



Franchising Discrimination Claims

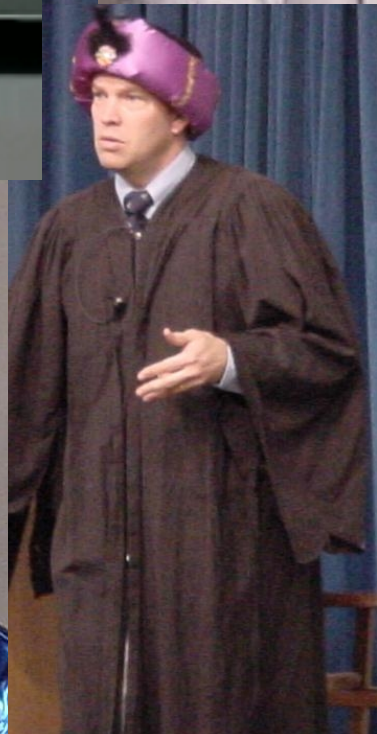
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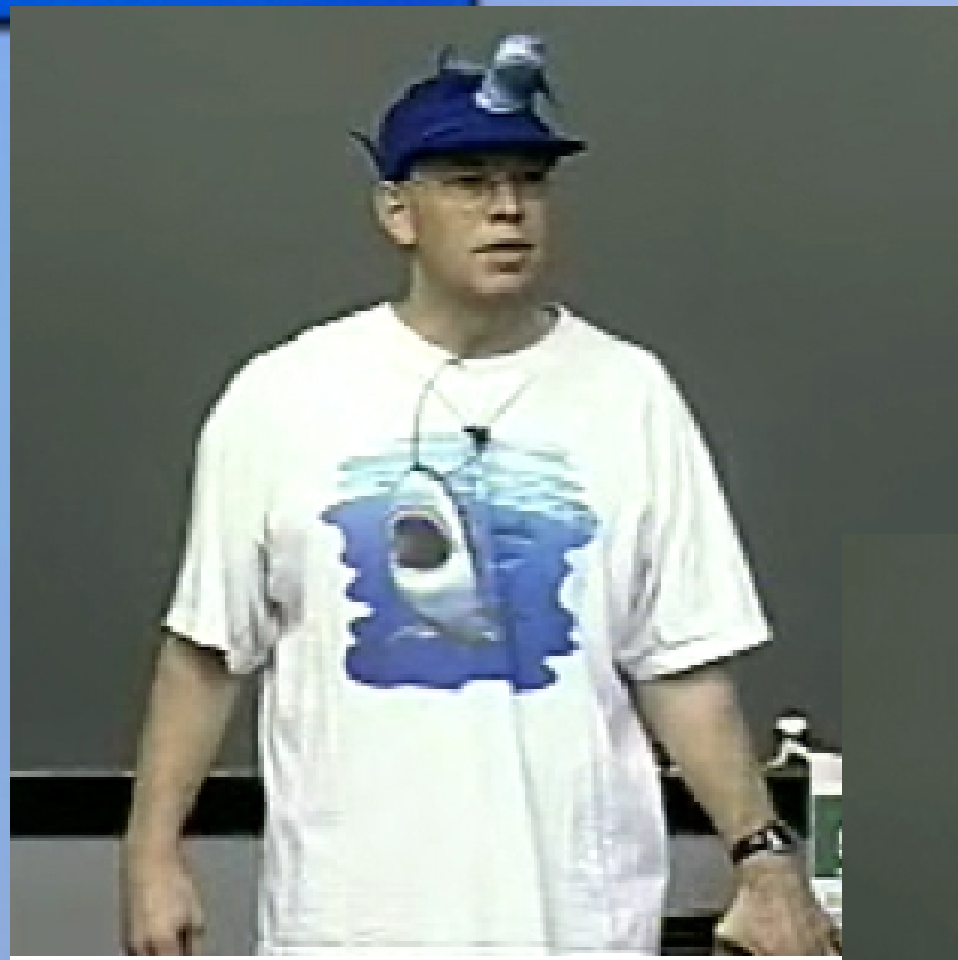
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The Modern-Day Franchise

COMMON POPULAR CONCEPTS OF FRANCHISING –

Franchise as a Right (to Vote)

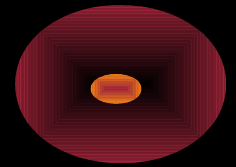
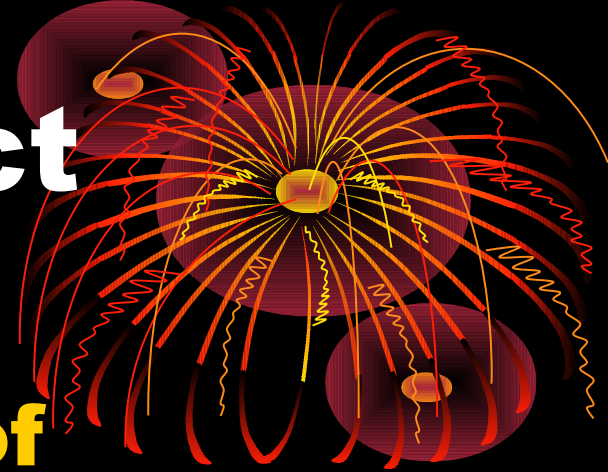
Sports Franchises (the Gators)

Brands



Franchise Contract

- **Key document—basis of litigation**
- **Needs specialized legal attention**



Contracts and

GOOD?

Operations Manuals

EVIL?

Like Zorro ?? !!

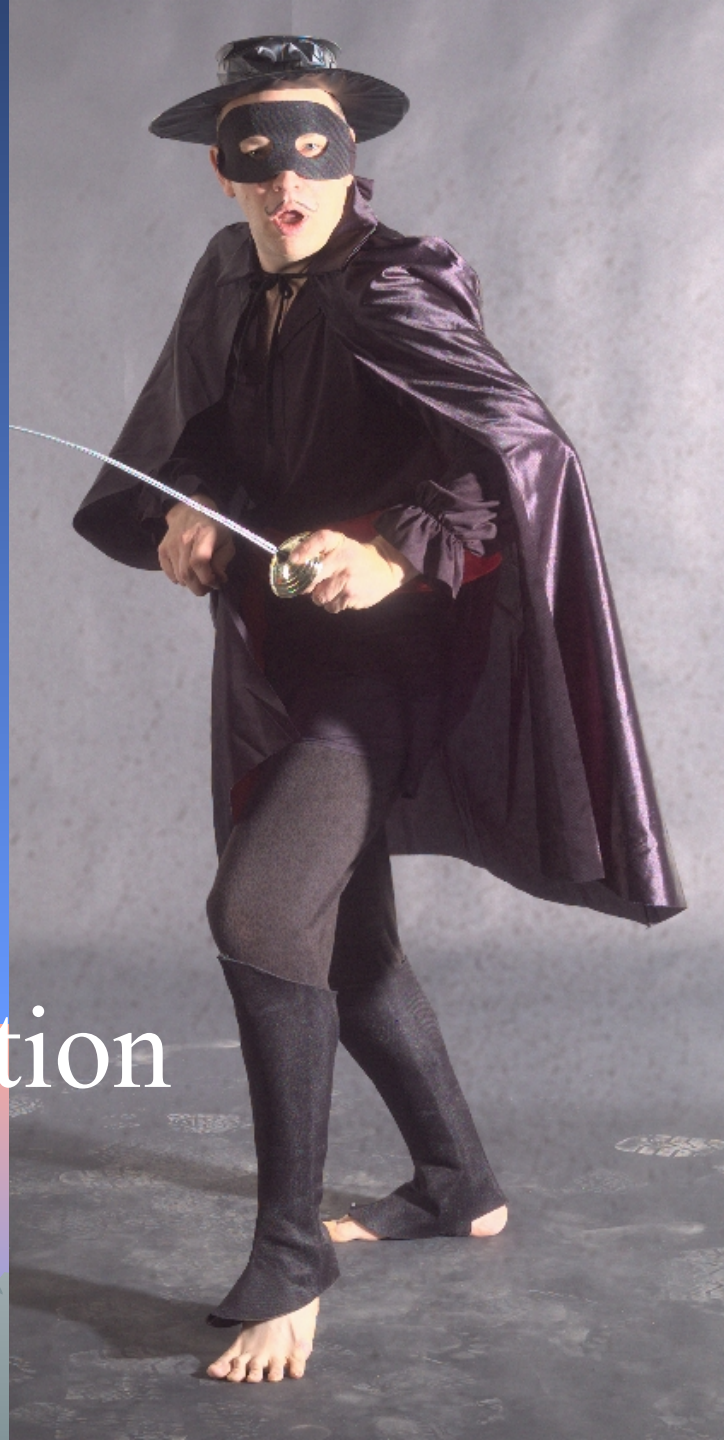


Stunned

by

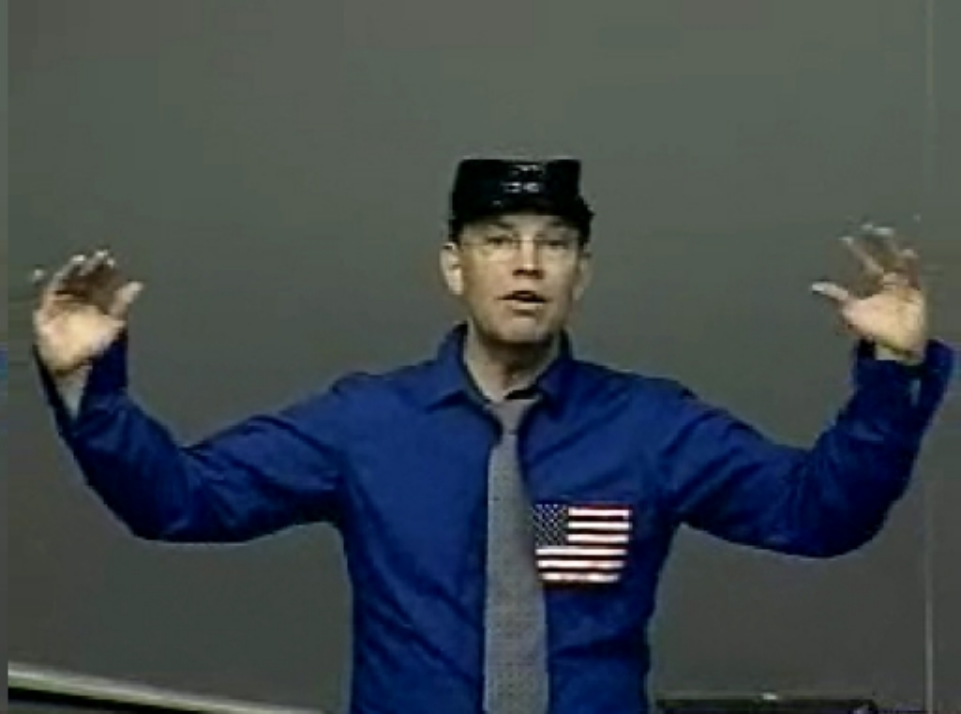
Discrimination

Claims!

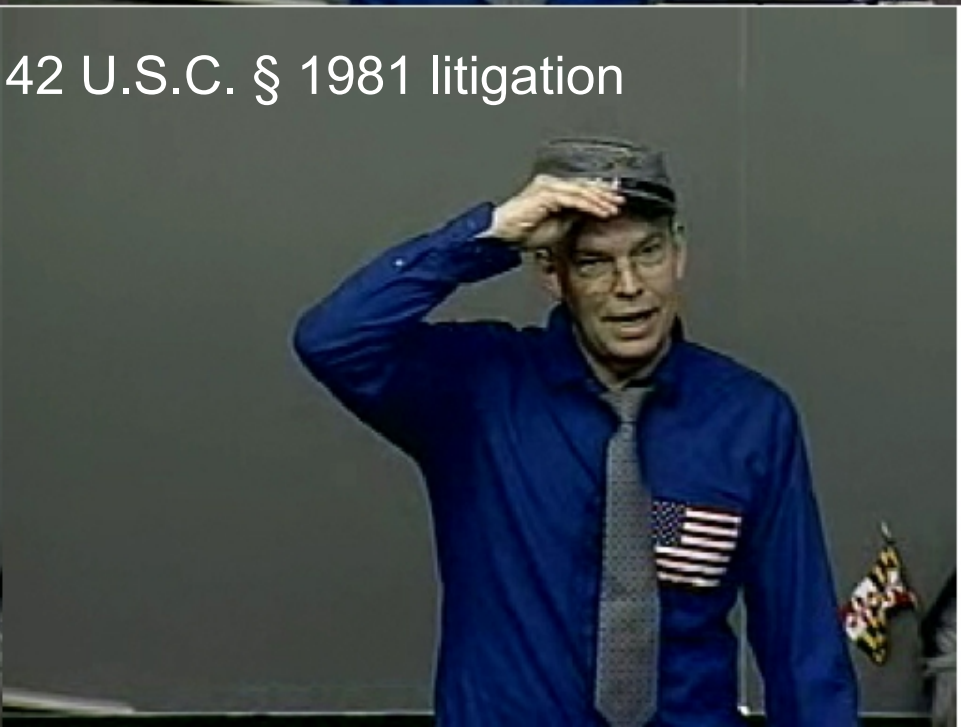
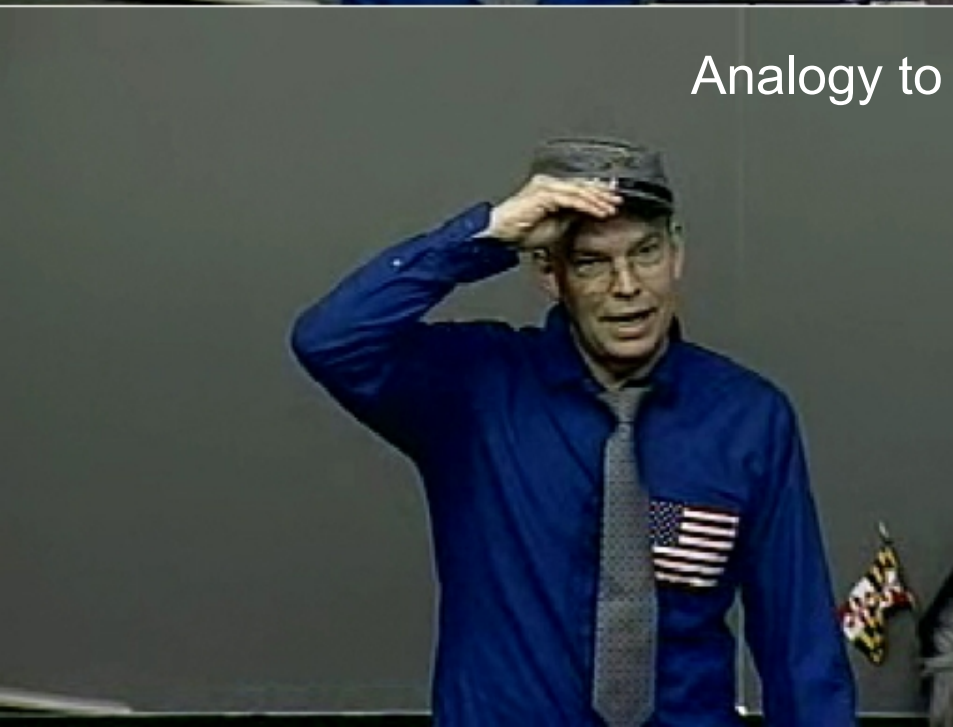


Weighing Alleged Discrimination:

- 
- Similarly situated franchisees
 - Treated differently for a
 - Material aspect of the franchised business
 - Courts have wide discretion – factors to be considered: “those relevant to the underlying business decisions”



Analogy to 42 U.S.C. § 1981 litigation



Many factors to consider – all sorts of possible combinations – like the many possible toppings on your favorite pizza pie brought to you by your smiling pizza guy:

Highly context specific – e.g., similarly expired contracts

defined geographical or territorial status



SO LET'S THINK

Because franchisors tend to employ standardized terms, perhaps this alone would suffice for reviewing courts to deem franchisees similarly situated. But that cannot be assumed, as franchisors typically maintain the right to adjust the contractual terms among franchisees as necessary. For example, the PM PA " only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or being offered.





A plaintiff-franchisee: Besides proving it is similarly situated to other franchisees that are being treated more favorably, this plaintiff-franchisee may also have to address whether the discrimination pertains to a material aspect of the business.

This especially matters for alleged discrimination in terminations, because many state statutes provide that termination is only acceptable IF the terminated franchisee failed to perform substantially some material aspects of the contract.

The same holds true under the PMPA: 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.'"

15 U.S.C. §§ 802(b)(2)(A).

So, when asserting that a franchisor has improperly terminated the franchise, a franchisee must prove that it performed the material portions of the agreement.

Hypothetical Example - Aggrieved franchisee Fran sues franchisor Copious Company, for discrimination – that Fran is being treated worse than other franchisees. The court must first review the written franchise agreement - the listed terms and conditions - to see whether the Copious's alleged behavior contradicts the agreement itself. Take the terms of the franchise agreement and Copious' actual treatment of Fran, and compare both with that of similarly situated franchisees.

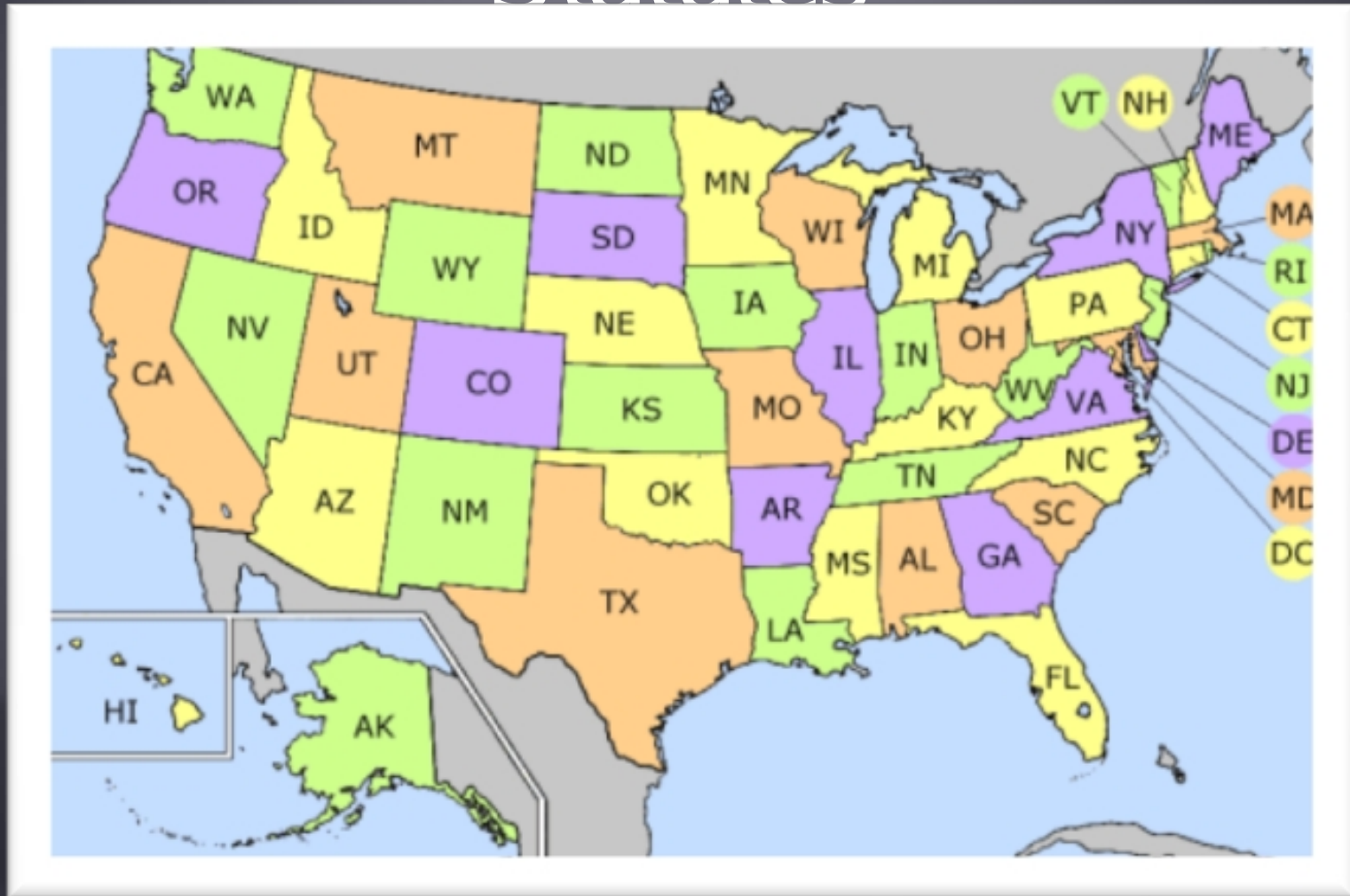
Even if the court determines that Fran is being treated differently, then the court must decide the legal effect of effect of such treatment.

But only a handful of states explicitly forbid franchise discrimination by statute.

And the court considers any other explanation from Copious as to why its differential treatment of Fran arose from legitimate business.



Express Anti-Discrimination Statutes



ARK, HAW, ILL, IND, WASH, WIS

State Franchisor-Franchisee Relationship Laws

Most Common:

1. *Restriction on Franchisor's right to terminate agreement:* need "good cause." Arkansas and Wisconsin
2. *Duty of good faith:* can limit party's discretion in performance or require additional performance. INDIANA

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.

Wisconsin "Good Cause" statute: "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." WIS. STAT. § 135.03.

Applied favorably to franchisors in cases such as *Brown Dog, Inc. v. Quizno's Franchise Co.*, 2005 WL 3555425 (W.D. Wis. 2005): "[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. . . . Dealers have no statutory right to insist on identical treatment." *Id.* at *15.

So, just as in Indiana, the courts in Wisconsin go beyond the statute's wording 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.





Getting That Name Recognition – Grabbing a Market

“Coming to America”

ROBINSON-PATMAN ACT





Price DIFFERENTIAL AND COMPETITIVE INTURY

- Various reasons

For selling at

Various Prices



With great powers...



Come great responsibilities.

Fairness is an Issue

- Regardless of what is written in the contract, some parties demand “fairness”.

Big
Guy
vs.
Little
Guy



*The Covenant of
Good Faith
and Fair Dealing*



HAVING YOUR CAKE AND EATING IT TOO

What Should be Done?

- The franchisor and franchisee should deal with all relationship concerns within the franchise contract signed by the parties. (Laws imposed by legislation or adjudication may not be the most efficient manner to deal with the relationship, as networks and the cases about them often have peculiar characteristics.



- Franchisee Associations
- Adoption of a private franchise agreement certification process



What Should be Done? Continued:

- The franchise contract should be simple and meet the non-drafting party's expectations.
- Reviewing courts can even look at a party's relationship-specific investment and apply legal concepts such as good faith and fair dealing as well as default rules for contractual gap-filling.



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Fin

ENDE