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# Fighting arbitration clauses in franchisor contracts

Jean R. Sternlight

*Purporting to serve justice, efficiency, and freedom of contract*, business interests are increasingly attempting to use binding arbitration clauses to secure unfair advantages over unknowing parties. These arbitration advocates proclaim the supposed (and unproven) cost and speed advantages of arbitration over litigation, while they seek to use arbitration to eliminate obligations and protections that would exist if claims were brought in court.<sup>1</sup>

While a series of U.S. Supreme Court cases have come down in favor of these business interests,<sup>2</sup> courts are increasingly refusing to enforce clauses that are deemed unconscionable or that prevent consumers or employees from adequately protecting their federal statutory rights. Arbitral organizations like the American Arbitration Association (AAA) have issued a series of "due process protocols," and the AAA claims it is refusing to administer unfair clauses.

Although many jurisdictions have recognized that the same kind of power imbalances that plague relationships between companies and consumers or between employers and employees may also exist in the franchise context, the use of arbitration clauses to disadvantage franchisees has received relatively little attention. In fact, courts seemingly have been eager to enforce arbitration clauses that appear in franchise agreements.

Yet, many of the arguments that have been used to protect consumers and employees should also be applied to protect certain franchisees. Recognizing that there is often a significant power disparity between franchisors and franchisees, Congress, state legislatures, and courts have all

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taken steps to protect franchisees against potentially unfair contractual agreements. Protective legislation and court decisions are typically based on a finding that franchisees often, if not always, are significantly less sophisticated than franchisors.

At the federal level, several bodies of law are designed to protect franchisees from franchisor abuses. A Federal Trade Commission (FTC) rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" requires franchisors engaged in interstate commerce to make specific disclosures to potential franchisees. Failure to do this is an "unfair or deceptive act or practice within the meaning of §5 [of the Federal Trade Commission Act]."

A report issued by the FTC in connection with the rule references "the relative lack of business experience of most prospective franchisees, the highlighting of unusually successful franchisees by franchisors and the popular press, . . . and the informational imbalance present between prospective franchisee and franchisor."<sup>3</sup>

Congress has passed legislation geared to protect franchisees from abusive practices in two specific business areas. First, the Automobile Dealer's Day in Court Act<sup>4</sup> was passed in 1956 "to balance the power now heavily weighted in favor of automobile manufacturers."<sup>5</sup> This statute, which applies to franchise agreements between automobile manufacturers and dealers, requires franchisors to act in "good faith" in enforcing terms of the agreement or in terminating the franchise.

Second, the Petroleum Marketing Practices Act (PMPA) limits the circumstances in which motor fuel suppliers can terminate or fail to renew contracts of their franchisees.<sup>6</sup> This law was intended to correct the great "disparity of bargaining power" between petroleum franchisors and franchisees.<sup>7</sup> In passing it, the Senate noted franchisees' complaints that petroleum franchise agreements are "contracts of adhesion" and found that these contracts "may translate the original disparity of bargaining power into continuing vulnerability of the franchisee to the demands and actions of the franchisor."<sup>8</sup>

State laws regarding franchises vary sub-

## Franchisees often, if not always, are significantly less sophisticated than franchisors.

stantially. Some states have concluded that the imbalance of power requires that franchisees be provided with special protections. For example, in *Electrical & Magneto Service Co. v. AMBAC International Corp.*, the Eighth Circuit concluded that "the Missouri legislature created a legislative presumption that franchisees are in an inferior bargaining position with respect to franchisors and thus are entitled to protection from the oppressive use of the franchisor's superiority."<sup>9</sup>

Some states have restricted the circumstances under which franchises may be terminated, some have prohibited franchisors from mandating out-of-state forums or other states' laws, some have required franchisors to register before selling franchises within their state, and some have required that franchisors provide certain disclosures to franchisees. On the other hand, a substantial number of states do not have special legislation geared to protect franchisees.

### Undermining protection

Courts are permitting companies to use arbitration clauses to accomplish ends that might be forbidden in litigation. Specifically, franchisors are using these clauses to secure waivers of the right to jury trial, to impose out-of-state forums, and to limit franchisee remedies.

How is this justified? Logically, it's not. Even leading franchisor attorney Edward Dunham admits that "as a theoretical matter, the elevated status of arbitration agreements is difficult to justify."<sup>10</sup>

The Supreme Court has never gone so far as to say that putting an otherwise improper or illegal clause in an arbitration agreement somehow immunizes that clause from attack. Nonetheless, many courts have misapplied arbitration precedents and preemption arguments to support decisions that allow franchisors to effectively exempt themselves from legislation and even constitutional provisions that would protect franchisees.<sup>11</sup>

Franchisors commonly use arbitration clauses, and they often include more than a mere requirement to arbitrate disputes. Professor Christopher Drahozal of the University of Kansas School of Law recently studied the Uniform Franchise Offering Circulars and franchise agreements filed by 75 leading franchisors in Minnesota and found 45 percent of these contained arbitration clauses.

The majority of these, some 82 percent, required that arbitration take place in the franchisor's home location; 75 percent of these clauses sought to preclude recovery of punitive damages; most clauses required franchisees to arbitrate all claims but allowed franchisors to litigate certain claims; many clauses precluded class relief; several provided de novo hearings if a franchisee's (but not a franchisor's) recovery exceeded a certain amount; and one clause prohibited the arbitrator from awarding attorney fees.<sup>12</sup>

Some franchisors have found it is easier to avoid jury trials by getting franchisees to sign arbitration clauses before a dispute arises rather than obtaining jury trial waivers during litigation. The Seventh Amendment jury trial right is subject to waiver only if the waiver is given knowingly and intelligently.

Many courts have held waivers in franchise agreements or similar business agreements unenforceable,<sup>13</sup> while others have held that such clauses were enforceable only because the parties signing the agreements were relatively knowledgeable and sophisticated enough to know what they were signing.<sup>14</sup>

Yet, courts are far more willing to enforce jury trial waivers contained in arbitration clauses. They typically cite the federal policy favoring arbitration without mentioning constitutional or statutory provisions allowing jury trials. As attorney Dunham notes, "[A]rbitration agreements are routinely enforced; even when the clause was inconspicuous and never negotiated, there was clearly disparate bargain-



ing power, and the franchisee never had a lawyer review the agreement."<sup>15</sup>

With respect to forum selection, many state legislatures and courts have prohibited franchisors from requiring franchisees to file their claims in distant forums, concluding that this practice may impose an unfair and sometimes impassable burden on franchisees who attempt to protect their legal rights.<sup>16</sup> Franchisors are increasingly using arbitration to avoid these limits.

Several courts have explicitly held that state legislatures cannot prohibit forum selection clauses in arbitration agreements, although they may restrict forum selection in litigation. Specifically, these courts have concluded that prohibiting the use of these clauses in arbitration agreements is preempted by the Federal Arbitration Act (FAA).<sup>17</sup>

In some cases, a class action is a franchisee's only hope of recovery. A claim that might be too small or too complex to be litigated by any individual franchisee may be pursued more practically by a group of franchisees in a class action.

Courts have approved class actions for claims like fraud and antitrust.<sup>18</sup> However, several federal courts have ruled that a dispute covered by an arbitration clause cannot be handled as a class action unless the clause specifically allows this.<sup>19</sup> Only two state court decisions<sup>20</sup> and one unpublished federal decision<sup>21</sup> have permitted class actions to proceed in arbitration. Therefore, some attorneys representing franchisors or banks suggest arbitration is a shield against class actions.<sup>22</sup>

Franchisors are using forum shopping as another procedural tool to secure strategic advantages over franchisees. Federal courts tend to be more enthusiastic than state courts in enforcing mandatory arbitration provisions.<sup>23</sup> Therefore, when franchisees file suit against franchisors in state court, franchisors often file a separate suit in federal court.

Franchisors frequently seek not only an order compelling arbitration of the dispute but also an antisuit injunction barring the state court from further considering the matter. A number of federal courts have acceded to these injunction requests, despite arguments that enjoining state courts

from action violates well-established federalism principles.<sup>24</sup>

It has been suggested that arbitration clauses, which appear to benefit franchisors at the expense of franchisees, may not be unfair after all. In arguments reminiscent of the old "trickle-down economics" theories, these commentators contend that the benefits franchisors achieve from seemingly unfair agreements may be greater than any detriment suffered by the franchisees and that free-market operation will ensure that the savings achieved by the franchisors are passed on to the franchisees.<sup>25</sup> These authorities also suggest that legislatures or courts that restrict the use of arbitration clauses may actually harm franchisees by raising the price of franchises.

There are two primary flaws with this theory. First, it is founded on assumptions of "perfect competition" in the marketplace that seem inconsistent with the real world as we know it.<sup>26</sup> There is little or no reason to be confident that costs saved by franchisors will be passed on to franchisees or customers, or that franchisees can choose between companies that do or do not impose arbitration clauses.

Second, when courts or commentators suggest that courts should use such economic arguments to reject policies set out in legislation, they are improperly suggesting that judges substitute their own thinking for that of legislators. If lawmakers have concluded that protective legislation is necessary and beneficial, courts should not rely on their own economic theories to vitiate the law.

### **Fighting back**

Efforts to create a more level playing field for franchisees take many forms.

Legislation has been introduced in Congress that is geared to protect franchisees and distributors from mandatory arbitration. In the House, the Fairness and Voluntary Arbitration Act, H.R. 534, would permit post-dispute rejection of arbitration in any "sales and service contract." The bill has 212 cosponsors.<sup>27</sup> This bill was reported from the subcommittee to the full committee on July 13, 2000.

In addition, the Senate's Motor Vehicle

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Franchise Contract Arbitration Fairness Act of 1999, S. 1020, which has 38 Republican and Democratic cosponsors, would protect car dealers from mandatory arbitration imposed by manufacturers and would allow them to reject arbitration after a dispute has arisen.<sup>28</sup>

Litigation can also provide remedies. Litigators representing franchisees seeking to avoid arbitration should consider arguments founded on the U.S. Constitution; federal statutes; state constitutions and statutes; contract law; and a series of statutes and doctrines governing the relationship between federal and state courts.

*U.S. Constitution.* Although courts have rarely used the Seventh Amendment's jury trial guarantee to void privately imposed mandatory arbitration clauses, this right has potential as a strong protection for franchisees.

The Supreme Court and lower courts have repeatedly said that the right to a jury trial may be waived only if the waiver is knowing and voluntary and have required that "courts indulge every reasonable presumption against waiver."<sup>29</sup> Therefore, when a form contract was used to impose binding arbitration on an unsophisticated franchisee—and particularly when that franchisee had no legal representation or was given limited time to review the contract—the Seventh Amendment argument should prevail.

Admittedly, courts have often cited the Federal Arbitration Act's "favoritism" toward arbitration in insisting that form arbitration clauses are enforceable, but the federal Constitution trumps any "favoritism" in a federal statute.

The Seventh Amendment argument will likely fail, however, where claims are brought in state rather than federal court, because the amendment has only been applied in federal court. Further, when franchisees are sophisticated or have secured legal representation, courts will likely find that they knowingly and voluntarily waived their jury trial right.

*Federal statutes.* Courts are increasingly recognizing that arbitration clauses are unenforceable when they prevent people from enforcing their rights under a federal statute. As the Supreme Court has repeat-

edly stated, courts should compel arbitration only "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum [such that] the statute will continue to serve both its remedial and deterrent function."<sup>30</sup>

Depending on the language and legislative history of the statute, franchisees

## **A study of franchise documents filed by 75 leading franchisors in one state found 45 percent of these contained arbitration clauses.**

might be able to argue that it prohibits mandatory arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court held that car distributors had failed to show that Congress intended to preclude arbitration of antitrust claims brought in an international context, but the Court left open the possibility that courts might interpret other federal legislation to preclude arbitration altogether.<sup>31</sup> Outside the franchise context, a few courts have found that claimants seeking to enforce certain rights under Title VII, the federal bankruptcy laws, or the Magnuson-Moss Act cannot be forced to arbitrate those claims.<sup>32</sup>

Alternatively, franchisees might present the more narrow (and potentially more persuasive) argument that even though a federal statute does not entirely proscribe mandatory arbitration, the contested clause contains unfair terms that would prevent franchisees from vindicating their federal rights. Franchisees successfully presented this argument in *Graham Oil Co. v. ARCO Products Co.*<sup>33</sup>

In that case, a gasoline distributor argued that the arbitration clause was invalid because it mandated the surrender of specific rights provided by the Petroleum Mar-

keting Practices Act. Specifically, the clause purported to forfeit the distributor's right to recover exemplary damages permitted by the PMPA, prohibited recovery of reasonable attorney fees allowed by the act, and shortened the distributor's statute of limitations from one year to 90 days or in some cases six months.

The Ninth Circuit struck down the clause, stating that "the fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily mandated rights and benefits that Congress intended them to possess."<sup>34</sup> The court explained that the very purpose of the PMPA was to protect franchisees and to correct the great "disparity of bargaining power" between petroleum franchisors and franchisees.

The *Graham Oil* rationale can be extended to protect franchisees' rights under other federal statutes when the arbitration clause is particularly egregious. Courts have recognized that federal statutes may render arbitration clauses unenforceable when the clause calls for a biased arbitrator, eliminates certain types of relief, imposes excessive costs, or eliminates the opportunity to proceed in a class action.<sup>35</sup>

*State constitutions and statutes.* Many state constitutions and state statutes contain provisions that franchisees can potentially use to defeat mandatory arbitration provisions. State constitutions frequently guarantee rights to jury trial or access to the courts. State statutes may provide for nonwaivable substantive remedies, prohibit franchisors from requiring franchisees to resolve their disputes out of state, regulate the way in which arbitration clauses are provided to franchisees, or purport to eliminate arbitration altogether in certain contexts.

However, courts have held many state laws to be preempted by the FAA. When a state law is found to target arbitration clauses for elimination, the Supreme Court and lower courts have consistently found the provision to be preempted.

For example, in *Doctor's Associates, Inc. v. Casarotto*, a case involving a Subway sandwich shop franchise, the Court held



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that the FAA preempted a Montana statute that regulated the placement of an arbitration provision in a contract.<sup>36</sup> Earlier, in *Southland Corp. v. Keating*, the Court had held that California's franchise statute was preempted to the extent it was interpreted to prohibit arbitration of claims brought under that statute.<sup>37</sup>

Not all state laws that might invalidate an arbitration clause are necessarily preempted. The Supreme Court has repeatedly stated (as does the FAA itself) that arbitration clauses may be voided using general contract defenses such as unconscionability, fraud, or duress.

Moreover, the Court has emphasized that the problematic state laws are those that *target* arbitration clauses. The Court has never said that a law seeking to protect franchisees or others in both litigation and arbitration would be preempted. Thus, where an arbitration clause contains provisions that would prevent franchisees from pursuing their rights under a particular state constitution or law, courts should be able to void at least those aspects of the clause.

Congress never intended the FAA to be a shield that companies could use to impose egregious contract terms that would be otherwise impermissible. Rather, Congress merely sought to ensure that courts would not, on a general basis, refuse to enforce arbitration provisions.

For example, despite several federal appellate decisions to the contrary,<sup>38</sup> franchisees should be able to void a forum selection clause in an arbitration agreement where state law prohibits clauses that mandate a foreign forum in both litigation and arbitration. The Montana Supreme Court so held in *Keystone, Inc. v. Triad Systems Corp.*, concluding that state provisions barring Montana residents from being required to litigate claims out of the state were not preempted by the FAA and that an arbitration clause imposed on an automotive parts distributor was unenforceable to the extent it mandated out-of-state arbitration.<sup>39</sup> The provision is evenhanded and does not target arbitration, the court found.

Similarly, state constitutional or statutory provisions that protect generally

against loss of the jury trial right or against mandatory forum selection clauses, including arbitration, should not be preempted. Outside the franchise context, several courts have refused to enforce arbitration provisions that did not comply with policy encompassed in state laws and have held that the FAA did not preempt these provisions.<sup>40</sup>

**Contract law.** Standard contractual defenses can be used to void or at least reform an arbitration clause. Franchisees who can make persuasive arguments of unconscionability, fraud, or duress should not be compelled to arbitrate their claims. Courts have accepted unconscionability arguments with respect to arbitration clauses that mandate a potentially biased arbitrator, impose excessive costs, limit available remedies, or deny claimants access to a class action.<sup>41</sup>

Also, several franchisees have defeated forum selection clauses in franchise agreements on the ground that there was no "meeting of the minds."<sup>42</sup> However, a franchisee who attacks the contract in general, rather than the arbitration clause in particular, may be required to make his or her arguments to the arbitrators rather than a court.<sup>43</sup>

**Federalism.** Franchisees should be prepared to use a number of federal jurisdiction statutes and doctrines to prevent franchisors from enjoining claims in state court. These include the federal Full Faith and Credit statute, the Anti-Injunction Act, claim and issue preclusion, traditional equitable principles, and various types of abstention. The further the state court action has progressed, the less subject it should be to antisuit injunction by a federal court.<sup>44</sup>

## Fair is fair

Many people have debated whether franchisees are relatively unsophisticated individuals deserving of protection from powerful franchisors or whether, instead, they tend to be experienced and sophisticated businesspeople, who should be held to the fine print of their contracts. I tend to believe that the first characterization is more often accurate, but the question, in any case, need not be resolved on a general

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basis in order for the courts to do their jobs.

Where a legislature has concluded that franchisees are entitled to protection, courts should enforce the law unless it is tailored so narrowly to arbitration that it is found to be preempted by the FAA. Similarly, to resolve arguments regarding jury trial waiver or unconscionability, courts need not make a determination as to the sophistication of franchisees generally. The courts should focus only on the litigants who appear before them. Where a franchisee is relatively unsophisticated, lacks adequate legal counsel, and has been overwhelmed by a powerful franchisor, courts should be willing to refuse to enforce an arbitration clause on the ground that the franchisee did not knowingly or intelligently waive its jury trial right or that the clause is unconscionable.

Franchisees, like consumers, employees, and others, are entitled to protection under the U.S. Constitution and federal and state laws. Franchisors should not be permitted to use arbitration clauses to exempt themselves from these legal protections. Existing law, if properly interpreted, can protect against many such abuses.

Where existing law proves insufficient to protect franchisees from unjust or unfair arbitration clauses, Congress and state legislatures must take steps to provide franchisees with the legal protections they are due. □

#### Notes

1. See generally Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

2. The articles in note 1 discuss many of these cases.

3. 43 Fed. Reg. 59614, 59626 (1978).

4. 15 U.S.C. §§1221-1225 (1997).

5. Pub. L. No. 1026, 70 Stat. 1125.

6. 15 U.S.C. §§2801-2806 (1997).

7. S. Rep. No. 95-731, at 17 (1978), reprinted in U.S.C.A.N. 873, 876.

8. *Id.*

9. 941 F.2d 660, 663 n.3 (8th Cir. 1991).

10. Edward Wood Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91, 98-99 (2000). Of course, Dunham does not admit that the arbitration cases are wrongly decided but rather argues that the protec-

tions that have been eliminated with arbitration should also be eliminated in litigation, using a freedom of contract argument. *Id.* at 99 citing L&R Realty v. Connecticut Nat'l Bank, 715 A.2d 748, 753 (Conn. 1998).

11. See, e.g., Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42 (1st Cir. 1999); Woods v. Saturn Distrib. Corp., 78 F.3d 424 (9th Cir. 1996).

12. Christopher R. Drahozal, "Unfair" Arbitration Clauses, U. ILL. L. REV. (forthcoming 2001) (manuscript at 35, 43, 49, 41, 46, on file with author).

13. See, e.g., National Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977); AAMCO Transmissions, Inc. v. Marino, Nos. Civ. A. 88-5522, 88-6197, 1990 WL 10024, at \*2 (E.D. Pa. 1990); Dreiling v. Peugeot Motors of Am., Inc., 539 F. Supp. 402, 403 (D. Col. 1982).

14. Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837-38 (10th Cir. 1988); Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986); Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., 56 F. Supp. 2d 694, 705-09 (E.D. La. 1999); Smyly v. Hyundai Motor Am., 762 F. Supp. 428, 430 (D. Mass. 1991).

15. Dunham, *supra* note 10, at 96.

16. See, e.g., R.I. GEN. LAWS §19-28.1-14 (1998); Kubis & Perszyk Assocs. v. Sun Microsystems, 680 A.2d 618, 627 (N.J. 1996); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 500 (Mo. 1992) (en banc).

17. KKW Enter., Inc., 184 F.3d 42, 49-52; Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157, 163 (2d Cir. 1998); M.C. Const. Corp. v. Gray Co., 17 F. Supp. 2d 541, 547-48 (W.D. Va. 1998). But see Keystone, Inc. v. Triad Sys. Corp., 971 P.2d 1240, 1244-45 (Mont. 1998).

18. See, e.g., Collins v. Int'l Dairy Queen, 186 F.R.D. 689 (M.D. Ga. 1999); Little Caesar Enter., Inc. v. Smith, 172 F.R.D. 236, 241-45 (E.D. Mich. 1997). Cf. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 337-44 (4th Cir. 1998).

19. See, e.g., Champ v. Siegel Trading Co., 55 F.3d 269, 274-75 (7th Cir. 1995); Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); Gammara v. Thorp Consumer Discount Co., 828 F. Supp. 673, 674-75 (D. Minn. 1993), appeal dismissed, 15 F.3d 93 (8th Cir. 1994).

20. See, e.g., Keating v. Superior Ct., 645 P.2d 1192, 1209-10 (Cal. 1982), *rev'd on other grounds sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 865, 867 (Pa. Super. Ct. 1991).

21. Sterling Truck Corp. v. Allegheny Fort Truck Sales, No. 1:00-CU-565 (N.D. Ohio May 23, 2000) (holding the arbitrator, not the court, is responsible for deciding whether dispute can proceed by class action) (on file with author).

22. Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141 (1997); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, 7 BUS. L. TODAY, May-June 1998, at 24. For an argument that arbitration clauses should not be used to eliminate class actions, see Jean R. Sternlight, *As Mandatory Arbitra-*

*tion Meets the Class Action, Will the Class Action Survive?* 42 WM. & MARY L. REV. 1 (forthcoming Oct. 2000).

23. Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 93-94 (1998); Mark R. Kravitz & Edward Wood Dunham, *Compelling Arbitration*, LITIG., Fall 1996, at 34, 35.

24. See, e.g., Specialty Bakeries, Inc. v. HalRob, Inc., 129 F.3d 726 (3d Cir. 1997); Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997).

25. See, e.g., Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies Ltd., 970 F.2d 273, 282 (7th Cir. 1992); Drahozal, *supra* note 12. Cf. James A. Brickley et al., *The Economic Effects of Franchise Termination Laws*, 34 J.L. & ECON. 101, 103 (1991).

26. Paul D. Carrington, *The Dark Side of Contract Law*, TRIAL, May 2000, at 73. See also Sternlight, *supra* note 1, at 686-93.

27. H.R. 534, 106th Cong. (1999).

28. S. 1020, 106th Cong. (1999).

29. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

30. E.g., Gilmer v. Johnson/Interstate Lane Corp., 500 U.S. 20, 28 & n.3 (1991).

31. 473 U.S. 614, 628, 640 (1985).

32. See, e.g., Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1189-90 (9th Cir.), *cert. denied*, 119 S. Ct. 445 (1999); Knepp v. Credit Acceptance Corp., 229 B.R. 821, 843-45 (N.D. Ala. 1999); Wilson v. Waverlee Homes, Inc., 954 F. Supp. 1530, 1539-40 (M.D. Ala. 1997).

33. 43 F.3d 1244 (9th Cir. 1994).

34. *Id.*

35. See, e.g., Randolph v. Green Tree Fin. Corp., 178 F.3d 1149, 1157-59 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1467-69 (D.C. Cir. 1997); Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264, 270 (D. Del. 1999).

36. 517 U.S. 681.

37. 465 U.S. 1.

38. See decisions at note 17.

39. 971 P.2d 1240, 1244-45.

40. See, e.g., Strawn v. AFC Enter., Inc., 70 F. Supp. 2d 717, 725-28 (S.D. Tex. 1999); Broughton v. Cigna Healthplans of Cal., 90 Cal. Rptr. 2d 334, 343-47 (Cal. 1999); Keystone, 971 P.2d 1240, 1244-45.

41. See, e.g., Ramirez v. Circuit City Stores, 90 Cal. Rptr. 2d 916, 920-21 (Ct. App. 1999); Baron v. Best Buy Co., Inc., 75 F. Supp. 2d 1368, 1370-71 (S.D. Fla. 1999); Armendariz v. Foundation Health Psych-care Servs., Inc., 80 Cal. Rptr. 2d 255 (Ct. App. 1999); Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998).

42. Laxmi Invs., LLC v. Golf USA, 193 F.3d 1095, 1097 (9th Cir. 1999); Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc., 840 F. Supp. 708, 711 (D. Ariz. 1993).

43. Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404-07 (1967).

44. See generally Sternlight, *supra* note 23. See also Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199-207 (4th Cir. 2000).