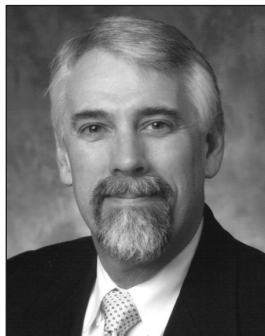


# Standing in Franchise Disputes: Check the Invitations, Not Every Party Gets Inside

JON S. SWIERZEWSKI

Consider the following all-too-common scenario: A franchisee in financial trouble is looking for an exit strategy, so it locates a potential buyer for its store. As with most franchise agreements, there is a clause stipulating that any assignment or transfer of the franchise requires the franchisor's consent. The only restriction on your franchisor client's behavior is that if it chooses to deny the transfer, its withholding of consent cannot be "unreasonable." Unimpressed with the potential buyer's financial picture and level of experience, your client exercises its right and refuses the proposed transfer. Both the franchisee and the thwarted buyer feel that the franchisor's denial of the transfer was unreasonable, completely arbitrary, and totally unjustified.



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So both the franchisee, the sole shareholder in a now-bankrupt corporation that is the signatory of the franchise agreement, and the prospective buyer sue as individuals. They bring claims under their state's franchise relationship laws and for breach of contract, claiming that your client breached its duty under the franchise agreement to act reasonably with regard to the proposed transfer. Your client comes to you and asks how you plan to defend the statutory and contract claims. You may not have to. Many courts faced with similar facts will hold that neither plaintiff has standing to sue.

## Stopping the Suit at the Courthouse Steps

This article will offer a broad survey of the law of standing in the franchise context and discuss how a franchisor can challenge a plaintiff's standing in the common factual settings of many franchise disputes.

The franchise form of business, by its very nature, can give rise to a wide range of disputes between franchisors and franchisees. Plaintiffs base most of their claims on a perceived breach of the franchise agreement, with various tort and antitrust claims often thrown in for good measure. But when a franchisor faces a lawsuit alleging such claims, the first question it should ask is not how best to defend the case on its merits, but rather whether the party asserting the claim even has the right to sue. In many common franchise disputes, the suing

party, although arguably having suffered some economic injury, lacks standing to pursue the claim. A savvy defendant will realize this and move the court to dismiss.

Most lawyers are familiar with the concept of standing, that is, which is the proper party, according to the court, to assert a claim. The notion of standing takes on special importance in franchise law because of the business form's wealth of contractual relationships and the necessity of dealings with third parties, many of which can be injured, directly or indirectly, as a result of actions of parties with which the franchisor has had no contractual dealings. There are many facets to the courts' analyses of a party's standing to sue over a franchise relationship gone bad; and although the legal issues are not necessarily unique to franchise law, they are common enough in franchise litigation to warrant the attention of the lawyers who practice in the field.

## Does the Plaintiff Have a "Dog in the Fight"?

Standing is an aspect of subject matter jurisdiction. A court faced with the question is charged with determining whether there is a logical nexus between the status asserted by the party and the claim sought to be adjudicated. The requirement of standing is satisfied if it can be said that the plaintiff has a legally protectable and tangible interest at stake in the litigation, i.e., whether or not it has "a dog in the fight."<sup>1</sup> This idea takes on great importance to franchisors asked to assume responsibility for economic injury to parties with which they never chose to deal.

In general, standing requirements are drawn from two sources: constitutional and prudential. The threshold requirements for constitutional standing derive from the terms *case* and *controversy*, which define the federal judicial power in Article III of the U.S. Constitution.<sup>2</sup> Even if the constitutional requirements are met, however, courts may nevertheless deny standing as a matter of judicial self-restraint if it seems unwise to entertain a case.<sup>3</sup> Of particular interest to franchise law practitioners is the constitutional standing test, which requires that the plaintiff show a distinct and palpable injury to itself, that the injury is caused by the challenged activity, and that the injury can be redressed by a remedy the court is able to give.<sup>4</sup>

Franchisors faced with lawsuits should remember that a mere economic injury, without more, generally will not give the plaintiff standing to sue. Under the laws most commonly invoked by plaintiffs for economic redress, i.e., state and federal franchise acts and antitrust laws, establishing standing to sue can be a difficult hurdle for any party but one whose protection is most clearly contemplated by the legislation. The courts' answer to the question of which party can sue has not always been obvious or consistent.

Franchise and distributorship arrangements give rise to numerous claims of injury where, although the existence of injury itself is not in dispute, the complaining party is neverthe-

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less not entitled to relief. Some of the most common examples of those trying to assert claims arising from franchise relationships include third parties that were not signatories to a franchise or dealership agreement attempting to recover damages for harm resulting from its breach. Among these are the prospective assignees or transferees whose purchases, like the hypothetical plaintiff above, are thwarted by the franchisor withholding its consent, or they may be the shareholders of corporate franchisees attempting to sue under their own names. Other common situations where the question of standing arises include franchisees suing via a franchisee association or other advocacy group, or franchisees attempting to pin their economic losses on what they view as the defendants' anticompetitive activities. There are many other scenarios and legal theories under which a franchisee might sue a franchisor, but the core question remains: Is the plaintiff's harm compensable under the law?

This article does not purport to address all circumstances under which the issue of standing could potentially arise in the context of franchise disputes. Rather, it exposes the most common factual situations where challenges to standing are made and alerts attorneys practicing in the franchise arena to the contours of the courts' analyses of such claims. For example, this article focuses on standing disputes in suits brought under various state franchise laws, auto dealer acts, and antitrust laws, as well as some common law contract claims. The issue of standing may be raised in a number of other settings, often in the same case as a statutory franchise or antitrust claim, and the outcome may differ.

The article is broken into several sections, based on the nature of the suits from which standing issues commonly arise: claims by third parties (nonsignatories to the franchise agreement) under franchisee and dealer protection acts, claims by associations purporting to represent a signatory to a franchise agreement, and suits under the antitrust laws.

### **What Name Is on the Contract?**

Perhaps the most common standing problem stems from a discrepancy between the party that executed the franchise agreement and the party bringing the suit. If the parties are not the same, the plaintiff is generally (but not always) out of luck.<sup>5</sup> This would seem an obvious point—hardly worth making perhaps—if it were not for the fact that there are dozens of reported cases where this precise roadblock has cut off the plaintiff's case at the knees. Specifically, the most common version of this case arises when the plaintiff franchisee signs the franchise agreement under a corporation's or partnership's name, then later attempts to assert contractual rights under its name as an individual, or vice versa. Another version of the third-party dilemma can occur when a prospective transferee or assignee of a franchise agreement sues the franchisor for unreasonably withholding its consent to the transfer. Again, if the party suing is not a party to the franchise agreement, it generally will lack standing to sue under a breach of contract theory.

It is not uncommon for an individual franchisee to establish a corporation or partnership that, in turn, is the actual signatory to the franchise agreement (or is the transferee of the individual's rights in the agreement). This can have significant implications on a franchisee's rights if and when a legal dis-

pute arises. In particular, courts have not looked favorably upon shareholders of franchisee corporations who attempt to assert claims, whether in contract or tort, under their individual names. Generally, if the corporation signed the agreement, or accepted an approved transfer of the franchisee's interest in the agreement, the corporation is the proper party to a suit. Individual shareholders will not have standing. This also holds true for single-shareholder corporations. In the realm of standing in franchise litigation, there is little more important than whose name is on the agreement.

### ***KMS Restaurant Corp. v. Wendy's***

There is no single definitive case regarding individual shareholders or partners who attempt to assert the rights of their respective corporations or partnerships; rather, there is a long line of federal and state decisions offering the same result: the name on the pleading must match the name on the franchise agreement.

A recent case from the Eleventh Circuit is illustrative. In *KMS Restaurant Corp. v. Wendy's International, Inc.*,<sup>6</sup> a corporation (KMS) attempted to purchase twenty-seven Wendy's restaurants in Florida from Citicorp. Because the restaurants were franchises of Wendy's International, Inc., the purchase agreement was contingent on Wendy's approval of KMS as a franchisee. For undisclosed reasons, Wendy's declined to approve KMS as a franchisee, and KMS's contract with Citicorp subsequently failed. KMS's primary shareholder filed suit against Wendy's for tortious interference with its contract with Citicorp. The court ruled that KMS's shareholder lacked standing to sue.

In 1991, before he had formed KMS, the plaintiff/shareholder-to-be wrote a letter in his own name to Citicorp expressing his intent "on behalf of a venture to-be-formed" to buy the twenty-seven restaurants from Citicorp. The plaintiff then formed KMS, which became the signatory to a purchase agreement with Citicorp. KMS alleged that Wendy's, when it refused to approve KMS as a franchisee, tortiously interfered with that purchase agreement. The plaintiff/shareholder argued that he had standing to sue in his individual capacity because the original letter of intent he sent to Citicorp had been signed by him before KMS was established.

The court disagreed. First, the court doubted that the plaintiff's original letter of intent created any rights at all. But even if it did, the court noted, those rights were created not for the plaintiff/shareholder individually, but for KMS, because that was the "venture to-be-formed" as stated in the letter of intent. Further, the actual KMS/Citicorp purchase agreement itself stated that the parties to it were Citicorp and KMS, not Citicorp and the individual plaintiff. The individual shareholder's name was nowhere mentioned as a party to the agreement. The court concluded that because KMS was the signatory to the agreement, it was the only proper plaintiff for the claim.

The result in *KMS* is typical. Courts are almost never willing to put aside long-standing principles of corporate law to grant relief to aggrieved plaintiffs, even if the plaintiffs are sole shareholders or a group of shareholders in a closely held corporation.<sup>7</sup> Underscoring the importance of the names of the parties to the actual franchise agreement when it comes time to litigate, at least one court has held that just as corporate sig-

natories must assert their own rights, so must individual signatories. In *Akparewa v. Amoco Oil Co.*,<sup>8</sup> the Court of Special Appeals of Maryland held that although the plaintiff franchisee had formed a corporation to run his gas station, the corporation did not have standing to sue because the plaintiff had signed the franchise agreement in his own name, with no reference to the corporation. Because his name was on the dotted line, he was the only proper plaintiff.<sup>9</sup>

As with any rule, the rule that shareholders of corporate franchisees lack standing to sue as individuals, and vice versa, would not be complete without a couple of exceptions. There is disagreement among the courts as to the vitality of these exceptions, but as long as they remain alive somewhere, they are worthy of note, especially as one of them flows directly from the choice of language contained in the franchise agreement.

### **Kavanaugh v. Ford Motor Co.**

Of the two exceptions<sup>10</sup> to the rule that individual shareholders, officers, or directors of franchisee corporations lack standing to sue franchisors as individuals, the one less commonly invoked

stems from a forty-year-old case, *Kavanaugh v. Ford Motor Co.*<sup>11</sup> In *Kavanaugh*, the court granted individual standing under the Automobile Dealers' Day in Court Act (ADDCA) to Kavanaugh, a Ford dealer who was a 20 percent share-

holder in the franchisee corporation. Ford Motor Company challenged whether Kavanaugh possessed standing as a dealer under the Act because of his status as a mere shareholder of the franchisee/dealer corporation. Although noting that the answer is generally no, the court decided to carve out an exception for Kavanaugh based on the unique facts before it. In particular, the court was bothered by the fact that the franchisee corporation of which Kavanaugh was a shareholder was unwilling to bring suit against Ford, leaving Kavanaugh without any legal remedy. This was because the owner of the remaining 80 percent of the corporation's voting stock was Ford Motor Company itself. The court concluded that because there was no chance that Ford would bring suit against itself, it would be unjust to bar Kavanaugh, mere shareholder though he was, from bringing suit to enforce his rights. The situation in *Kavanaugh*, where the franchisee corporation is unwilling or unable to bring suit, is rare, and a number of courts have declined to follow its reasoning, preferring for the sake of simplicity and consistency to enforce the principle that a corporation must enforce its own rights.<sup>12</sup>

### **York Chrysler-Plymouth v. Chrysler Credit**

An exception more frequently raised as a defense to a standing challenge arises from the Fifth Circuit's decision in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*,<sup>13</sup> another ADDCA case. At its heart, the *York* exception states that if the language of the franchise agreement expressly relies on the participation of the individual shareholder or officer, thereby making the person "essential" to the franchise's or dealership's operation, the person may be permitted to sue in his capacity as

an individual. The franchise agreement in *York* (1) provided that it was made in reliance "on the active, substantial and continuing participation" of the plaintiff shareholders, (2) required the individual shareholders to maintain beneficial ownership and control of the stock in the dealership corporation, and (3) permitted termination of the agreement by the manufacturer if either of the plaintiff shareholders died or failed to continue in the active management of the dealership.<sup>14</sup>

The reasoning in *York* has been followed by some courts, but only to a limited degree.<sup>15</sup> Despite the intuitive attractiveness of the *York* exception, it has been expressly disavowed by a number of courts, and its future is uncertain.<sup>16</sup>

To the extent it is still alive, it effectively has been limited to cases involving a strong showing that the individual shareholder was indispensable to the operation of the dealership, coupled with a *Kavanaugh*-like showing that the corporation itself is unlikely to pursue a claim. For example, in *Moorehead v. General Motors Corp.*,<sup>17</sup> the district court held that merely naming the individual plaintiff personally in the franchise agreement did not give rise to

the inference that he was indispensable to the dealership's operation. The franchise agreement must explicitly make his participation essential, i.e., a basis of the bargain. Likewise, a number of courts have held that in order for an individ-

ual plaintiff to establish that the franchisee/dealership corporation is unable or unlikely to bring a claim itself, he must establish that the defendant owns a majority of the voting stock in the corporation, as was the case in *Kavanaugh*.<sup>18</sup> Thus, it appears the exceptions to the general rule barring individual standing, although technically alive, have been tightly reined in by the courts, giving the shareholder plaintiff a very high bar to leap.<sup>19</sup>

Regardless, it bears comment that the rule against individual shareholder standing is not ironclad, and careful drafters of franchise and dealership agreements should pay close attention to the identity of parties to the contract. If the franchisee or dealership is a corporation or partnership, close attention should be paid to whether there are any express responsibilities or expectations placed on named individual shareholders or officers.

### **Prospective Franchisees**

One of the most common situations giving rise to battles over third-party standing is, like the hypothetical on at the beginning of this article, when a franchisee attempts to sell his business to another party contingent on the approval of the franchisor. When a franchisor withholds its approval, the prospective buyer often becomes dismayed at what it views as an unreasonable or capricious withholding of consent and sues to enforce its rights under the governing state franchise laws. But most state franchise relationship laws only grant standing to sue to franchisees. Is a prospective franchisee a franchisee for the purposes of these laws? Unfortunately for the hopeful buyer, the answer is usually no.<sup>20</sup>

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**A long line of decisions offer the same result: the name on the pleading must match the name on the franchise agreement.**

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The resolution of such cases turns largely on the presiding court's interpretation of the language of the particular state franchise statute at issue, but the principles involved remain relatively uniform among jurisdictions, with just a few exceptions. A good example is a case from California, *Dameshghi v. Texaco Refining & Marketing Inc.*<sup>21</sup>

In 1986, Peet, the owner of a Texaco gasoline station operated pursuant to a three-year franchise lease, listed his business for sale. Dameshghi made an offer to purchase the station. The consummation of the purchase was contingent upon Texaco's approval of Dameshghi as the new franchisee. Texaco elected to withhold its consent to Peet's assignment of the lease to Dameshghi<sup>22</sup> and instead decided to purchase and operate Peet's gas station itself. Dameshghi did not learn of Texaco's move to buy the station until some time after the sale had been completed. He filed suit claiming that, among other things, Texaco had violated California's Franchise Investment Law<sup>23</sup> by failing to supply him with adequate documentation and falsely communicating to him that he was approved to become a franchisee.

Setting aside the merits of Dameshghi's claims, the court began its inquiry by investigating whether he even had standing to bring an action under California's Franchise Investment Law. The court concluded he did not. California's franchise law, like many similar state franchise laws across the nation, contains explicit language delineating those within the scope of its protection. In particular, the portion of the franchise law providing for private right of action stated that "[a]ny person who offers or sells a franchise in violation of [various portions of the California Franchise Investment Law] shall be liable to the franchisee or subfranchisor, who may sue for damages caused thereby. . . ."<sup>24</sup> The court looked directly to the plain language of the statute granting standing to the "franchisee or subfranchisor" and concluded that Dameshghi fit neither description. Because Dameshghi never became a franchisee, he was not entitled to bring a claim under California's franchise law. His mere desire and intent to become a franchisee was insufficient.

### **Dameshghi Typical of National Trend**

The result in *Dameshghi* is typical of a national trend toward narrow interpretations of which parties can sue under the various state franchise laws. Courts nationwide have been unwilling to construe the plain language of state franchise laws to grant standing to prospective buyers or transferees.<sup>25</sup> The common reasoning is that if the legislature intended to permit such parties to sue, it would have included them as permissible plaintiffs in the statutory language.<sup>26</sup>

Predictable as the result generally is courts are nevertheless divided on some of the finer points. First, the general rule that prospective transferees lack standing to sue as franchisees is largely applicable only to claims brought pursuant to state

franchise statutes. If a common law breach of contract claim is at issue, at least one court has indicated a willingness to step beyond the traditional, plain meaning of the term "franchisee" and grant standing to an aggrieved prospective transferee.

### **Don Rose Oil Co. v. Lindsley**

In *Don Rose Oil Co. v. Lindsley*,<sup>27</sup> the California Court of Appeal held that under some circumstances, a prospective transferee can maintain a common law breach of contract claim. In particular, the *Don Rose* court held that in view of the modern trend toward assignability of contracts, the superior power of the franchisor in the relationship should be recognized: "The law should accommodate itself to new forms of business endeavor and meet the reasonable expectations of franchisors, franchisees and their respective successors in interest. To do otherwise would deny a substantial segment of the economy access to justice."<sup>28</sup> Specifically, the court found it "inconsistent" for the franchisor to admit that it could not refuse consent unreasonably, but then argue that a "conditional assignment—subject only to Shell's consent—creates no rights in the assignee."<sup>29</sup>

Few courts have been willing to embrace the reasoning in *Don Rose*. Of those few courts that have allowed a prospective franchisee to sue on common law contract claims, unusual facts often color the

decision, such as when a prospective franchisee is also the guarantor of the original franchisee, giving rise to special rights.<sup>30</sup> Such scenarios are uncommon, however, and most courts faced with the question of a prospective franchisee's standing to assert common law contract claims have declined to follow *Don Rose*.<sup>31</sup>

Instead, the trend is for courts to require that a prospective franchisee that wishes to sue a franchisor for breach of contract in response to its withholding of consent to a transfer show that it is a third-party beneficiary of the original franchise agreement.<sup>32</sup> This is a difficult hurdle for a plaintiff to overcome because it must show it was an intended, rather than merely incidental, beneficiary.<sup>33</sup> Absent an explicit provision in the original franchise contract recognizing the prospective transferee as an intended beneficiary of the agreement, such a showing is unlikely. Such arrangements are obviously uncommon. One court that expressly disagreed with the reasoning of *Don Rose*, instead requiring a third-party beneficiary showing, noted that "to allow the potential assignee to sue may force the franchisor to deal with a party with which it never wished to do business."<sup>34</sup> The court reasoned that permitting the prospective franchisee to sue would be inconsistent with basic principles of contract law.<sup>35</sup>

### **Existing Franchisees**

In the context of prospective franchisees and their standing to sue, most reported cases involve pure prospective buyers or assignees with no prior relationship to the franchisor whose efforts to acquire a franchise are somehow thwarted by the

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franchisor. In addition, as stated above, most such suits are brought pursuant to state franchise legislation, where the threshold issue of standing requires little more than a determination of whether the plaintiff is a franchisee or a dealer as contemplated by the statute. As demonstrated by *Dameshghi*, merely attempting to purchase a franchise does not grant a party franchisee status.

But what if the prospective franchisee already has an existing relationship with the franchisor? Specifically, what if the plaintiff is an existing franchisee but is rebuffed in an attempt to acquire another franchise from the franchisor or a third party? Does the plaintiff have standing to sue as a franchisee? Clearly, this question presents a more difficult problem because although many state franchise and auto dealer protection laws provide definitions for the terms *franchisee* or *dealer*, few, if any, offer insight as to whether the plaintiff must be a franchisee or dealer as to the transaction in question. Not unexpectedly, the courts have reached conflicting results.

Two cases exemplify the difference: similar facts but divergent outcomes. In *Bertera Chrysler Plymouth, Inc. v. Chrysler Corp.*,<sup>36</sup> the district court was faced with the question of whether Bertera, a Chrysler automobile dealer, possessed standing under the Massachusetts motor vehicle dealer law to sue Chrysler for allowing a competing dealer to purchase another dealership in Bertera's market. Bertera had also been attempting to purchase the assets of the dealership in question. When Chrysler refused to consent to Bertera's purchase and instead awarded the dealership to the other buyer, Bertera sued. Chrysler responded by arguing that Bertera was merely a prospective dealer because it had not yet entered into a contract with Chrysler regarding the sought-after dealership and therefore lacked standing under Massachusetts law, which afforded relief to "[a]ny franchisee or motor vehicle dealer who suffers any loss of money or property, real or personal, as a result of the use or employment by a manufacturer . . . [of] an unfair business practice. . . ."<sup>37</sup>

The court disagreed. In the court's view, Bertera's status as a current franchisee to Chrysler was sufficient to raise it to the level of a franchisee and within the ambit of the statute's protection. In particular, the court held that although Bertera was admittedly only a prospective franchisee as to the disputed dealership, a "commonsensical plain reading of the statute" permitted it to sue as an affiliated dealer.<sup>38</sup>

### ***Pung v. General Motors Corp.***

Not all courts share this view. In *Pung v. General Motors Corp.*,<sup>39</sup> the Michigan Court of Appeals denied standing on facts similar to those in *Bertera*. In *Pung*, the plaintiff was a GMC dealer seeking to acquire the assets of another local dealer. General Motors refused to approve the sale, and the plaintiff sued. The plaintiff conceded that mere prospective dealers generally do not have standing under the Michigan automobile dealer law. Instead, the plaintiff argued, as Bertera did, that its status as an existing GMC dealer with an ongoing relationship with the manufacturer was sufficient to accord it standing to sue on the prospective GMC dealership purchase. The court was unconvinced, holding that the plaintiff's status

as an existing dealer had nothing to do with the proposed purchase of the new dealership and was therefore insufficient to confer standing. To the Michigan Court of Appeals, at least, a determination of whether a plaintiff was an automobile dealer under the statute required an examination of the actual dealership at issue, not whether the plaintiff was a dealer in a more general sense. Courts interpreting other states' automobile dealer acts have agreed with *Pung*.<sup>40</sup>

### **Associational Standing**

One exception to the basic rule that a plaintiff must establish the existence of a direct injury to itself can be found in the doctrine of associational standing,<sup>41</sup> set forth by the U.S. Supreme Court in *Warth v. Seldin*<sup>42</sup> and *Hunt v. Washington State Apple Advertising Commission*.<sup>43</sup> In *Warth* and *Hunt*, the Court held that in certain situations an association may have standing to bring a suit in its representative capacity even if the association itself has not suffered a direct injury. The few plaintiffs that have tried to assert associational standing have not, however, met with much success. The existence of the strategy nevertheless warrants scrutiny because independent franchise associations have sought to increase their influence in franchise systems.

Associational standing is not a new concept. After affirming its existence thirty years ago in *Warth*, the Supreme Court set out in *Hunt* to establish a test whereby courts could determine whether an association possesses the requisite standing necessary to sue on behalf of its constituent members. According to the Court, even if the association itself has not been injured, it may have standing to sue as the representative of its members when

1. its members would otherwise have standing to sue in their own right,
2. the interests that the association seeks to protect are germane to the association's purpose, and
3. neither the claim asserted nor the relief requested requires individual members of the association to participate in the lawsuit.<sup>44</sup>

The bulk of reported associational standing cases involve constitutional challenges to statutes and regulations, and such cases are not as common in the commercial setting. This disparity is due largely to the difficulty inherent in satisfying the third prong of the *Warth* test in the commercial context. For example, when plaintiffs seek a declaratory judgment regarding the constitutionality of a statute, the relief requested will typically not require the participation of individual members of the association—the relief will be the same for all members.

In *Hunt*, a state commission representing apple growers challenged a North Carolina statute prohibiting the display of state quality grades on apple containers shipped into the state. The commission argued that the statute unconstitutionally discriminated against interstate commerce. The Supreme Court recognized the commission's standing to sue on behalf of its members because, in addition to satisfying the first two prongs of the *Warth* test, neither the interstate commerce claim nor the request for declaratory and injunctive relief required individualized proof.<sup>45</sup>

In commercial disputes, on the other hand, the relief requested is usually in the form of monetary damages, and courts have been hesitant to grant associational standing when the calculation of damages is likely to require an individualized determination for each of the association's members.

### **DDFA of South Florida v. Dunkin' Donuts**

Claims of associational standing have cropped up a few times in franchise litigation, and, not surprisingly, the courts' responses have been cool.<sup>46</sup> Franchisee associations rarely, if ever, can satisfy the requirements of *Warth*.

A case in Florida tackled the problem head-on and is illustrative of how courts are unreceptive to claims by franchise associations asserting the rights of their individual members. In *DDFA of South Florida, Inc. v. Dunkin' Donuts, Inc.*,<sup>47</sup> a group of Florida Dunkin' Donuts franchisees formed an association, DDFA of South Florida, Inc., "to articulate and advocate the needs, interests and lawful goals of its members by means of a constructive and cooperative relationship with [Dunkin' Donuts]."<sup>48</sup>

Dunkin' Donuts mandated that each franchisee contribute up to 1 percent of its store's gross sales to support special advertising and marketing programs. Whether to make an additional contribution beyond the 1 percent was to be decided by a majority vote among the franchisees in a particular market. DDFA claimed that beginning in 1996, Dunkin' Donuts, in an effort to make sure that a majority of DDFA members voted in favor of the percentage increase, began requiring that the ballots be signed in the presence of a Dunkin' Donuts representative.

DDFA alleged that the new voting procedure allowed Dunkin' Donuts to intimidate, threaten, and coerce DDFA's members into voting for the fund increases. DDFA also asserted that the advertising funds collected by Dunkin' Donuts were being used to support other Dunkin' Donuts-affiliated franchise systems in violation of the franchise agreement. Dunkin' Donuts responded by questioning whether DDFA, as an association, had standing to bring such claims.

Applying the *Hunt* test to DDFA, the court quickly determined that DDFA satisfied the first two requirements. Accepting as true the allegations in DDFA's complaint, the court agreed that the individual franchisees would have standing to sue in their own right. The court further held that the interests that DDFA sought to protect were germane to the organization's purpose, namely, "to articulate the needs, interests and lawful goals of its members [and] to protect and enhance the economic investments of Dunkin' Donuts' franchisees in the State of Florida."

But as for the third element of the *Hunt* test, i.e., whether the claim asserted or the relief sought would require the participation of the individual members in the lawsuit, the court held that DDFA had not met its burden. In particular, the court reasoned that although the franchise agreements between Dunkin' Donuts and the individual franchisees were relatively uniform in their terms, DDFA's allegations did not set forth a discrete legal issue pertaining to the members of the association as a whole. Rather, the complaints of tortious conduct and breach of contract would necessarily require individual determinations as to whether Dunkin' Donuts was liable to each member

of the association. Because the complaint did not raise a "pure question of law," the court determined that the claims for relief could not be considered without the individual participation of DDFA's members. Consequently, the doctrine of associational standing was inapplicable, and the court granted Dunkin' Donuts' motion to dismiss.

### **Monetary Damages**

Generally, when money damages are sought, courts deny associational standing. In fact, the author is not aware of any reported cases involving a franchisee association successfully asserting a claim of associational standing on behalf of its members for tort or private contract claims (not to be confused with an association alleging harm to itself as an organization). One commentator has suggested that this dearth of private contract cases may be due to the basic principle that privity of contract is an essential element for recovery based on a contract.<sup>49</sup>

Regardless, the fact remains that the doctrine is nonetheless asserted on occasion and should not be ignored lest a court sympathetic to a band of underdog franchisees finds a way to wrestle an association's tort or contract claims within the scope of *Hunt*'s third prong.<sup>50</sup> Although claims of associational standing are not necessarily recognized under the laws of each state and several states do not follow the federal model set out in *Warth* and *Hunt*,<sup>51</sup> the doctrine nonetheless lurks as a potential tool for franchisee plaintiffs.<sup>52</sup>

### **Antitrust Standing**

The past few decades have seen the emergence of an alternative avenue of relief for franchisees: recovery under state and federal antitrust laws. Violations of federal or state antitrust laws are often alleged as flowing from the structure of the franchise agreement or, more commonly, the business practices of the franchisor. Such allegations often include price fixing, price control, tie-in buying, market domination, and territorial domination through vertical integration. Although courts have witnessed an upsurge in antitrust claims by franchisees and dealers, they have been slow in permitting the majority of these suits to proceed, often because the plaintiffs lack the particular standing required by the antitrust laws. Although the analysis of whether a party possesses standing to assert an antitrust claim is by no means unique to franchise litigation, the increase in such claims by franchisees (and occasionally by franchisors) warrants some attention.

An initial survey of the federal antitrust statutes gives the impression that the class of eligible plaintiffs is a broad one. For example, section 4 of the Clayton Act grants a private cause of action for damages to "[a]ny person . . . injured in business or property by reason of anything forbidden in the antitrust laws."<sup>53</sup> This language, taken alone, would appear to give franchisees carte blanche to sue franchisors for any damages somehow flowing from violations of the antitrust laws.

The Supreme Court has rejected such a broad interpretation. The Court has held that in order for a claimant to have standing to sue under the antitrust laws, regardless of the statute, it must prove that its alleged injury was caused by the type of activity the antitrust laws were intended to prevent—it must be an "antitrust injury."<sup>54</sup> That is, although the injury may be causally

related to the alleged antitrust violation, it must be attributable to an anticompetitive aspect of the practice under scrutiny; it cannot merely stem from continued competition or decreased business.<sup>55</sup> Although the Supreme Court has outlined additional factors for courts to consider in assessing antitrust standing questions,<sup>56</sup> the predominant question is whether the plaintiff's loss is the type of loss the antitrust laws were intended to prevent. In practice, the courts that have addressed the issue have placed a substantial burden on franchisees seeking to assert antitrust claims against their franchisors.

In general, even if a plaintiff can prove that its economic loss occurred by reason of the defendant's unlawful activity, it will be unable to recover unless it can show that the loss occurred by reason of that which made the activity unlawful.<sup>57</sup> Due to the unique relationship of the franchisee and franchisor, this is often impossible to prove because courts view antitrust laws as existing primarily for the benefit of the consumer and not for those in the distribution chain.

### ***Serpa Corp. v. McWane, Inc.***

An illustrative example is *Serpa Corp. v. McWane, Inc.*,<sup>58</sup> where the court denied the plaintiff standing to pursue an antitrust claim on the basis that its alleged harm was not of the sort protected by the antitrust laws. Serpa was a distributor of plumbing supplies and for twenty years the exclusive sales representative in New England for a line of products manufactured by a company called Anaco. Historically, Anaco's products were sold through exclusive sales representatives like Serpa, which then sold them to plumbing supply wholesalers. In 1996, McWane acquired Anaco, as well as one of Anaco's competitors, giving McWane 85 percent of the product market in New England. McWane subsequently terminated Serpa as a sales representative for Anaco products, leaving it with a severely handicapped business. Serpa filed suit, alleging that McWane's consolidation of the market lessened competition and constituted an attempt to monopolize the New England market for the plumbing supplies at issue. The district court dismissed Serpa's antitrust claim for lack of standing.

The court began its analysis by noting in express terms that Serpa's case already had one strike against it: distributors presumptively lack antitrust standing.<sup>59</sup> Rather, the court pointed out, competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury.<sup>60</sup> The distributor or sales representative, on the other hand, generally lacks standing because its antitrust injury is too remote.<sup>61</sup>

Declining to stray from that presumption, the court did not allow Serpa to pursue its antitrust claim. Despite Serpa's claim that it was the "only truly viable plaintiff" because of the absence of any real competitors on the manufacturing level and the unlikelihood that any consumers would file an antitrust suit due to a lack of financial incentive, the court

remained unconvinced. Conceding that a distributor may well suffer financial injury from the "efficiency effects" of a vertical merger, the court nevertheless held that such harm is not the sort of harm intended to be addressed by the antitrust laws as long as there remain alternative sources of the product.<sup>62</sup> Applying this principle to Serpa, the court pointed out that Serpa brought its antitrust claim neither as a competitor nor a consumer, but rather as a distributor whose injuries resulted from the loss of its position as Anaco's exclusive New England distributor. As such, the court could not see how Serpa's loss resulted from, or was even connected to, the defendant's market power in the industry. Consequently, the court held that Serpa's injuries did not "flow from that which makes the defendant's acts unlawful."<sup>63</sup>

### ***Abbouds' v. McDonald's Corp.***

A recent case dealing with whether a franchisor's action can give rise to an antitrust claim is *Abbouds' McDonald's, LLC v. McDonald's Corp.*<sup>64</sup> In *Abbouds' McDonald's*, the plaintiff alleged that McDonald's had conspired with other franchisees to deny it certain stores put up for bid by the estate of a deceased franchisee. Abbouds' McDonald's alleged that McDonald's tried to bar it from bidding on those stores and that when Abbouds' McDonald's had submitted the highest bid on five stores, McDonald's exercised its contractual right of first refusal, all in furtherance of the alleged conspiracy. The district

court held that even if the Abbouds' McDonald's allegations were true, the exclusion of franchisees from additional franchise locations was not the type of injury the antitrust laws were meant to prevent.<sup>65</sup>

Other courts faced with the question of antitrust standing have also found no standing, such as when the alleged injury results from the defendant's merger with another company. Some courts apply different versions of the "antitrust standing" inquiry,<sup>66</sup> but the results are generally the same: distributors that are terminated, or whose contracts are not renewed following a merger, are consistently denied standing.<sup>67</sup> One court has stated flatly that if a plaintiff's chief complaint is not about higher prices or injury to competition, but rather about injury only to itself, there is no antitrust injury to speak of and, consequently, no standing to sue.<sup>68</sup> To be sure, market domination resulting from mergers is but one type of anticompetitive activity contemplated by the antitrust laws. It is, however, the activity most commonly complained of by distributors, dealers, and franchisees because it is the kind most likely to result in the termination of contracts and decrease in market share.

### ***Tying Arrangements***

Another relatively common source of litigation between franchisors and franchisees results from tying arrangements, where the franchisor sells one item, known as the tying product, for resale by the franchisee on the condition that the franchisee also

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**Generally, when money  
damages are sought, courts  
deny associational standing.**

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purchase another item, known as the tied product. Although the inquiry into antitrust injury remains a critical part of the standing analysis for tying claims, the focus is slightly different. Such arrangements are common in franchise relationships, and the relatively steady stream of litigation surrounding such setups renders useful an example of a typical scenario.

In *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*,<sup>69</sup> the Third Circuit considered a case where the second-largest pizza company in the United States was sued by an organization of franchisees challenging the legality of restrictions that enabled Domino's to sell approximately 90 percent of the ingredients and supplies (half a billion dollars' worth) used by Domino's franchisees. In essence, Domino's required the franchisees, in addition to paying franchise fees and other standard requirements of the franchise agreements, to purchase its ingredients and supplies. The franchisees alleged that their average individual annual costs for ingredients and supplies were somewhere between \$3,000 and \$10,000 more per year than they would have been in a competitive market. The court, however, affirmed a dismissal of the franchisees' antitrust claims on the ground that they lacked standing to sue.

The franchisees claimed that Domino's restrictions on where and from whom they could purchase ingredients and supplies constituted a monopoly on the market for such goods in violation of section 2 of the Sherman Act. The offense of monopoly under section 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>70</sup>

### First Prong: Relevant Market

In assessing the franchisees' standing to contest the propriety of the tying arrangement under the antitrust laws, the court focused on the first prong: specifically, what was the asserted relevant market over which Domino's allegedly possessed a monopoly? The franchisees argued that the relevant market was the one for "ingredients, supplies, materials, and distribution services used by . . . Domino's pizza stores."<sup>71</sup> The court disagreed. Although the court did not go so far as to define what the relevant market was, it did note that if the franchisees' definition was adopted, almost all franchise agreements requiring the franchise to purchase items from the franchisor would violate antitrust law. Recognizing the uniqueness of the franchise relationship and calling it a "bedrock of the American economy," the court noted that tying contracts are an essential and important part of the relationship because they prevent franchisees from "freeriding," i.e., offering substandard products of a quality insufficient to maintain the reputational value of the franchise product while benefiting from the quality control efforts of other actors in the franchise system.<sup>72</sup> Because the purpose of the antitrust laws is not to "protect business from the

working of the market," the court concluded that even if Domino's acted unreasonably by limiting the franchisees' freedom to purchase supplies and ingredients from other sources, the franchisees' remedy, if any, was in contract, not under the antitrust laws.<sup>73</sup> Thus, despite possible inequities in the contractual relationships between Domino's and the franchisees, the court held that as long as they were contemplated in the franchise agreements, it would be unwilling to disturb such a bulwark of the franchise form of business.

As with other anticompetitive behavior found insufficient to grant antitrust standing to franchisees, courts are hesitant to disturb business arrangements typical of the franchise form of business. Despite the observation by the dissent in the Third Circuit's denial of the franchisees' petition for rehearing en banc that such an approach constitutes a virtual grant of immunity to franchisors on tying claims, the fact remains that franchisees most likely will have to look elsewhere, such as the common law, if they wish to assert their claims.<sup>74</sup>

This is not to say that all antitrust claims arising out of franchise or distributorship arrangements are subject to dismissal for lack of standing. The defendant must look closely at its relationship with the plaintiff. If the plaintiff is merely a franchisee suing on the nonrenewal of a contract or decreased profits, for example, it will most likely be found to lack antitrust standing. But if the plaintiff is, say, a third-party distributor that could somehow be construed as a competitor of the defendant as well as a franchisee or distributor, then courts might be more willing to entertain antitrust claims.<sup>75</sup> Such suits are outside the scope of this article, however, as they touch on the franchise relationship only tangentially.

### The Bottom Line on Tying Claims

Franchisors should also be aware that they are not immune to the requirement that an antitrust plaintiff demonstrate antitrust injury. Although most antitrust claims arising from franchise relationships gone bad involve franchisees asserting claims against franchisors, there is at least one case that demonstrates that the same standing requirements apply to franchisors wishing to avoid collective action by their franchisees. In *Oil Express National, Inc. v. D'Alessandro*,<sup>76</sup> the franchisees went on a "royalty strike" and filed suit seeking rescission of their franchise agreements. The franchisor, in turn, terminated the franchise agreements and, when the franchisees refused to cease using the Oil Express trademark, sued under the Lanham Act. The defendant franchisees responded by organizing a "royalty boycott" involving half of the Oil Express franchisees and demanded that the franchisor reduce its royalty rate. The franchisor plaintiff then amended its complaint to assert that the group boycott was in violation of the antitrust laws.

The court denied the franchisor's request to file another amended complaint, holding that its sole remedy against the breaching franchisees was termination of their franchise agree-

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## Franchisors . . . are not immune to the requirement that an antitrust plaintiff demonstrate antitrust injury.

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ments to pay royalties. The court explained that even if the franchisees' boycott destroyed the Oil Express franchise system, reducing by one the number of franchisors selling "quick lube" franchises, the franchisor was not the proper party to assert the antitrust claim. Rather, the parties with standing would be the franchisees and potential franchise purchasers in that market, as they would be the ones that might suffer injury from a decrease in competition.

In short, franchisees, distributors, and dealers are almost never viewed by courts as proper plaintiffs to antitrust suits, except under unique circumstances. This is true even when the defendant has actually engaged in the types of anticompetitive behavior disallowed by the antitrust laws. If the franchisee or distributor plaintiff has not suffered the sort of harm contemplated by the drafters of the laws (i.e., the type of harm usually reserved for competitors and consumers), it is quite simply out of luck. For franchisees and distributors, which often bundle antitrust claims with other, more traditional contract and tort claims, this means that something more than mere decreased sales or lost business opportunities will have to be the alleged result of the defendant's activities.

### Conclusion

Defending on its merits a lawsuit resulting from a soured franchise relationship is often unavoidable. But there are cases that present litigators with the opportunity to dispose of a case before contesting any of its allegations. Within the arena of franchise litigation, there is no more important question to ask at the outset of a lawsuit than "Does this party have an invitation?" More specifically, is the party that is trying to bring this lawsuit allowed to do so?

This article is not intended to suggest that a plaintiff that is not a signatory to the franchise agreement lacks standing to sue under any circumstances. Nor does a party's status as an association mean that it necessarily lacks protection under the franchise laws. Similarly, a party's status as a franchisee does not necessarily mean that it lacks standing under the antitrust laws. Such grand pronouncements can never be made as there are always exceptions to the rules. But if defendants really stop to think about the actual identity of the plaintiff and what its stake is in the lawsuit before jumping to defending a case on the merits, at least some franchise disputes might be halted before they truly begin.

### Endnotes

1. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
2. *See* U.S. CONST. art. III. The constitutional limitations arise from Section 2, requiring the existence of a case or controversy in which the putative plaintiff has a genuine interest. Although state courts are not bound by the jurisdictional restrictions of Article III, *see Virginia v. Hicks*, 539 U.S. 113 (2003), many states, as reflected by the decisions cited in this article, have similar constitutional or jurisprudential limitations.
3. *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE 2d § 3531 (2005).
4. *Id.* § 3531.4; *see* *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Lujan*, 504 U.S. at 555.
5. Often, an action could simply be recommenced by the proper party. There are circumstances, however, when that option might not be available, i.e., a corporation has been dissolved or is under sepa-

rate ownership and does not want to participate in the lawsuit, or a bankruptcy has intervened.

6. 361 F.3d 1321 (11th Cir. 2004).

7. *See, e.g.*, *G&R Moojestic Treats, Inc. v. Maggiemoo's Int'l, LLC*, Bus. Franchise Guide (CCH) ¶ 13,066 (D. Md. Mar. 10, 2005) (holding that individual shareholder had no standing to sue when he had entered franchise agreement "on behalf of an entity to be named later"); *Ward Enters., Inc. v. Bang & Olufsen Am.*, No. 02-C-7640, 2003 WL 22859793 (N.D. Ill. Dec. 2, 2003) (sole shareholder and guarantor lacked standing under Washington Franchise Investment Protection Act); *Learning Express, Inc. v. Ray-Matt Enter., Inc.*, 74 F. Supp. 2d 79 (D. Mass. 1999) (holding that joint shareholders of franchisee shell corporation lacked individual standing); *Fiore v. McDonald's Corp.*, Nos. CV-95-2708, CV-96-0376, 1996 WL 331090 (E.D.N.Y. June 12, 1996); 1996 WL 91908 (E.D.N.Y. Feb. 23, 1996) (individual shareholders of franchisee corporation do not have standing to sue for alleged wrongs to corporation); *Hengel, Inc. v. Hot'n Now, Inc.*, 825 F. Supp. 1311 (N.D. Ill. 1993) (same).

8. 771 A.2d 508 (Md. Ct. Spec. App. 2001).

9. *See also* *Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F. Supp. 858 (E.D. Va. 1980) (sister corporation lacked standing to sue under license agreement).

10. The cases that gave rise to both of these exceptions involved the federal Automobile Dealers' Day in Court Act (ADDCA), but the reasoning could be applicable to other types of franchise relationships.

11. 353 F.2d 710 (7th Cir. 1965).

12. *Vincel v. White Motor Corp.*, 521 F.2d 1113 (2d Cir. 1975); *Bronx Chrysler Plymouth, Inc. v. Chrysler Corp.*, 212 F. Supp. 2d 233 (S.D.N.Y. 2002); *Milburn v. Ford Motor Co.*, 437 F. Supp. 7 (E.D. Okla. 1977).

13. 447 F.2d 786 (5th Cir. 1971).

14. *Id.* at 790-91.

15. *See, e.g.*, *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir. 1974); *Imperial Motors, Inc. v. Chrysler Corp.*, 559 F. Supp. 1312 (D. Mass. 1983).

16. *See, e.g.*, *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n.11 (9th Cir. 1979) ("[W]e are not persuaded to follow *York*."); *Bronx Chrysler Plymouth*, 212 F. Supp. 2d at 239-43 (holding that *York* was inconsistent with Second Circuit law); *Northgate Motors, Inc. v. Gen. Motors Corp.*, 111 F. Supp. 2d 1071, 1075-76 (E.D. Wis. 2000); *Conroy Datsun Ltd. v. Nissan Motor Corp. in U.S.A.*, 506 F. Supp. 1051, 1055-56 (N.D. Ill. 1980); *cf. Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 56 F. Supp. 2d 694, 699-701 (E.D. La. 1999) (finding *York* "likely misguided" but still binding in circuit).

17. 442 F. Supp. 873 (E.D. Pa. 1977).

18. *See, e.g.*, *Olson Motor Co. v. Gen. Motors Corp.*, 703 F.2d 284 (8th Cir. 1983); *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 627 F. Supp. 1202 (S.D.N.Y. 1986).

19. *See, e.g.*, *Bishay v. Am. Isuzu Motors, Inc.*, 404 F.3d 491 (1st Cir. 2005).

20. Disappointed suitors do have other claims, such as interference with contract or business advantage, that will not be subject to a standing defense.

21. 6 Cal. Rptr. 2d 515 (Ct. App. 1992).

22. There was disagreement between *Dameshghi* and *Texaco* regarding the length of his lease, if the transfer was approved. *Dameshghi* insisted on three years, but *Texaco* wanted him to agree to a one-year trial period. *Id.* at 519.

23. CAL. CORP. CODE § 31000.

24. CAL. CORP. CODE § 31300.

25. *See, e.g.*, *Boyle v. Int'l Truck & Engine Corp.*, 369 F.3d 9 (1st Cir. 2004); *Tynan v. Gen. Motors Corp.*, 591 A.2d 1024 (N.J. Super. App. Div. 1991), *rev'd in part on other grounds*, 604 A.2d 99 (N.J. 1992) (holding that a prospective purchaser of an automobile franchise did not qualify as a franchisee under the New Jersey Franchise Practices Act); *Beard Motors, Inc. v. Toyota Motor Distribs., Inc.* 480 N.E.2d 303 (Mass. 1985) (prospective purchaser of an auto dealer-

ship lacked standing because he was not a dealer under the Massachusetts motor vehicle dealer law).

26. *See Damesghi*, 6 Cal. Rptr. 2d at 527.

27. 206 Cal. Rptr. 670 (Cal. Ct. App. 1984).

28. *Id.* at 674.

29. *Id.*

30. *See, e.g., G&R Moojestic Treats, Inc. v. Maggiemoo's Int'l, LLC*, Bus. Franchise Guide (CCH) ¶ 13,066 (D. Md. Mar. 10, 2005) (holding that guarantor of original franchisee, although lacking standing to sue as a franchisee under the Maryland Franchise Law, did possess standing to assert common law fraud and negligent misrepresentation claims).

31. The only other reported case found that explicitly endorsed the analysis in *Don Rose* was *Sea Air Shuttle Corp. v. Virgin Islands Port Authority*, 800 F. Supp. 287 (D.V.I. 1992).

32. *See, e.g., Superlease Rent-A-Car, Inc. v. Budget Rent-A-Car of Md., Inc.*, No. Civ. A. 89-0300, 1989 WL 39393 (D.D.C. Apr. 13, 1989).

33. *See, e.g., Roberts v. Gen. Motors Corp.*, 643 A.2d 956 (N.H. 1994) (stating that in determining liability the court must ascertain whether the plaintiff was an incidental or an intended beneficiary).

34. *Nerhan v. Shell Oil Co.*, 911 F.2d 738 (9th Cir. 1990) (franchise agreement was meant to benefit franchisee and franchisor, and prospective franchise buyer did not qualify as a third party beneficiary entitled to enforce the agreement).

35. *Id.*

36. 992 F. Supp. 64 (D. Mass. 1998).

37. *Id.* at 68 (quoting MASS. GEN. LAWS. ch. 93B, § 12A).

38. *Id.* at 69.

39. 573 N.W.2d 80 (Mich. Ct. App. 1997).

40. *See Rochester Lincoln-Mercury, Inc. v. Ford Motor Co.*, 248 F.3d 46 (1st Cir. 2001); *Key v. Chrysler Motors Corp.*, 918 P.2d 350 (N.M. 1996).

41. Also referred to as "representational standing."

42. 422 U.S. 490 (1975).

43. 432 U.S. 333 (1977).

44. *Id.* at 343.

45. *Id.* at 344.

46. Franchisee associations may also attempt to invoke the doctrine of associational standing if they are suing for harm suffered by the association itself due to the franchisor's interference with the association's activities. Such cases are rare in the franchise context and are not discussed in this article.

47. No. 00-7455-Civ, 2002 WL 1187207 (S.D. Fla. May 22, 2002).

48. *Id.* at \*1.

49. William B. Steele III & A. Darby Dickerson, *Standing Issues Related to Franchisee Associations*, 12 FRANCHISE L.J. 99, 101-02 (1993).

50. *See, e.g., Ass'n of Merger Dealers, LLC v. Tosco Corp.*, 167 F. Supp. 2d 65 (D.D.C. 2001).

51. *See id.*

52. In *Dealer Store Owners Ass'n, Inc. v. Sear, Roebuck & Co.*, 2006 WL 91335 (D. Minn. Jan. 12, 2006), the plaintiff association sought to have the court determine that its members were franchisees under various state laws. The court, although dismissing for lack of subject matter jurisdiction, noted that such a determination would require a review of what the plaintiff had alleged were inherently individual contracts.

53. 15 U.S.C. § 15.

54. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

55. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

56. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-545 (1983), the Supreme Court summarized the factors to be considered in determining whether a particular plaintiff has standing to assert an antitrust claim. The factors include (1) the potential for duplicative recovery, (2) the existence of more direct victims of the alleged antitrust violation, (3) the directness of the injury, (4) whether the claim for damages rests on some abstract conception or speculative measure of harm, (5) the nature of the plaintiff as a consumer or a competitor in the relevant market, (6) the causal connection between the asserted antitrust violation and the harm to the plaintiff, and (7) whether the plaintiff's loss is of the type the antitrust laws were intended to prevent and flows from that which makes a defendant's acts unlawful.

57. *Brunswick*, 429 U.S. at 488-89.

58. 199 F.3d 6 (1st Cir. 1999).

59. *Id.* at 10.

60. *Id.*

61. *Id.* at 11.

62. *Id.*

63. *Id.* at 12 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

64. No. CV 04-1895P, 2005 WL 2656591 (W.D. Wash. Oct. 14, 2005).

65. The *Abbouds'* case was scheduled for argument before the Ninth Circuit on June 5, 2006.

66. *See, e.g., Fla. Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir. 1997) (requiring the antitrust plaintiff to show that it (1) has suffered antitrust injury and (2) is an efficient enforcer of the antitrust laws).

67. *See, e.g., Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 345 (1990); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir.); *Sierra Wine & Liquor Co. v. Heublein, Inc.*, 626 F.2d 129 (9th Cir. 1980); *Universal Brands, Inc. v. Philip Morris, Inc.*, 546 F.2d 30 (5th Cir. 1977).

68. *Fla. Seed*, 105 F.3d at 1375.

69. 124 F.3d 430 (3d Cir. 1997).

70. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

71. *Queen City Pizza*, 124 F.3d at 437.

72. *Id.* at 440 (citing *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1349-50 (9th Cir. 1987); Warren S. Grimes, *When Do Franchisors Have Market Power?*, 65 ANTITRUST L.J. 105, 145-47 (1996)).

73. *Queen City Pizza*, 124 F.3d at 441.

74. *See, e.g., Juliano v. Sun Co.*, Bus. Franchise Guide (CCH) ¶ 11,562 (3d Cir. Aug. 24, 1998) (holding that a Sunoco gas station franchisee lacked antitrust standing but reversing the district court's grant of summary judgment and holding that the plaintiff was free to pursue a common law claim of breach of the covenant of good faith and fair dealing).

75. *See, e.g., George v. Anheuser-Busch, Inc.*, No. 87-CV-1184, 1988 WL 117064 (N.D.N.Y. Nov. 1, 1988) (conferring antitrust standing on potential beer distributor that was frozen out of a particular geographic market due to the defendant's refusal to approve transfer of distributorship contract to plaintiff unless plaintiff agreed not to distribute other brands within geographic area).

76. No. 96 C 1528, 1998 WL 214727 (N.D. Ill. Apr. 27, 1998).