions when they involve arbitration
19. **Rhode Island:** RIFIA limits the enforceability of both choice of law and choice of forum clauses. The statute voids any provision that would restrict jurisdiction to an out of state forum or require the application of out of state law.
20. **Virginia:** VRFA contains an anti-waiver provision similar to those found in comparable franchise relationship laws. Specifically the VRFA states that any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or any rule or order thereunder shall be void.
21. **Washington:** WFIPA does not expressly void choice of law provisions that cause a person to waive compliance with the WFIPA. EFIPA does not address restrictions on choice of forum clauses, however out of state arbitration forums are not in good faith, reasonable or a fair act and practice.
22. **Wisconsin:** general statutory provision that voids contractual clauses requiring an individual to waive compliance with any rules under the Wisconsin Franchise Investment Law. Courts have often relied on such anti-waiver provision to void choice of law clauses that would have the effect of depriving a franchisee of his rights and claims under applicable franchise law.