Discriminating Between Members of the Same Network: American Statutes and Cases

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The Franchise Relationship and Alleged Discrimination in Contract Terms or Enforcement: Ruminations on "Similarly Situated" Franchisees, Analogous Federal Law, and Other Concepts

The relationship between franchisor and franchisee is customarily governed by the specific contractual terms listed within the franchise agreement and the more general, yet often complex, operations manual.[1] The manuals, and perhaps other specification documents, stipulate standardized procedures for the operation of the franchise, thus ensuring continuity of the brand.[2] This same goal permeates the franchise agreements, as franchisors often maintain similar contractual terms among franchisees.[3] While this practice would seem to, and often does, create consistency within a franchise network, it can also lead to discrimination claims by franchisees when franchisors do not apply the agreement or manual in a consistent manner.

While not defined statutorily, discrimination can be interpreted to mean differences in the way franchisors treat similarly situated franchisees with regard to a material aspect of the franchised business.[4] Due to the inherent ambiguity of the terms "similarly situated" and "material aspect," the courts have had wide discretion in determining whether a difference of treatment among franchisees is sufficiently discriminatory. For example, the court in *Implement Serv., Inc. v. Tecumseh Prods. Co.* acknowledged

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[1] Mark J. Burzych & Emily L. Matthews, *Selective Enforcement of Franchise Agreement Terms and System Standards*, 23 FRANCHISE L.J. 110 (2003).
[2] *Id. See also* Robert W. Emerson, *Franchise Terminations: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates*, 35 AM. BUS. L.J. 559, 593 (1998) (stating the verbiage and effect of an operations manual as incorporated in the franchise agreement).
[3] Burzych & Matthews, *supra* note 1, at 110.
[4] W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 10:51 (2010).

that "whether a plaintiff/franchisee is 'similarly situated' to other franchisees will, of course, depend on which factors about the franchisees are compared."[5] While a seemingly obvious statement, the court acknowledged the disparity among the application of the term "similarly situated" and the resulting inconsistent effect when varying factors are considered. The court in *Implement Service* indicated that the factors to be considered should be those "relevant to the underlying business decision being made."[6] As with the franchisee in *Implement Service*, if there is too little, if any, evidence to put forth a prime facie case that it is similarly situated with other franchisees who are being treated more favorably, then the claim will proceed no further.

The same inquiry as to whether a franchisee is similarly situated with others that are receiving advantageous treatment is a prerequisite for a civil rights discrimination claim under a venerable post-Civil War enactment in the United States Code, 42 U.S.C. § 1981.[7] In *Elkhatib v. Dunkin Donuts, Inc.*, the court shed light on how to evaluate whether multiple franchisees are similarly situated by suggesting that the requirement "should not be applied mechanically or inflexibly, but rather is a common-sense flexible inquiry that seeks to determine whether there are enough common features between the individuals to allow a meaningful comparison."[8] The court further stated that only "substantial similarity, not complete identity, is required."[9]

If the standard set forth in *Elkhatib* related to racial discrimination against similarly situated franchisees could also be applied more broadly to encompass any discriminatory action, courts would have increased power to use varying factors when evaluating whether franchisees are similar enough to permit a useful comparison of franchisor treatment. Even if the courts addressing selective enforcement discrimination claims have not explicitly stated that they are applying this broad, flexible standard rather than a set rule, it is clear from their application that many factors can be considered and those applicable will be highly context specific. For example, in *Wisconsin Music Network, Inc. v. Muzak Ltd. P'ship*, similarly situated

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[5] Implement Serv., Inc. v. Tecumseh Prods. Co., 726 F. Supp. 1171, 1181 (S.D. Ind. 1989) (holding that an equipment seller, who had been enlisted as an authorized service distributor by manufacturer's central warehouse distributor, did not have a discrimination claim for contract termination, based in part on its failure to prove that it was similarly situated to those franchisees being treated more favorably).
[6] *Id.* at 1181.
[7] 42 U.S.C.A. § 1981 (West 2000).
[8] Elkhatib v. Dunkin Donuts, Inc., 493 F.3d 827, 831 (7th Cir. 2007).
[9] *Id.* at 831.

franchisees were defined as "those whose previous contracts had expired," as it was the expired status that was the common thread among franchisees treated differently.[10] In a separate context, in *Implement Service*, the court looked to the geographical status of franchisees as the key determinant of whether they were similarly situated, as the discrimination claim in that case arose from certain allocations that were "driven by considerations of geography."[11] Therefore, in every discrimination claim, the court has wide discretion to apply those factors pertinent to determining whether franchisees are similarly situated.

An obvious drawback to such a broad standard is the potential for inconsistent application of the term "similarly situated." If the factors to be considered vary widely within each discrimination claim, the probability of a plaintiff-franchisee's success likely will fall, as the franchisor probably can put forth justifiable reasons for the differences in treatment.[12] The franchisor would likely struggle to establish a justifiable reason for the discrimination if the court evaluated the same or similar factors in each claim, as it would not have the ability to persuade the court that there were factors more important to the operation of the franchise than those alleged by the franchisee.

Because, as previously discussed, franchisors tend to employ standardized terms in both their contracts with and their operation manuals for franchisees, perhaps this alone would suffice for reviewing courts to deem franchisees similarly situated. While this may be a factor that is considered in many cases, it cannot be assumed that it will apply to all, as franchisors typically maintain the right to adjust the contractual terms among franchisees as necessary. For example, under the Petroleum Marketing Practices Act (PMPA),[13] a federal law dictating many of the terms of the franchisor-franchisee relationship for gasoline service stations, it is not required that the terms of a franchisee's new franchise agreement be identical to all other franchise agreements with that particular franchisor.[14] The PMPA "only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor."[15] Additionally, and most important for our analysis, the state

[10] Wis. Music Network, Inc. v. Muzak Ltd. P'ship, 5 F.3d 218, 220-21 (7th Cir. 1993).
[11] *Implement*, 726 F. Supp. at 1181 (holding that the alleged discrimination arose out of certain franchisor allocations on the basis of geography, and hence the inquiry about whether the franchisee was similarly situated to others was to be determined by looking at the geographic relationship between the plaintiff-franchisee and the other franchisees who had been treated more favorably).
[12] Emerson, *supra* note 2, at 572.
[13] 15 U.S.C. §§ 2801-2807, 2821-2824, 2841 (2007).
[14] Unocal Corp. v. Kaabipour, 177 F.3d 755, 767 (9th Cir. 1999).
[15] *Id*. at 767 (quoting S. Nevada Shell Dealers Ass'n v. Shell Oil Co., 725 F. Supp. 1104, 1109 (D. Nev. 1989).

statutes that prohibit discriminatory behavior[16] do not specifically state that a franchisor cannot alter contractual provisions among franchisees.

Besides proving it is similarly situated to other franchisees that are being treated more favorably, the plaintiff-franchisee may also be required to address whether the discrimination pertains to a material aspect of the business. This has specific application to claims pertaining to discrimination in the termination of a franchise, as many state statutes provide that termination is only acceptable if the terminated franchisee failed to perform substantially some material aspects of the contract.[17] The same is true under the PMPA, which stipulates in Section 2(b)(2)(A) that a franchisor cannot terminate the franchise for contract violations "unless the provisions of the contract that were violated are 'both reasonable and of material significance to the franchise relationship.'"[18] Therefore, when asserting that a franchisor has improperly terminated the franchise, a franchisee would be required to prove that there was no failure on its own part to perform the material portions of the agreement.

State Franchise Statutes

Assume that an aggrieved franchisee, Fran, has sued the franchisor, Copious Company, for discrimination. When a court is presented with franchisee Fran's claim that Fran is being treated worse than other franchisees, the court must first start with a review of the written franchise agreement between Fran and Copious.[19] Presumably, the court would review the listed terms and conditions to determine that most basic of findings: whether the franchisor's alleged behavior contradicts the agreement itself. The court would likely take the terms of the Copious-Fran agreement as well as Copious' actual treatment of Fran, and compare both (the agreement and the treatment) with that of similarly situated franchisees. Even if the court determines that Fran is being treated differently, then the court must decide the legal effect of such treatment; this is likely to present a challenge for the franchisee, as most states do not explicitly forbid franchise discrimination by statute. In undertaking this analysis, the court considers any other explanation from Copious as to why its differential treatment of Fran arose from legitimate business

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[16] HAW. REV. STAT. ANN. § 482E-6(2)(C) (West 1974); IND. CODE ANN. § 23-2-2.7-2(5) (West 1985); 815 ILL. COMP. STAT. 705/18 (1988); WASH. REV. CODE § 19.100.180(2)(c) (1991); ARK. CODE ANN. § 4-72-204 (West 2010); WIS. STAT. ANN. § 135.03 (West 2011).
[17] Emerson, *supra* note 2, at 577 n.69.
[18] Patel v. Sun Co., 948 F. Supp. 465, 475 (E.D. Pa. 1996) (quoting 15 U.S.C. §§ 2802(b)(2)(A)).
[19] *See* Burzych & Matthews, *supra* note 1, at 110.

concerns. This step is thus another potential death knell to the franchisee's claim, as courts have given wide deference to the business rationales offered by franchisors.[20]

When a franchisee is able to establish that it is being treated differently than other franchisees similarly situated, the court will then look to the applicable statute to determine if the disparity is legally sufficient to constitute discrimination. The large majority of claims will be evaluated under state legislation, as there is no over-arching federal statute that applies to all franchise relationships. Only two U.S. industries, petroleum and automobile dealerships, have federal statutes that provide substantive laws regarding the relationship between franchisor and franchisee.[21] If the discrimination claim is not within one of these two industries, the court is left to examine state statutes and any ancillary case law.

Unfortunately for franchisees, while many states have statutes that provide guidance on the franchisor-franchisee relationship, only six states currently have express anti-discrimination provisions: Arkansas, Hawaii, Illinois, Indiana, Washington and Wisconsin.[22] Even in these states, a franchisee's discrimination claim is not guaranteed success for three main reasons: (1) some of the anti-discriminatory statutes only apply to the practice of termination or non-renewal instead of a broader range of general behavior; (2) some statutes provide express defenses for the franchisor; and (3) courts have often interpreted anti-discrimination statute provisions against the franchisee.

To understand that conclusion, let us review the statutes found in those six states mentioned above.

The broadest reaching anti-discriminatory provisions are stipulated in the franchise laws of Hawaii, Illinois, Indiana, and Washington.

Hawaii has perhaps the most expansive anti-discrimination provision of all, as provided within Section 482E-(6)(2)(c) of the Hawaii Revised Statutes Annotated. The provision states in part that it is "an unfair or deceptive act or practice or an unfair method of competition for a franchisor. . .to. . .discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing."[23] However, despite this broad range of behavior in which discrimination is prohibited, the section immediately provides several defenses for the franchisor. The section states that such discriminatory actions are prohibited *unless* the franchises were granted at

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[20] Emerson, *supra* note 2, at 572.
[21] *See* Burzych & Matthews, *supra* at note 1, at 110-11; Emerson, *supra* note 15, at 563.
[22] Burzych & Matthews, *supra* note 1 at 111-14.
[23] HAW. REV. STAT. ANN. § 482E-6(2)(C) (West 1974).

materially different times or the discrimination is related to efforts to cure deficiencies in the operation of the franchises, related to a program that makes franchises available to those lacking certain qualifications, or is related to an experimentation with, or variations in, the product or service lines. [24] In addition to these defenses, there is a broad loophole for franchisors in which discrimination is acceptable if "based on other reasonable distinctions."[25] Therefore, with Hawaii's expansive statutory definition of possibly wrongful discrimination but with an almost equally broad set of defenses built into the statute, the typical franchise discrimination case – with perhaps poor behavior on the franchisor's part but *sans* outright, provable malice (e.g., *intentionally* undermining the franchisee's interests) – appears unlikely to succeed in that island state.

Similarly, the Illinois Franchise Disclosure Act stipulates that it is "a violation of this Act for any franchisor to unreasonably and materially discriminate between franchisees operating a franchised business located in this State in the charges offered or made for franchise fees, royalties, goods, services, equipment, rentals or advertising services."[26] However broad this reach may be, this statement is immediately followed by two stipulations that immediately limit its application. First, such discrimination is only a violation of the Illinois Act if it will "cause competitive harm to a franchisee that competes with a franchisee that received the benefit of the discrimination."[27] Additionally, it provides the same franchisor defenses as listed in the Hawaiian statute: (1) difference in time in which the franchise was granted, (2) part of a program to provide franchises to persons lacking qualifications, (3) related to experimentation or variations, (4) related to efforts to cure deficiencies, or (5) any other reasonable distinction.[28]

The state of Washington's code follows a similar pattern, in which the franchise legislation states that it is an "unfair or deceptive act or practice or an unfair method of competition and therefore unlawful. . .to. . .discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing."[29] Immediately following, the statute limits the application of the provision by stating that the franchisor can trump the discrimination claim by proving that the "discrimination between franchisees is: (i) Reasonable, (ii) based on franchises granted at materially different times and such discrimination is reasonably related to such difference in

[24] HAW. REV. STAT. ANN. § 482E-6(2)(C)(i)(ii)(iii)(iv) (West 1974).
[25] HAW. REV. STAT. ANN. § 482E-6(2)(C)(v) (West 1974).
[26] 815 ILL. COMP. STAT. 705/18 (1988).
[27] *Id*.
[28] 815 ILL. COMP. STAT. 705/18(a)(b)(c)(d) (1988).
[29] WASH. REV. CODE § 19.100.180(2)(c) (1991).

time, or is based on other proper or justifiable distinctions considering the purposes of this chapter, and (iii) is not arbitrary."[30]

Indiana's Deceptive Franchise Practice provisions broadly state that it is unlawful for franchisors to engage in the act of "discriminating unfairly among its franchisees or unreasonably failing or refusing to comply with any terms of a franchise agreement."[31] Unlike its counterpart provisions in Hawaii and Illinois, the Indiana provision does not list any defenses to which a franchisor can avoid fault when acting in a discriminatory fashion. This provision has perhaps the widest reach because it is the vaguest – that is, without any stipulations. However, even with such a broad provision, courts still appear hesitant to rule in favor of a franchisee's discrimination claim. In *Carrel v. George Weston Bakeries Distrib., Inc.*, the court was unwilling to grant a franchisee's motion for summary judgment when the facts indicated that the franchisor had provided different commission rates to various franchisees.[32] The court stated that even if discrimination did occur, it must also be both arbitrary and unfair before it furnishes the franchisee with an actionable claim.[33] Therefore, such a decision weakens the impact of a relatively pro-franchisee statute by allowing franchisors to pursue an extensive set of possible defenses to their allegedly actionable discrimination: as a fallback position once the discrimination itself becomes incontrovertible, the franchisor still can present anything that goes to show its actions were pondered or deliberated (not simply arbitrary) and were, in the overall context, just or reasonable.

Two of the six state statutes against franchise discrimination pertain only to the termination or non-renewal of the franchise. These statutes are found in Arkansas and Wisconsin.

Arkansas's anti-discrimination provision is governed by the Arkansas Franchise Practices Act.[34] The statute states in part that it is a violation for a franchisor to "terminate or cancel a franchise without good cause."[35] Good cause is later defined in section 4-72-202(7)(A) as meaning "failure by a franchisee to comply substantially with the requirements imposed upon him or her by the franchisor. . .which requirements are not discriminatory as compared with the requirements imposed on other similarly situated franchisees, either by their terms or in the manner of their enforcement."[36] Therefore, in

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[30] *Id.*
[31] IND. CODE ANN. § 23-2-2.7-2(5) (West 1985).
[32] Carrel v. George Weston Bakeries Distrib., Inc., No. 1:05-CV-1769-SEB-JPG, 2007 WL 2827405, at *26 (S.D. Ind. Sept. 25, 2007).
[33] *Id.*
[34] ARK. CODE ANN. § 4-72-204 (West 2010).
[35] ARK. CODE ANN. § 4-72-204(a)(1) (West 2010).
[36] ARK. CODE ANN. § 4-72-202(7)(A) (West 2010).

Arkansas, a discrimination claim could be brought by a franchisee that was terminated by a franchisor for failure to comply with its franchise requirements if either the terminated franchisee was compelled to follow certain requirements not imposed on others or was treated differently – i.e., its franchise came to an end while other franchisees acting the same did not suffer that fate.

Wisconsin specifically forbids the termination, cancellation or failure to renew a dealership agreement unless there is good cause on the part of the franchisor.[37] "Good cause" is defined in this same chapter as "failure by a dealer to comply substantially with essential and reasonable requirements imposed upon the dealer by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement."[38] This statute has been applied favorably to franchisors in cases such as *Brown Dog, Inc. v. Quizno's Franchise Co.,* in which the court stated that "[i]t is not unlawful discrimination for a grantor to consider each dealer's situation and to decide to keep or terminate a dealer based on whether it has met the newly-imposed goals or has failed to do so."[39] The court elaborated by stating that "[d]ealers have no statutory right to insist on identical treatment."[40] In other words, just as in Indiana, the courts in Wisconsin will go beyond the literal wording of the statute and broadly apply concepts of procedural fairness (non-arbitrariness) and substantive fair dealing, not simply examine the allegedly flawed franchise relationship for evidence of uneven handling.

The Robinson-Patman Act

Despite the limited federal legislation addressing the topic of discrimination in the franchise relationship, franchisees do have the ability to bring claims arising from allegations of price discrimination prohibited by the Robinson-Patman Act.[41] The Robinson-Patman Act generally prohibits any seller from discriminating among its customers with regards to price if the effect would be to reduce competition

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[37] WIS. STAT. ANN. § 135.03 (West 2011).
[38] WIS. STAT. ANN. § 135.02(4) (West 2011).
[39] Brown Dog, Inc. v. Quizno's Franchise Co., No. 04-C-18-X, 2005 WL 3555425, at *15 (W.D. Wis. Dec. 27, 2005).
[40] *Id.*
[41] 15 U.S.C. § 13(a) (1988). *See* Emerson, *supra* note 15, at 567-68.

among the seller's customers.[42] In the franchise context, a franchisor who sells its products to various franchisees would be prohibited from engaging in price discrimination among them.

A claim for price discrimination by franchisees under the Robinson-Patman Act[43] can take one of two forms: a franchisee may claim that the franchisor sold products at a lower price to company-owned units and non-franchise retailers, or the claim may address such behavior with other franchisees. However, claims of discrimination by franchisees regarding disparate treatment when compared with the price of products sold to company-owned units are not within the realm of the Robinson-Patman Act.[44] According to the court in *Mumford v. GNC Franchising, LLC*, this determination is based on the Supreme Court's holding that "a parent and a wholly owned subsidiary are a single economic unit under the Sherman [Antitrust Act, a decision that] has been construed to apply to the Robinson-Patman Act as well."[45] Therefore, a franchisee can only claim price discrimination with regard to disparate treatment among various franchisees.

To bring a successful claim under the Robinson-Patman Act, there must be eight jurisdictional elements:

> These elements are: (a) the 'discriminator' is a 'person'; (b) the discrimination arises from at least two consummated and contemporaneous sales transactions; (c) the discrimination is by the same seller; (d) the discriminatory sale involves 'commodities'; (e) the commodities are of 'like grade and quality'; (f) the discriminatory transaction involves interstate commerce; (g) there is a difference in the prices that different buyers pay; and (h) there is competitive injury.[46]

If one or more of the above elements are absent, the franchisee's claim will fail regardless of the effect on competition.[47] While the first six elements are generally "present in most franchise price discrimination cases where the franchisor continuously sells products throughout its system," the price differential and competitive injury are often more complex elements to prove.[48]

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[42] PHILIP F. ZEIDMAN & BRET LOWELL, LEGAL ASPECTS OF SELLING AND BUYING § 970 (3d ed. 2010).
[43] 15 U.S.C. § 13(a) (1988).
[44] Stuart Hershman, *Revisiting the Robinson-Patman Act in the Franchise Supply Setting*, 16 FRANCHISE L.J. 57, 77 (1996). *See* Emerson, *supra* note 15, at 568.
[45] Mumford v. GNC Franchising, LLC, 437 F. Supp. 2d 344, 360 (W.D. Pa. 2006) (holding that GNC could not be held liable under the Robinson-Patman Act for selling products to company-owned stores at different and lower prices than those sold to franchise stores).
[46] Hershman, *supra* note 42, at 77.
[47] *Id*.
[48] *Id*.

The complexity associated with proving a difference in the prices that different franchisees pay results from the various reasons for which a franchisor may justify selling at various prices.[49] These defenses arise both from the language of the Robinson-Patman Act and common law interpretations in which prices are subject to change based on "changing conditions affecting the market for or the marketability of the goods concerned," and different prices can be charged to different franchisees if the franchisor can prove that there are differences in the costs of dealing with certain customers.[50]

Proving competitive injury can be equally as challenging for franchisees, as there must be actual, provable injury in order for recovery of damages.[51] If there is an only an inference of injury or it is likely to result, the franchisee can only recover injunctive relief.[52] Additionally, courts have been unwilling to accept inferences of injury if the discrimination is temporary or insubstantial in amount.[53]

In some instances, franchisors have insulated themselves from a franchisee's ability to claim competitive injury by imposing territorial or customer restraints in their franchise agreements.[54] While there is some variation in the effect of these restraints depending on the agreement, it is possible that a franchisor could sell its products to franchisees at varying prices without it having an actual effect on competition.[55] In such a situation, it would be challenging for the franchisee to win on its discrimination claim because it could not prove there was actual competitive injury.

Despite the interpretation of the Robinson-Patman Act, many states have enacted statutes that condemn unfair trade practices.[56] These statutes are far more pervasive in terms of the number of states that have enacted them when compared to specific discrimination statutes.

The Implied Covenant of Good Faith and Fair Dealing

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[49] *Id*. at 78.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*. at 79.
[54] ZEIDMAN & LOWELL, *supra* note 42.
[55] *Id*.
[56] *Id.;* Emerson, *supra* note 2, at 568.

If a franchisee's discrimination claim is not in accordance with the requirements of either the state statute on point or the Robinson-Patman Act, the franchisee can allege a general breach of the implied covenant of good faith and fair dealing. This covenant is implied in every agreement and requires the parties to treat one another fairly and to not prevent the other party from performing the contract.[57] As stated in *Bonanza Int'l, Inc. v. Restaurant Mgmt. Consultants, Inc.*, this requirement is different from those that pertain to discrimination in that the disparate treatment of franchisees has no bearing on the performance of the covenant.[58] Therefore, the franchisee could prove a breach of the implied covenant even if the franchisor's dealings with a third party are deemed to be acceptable.

The implied covenant has direct correlation with the good cause requirement listed in many state statutes related to franchise termination. If an implied covenant of good faith and fair dealing is present in the agreement, a franchisor cannot terminate an agreement unless good cause exists.[59] However, this is limited by the fact that an express provision within the contract can state that a franchise can be terminated for no cause, in which case the implied covenant no longer has relevance.[60] Additionally, the franchisor's motive can be irrelevant to a determination of good faith if there is sufficient evidence of good cause, regardless of the true intention.[61] This has a limiting effect on the good faith and fair dealing requirement in the termination context.

Even apart from the application to franchise termination, the implied covenant of good faith and fair dealing has limited relevance to claims against franchisors. Specifically, the implied covenant cannot override any express terms written into the franchise agreement.[62] Therefore, franchisor behavior that may be in opposition of the good faith and fair dealing requirement is likely to be permitted by a court if it is in accordance with the contractual conditions. Additionally, most courts have held that the implied covenant does not create a separate cause of action if breached or an individual, substantive right.[63] Therefore, a franchisee's claim for franchisor's failure to comply with the covenant would have to be based on lack of good faith or a breach of a specific contractual provision,[64] but does not pertain to bad faith in accordance with express contractual terms.

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[57] Burzych & Matthews, *supra* note 1 at 117; Joel Iglesias, *Applying the Implied Covenant of Good Faith and Fair Dealing to Franchises*, 40 HOUS. L. REV. 1423, 1424-25 (2004).
[58] Bonanza Int'l, Inc. v. Rest. Mgmt. Consultants, Inc., 625 F. Supp. 1431 (E.D. La. 1986).
[59] 62B Am. Jur. 2d Private Franchise Contracts § 315 (2011).
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Iglesias, *supra* note 57 at 1439-40.

Lastly, not every jurisdiction recognizes the implied covenant of good faith and fair dealing.[65] Therefore, as with the state statutes pertaining to discrimination, a franchisee may have a low chance of success bringing a claim of bad faith against a franchisor if the jurisdiction does not recognize the requirement of fair dealing.

Despite its limitations, some argue that the implied covenant of good faith and fair dealing logically extends to the franchise relationship, as the franchise agreement is nothing more than a contract.[66] According to the Restatement (Second) of Contracts,[67] all parties to an agreement have a duty of good faith and fair dealing in its performance; because this provision applies to all contracts, it should follow that the covenant is implied in all franchise agreements.[68]

Comparative Law

While the courts within the United States place a high degree of deference on the written franchise agreement between a franchisee and a franchisor, the European Union takes a more active role in the regulation of this business relationship. Article 85 of the Rome Treaty establishing the European Economic Community addressed the regulation of franchise agreements for the European Union.[69] The policies of this Article provide many rights to franchisees that may otherwise be prohibited by express contractual terms of a franchise agreement drafted in the United States. For example, the Article allowed franchisees to buy products from other franchisees and prohibits franchisors from denying the supplier nomination by a franchisee except in situations in which the franchisor's reputation may be negatively affected.[70] The result is that franchisees are able to "remain independent businesses . . . without undue influence from a franchisor."[71]

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[65] 62B Am. Jur. 2d Private Franchise Contracts § 315 (2011).
[66] Iglesias, *supra* note 57, at 1431-32.
[67] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).
[68] Iglesias, *supra* note 57, at 1432.
[69] James W. Kirkconnell, *Franchise Agreements and Adjudication in the United States and the European Union*, 18 FLA. J. INT'L L. 413, 418 (2006). Actually, Section 85 of the Rome Treaty (1957) which instituted the European Community has been superseded by Article 81 § 3 of the Amsterdam Treaty, signed February 10, 1997 (prohibiting vertical agreements and concerted practices). Robert W. Emerson, *Franchise Contracts and Territoriality: A French Comparison*, 3 ENTREPRENEURIAL BUS. L.J. 315, 325 & 325 n.39 (2009). The effects of the "renumbered" Article appear to be about the same as under Article 85, which still is discussed and turned to for guidance although no longer technically in force.
[70] *Id.* at 419.
[71] *Id.*

The European Union approach to franchise agreements limits the potential for abuse by franchisors that may be more prevalent under the United States method. While the Article does not specifically address the potential for discrimination claims, it is likely that such a claim by a franchisee would have a greater chance of success due to the general protection afforded it by the regulation.

Conclusion

A franchisee in the United States is generally better served pursuing a claim of discrimination under a more general theory of contract law and implied covenants, or perhaps fair competition laws than under the limited, few in number, narrowly interpreted state statutes directly assailing discrimination within a franchise network.