

FORUM SELECTION CLAUSES IN CONTRACTS GOVERNED BY THE NEW JERSEY FRANCHISE PRACTICES ACT ARE PRESUMPTIVELY INVALID

A written agreement between parties, made for valid consideration,¹ is generally binding upon those parties.² This is especially true if the language is a clear and unequivocal representation of the intent of the parties.³ Courts have demonstrated, however, that the law is not simply concerned with the written manifestations of an agreement in determining the enforceability of a contract.⁴ While a court will place the greatest

¹ See *Continental Bank v. Barclay Riding Academy*, 93 N.J. 153, 170, 459 A.2d 1163, 1171 (1983) (finding that no agreement is enforceable "without the flow of consideration"); *Campi v. Seven Haven Realty Co.*, 294 N.J. Super. 37, 43, 682 A.2d 281, 284 (Law Div. 1996) (defining consideration as "a bargained-for exchange of promises or performance that may consist of an act, a forbearance, or the creation, modification, or destruction of a legal relation" and stating that a contract "must be supported by valuable consideration in order to be enforceable").

² See *Moreira Constr. Co. v. Moretrench Corp.*, 97 N.J. Super. 391, 394, 235 A.2d 211, 213 (App. Div. 1967) (stating that one who signs a contract is generally bound by its provisions). While a contract need not be in writing if there is an expression of mutual agreement, this Note concerns the validity of forum selection clauses under the New Jersey Franchise Practices Act, which requires a written expression of the parties' intentions for a contract to be enforceable. See N.J. STAT. ANN. § 56:10-3a (West 1989).

³ See RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981). The Restatement states: "(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." *Id.*

⁴ See *Glenfed Fin. Corp. v. Penick Corp.*, 276 N.J. Super. 163, 172, 647 A.2d 852, 856 (App. Div. 1994) ("[New Jersey] courts recognize that an otherwise enforceable contract may be invalidated on the ground that it was entered into under 'economic duress.'"); see also *Continental Bank*, 93 N.J. at 175, 459 A.2d at 1174-75 (noting that the use of economic pressure on a contracting party may invalidate the bargain under the theory of economic duress). However, forcing one's position and thus pressuring another's financial situation, does not, in and of itself, constitute duress. See 13 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1617, at 708 (3d ed. 1970). Rather, duress concerns "wrongfulness of the pressure exerted." See *Glenfed*, 276 N.J. Super. at 172, 647 A.2d at 856.

In the realm of forum selection clauses, the concept of abuse of bargaining power is found in the language of case law that states that such a provision may be found to be void as against public policy. See, e.g., *Electrical & Magneto Serv. Co. v. AMBAC Int'l Corp.*, 941 F.2d 660, 664 (8th Cir. 1991) (voiding a forum selection clause because it violated Missouri public policy); *Weidner Communications, Inc. v. H.R.H. Prince Bandar Al Faisal*, 859 F.2d 1302, 1310 (7th Cir. 1988) (invalidating a forum selection clause on the grounds of duress and unequal bargaining power).

weight on the written word, some contracts, or clauses therein, are unenforceable despite clear and unequivocal language.⁵

For example, legislatures and courts continue to express concern that disparities in bargaining power might force the weaker party to accept unconscionable⁶ terms.⁷ The fear is that the resulting contracts will

⁵ See RESTATEMENT (SECOND) OF CONTRACTS §178 (1981), which provides:

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of

(a) the parties' justified expectations,
(b) any forfeiture that would result if enforcement were denied, and
(c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

(a) the strength of that policy as manifested by legislation or judicial decisions,
(b) the likelihood that a refusal to enforce the term will further that policy,
(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
(d) the directness of the connection between that misconduct and the term.

Id. See generally ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1373-1378 (1962) (noting that otherwise valid agreements may be unenforceable on the grounds of public policy).

⁶ See N.J. STAT. ANN. § 12A:2-302 (West 1963 & Supp. 1996) (allowing a court to deny enforcement to a particular clause in a contract if it is found to be unconscionable, or allowing a court to deny enforcement to the entire contract if the unconscionability is pervasive). This provision is designed to protect against unfair contract terms that may result from "grossly disproportionate bargaining power." *Shell Oil Co. v. Marinello*, 63 N.J. 402, 408, 307 A.2d 598, 601 (1973). This section of New Jersey's Uniform Commercial Code is not meant "to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement was resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion." *Kugler v. Romain*, 58 N.J. 522, 544, 279 A.2d 640, 652 (1971). Therefore, it follows that this provision was not created to allow a party to avoid contract terms that she "later finds to be unfavorable." *Toker v. Westerman*, 113 N.J. Super. 452, 454, 274 A.2d 78, 80 (App. Div. 1970).

⁷ See, e.g., CAL. CORP. CODE § 31512 (West 1977 & Supp. 1997) (voiding provisions that waive compliance with any provision of the California Franchise Investment Law); N.J. STAT. ANN. § 56:10-7.3a(2) (West 1989 & Supp. 1996) (declaring forum selection clauses to be unenforceable as a means of protecting consumers and other parties with little bargaining power); N.C. GEN. STAT. § 22b-3 (1994) (stating that forum selection clauses are void as a matter of public policy). Judicial decisions finding forum selection clauses to be generally invalid can be found in four states. See *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554, 556 (Ala. 1980) (finding forum selection clauses void for public policy reasons); *Cartridge Rental Network v. Video Entertainment, Inc.*, 209

not represent the outcome of arms-length negotiation, but rather will foster a situation in which the weaker party must either do business on the terms of the stronger party or not at all.⁸ Forum selection clauses⁹ are often the result of such disparities.¹⁰ Despite this fact, the law governing forum selection clauses expresses a general acceptance of such terms.¹¹

S.E.2d 132, 133 (Ga. Ct. App. 1974) (holding that the "contract [provision] fixing the venue of an action on the contract as to future litigation [was] void"); *Montana ex rel. Polaris Indus. v. District Court*, 695 P.2d 471, 471-72 (Mont. 1985) (finding forum selection clause to be unenforceable under state statute); *Dowling v. NADW Mktg., Inc.*, 578 S.W.2d 474, 475-76 (Tex. App. 1979), *rev'd on other grounds*, 631 S.W.2d 726 (Tex. 1982) (stating that it is against public policy to permit parties to bargain for contract clauses depriving the Texas courts of jurisdiction).

⁸ See *Franchise Practices Act: Hearing on A. 2063 Before the Assembly Judiciary Comm.*, 194th Legis., 2d Sess. 35 (N.J. 1971) (statement of Mr. Robert M. Burd) (stating that franchise agreements are often not a product of mutual consent, but rather are offered by the franchisor on a "take it or leave it" basis).

⁹ See Michael Mousa Karayanni, *The Public Policy Exception to the Enforcement of Forum Selection Clauses*, 34 DUQ. L. REV. 1009, 1009 (1996). A forum selection clause is a "contractual stipulation" that allows parties to designate the court or courts where litigation will occur should a dispute arise. See *id.* Forum selection clauses should not be confused with choice of law provisions or with provisions submitting to the personal jurisdiction and venue of a particular court. See David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 786-87 (1993).

The use of forum selection clauses is thought to have advantages to both parties. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991). For example, it provides a degree of certainty to the parties and allows them to make the economic costs of litigation a part of the bargaining process. See *id.* (noting that the price of cruise tickets reflected a lower fare in return for the concession of permitting a forum selection clause); *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 604 (7th Cir. 1994) (presumption of being compensated for agreeing to litigate abroad); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993) (financial value of forum selection clause should be reflected in the agreement and thus should be enforceable). These clauses also assist with judicial economy by reducing the need for pretrial motions to determine the correctness of the forum. See *Carnival Cruise Lines*, 499 U.S. at 593-94.

It has become common practice for forum selection clauses to be included in distributorship agreements. See Charles J. Faruki, *The Defense of Terminated Dealer Litigation: A Survey of Legal and Strategic Considerations*, 46 OHIO ST. L.J. 925, 936 (1985). The advantages to the distributor include avoiding dealer-initiated frivolous litigation, litigating in a familiar forum, and having a uniform interpretation of standardized agreements. See *id.* at 937.

A distributor or franchisor seeking to protect her interests, however, by including a forum selection clause as a part of her standard agreement should know that courts often take aim at these clauses as violative of public policy. See David J. Kaufman, *An Introduction to Franchising and Franchise Law*, in *FRANCHISING 1992 BUSINESS AND LEGAL ISSUES* (1992), at 87 (PLI Comm. Practice Course Handbook Series No. A4-4367, 1992).

¹⁰ See N.J. STAT. ANN. § 56:10-7.2(a) (West 1989 & Supp. 1996) (noting that inequality in bargaining power has often caused motor-vehicle franchisees to be subjected to terms that deny them the opportunity to have suits settled in appropriate and convenient forums).

¹¹ See generally *Carnival Cruise Lines*, 499 U.S. at 585 (holding that the forum se-

This general acceptance, however, was not always the rule.¹² The move toward the acceptance of such clauses began with the United States Supreme Court's 1972 decision of *Bremen v. Zapata Off-Shore Co.*¹³ Over time, the increasing level of acceptance of forum selection clauses has led federal courts sitting in diversity to give force to forum selection clauses even if the law of the state in which the court sits¹⁴ would find

lection clause found on the back of the Carnival Cruise ticket was valid); *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 916 (3d Cir. 1988) (holding that American public policy would not prevent the enforcement of a forum selection clause naming the Italian courts as the appropriate forum).

While it has become generally accepted that forum selection clauses are valid per se, it should be noted that these cases also discussed the possibility of an exception to the general rule based upon public policy. See Taylor, *supra* note 9, at 787-88 (stating that in federal courts that forum selection clauses have been enforced only as being either a reasonable product of contract formation or as being a fair choice of venue in a 28 U.S.C. § 1404 analysis).

Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), for example, involved a contract between two foreign companies for the towing of a drilling rig from Louisiana to Italy. See *id.* at 2. The contract contained a clause that stated that "[a]ny dispute arising must be treated before the London Court of Justice." *Id.* When plaintiff filed suit in United States District Court, defendant made a motion to dismiss. See *id.* at 4. The district court denied the motion, adhering to the then-traditional view that parties to a contract could not oust a court of jurisdiction. See *id.* at 6. The court of appeals affirmed this decision. See *id.* at 7. The Supreme Court, while noting that forum selection clauses were historically disfavored, found that "in the light of present-day commercial realities and expanding international trade . . . forum clause[s] should control absent a strong showing that [they] should be set aside." *Id.* at 15. Thus, the party challenging the enforcement of the forum selection clause bore the burden of demonstrating that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.*

¹² See John McKinley Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute*, 70 N.C. L. REV. 888, 888 (1992) (noting that traditionally forum selection clauses were rejected by the courts as an improper form of ousting jurisdiction, but explaining that modern courts have come generally to accept such clauses); see also *Insurance Co. v. Morse* 87 U.S. (20 Wall.) 445, 451 (1874) (viewing forum selection clauses as an attempt by the parties to improperly oust a court of jurisdiction, and thus finding such clauses to be unenforceable); *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 185 (1856) (finding forum selection clauses to be invalid as against public policy).

¹³ 407 U.S. 1 (1972) (enforcing an arbitration clause against an American plaintiff even though the clause designated France as the proper forum); see also Karayanni, *supra* note 9, at 1011 (finding that after *Bremen*, "an all-embracing attitude of mistrust to choice-of-forum agreements was replaced by one favoring party autonomy regarding the means of dispute resolution").

¹⁴ See generally *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965) (stating that if a Federal Rule of Civil Procedure encompasses the question before the court then it is controlling, even in the face of contrary state law); *Erie R.R. v. Tompkins*, 304 U.S. 64, 79-80 (1938) (finding unconstitutional the use of general federal common law in diversity actions). The general rule, that a federal court sitting in diversity must apply the substantive law of the state in which that court sits, is not dispositive of the issue of whether the court should apply state or federal law regarding the enforcement of forum selection clauses. See Walter W. Heiser, Note, *Forum Selection Clauses in Federal Courts:*

the clause unenforceable.¹⁵ Thus, it is conceivable that a party could circumvent the state rule of law by resorting to a federal forum.¹⁶

Limitations on Enforcement After Stewart and Carnival Cruise, 45 FLA. L. REV. 553 (1993); Robert A. de By, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068 (1989). The reason for this uncertainty is the difficulty in determining whether forum selection clauses are procedural, as a matter of venue, or whether enforcement is a matter of substantive state contract law. See de By, *supra*, at 1071. This inquiry is complicated by the fact that the issue of enforcement of forum selection clauses can arise in several different manners in federal court. See *id.* at 1074, 1075 (noting that a defendant can seek enforcement of such a clause through either a motion to transfer under 28 U.S.C. § 1404 or a motion to dismiss under Federal Rule of Civil Procedure 12(b)(3)).

As to the former question, the United States Supreme Court in *Stewart Organization, Inc. v. Ricoh Corp.* held that § 1404 governed the decision and that enforcement of forum selection clauses on a motion to transfer would be controlled by federal law. See 487 U.S. 22, 32 (1988). This decision, however, stated that the existence of a forum selection clause was only one of a number of factors to be considered by a court and did not provide any guidance as to the weight to be given to the forum selection clause. See Heiser, *supra*, at 569-74.

As to the latter scenario, it is generally believed that the *Erie* analysis compels a federal court to apply state law in determining the outcome of a motion to dismiss based on the existence of a forum selection clause. See de By, *supra*, at 1083; Heiser, *supra*, at 582-86.

¹⁵ See *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 147-48 (N.D. Tex. 1979). This case concerned a diversity suit involving a contract. See *id.* at 146. The court noted that under Texas law a state court would not enforce a forum selection clause. See *id.* at 147 n.1. The federal trial court, however, determined that enforcement of forum selection clauses presented a federal question: deciding "[w]here suit will lie in the federal system is peculiarly the concern of the federal courts. There is nothing to require resort to state law to lay out the rules." *Id.* at 147-48; see also *Stewart*, 487 U.S. at 29 (finding that even when state law would have invalidated a forum selection clause, federal courts could still look to the clause as part of their determination of a motion to transfer under 28 U.S.C. § 1404); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 279 (9th Cir. 1984) (applying federal law to enforce a forum selection clause in a breach of contract action).

¹⁶ See David J. Kaufmann, *The New York Franchise Act*, in FRANCHISING 1992 BUSINESS AND LEGAL ISSUES (1992) at 205-06 (PLI Comm. Practice Course Handbook Series No. A4-4367, 1992) (suggesting that franchisors who are wary that a state court will not enforce forum selection clauses for reasons of public policy should seek removal to a federal forum).

Prior to the Court's decision in *Stewart*, resort to a federal forum may not have been as beneficial. See *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356, 357 (3d Cir. 1986) (finding, in a decision prior to *Stewart*, that the validity of forum selection clauses is determined as a matter of state law); Julia L. Erickson, Comment, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation*, 72 MINN. L. REV. 1090, 1096-97 (1988) (stating that in determining the enforceability of forum selection clauses in diversity cases, only two circuits, the Third and Eighth, follow state law). However, even after *Stewart*, some uncertainty remains as to whether a federal court will feel compelled to follow federal law in every instance. Compare *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879-80 (3d Cir. 1995) (applying the rule from *Bremen* in determining the effect of a forum selection clause on a § 1404 motion to transfer) with *Instrumentation Assocs., Inc. v. Madsen Elec., Ltd.*, 859 F.2d 4, 7 (3d Cir. 1988) (reviewing a motion to dismiss and stating that

The New Jersey Supreme Court recently visited the issue of the validity of forum selection clauses in *Kubis & Perszyk Associates v. Sun Microsystems, Inc.*¹⁷ The court held, without determining whether the disputed contract was governed by the New Jersey Franchise Practices Act (the Act),¹⁸ that forum selection clauses in contracts covered by the Act are presumptively invalid.¹⁹

Kubis & Perszyk Associates, Inc., the plaintiff in *Kubis & Perszyk*, was a New Jersey corporation that sold computer systems.²⁰ Kubis & Perszyk Associates operated under the name of Entre Computer (Entre), a franchisee of Entre Computer Centers, Inc.²¹ The defendant in this action, Sun Microsystems, Inc., a California corporation, distributed computer hardware, software, and services.²² Sun Microsystems, Inc., and its subsidiary, Sun Computer (collectively "Sun"), controlled a large share of the national market for computer products and operated three New Jersey offices.²³

In 1990, Sun initiated negotiations of a reseller agreement with Entre.²⁴ As a result of these negotiations, Entre agreed to become a Sun distributor and to concentrate on the sale of Sun products.²⁵ As Entre focused on the sale of Sun products, it de-emphasized the marketing of personal computers.²⁶ The agreement between Entre and Sun (the Agreement) stated that "[t]he parties are independent contractors under this Agreement and no other relationship is intended, including a partnership, franchise, joint venture, agency, employer/employee, or master/servant relationship."²⁷

In 1993, Sun and Entre entered into a new agreement entitled Indirect Value Added Reseller Agreement (the IVAR).²⁸ Pursuant to this

it has not yet been decided whether a district court sitting in diversity must apply state or federal law in determining the enforceability of forum selection clauses).

¹⁷ 146 N.J. 176, 680 A.2d 618 (1996).

¹⁸ N.J. STAT. ANN. §§ 56:10-1-15 (West 1989 & Supp. 1996). See *infra* notes 60, 83 and accompanying text for a discussion of the Act and its coverage.

¹⁹ See *Kubis & Perszyk*, 146 N.J. at 197, 680 A.2d at 628.

²⁰ See *id.* at 178, 680 A.2d at 619.

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.* at 178-79, 680 A.2d at 619.

²⁵ See *Kubis & Perszyk*, 146 N.J. at 178-79, 680 A.2d at 619.

²⁶ See *id.* at 179, 680 A.2d at 619. Entre originally sold personal computer systems from companies such as IBM and Compaq. See *id.* at 178, 680 A.2d at 619. Sun's product line consisted of higher-end workstations and operating systems. See *id.* at 179, 680 A.2d at 619.

²⁷ *Id.* (emphasis added). See *infra* note 83 and accompanying text for a discussion of what constitutes a franchise covered by the Act.

²⁸ See *Kubis & Perszyk*, 146 N.J. at 179, 680 A.2d at 619.

agreement, Entre increased the funds it devoted to marketing and servicing Sun products.²⁹ This new agreement between Entre and Sun contained both choice of law and forum selection clauses.³⁰ These clauses designated that the IVAR would be governed by California law and that any disputes would be settled in the courts of California.³¹ This contract was terminated by Sun on December 31, 1993.³²

Entre claimed that the termination of the contract was without good cause and was prompted by members of Sun's direct sales force.³³ As a result, Entre filed suit against Sun in New Jersey Superior Court alleging that Sun's termination of the Agreement violated the Act and constituted tortious interference with Entre's business relationships.³⁴ Sun, citing the Agreement's forum selection clause contained in subparagraph 17a of the Agreement, moved to dismiss the complaint.³⁵ In support of its motion to dismiss, Sun contended that Entre's principals never objected to the presence of subparagraph 17a.³⁶ Further, Sun argued that the clause was, in fact, negotiable and should therefore be enforced.³⁷ Entre disa-

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.* Subparagraph 17a of the IVAR Agreement stated:

Any action related to this Agreement will be governed by California law, excluding choice of law rules, and will be brought exclusively in the United States District Court for Northern California or the California Superior Court of the County of Santa Clara. The parties hereby submit to the personal jurisdiction and venue of such courts.

Id.

The trial court found that Entre had notice of this provision and that it could have, but did not, object to the provision. See Trial Court Decision on Defendant's Motion to Dismiss at 3-4, *Kubis & Perszyk Assocs. v. Sun Microsystems, Inc.*, No. SOML-2349-93 (N.J. Super. Ct. Law Div. Jan. 21, 1994) [hereinafter *Decision on Motion to Dismiss*] (on file with the *Seton Hall Law Review*). The trial court also determined that Entre did not seek to modify these terms in any way. See *id.* at 4.

³² See *Kubis & Perszyk*, 146 N.J. at 180, 680 A.2d at 620.

³³ See *id.*, 680 A.2d at 619-20.

³⁴ See *id.*, 680 A.2d at 620. Entre contended that Sun and its sales force interfered with a substantial order of Sun products to be delivered to AT&T. See *id.*, 680 A.2d at 619-20. Entre also claimed that Sun disparaged Entre's abilities to service its customers. See *id.*, 680 A.2d at 620. Thus, Entre contended that Sun did not have good cause to terminate the Agreement and that the termination would serve to destroy Entre's business. See *Decision on Motion to Dismiss*, *supra* note 31, at 2. This type of suit, concerning termination or failure to renew without good cause, concerns the main purpose of the Franchise Act. See *Monmouth Chrysler-Plymouth v. Chrysler Corp.*, 102 N.J. 485, 492, 509 A.2d 161, 165 (1986) (noting that "[t]he principal thrust of the Franchise Practices Act is to prohibit a franchisor from terminating or failing to renew a franchise without 'good cause'").

³⁵ See *Kubis & Perszyk*, 146 N.J. at 180, 680 A.2d at 620.

³⁶ See *id.* at 179, 680 A.2d at 619.

³⁷ See *id.*

greed, arguing that the forum selection clause was a boilerplate provision and was thus not negotiable.³⁸

The New Jersey Superior Court, Law Division, found that the forum selection clause was enforceable and dismissed the case.³⁹ Entre filed an appeal to challenge the validity of the forum selection clause.⁴⁰

The appellate division issued a temporary injunction preventing Sun's termination of the Agreement and staying the order of dismissal pending the outcome of the appeal.⁴¹ After hearing the case, the appellate division determined that the forum selection clause was enforceable and upheld the decision of the trial court.⁴² The court affirmed the dismissal, however, on the condition that the California courts would apply New Jersey law to the dispute.⁴³

The New Jersey Supreme Court granted certification to determine the enforceability of forum selection clauses in contracts governed by the Act.⁴⁴ The supreme court, reversing the decision of the appellate division, declared that forum selection clauses in contracts governed by the Act are presumptively invalid.⁴⁵ Based on this finding, the New Jersey Supreme Court remanded the case to the law division for a determination of whether the Agreement was, in fact, governed by the Act.⁴⁶

Kubis & Perszyk, therefore, created an exception to New Jersey's long-standing acceptance of forum selection clauses.⁴⁷ While New Jersey courts addressed the validity of forum selection clauses in very few decisions, each of these occasions denoted a general acceptance of a contrac-

³⁸ See *id.* at 179-80, 680 A.2d at 619.

³⁹ See *Decision on Motion to Dismiss*, *supra* note 31. The law division did not address whether the Agreement was governed by the Franchise Act. See *Kubis & Perszyk*, 146 N.J. at 180, 680 A.2d at 620.

⁴⁰ *Kubis & Perszyk Assocs. v. Sun Microsystems, Inc.*, No. A-2741-93T5, slip op. at 2 (N.J. Super. Ct. App. Div. May 24, 1995).

⁴¹ See *Kubis & Perszyk*, 146 N.J. at 180, 680 A.2d at 620.

⁴² See *id.* at 181, 680 A.2d at 620.

⁴³ See *id.*

⁴⁴ See *Kubis & Perszyk Assocs. v. Sun Microsystems, Inc.*, 142 N.J. 571, 667 A.2d 189 (1995).

⁴⁵ See *Kubis & Perszyk*, 146 N.J. at 197, 680 A.2d at 628.

⁴⁶ See *id.*

⁴⁷ Compare *id.* (finding forum selection clause to be unenforceable under New Jersey statute) with *Shelter Sys. Group Corp. v. Lanni Builders, Inc.*, 263 N.J. Super. 373, 375, 622 A.2d 1345, 1346 (App. Div. 1993) (finding forum selection clauses to be enforceable in the absence of fraud or overreaching); *Wilfred MacDonald, Inc. v. Cushman, Inc.*, 256 N.J. Super. 58, 63, 606 A.2d 407, 410 (App. Div. 1992) (same); *Air Econ. Corp. v. Aero-Flow Dynamics, Inc.*, 122 N.J. Super. 456, 457, 300 A.2d 856, 856 (App. Div. 1973) (finding forum selection clauses to be enforceable in the absence of fraud or overreaching); *Fairfield Lease Corp. v. Liberty Temple Universal Church of Christ, Inc.*, 221 N.J. Super. 647, 652, 535 A.2d 563, 566 (Law Div. 1987) (same).

tual choice of forum.⁴⁸ For example, in *Air Economy Corp. v. Aero-Flow Dynamics, Inc.*,⁴⁹ the appellate division affirmed the trial court's reliance on a forum selection clause to dismiss the suit.⁵⁰ *Air Economy* involved a contract between two foreign corporations authorized to do business in New Jersey.⁵¹ Their contract was to be governed by New York law and selected a New York court as the appropriate forum.⁵² The appellate division held that a choice of forum clause would "be enforced unless it is unfair, unreasonable or against the public policy of the forum state."⁵³

Similarly, the court in *Fairfield Lease Corp. v. Liberty Temple Universal Church of Christ, Inc.*⁵⁴ found that forum selection clauses were generally enforceable.⁵⁵ The court noted, however, that this general presumption could be overcome by a showing that enforcement of the clause would be "'unreasonable' under the circumstances."⁵⁶

The court, in *Wilfred MacDonald, Inc. v. Cushman, Inc.*,⁵⁷ reiterated the general rule supporting forum selection clauses.⁵⁸ There, the court found that "[s]uch clauses will be enforced unless the party objecting thereto demonstrates (1) the clause is the result of fraud or overween-

⁴⁸ See *supra* note 47 for a discussion of New Jersey decisions upholding choice of forum clauses.

⁴⁹ 122 N.J. Super. 456, 300 A.2d 856 (App. Div. 1973).

⁵⁰ See *id.* at 457-58, 300 A.2d at 857.

⁵¹ See *id.* at 457, 300 A.2d at 856. The agreement involved plaintiff's sale of its business to defendant. See *id.* Plaintiff was a foreign corporation authorized to do business in New Jersey and defendant was a foreign corporation authorized to do business in New York. See *id.*

⁵² See *id.* The agreement between the parties stated:

This Agreement shall be governed, construed and interpreted in all respects in accordance with the laws of the State of New York. The Supreme Court of the State of New York, in the County of New York, shall have jurisdiction to hear and determine any claims or disputes pertaining directly or indirectly to this Agreement or to any matter arising therefrom.

Id.

⁵³ *Id.*

⁵⁴ 221 N.J. Super. 647, 535 A.2d 563 (Law Div. 1987).

⁵⁵ See *id.* at 652, 535 A.2d at 566. The *Fairfield* court traced New Jersey's acceptance of forum selection clauses. See *id.* (citing *Mayer v. Roche*, 77 N.J.L. 681 (N.J. 1909); *Ball & Hill v. Consol. Franklinite Co.*, 32 N.J.L. 102 (N.J. Sup. Ct. 1866)). These cases, however, treated choice of law provisions as being analogous to forum selection clauses. See *Mayer*, 77 N.J.L. at 683-84; *Ball & Hill*, 32 N.J.L. at 103-04. These cases are not addressed by the court in *Kubis & Perszyk Assocs. v. Sun Microsystems, Inc.*, 142 N.J. 571, 667 A.2d 189 (1995).

⁵⁶ *Fairfield*, 221 N.J. Super. at 652, 535 A.2d at 566. The court then remanded the case for a determination as to whether the agreement fell within an exception to the general rule upholding forum selection clauses. See *id.* at 652-53, 535 A.2d at 566-67.

⁵⁷ 256 N.J. Super. 58, 606 A.2d 407 (App. Div. 1992).

⁵⁸ See *id.* at 63; 606 A.2d at 410.

ing bargaining power, or (2) enforcement in a foreign forum would violate strong public policy of the local forum."⁵⁹ The *Wilfred MacDonald* court found that there was no violation of public policy in having another forum's court adjudicate the applicability of the New Jersey Franchise Practices Act.⁶⁰

Wilfred MacDonald was a retailer of golf equipment who sold Cushman products under a dealership agreement.⁶¹ When Cushman declined to renew the agreement, Wilfred MacDonald brought suit in New Jersey Superior Court alleging violations of the Act.⁶² Cushman moved to dismiss, citing the contract provision that selected Nebraska as the exclusive forum for the settlement of disputes.⁶³ Finding that the forum selection clause was not the product of fraud or overreaching, the court enforced the clause and remanded the case, ordering the trial court to grant Cushman's dismissal motion.⁶⁴

*Shelter Systems Group Corp. v. Lanni Builders, Inc.*⁶⁵ is the most recent reaffirmation of the presumptive enforceability of forum selection

⁵⁹ *Id.* (citations omitted). In this case, the trial court denied the motion to dismiss based upon "a strong State interest in providing a New Jersey forum for the [Franchise] Act's enforcement." *Id.* at 62, 606 A.2d at 409. The appellate division found this argument unpersuasive and reversed. *See id.* at 64-67, 606 A.2d at 410-12.

⁶⁰ *See id.* at 66, 606 A.2d at 411. This holding was reached even though the appellate division noted the existence of N.J. STAT. ANN. § 56:10-7.3a(2) (West 1989 & Supp. 1996), which states:

a. It shall be a violation of the "Franchise Practices Act," P.L.1971, c. 356 (C. 56:10-1 et seq.) for a motor vehicle franchisor to require a motor vehicle franchisee to agree to a term or condition in a franchise . . . which:

. . .

(2) Specifies 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

Id. The *Wilfred MacDonald* court found that this provision applied, by its terms, only to motor-vehicle franchises and was inapplicable to a suit involving turf equipment and golf supplies. *See Wilfred MacDonald, Inc. v. Cushman, Inc.*, 256 N.J. Super. 58, 66-67, 606 A.2d 407, 411 (App. Div. 1992).

⁶¹ *See Wilfred MacDonald*, 256 N.J. Super. at 59, 606 A.2d at 407-08.

⁶² *See id.* at 60, 606 A.2d at 408.

⁶³ *See id.* at 60-61, 606 A.2d at 408.

⁶⁴ *See id.* at 64, 67, 606 A.2d at 410, 411-12. The court made a special effort to note "that MacDonald, obviously having dealt with numerous manufacturers and other agreements over the years of its apparently successful business, is not unsophisticated. . . . It is, moreover, further significant we think that this was not an agreement entered into by an unaware, unsuspecting dealer." *Id.* at 64, 606 A.2d at 410.

⁶⁵ 263 N.J. Super. 373, 622 A.2d. 1345 (App. Div. 1993).

clauses.⁶⁶ The *Shelter Systems* court noted that New Jersey traditionally enforces forum selection clauses unless they are the product of fraud or coercive bargaining or are in violation of public policy.⁶⁷ Finding that the case before it did not present an exception to this general rule, the court upheld the choice of forum clause.⁶⁸

This discussion of prior law concerning forum selection clauses does not, however, provide the complete foundation for the court's decision in *Kubis & Perszyk*.⁶⁹ The New Jersey Supreme Court, in *Instructional Systems, Inc. v. Computer Curriculum Corp.*,⁷⁰ addressing the closely related topic of the enforceability of choice of law provisions⁷¹ under the Act, found that, regardless of a contractual clause selecting the application of California law, New Jersey had strong policy reasons for applying the Act.⁷² This case provides a greater understanding of the court's willingness to use the Act to protect New Jersey franchisees.⁷³

The *Instructional Systems* court began its legal discussion by noting that contracting parties are generally free to select the law that will govern their agreement.⁷⁴ The court cautioned, however, that this rule would necessarily be tempered by New Jersey public policy.⁷⁵ The *In-*

⁶⁶ See *id.* at 375, 622 A.2d at 1346. This case involved a New Jersey seller of building materials who was seeking to recover payment for goods delivered to a Pennsylvania purchaser. See *id.* at 374, 622 A.2d at 1346. The purchaser moved to dismiss the case for lack of jurisdiction. See *id.* The court, however, found that the parties had contractually agreed that suits would be settled in courts sitting in the state of the seller's primary place of business. See *id.* at 375, 622 A.2d at 1346. Thus, the court, finding that the seller's principal place of business was in New Jersey, held the defendant to the contractual agreement and refused to dismiss the case for lack of personal jurisdiction. See *id.* at 376, 622 A.2d at 1347.

⁶⁷ See *id.* at 375, 622 A.2d at 1346.

⁶⁸ See *id.*

⁶⁹ 146 N.J. 176, 680 A.2d 618 (1996).

⁷⁰ 130 N.J. 324, 614 A.2d 124 (1992).

⁷¹ See *Burger King v. Rudzewicz*, 471 U.S. 462, 481-82 (1985) (noting the similarity between choice of law provisions and forum selection clauses and remarking that while consent to be sued or to sue in a forum is not implicit in a choice of law provision, it may be considered when deciding whether a forum is appropriate). Forum selection clauses and choice of law provisions are both contractual devices designed to allow potential litigants to control the adjudicatory process by selecting either the appropriate forum or the governing law. See Linda S. Mullenly, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 296-97 (1988).

⁷² See *Instructional Sys.*, 130 N.J. at 345-46, 614 A.2d at 135.

⁷³ See Reva S. Bauch, *An Update on Choice of Law in Franchise Agreements: A Trend Toward Unenforceability and Limited Application*, 14 *SPRING FRANCHISE L.J.* 91, 94 (1995) (noting that the New Jersey Supreme Court found choice of law provisions to be unenforceable under the Act, even though the Act contained no anti-waiver provision).

⁷⁴ See *Instructional Sys.*, 130 N.J. at 341, 614 A.2d at 133.

⁷⁵ See *id.* (citing *Winer Motors, Inc. v. Jaguar Rover Triumph, Inc.* 208 N.J. Super.

structional Systems majority found that "New Jersey has a strong policy in favor of protecting its franchisees."⁷⁶ Finding that both the franchisee and the majority of its employees resided in New Jersey, the court found that public policy warranted the application of New Jersey law despite the contract's express provision selecting California law.⁷⁷

Nonetheless, prior to *Kubis & Perszyk*, New Jersey's common law clearly expressed a general acceptance for forum selection clauses.⁷⁸ The New Jersey Supreme Court, however, had never availed itself of the opportunity to rule on this issue.⁷⁹

Justice Stein, joined by Justices Handler, O'Hern, and Coleman, delivered the opinion of the court in *Kubis & Perszyk*.⁸⁰ The justice began by expounding upon the Act and its legislative history.⁸¹ The court noted that the Act afforded New Jersey franchisees "broad statutory protections."⁸² For the purposes of the decision, however, the court avoided making a determination as to whether the agreement between Sun and Entre was a franchise covered by the Act.⁸³ Rather, the court proceeded

666, 671-72, 506 A.2d 817, 820 (App. Div. 1986); *Kalman Floor Co. v. Jos. L. Muscarelle, Inc.* 196 N.J. Super. 16, 21-22, 481 A.2d 553, 555-56 (App. Div. 1984); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 (1969)).

⁷⁶ *Instructional Sys.*, 130 N.J. at 345, 614 A.2d at 135.

⁷⁷ *See id.* at 345-46, 614 A.2d at 135.

⁷⁸ *See supra* notes 11-12, 47-68 and accompanying text (discussing the general acceptance of forum selection clauses).

⁷⁹ *See Kubis & Perszyk Assocs. v. Sun Microsystems, Inc.*, 146 N.J. 176, 191-92, 680 A.2d 618, 626 (1996) (listing the cases in New Jersey that have addressed the validity of forum selection clauses); *see also supra* notes 47-68 and accompanying text (discussing the cases cited in *Kubis & Perszyk*, 146 N.J. at 191-92, 680 A.2d. at 626).

⁸⁰ *See Kubis & Perszyk*, 146 N.J. at 177, 208, 680 A.2d at 618, 634.

⁸¹ *See id.* at 181-86, 680 A.2d at 620-23.

⁸² *See id.* at 182, 680 A.2d at 620. The broad statutory protections may be found in N.J. STAT. ANN. §§ 56:10-7, 56:10-5, 56:10-10 (West 1989). *See, e.g.*, N.J. STAT. ANN. §§ 56:10-7 (prohibiting a franchisor from requiring a franchisee to agree to provisions which would relieve the franchisor of responsibility under the Act); :10-5 (granting franchisees protection from termination or non-renewal of their franchise agreements without good cause and requiring franchisors to provide notice of termination); :10-10 (providing franchisees with access to the New Jersey courts to recover damages or to seek injunctive relief).

⁸³ *See Kubis & Perszyk*, 146 N.J. at 181, 680 A.2d at 620. In order to be covered by the Act an agreement must meet the statutory requirements. *See* N.J. STAT. ANN. § 56:10-4. This provision provides:

This act applies only 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.

Id. The term franchise is defined as

under the assumption that the Act was applicable and addressed the validity of the forum selection clause within the confines of the Act.⁸⁴

The majority found that the Act was "enacted to compensate for the economic imbalance between franchisors and franchisees."⁸⁵ Justice Stein noted that the Act's legislative history reflected the concern that franchise agreements were often adhesion contracts in which franchisors pressured franchisees into agreeing to disadvantageous terms.⁸⁶

In addition, the court cited the legislature's desire that the Act provide franchisees with "prompt and effective judicial relief."⁸⁷ The majority recognized that the Act encompassed both protections against unequal bargaining power and provisions for access to the judicial process.⁸⁸ The court cited to portions of the statute that (1) prevented franchisors from demanding that franchisees submit to unreasonable terms, (2) limited a franchisor's ability to terminate or fail to renew a contract, and (3) allowed for suit to be brought in New Jersey Superior Court.⁸⁹

The court also highlighted a 1989 amendment to the Act that buttressed the protections offered to motor-vehicle franchises.⁹⁰ The court observed that, under this amendment, forum selection clauses in motor-vehicle franchise agreements are presumptively invalid.⁹¹

a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.

Id. § 56:10-3a. For judicial applications of this rule see generally *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 614 A.2d 124 (1992); *Greco Steam Cleaning, Inc. v. Associated Dry Goods Corp.*, 257 N.J. Super. 594, 608 A.2d 1010 (Law Div. 1992). In *Greco Steam Cleaning*, for example, the court found that the Act covered "only those businesses which operate[d] out of a fixed location," and then only those operations in which the franchisees both "display[ed] for sale and [sold] the franchisor's goods." *Id.* at 596, 608 A.2d at 1011.

When determining whether an agreement contemplates a franchise, the name used by the parties in describing the agreement is not determinative. See *Instructional Sys.*, 130 N.J. at 340, 614 A.2d at 132. "Therefore, in determining whether a relationship constitutes a franchise . . . the entire course of dealings between the parties" should be examined. *Id.*

⁸⁴ See *Kubis & Perszyk*, 146 N.J. at 181, 680 A.2d at 620.

⁸⁵ *Id.* at 182, 680 A.2d at 620-21.

⁸⁶ See *id.* at 182-86, 680 A.2d at 620-23.

⁸⁷ *Id.* at 184, 680 A.2d at 622; see also N.J. STAT. ANN. § 56:10-10 (granting any franchisee covered by the Act the ability to sue a franchisor in the Superior Court of New Jersey and providing for the recovery of litigation costs, including attorneys' fees).

⁸⁸ See *Kubis & Perszyk*, 146 N.J. at 184, 680 A.2d at 622.

⁸⁹ See *id.*; see also N.J. STAT. ANN. §§ 56:10-7, :10-5, :10-10. For a discussion of these statutory provisions see *supra* note 82 and accompanying text.

⁹⁰ See *Kubis & Perszyk*, 146 N.J. at 184, 680 A.2d at 622.

⁹¹ See *id.* at 185, 680 A.2d at 623.

The court explained Sun's argument that the language of the amendment regarded only motor-vehicle franchises.⁹² Discarding this reasoning, the court declared that "the legislative findings persuade us that the Legislature considered [forum selection] clauses in general to be inimical to the rights afforded all franchisees under the Act."⁹³

The court proceeded by outlining the history of forum selection clause jurisprudence.⁹⁴ First, the court described federal jurisprudence as generally recognizing the enforceability of forum selection clauses.⁹⁵ Next, the court dealt with two exceptions to this rule, one based on public policy⁹⁶ and the other based on extreme hardship to one of the contracting parties.⁹⁷ Lastly, the court gave a brief synopsis of prior New Jersey case law concerning contractual choice of forum.⁹⁸

The majority, while recognizing that New Jersey common law generally enforces forum selection clauses, found that such enforcement in contracts covered by the Act "would substantially undermine the protections that the Legislature intended to afford to all New Jersey franchisees."⁹⁹ Justice Stein remarked that, typically, commercial contracts represent competitive bidding between near equals; thus, a forum selection clause may be the product of party negotiations and mutually benefi-

⁹² See *id.* Sun contended that the 1989 amendment evidenced the legislature's sole intention to ban forum selection clauses in only motor-vehicle franchise agreements. See *id.* The court agreed that the amendment did effectively prohibit forum selection clauses in motor-vehicle franchise agreements, but the majority also viewed the legislative history as espousing a general disdain for choice of forum provisions in any franchise agreement. See *id.*

⁹³ *Id.*

⁹⁴ See *id.* at 186-92, 680 A.2d at 623-26. See also *infra* notes 97-98 and accompanying text for a discussion of cases cited by the court.

⁹⁵ See *Kubis & Perszyk*, 146 N.J. at 186-90, 680 A.2d at 623-25.

⁹⁶ See *id.* at 190, 680 A.2d at 625. In discussing extreme hardship, the court cited *Hoffman v. Minuteman Press International, Inc.* as an example of this exception. See *Kubis & Perszyk*, 146 N.J. at 190, 680 A.2d at 625; see also *Hoffman v. Minuteman Press Int'l, Inc.*, 747 F. Supp. 552 (W.D. Mo. 1990) (finding that the plaintiff would face extreme hardship if forum selection clause were enforced).

⁹⁷ See *Kubis & Perszyk*, 146 N.J. at 191, 680 A.2d at 625-26. The court cited several cases where public policy required that forum selection clauses be invalidated. See *id.*; see also *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 909 (E.D. Wis. 1981) (declining to enforce a forum selection clause in order to give full effect to Wisconsin's Fair Dealership Law); *Lulling v. Barnaby's Family Inns, Inc.*, 482 F. Supp. 318, 320-21 (E.D. Wis. 1980); *Wismatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.*, 38 Cal. Rptr. 2d 612, 618-19 (1995) (declining to enforce forum selection clause and relying on California's Franchise Investment Act as a source of compelling public policy).

⁹⁸ See *Kubis & Perszyk*, 146 N.J. at 191-92, 680 A.2d at 626. The cases discussed by the court were *Wilfred MacDonald*, *Shelter Systems*, *Air Economy*, and *Fairfield Lease*. See *id.* For a discussion of these cases see *supra* notes 49-68 and accompanying text.

⁹⁹ *Kubis & Perszyk*, 146 N.J. at 192-93, 680 A.2d at 626.

cial.¹⁰⁰ In the context of franchises, however, the court concluded that franchisors, generally more sophisticated and economically more powerful than their franchisees, tend to offer franchisees form contracts that are non-negotiable.¹⁰¹ Thus, the majority found that franchisors were able to gain the benefits of forum selection clauses without a concomitant advantage being provided to the franchisee.¹⁰²

As a result, the court adopted a presumption against the validity of forum selection clauses in agreements covered by the Act.¹⁰³ To overcome this presumption, the court stated that a franchisor must proffer evidence and prove that the forum selection clause was not obtained as a result of the franchisor's superior bargaining power.¹⁰⁴ Absent such proof, the majority warned that New Jersey courts would not give effect to the contractual choice of forum.¹⁰⁵ The court concluded by noting that two factors compelled its holding: (1) the desire to effectuate the legislature's intent to protect franchisees and (2) the fear that enforcing forum selection clauses in contracts covered by the Act would contravene that policy.¹⁰⁶

In a dissenting opinion, Justice Garibaldi, joined by Justice Pollock, challenged the majority's reliance on the Act's provisions that prohibited

¹⁰⁰ See *id.* at 193, 680 A.2d at 626-27.

¹⁰¹ See *id.*, 680 A.2d at 627.

¹⁰² See *id.* at 194, 680 A.2d at 627. The court noted that forum selection clauses in this context were particularly troubling as they may deprive the franchisee of prompt injunctive relief. See *id.*

¹⁰³ See *id.* at 197, 680 A.2d at 628.

¹⁰⁴ See *id.* at 195, 680 A.2d at 627. The majority stated:

We anticipate that a franchisor could sustain its burden of proof by offering evidence of specific negotiations over the inclusion of the forum-selection clause and that it was included in exchange for specific concessions to the franchisee. Absent such proof, or other similarly persuasive proof demonstrating that the forum-selection clause was not imposed on the franchisee against its will, a trial court should conclude that the presumption against the enforceability of forum-selection clauses in franchise agreements subject to the Act has not been overcome.

Id., 680 A.2d at 627-28.

¹⁰⁵ See *Kubis & Perszyk*, 146 N.J. at 195, 680 A.2d at 627-28.

¹⁰⁶ See *id.*, 680 A.2d at 628. The court noted that the Act was comprehensive legislation created for the protection of New Jersey franchisees. See *id.* at 195-96, 680 A.2d at 628. In addition, the court expressed concern that the enforcement of forum selection clauses would lead to the constructive denial of access to the New Jersey courts, forcing franchisees to incur the expense and uncertainty of bringing suit in a foreign forum. See *id.* This, the majority added, was not a concern that foreign forums would not adequately apply New Jersey law, but was a concern that seeking judicial relief may be impractical for many disadvantaged, or underfunded, franchisees. See *id.* The majority stated, "The added expense, inconvenience, and unfamiliarity of litigating claims under the Act in a distant forum could . . . result in the abandonment of meritorious claims that could have been successfully litigated in a New Jersey court." *Id.* at 196, 680 A.2d at 628.

forum selection clauses in motor-vehicle franchise agreements.¹⁰⁷ The justice noted the absence of express statutory authorization for the majority's decision and stressed that "New Jersey courts have consistently applied [the] common law rule to approve forum-selection clauses."¹⁰⁸

Citing rules of statutory interpretation, the dissent stated that, in the absence of an express statutory mandate, the common-law rule should apply.¹⁰⁹ Therefore, Justice Garibaldi proceeded to address the question of whether the Act provided a rule contrary to the common law.¹¹⁰

Examining the plain language of the statute, the justice found that the legislature invalidated forum selection clauses exclusively in motor-vehicle franchise contracts and that, aside from this exception, forum selection clauses remained enforceable.¹¹¹ Justice Garibaldi found that the decision specifically to prohibit forum selection clauses only in motor-vehicle franchises manifested the legislature's general "tolerance" of forum selection clauses.¹¹² In addition, the justice concluded that the Act's

¹⁰⁷ See *id.* at 197, 298, 680 A.2d at 629, 634 (Garibaldi, J., dissenting); see also N.J. STAT. ANN. § 56:10-7.3a(2) (West 1989 & Supp. 1996).

¹⁰⁸ *Kubis & Perszyk*, 146 N.J. at 198, 680 A.2d at 629 (Garibaldi, J., dissenting).

¹⁰⁹ See *id.* at 199, 680 A.2d at 629-30 (Garibaldi, J., dissenting) (stating that the common-law rule of general acceptance of forum selection clauses should apply); see also *Lammers v. Board of Educ.*, 134 N.J. 264, 267, 633 A.2d 526, 528 (1993) ("The interpretation of any statute necessarily begins with consideration of its plain language."); *State v. Sutton*, 132 N.J. 471, 479, 625 A.2d 1132, 1136 (1993) (noting that the starting point for statutory interpretation is the plain language of the text). As the majority noted, however, statutory construction also involves making a determination of legislative intent. See *Kubis and Perszyk*, 146 N.J. at 182, 680 A.2d at 620-21; see also *Parker v. Esposito*, 291 N.J. Super. 560, 565-66, 677 A.2d 1159, 1162 (App. Div. 1996) (noting that statutory interpretation involves making a determination regarding the legislature's intent).

¹¹⁰ See *Kubis & Perszyk*, 146 N.J. at 199, 680 A.2d at 629 (Garibaldi, J., dissenting).

¹¹¹ See *id.* at 200-02, 680 A.2d at 630-31 (Garibaldi, J., dissenting). The justice stated that the Act demonstrates a clear intent to modify the common-law rule only as to forum selection clauses included in motor-vehicle franchise agreements. See *id.*

¹¹² See *id.* at 200-01, 680 A.2d at 630 (Garibaldi, J., dissenting). Justice Garibaldi cited to several states that had expressly banned forum selection clauses in any franchise agreement and noted that if the New Jersey Legislature had desired to restrict forum selection clauses in all agreements it could have chosen the appropriate language. See *id.*; see also CAL. CORP. CODE § 31512 (West 1989) (voiding any contract term requiring a franchisee to waive compliance with California's franchise laws); HAW. REV. STAT. § 482E-6(2)(F) (1988) (voiding any agreement that would relieve any person from liability under Hawaii's Franchise Investment Law); 815 ILL. COMP. STAT. ANN. 705/41 (West 1993); MINN. STAT. ANN. § 80C.21 (West 1986); N.Y. GEN. BUS. LAW § 687(4) (McKinney 1980); N.D. CENT. CODE § 51-19-16(7) (1989); OKLA. STAT. ANN. tit. 71, § 826(c) (West 1995); WASH. REV. CODE ANN. § 19.100.220(2) (West 1989) ("any agreement, condition, or provision—including choice of law—waiving compliance with [the Franchise Investment Protection] chapter is void"); WIS. STAT. ANN. § 553.76 (West 1988 & Supp. 1996). The justice also highlighted that the legislature had been presented with a bill that would have banned forum selection clauses in all franchise agreements,

grant of jurisdiction to New Jersey courts was not a grant of exclusive jurisdiction and therefore did not undermine the validity of forum selection clauses.¹¹³

In addition, the dissent found the majority's argument, that judicial access must be protected, unpersuasive.¹¹⁴ While noting that some "marginal franchises" would perhaps be prevented from seeking enforcement of rights in a foreign forum, Justice Garibaldi found that this was not a reason to nullify all forum selection clauses.¹¹⁵

Also, the dissent expressed concern that the rule established by the court would lead to a burdensome case-by-case analysis of the negotiability of individual forum selection clauses.¹¹⁶ Justice Garibaldi feared that the inquiry required by the majority would lead to difficult and expensive procedures for making factual determinations about negotiations of con-

but failed to pass the provision. *See Kubis and Perszyk*, 146 N.J. at 200-01, 680 A.2d at 630 (Garibaldi, J., dissenting); *see also* A. 1165, 206th Leg., 1st Reg. Sess. (N.J. 1994) (stating that it shall be a violation of the Act for any franchisor to demand that a franchisee agree to "any provision which would require that arbitration or litigation be conducted outside this State").

¹¹³ *See Kubis & Perszyk*, 146 N.J. at 201, 680 A.2d at 631. (Garibaldi, J., dissenting). Justice Garibaldi agreed with the appellate division's decision in *Wilfred MacDonald* that stated that the jurisdiction granting provision did not hinder enforcement of a forum selection clause. *See id.*, 680 A.2d at 630 (Garibaldi, J., dissenting) (citing *Wilfred MacDonald v. Cushman, Inc.*, 256 N.J. Super. 58, 66-67, 606 A.2d 407, 410 (App. Div. 1992)).

¹¹⁴ *See id.* at 202-03, 680 A.2d at 631 (Garibaldi, J., dissenting). Justice Garibaldi noted that the forum selection clause in this case was not the product of fraud or overweening bargaining power. *See id.* at 204, 680 A.2d at 632 (Garibaldi, J., dissenting). *Entre*, for example, was a subsidiary of a billion-dollar computer corporation. *See Decision on Motion to Dismiss*, *supra* note 31, at 4. Also, *Entre* had experience in negotiating resale agreements with companies such as IBM, Compaq, and Hewlett Packard. *See id.* Thus, neither Justice Garibaldi nor the trial court was convinced that *Entre* would have been seriously inconvenienced by a trial in a California court. *See Kubis & Perszyk*, 146 N.J. at 204-05, 680 A.2d at 632 (Garibaldi, J., dissenting).

Also, *Sun* had agreements with other resellers that did not contain forum selection clauses. *See id.* Because *Entre* was an experienced, multimillion dollar reseller, Justice Garibaldi concluded that *Entre* could have negotiated a change to the forum selection clause, but chose to accept it. *See id.* at 204, 680 A.2d at 632 (Garibaldi, J., dissenting). As a result, the dissent would have barred *Entre* from claiming that the California forum was inconvenient. *See id.* at 204-05, 680 A.2d at 632 (Garibaldi, J., dissenting).

¹¹⁵ *See Kubis & Perszyk*, 146 N.J. at 203-04, 680 A.2d at 632. (Garibaldi, J., dissenting). The justice realized that some undercapitalized franchisees might be forced to abandon legitimate suits if forced to sue outside of New Jersey, but the justice stated that parties should be held to the terms of freely negotiated agreements. *See id.*

¹¹⁶ *See id.* 205, 680 A.2d at 632 (Garibaldi, J., dissenting). The dissent viewed this case to be one such example of the time and money that would be expended under the majority's ruling. *See id.* Of special concern to the dissent were the facts that demonstrated that *Entre* litigated the applicability of the forum selection clause even though *Entre* made no claims of fraud, inability to negotiate the clause, or lack of notice. *See id.*, 680 A.2d at 632-33. (Garibaldi, J., dissenting).

tractual terms.¹¹⁷ Thus, in the absence of an express legislative rule to the contrary, Justice Garibaldi followed the rule that forum selection clauses are presumptively valid unless (1) there is evidence of "fraud or overweening bargaining power, (2) a violation of strong public policy, or (3) serious inconvenience for the trial."¹¹⁸

The *Kubis & Perszyk* court's conclusion, as noted by Justice Garibaldi, does not appear to be compelled by the Act.¹¹⁹ Indeed, in light of the legislature's failure to pass a provision banning forum selection clauses in general, the logic of Justice Garibaldi's dissent seems even more compelling. Further, the explicit statutory protection provided to motor-vehicle franchisees indicates that New Jersey legislators understood the existing application of forum selection clauses in New Jersey.¹²⁰ Nothing prevented the legislature from using language of general applicability. Thus, the language of the Act, when given its plain meaning, should not serve as a source of expansion.

In addition, in the absence of express statutory protections, New Jersey common law provides sufficient protection for parties who are truly subjected to overreaching in the bargaining process.¹²¹ The court, when presented with a case of disparate bargaining power or unfairness, could have offered New Jersey franchisees relief under the common law while still affording parties the ability to contract freely. The facts of this case, however, demonstrate the sophistication and financial stability of both parties.¹²² In addition, each sought representation by top New Jersey law firms.¹²³ Nothing suggests that Entre needed the paternalistic interference of the state. Thus, neither statutory interpretation nor the facts compel the court's presumption against forum selection clauses under the Act.

¹¹⁷ See *id.*, 680 A.2d at 632 (Garibaldi, J., dissenting). Justice Garibaldi viewed this test as being much easier to apply, less expensive, and less demanding on judicial resources. See *id.*, 680 A.2d at 633 (Garibaldi, J., dissenting).

¹¹⁸ *Id.* at 206, 680 A.2d at 633 (Garibaldi, J., dissenting) (citing *Wilfred MacDonald*, 256 N.J. Super. at 63-64, 606 A.2d at 410).

¹¹⁹ See *id.* at 205, 680 A.2d at 633 (Garibaldi, J., dissenting). The majority concluded that "forum-selection clauses in franchise agreements are presumptively invalid, and should not be enforced unless the franchisor can satisfy the burden of proving that such a clause was not imposed on the franchisee unfairly." *Id.* at 195, 680 A.2d at 627.

¹²⁰ See N.J. STAT. ANN. § 56:10-7.3a (West 1989 & Supp. 1996).

¹²¹ See *supra* notes 47-77 and accompanying text for a discussion of prior New Jersey law.

¹²² See *Kubis & Perszyk*, 146 N.J. at 207, 680 A.2d at 633 (Garibaldi, J., dissenting) (noting that Entre had been in business for a number of years and was the subsidiary of a multibillion dollar corporation).

¹²³ See *id.* at 177, 680 A.2d at 618.

Fortunately, the language of this decision is very limiting.¹²⁴ It does not appear that the court intends to retreat from the enforcement of forum selection clauses in contracts not covered by the Act. Yet, the court departed from the plain language of a statute and the general rules of the common law, possibly leading to confusion in the lower courts regarding the application of *Kubis & Perszyk* beyond the realm of franchise agreements.¹²⁵

In addition, the decision provides only a vague framework within which a franchisor might overcome the presumption of invalidity.¹²⁶ Uncertainty amongst the lower courts in determining the parameters and application of this rule will inevitably follow. As a result, a franchisor who wishes to include a forum selection clause in a contract is now faced with the burden of demonstrating that the clause was freely negotiated and not merely the product of "superior bargaining power."

One recourse for franchisors may lie in the federal court system. It is possible that a federal court would look to *Bremen* as a guideline for determining the enforceability of the forum selection clause, especially if the franchisor has moved for a transfer of venue as opposed to a dismissal of the case. In a case such as that presented by *Kubis & Perszyk*, where no fraud or overreaching is found, a federal court might well grant the franchisor the benefit of the contractual forum.¹²⁷ While the economic effects of this ruling may be mitigated by resorting to a federal forum, such a result still denies the franchisor the full benefit of her initial bargain. Indeed, there is no means for an out-of-state franchisor to gain the benefit of certainty that forum selection clauses ideally provide without testing the uncharted waters of (1) what will be needed to overcome

¹²⁴ See *id.* at 195, 680 A.2d at 627 (limiting the presumptive invalidity of forum selection clauses to contracts governed by the Act).

¹²⁵ For example, one court, addressing the enforceability of a forum selection clause in an insurance contract, relied upon the logic of *Kubis & Perszyk* to find the clause presumptively invalid. See *Param Petroleum Corp. v. Commerce & Indus. Ins. Co.*, 296 N.J. Super. 164, 166-67, 686 A.2d 377, 378 (App. Div. 1997). But see *Reynolds Publishers, Inc. v. Graphics Fin. Group, Ltd.*, 938 F. Supp. 256, 264-66 (D.N.J. 1996) (refusing to apply the reasoning of *Kubis & Perszyk* to a lease agreement).

¹²⁶ See *supra* notes 107-118 and accompanying text for a discussion of Justice Garibaldi's views concerning the shortcomings of the majority's decision.

¹²⁷ See *supra* notes 14-16 and accompanying text discussing the law to be applied when a forum selection clause is used to support a motion to transfer or to dismiss a case in federal court.

the presumption of invalidity or (2) how a federal court, sitting in diversity, will settle the *Erie*¹²⁸ problem that is created in this situation.

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¹²⁸ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 79-80 (1938) (abolishing the use of general federal common law in diversity actions).