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ADJUSTING THE EQUITIES IN FRANCHISE TERMINATION: A *Sui Generis* APPROACH

I. INTRODUCTION

A. *An Overview: Why Franchise?*

IN THE DECADES FOLLOWING WORLD WAR II, a method of marketing services and products developed which is unique unto itself. Franchising began as an alternative to the chain store method of operating a business. Franchises retained many of the advantages of chain stores, while doing away with chain stores' chief drawbacks. Similar to a chain store, the franchise outlet sells a publicly recognizable product through a standardized system. Economies of scale remain present, allowing the distribution of advertising, design and even bookkeeping and accounting costs among the members of the system, thus reducing the cost to each. Yet unlike the chain store, the parent company does not have to provide the large amounts of start-up capital which are necessary to establish a chain outlet. In addition, each outlet is managed by an individual with a vested financial interest in the success of his operation.[1]

Franchising as a marketing concept has grown into a way of life for Americans. Virtually every product and service offered to consumers has been franchised. The list includes products and services as diverse as art galleries, employment agencies and wig salons.[2] The food industry alone has been deluged with franchised products. No fewer than thirty companies licensed their method to sell hamburgers.[3] Over 492,000 franchised outlets now exist, accounting for nearly three hundred billion dollars in annual sales.[4]

This overwhelming acceptance of the franchising concept as a marketing method has not spared the industry of its share of problems. Indeed, the scope of troubled areas in the franchising industry is nearly as broad as the variety of goods and services available through franchised systems. This Note cannot attempt even an overview of all the problems that confront the industry;[5] instead the discussion will focus on one recurring problem within the industry: the rights of the parties

[1] *See Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 8 (1965).

[2] Info Press, Inc. collects a complete list of products and services listing them by product and manufacturer together with other relevant information annually in THE FRANCHISE ANNUAL.

[3] INFO PRESS, INC., THE 1981 FRANCHISE ANNUAL HANDBOOK AND DIRECTORY 30-50 (1981).

[4] U.S. DEPT. OF COMMERCE, INDUSTRY AND TRADE ADMINISTRATION, FRANCHISING IN THE ECONOMY 1977-79 (1979).

[5] For an excellent general review of the pros and cons of the franchise method of doing business, see H. KURSH, THE FRANCHISE BOOM (2d ed. 1968).

engaged in a franchise relation following the termination of that relationship.

B. *The Problem*

Much litigation has ensued in recent years over this very issue. Franchisors claim the termination of a franchise contract means the franchisee has no claim against the franchisor whatsoever for damages of any kind. Franchisees maintain that the relationship creates rights beyond the contract, that termination is an infringement of these rights and that damages should be available for this infringement. The courts have tried valiantly to walk a thin line, balancing on one hand freedom and sanctity of contract, and on the other, good faith and fair play. The results, as might be imagined, are far from consistent.[6]

The onslaught of lawsuits in this area has not gone unnoticed by legislatures. Almost every state has made at least one attempt at regulating the franchise method of doing business.[7] In short, all agree that termination of the franchisor-franchisee relationship remains a problem, but as yet no effective cure has been devised.

C. *The Relationship*

This stunning lack of success has been based, at least in part, on the failure of parties to a franchise agreement to agree on even the most basic elements of the relationship, including the definition of what constitutes a franchise. "In its simplest form, franchising involves a company with a product or service which arranges for a group of dealers to handle its distribution."[8] This definition does not aptly describe the dynamic nature of the arrangement. The International Franchise Association has defined franchising as "a continuing relationship in which the franchisor provides a licensed privilege to do business, plus assistance in organizing, training, merchandising and management in return for a consideration from the franchisee."[9] Of the commentators,

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[6] A full discussion of the judicial response is contained in the text accompanying notes 24-90 *infra*.

[7] Alabama and Alaska are the only states that have yet to adopt franchise legislation in some form. *See* notes 91-187 *infra* and accompanying text.

[8] E. LEWIS & R. HANCOCK, THE FRANCHISE SYSTEM OF DISTRIBUTION 1 (1963).

[9] U.S. DEPT. OF COMMERCE, FRANCHISE COMPANY DATA FOR EQUAL OPPORTUNITY IN BUSINESS (July, 1969, p.VIII). The legislative draftsmen have chosen to be less generic for the most part. Many franchise practices acts limit their scope to a single type of franchise. *See, e.g.*, Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221 *et seq.* (1976) (franchise is the written agreement between an automobile dealer and manufacturer which outlines the rights and liabilities of the parties thereto); Petroleum Marketing Practices Act, 15 U.S.C.A. §§ 2801 *et seq.* (West Supp. 1980) (franchise is the contract which authorizes a retailer to occupy leased premises for the sale of motor fuel under a trademark). An accepted

the courts, the legislatures and industry groups considering the question, nearly all agree that any definition must include some description of the ongoing nature of the arrangement.[10] The license is also an integral part of all franchise relationships.[11] It is these two features that set a franchise apart from a simple sales contract.[12] The trouble arises not on the parties' acceptance of the terms which define the relationship, but on the differing focus that the parties give to the concepts behind the terms.

For the franchisor, the center of the agreement is the license of the trademark. His stated contention is that protection of the trademark means that the license must remain very nearly revocable at will.[13] The grantor maintains that the words "continuing relationship" describe the control that must be maintained over the system as a whole. That is, the uniformity of the operation systemwide cannot be compromised. To accomplish this the license must remain revocable. In this manner the franchisor can weed out the undesirable or nonconforming dealers.[14]

To the franchisee, the licensed trademark is but a single piece of what was sold as an integrated system. The contention that a franchise is more than the grant of the right to use the franchisor's trademark and secret formulas is well founded.[15] From the parties' first association,

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definition of franchising has proven elusive. "The word 'franchise' has been applied so indiscriminately, and to such divergent business arrangements as to defy consistent definition." Wilson, *An Emerging Enforcement Policy for Franchising*, 15 N.Y.L. FORUM 1, 2 (1969).

[10] *See, e.g.*, J. MCCORD & I. COHEN, FRANCHISING: LEGAL PROBLEMS AND THE BUSINESS FRAMEWORK OF REFERENCE, AN OVERVIEW (1968); E. LEWIS & R. HANCOCK, THE FRANCHISE SYSTEM OF DISTRIBUTION 8-9 (1963); Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650, 660 (1971). Some courts, however, continue to look past this continuing relationship and view the parties' arrangement as simply a series of executory contracts. *E.g.*, American Oil Company v. Columbia Oil Co., Inc., 88 Wash. 2d 835, 567 P.2d 637 (1977) (sales contract coupled with the license of a trademark held not to be a franchise relation as no express contract provision required payment of a franchise fee).

[11] *See generally* H. BROWN, FRANCHISING: REALITIES AND REMEDIES 13-21 (1978).

[12] Gelhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 469.

[13] Indeed, the Lanham Act, 15 U.S.C. §§ 1051 *et seq.* (1976), requires a licensor of a trademark to insure the quality standards of his mark or risk losing the rights to it altogether.

[14] Adolph Coors Co. v. FTC, 497 F.2d 1178, 1183 (1974).

[15] Various types of franchise arrangements exist. In a distributor type franchise, the licensee is merely granted the right to market the parent company's product, usually from a preexisting licensee-owned facility. The most common example is the beer distributorship. In a "package" franchise, the franchisor provides the plans and methods to do business, and the franchisee provides the capital to build the outlet and start the business. In a "turnkey" operation the licensor provides a completely assembled business to the franchisee. He simply

heavy emphasis is placed on the franchisor's business skill and know-how.[16] The typical advertisement[17] offers the franchisee the chance to own his own business. Location, training, continuing support and advertising are all provided by the franchisor. The ad normally goes on to state that no experience in the field is needed; merely the desire to serve the public, the talent to manage your own business and minimal cash investment are necessary. It is against this background that the relationship begins.

D. *The Franchise Contract*

In the typical franchise situation prevalent today, a contract is signed which purports to define the rights of the parties.[18] However, the sheer economic size of the franchisor[19] and his stated desire to keep the system uniform means that few, if any, of the terms are negotiable.[20] The contract dictates the scope of the trademark license and what control the franchisor retains in the product.[21] This contract also defines the right of the licensor to revoke or terminate the license. By contrast, very little if anything is included in the contract relating to the parties' rights following termination.[22]

Failure to end the relationship amicably has been the cause of an increasing amount of recent franchise litigation. The franchisee cries foul

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pays the price, turns the key to open the door and begins business. Common examples of these latter two types are fast-food and gasoline service station franchises.

[16] United States v. Arnold, Schwinn & Co., 388 U.S. 365, 386 (1967).

[17] "A Real Opportunity!— —with over 100 franchise centers throughout the United States, now has excellent locations available in the Cleveland area for individuals who realize the tremendous potential of the— —industry. (No Mechanical Experience Necessary).— —provides: 1. A guaranteed location; 2. Complete home office training; 3. Continuing operations support; 4. Effective advertising; 5. Excellent territorial protection. You provide: 1. The desire to serve the public; 2. The talent to manage your own business; 3. Cash and assets of $30,000 (total investment—$61,465). If you have strong desire to acheive financial independence, don't miss this opportunity of your life-time. For further details, call. . . ." The Plain Dealer, Feb. 1, 1981, § F at 27, col. 4.

[18] *See* Bailey, *A Form Unit Franchise Agreement*, 1980 ARIZ. ST. L.J. 585, for a sample franchise contract.

[19] *See* Atlantic Refining Co. v. FTC, 381 U.S. 357, *reh. denied*, 382 U.S. 873 (1965); *see also* FTC v. Texaco, Inc., 393 U.S. 223 (1968).

[20] *See generally* Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172 (1965).

[21] Retention of too much control means being subject to antitrust violations under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 *et seq.* (1976), while too little control means loss of the trademark under the Lanham Act, 15 U.S.C. §§ 1055 *et seq.* (1976).

[22] H. KURSH, THE FRANCHISE BOOM 106 (1968). *See also* 5 CORBIN, CONTRACTS § 1058 (1960): "When parties are making a contract, their attention is centered on the performances that are promised." *Id.* at 939.

and sues to enjoin the termination. The parent then points to the contract and turns to other matters.[23] The courts have been reluctant to settle the disputes absent some legislative assistance. A short examination of the history of the problem bears this out.

II. Common Law Response

A. *Franchising's Beginnings*

In the early days of franchising[24] the grantor-franchisor retained the unilateral right to revoke the license at will.[25] The contracts included no express provision regarding termination in most cases. In *E.I. DuPont DeNemours and Company v. Claiborne-Reno Company*,[26] the court of appeals was called on to interpret a written contract of indefinite duration.[27] Reversing a jury verdict, the court held the termination-at-will clause was not actionable regardless of whether DuPont's motives were in good or bad faith.[28]

Other courts, recognizing the potential for abuse in such situations, began developing a number of approaches to the termination problem. Among these was the implication of a reasonable duration term into a contract of otherwise indefinite duration.[29] In *Allied Equipment Co. v.*

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[23] *See, e.g.*, Ted's Tire Service, Inc. v. Chevron U.S.A., Inc., 470 F. Supp. 163 (D. Conn. 1979); Diehl & Sons, Inc. v. International Harvester Co., 445 F. Supp. 282 (E.D.N.Y. 1978); Chinetti-Garthwaite Imports, Inc. v. Ferrari Societa Per Anzioni Esercizio Fabriche Automobili E Corse, 463 F. Supp. 73 (E.D. Pa. 1978); Paul Reilly Co., Inc. v. Dynaforce Corp., 449 F. Supp. 1033 (E.D. Wis. 1978); Dayan v. McDonald's Corp., 21 Ill. 2d 761, 382 N.E.2d 55 (1978); Finlay & Associates, Inc. v. Borg-Warner Corp., 155 N.J. Super. 331, 382 A.2d 933 (1978).

[24] The relationship was contractually termed a distributorship. It contained, however, all of the elements of a franchise. A trademark product was licensed to be sold in a more or less exclusive territory with the licensee paying a royalty for the privilege of his exclusivity.

Today the exclusive territory may raise some antitrust problems. *See generally* Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); United States v. Arnold-Schwinn & Co., 388 U.S. 365 (1967).

[25] E.I. DuPont De Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224 (8th Cir.), *cert. denied*, 290 U.S. 646 (1933); Schnerb v. Caterpillar Tractor Co., 43 F.2d 920 (2d Cir.), *cert. denied*, 282 U.S. 898 (1930); Biber Bros. News Co. v. New York Evening Post, Inc., 144 Misc. 405, 258 N.Y.S. 31 (Sup. Ct. 1932).

[26] 64 F.2d 224 (8th Cir.), *cert. denied*, 290 U.S. 646 (1933).

[27] The contract stated that it was "[Dupont's] intention and desire to continue under this agreement so long as [Claiborne-Reno's] services, in [Dupont's] judgment, prove satisfactory." *Id.* at 225.

[28] *Id.* at 233.

[29] Allied Equipment Co. v. Weber Engineered Products, Inc., 237 F.2d 879 (4th Cir. 1956); Brooks v. Jack's Cookie Co., 238 F.2d 69 (4th Cir. 1956); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960); San Francisco Brewing Corp. v. Bowman, 52 Cal. 2d 607, 343 P.2d 1 (1955).

Weber Engineered Products, Inc., the court held that an oral distributorship contract was not terminable at will where the franchisee spent large amounts of money to build up the franchise in reliance on the franchisor's promise of a continuing relationship.[30] The court ordered the parties to continue the relationship "for such a period of time as would enable it [Allied] to recoup [the expense which] it incurred in reliance upon the arrangement."[31] The California Supreme Court in *San Francisco Brewing Corp. v. Bowman*[32] went a step further, holding that an oral contract, impliedly running for a reasonable time, does not become terminable at will as soon as a profit is made. This fact was held to be but one element for the jury to consider.[33]

Along with the implied term of reasonable duration, courts soon began to require a reasonable notice before allowing termination of distributorship-franchise contracts.[34] In *J.C. Millett Co. v. Park & Tilford Distillers Corp.*,[35] the court, applying California law, stated that the circumstances surrounding a liquor wholesaler's distributorship were such that one year was the minimum reasonable time which it must remain in effect and three months was a concurrently reasonable period required for notice of termination.[36] The New York Court of Appeals in *Colony Liquor Distributors, Inc. v. Jack Daniels Distillery-Lem Motlow Properties, Inc.*,[37] held that the twelve year relationship between the parties and other facts necessitated the addition of a reasonable period of notice before termination. It fixed the notice period at twenty months.[38]

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[30] Allied Equipment Co. v. Weber Engineered Products, Inc., 237 F.2d 879, 881-82 (4th Cir. 1956). This was an extension of the "Missouri doctrine," an agency law concept so named as a result of its apparent origin in Glover v. Henderson, 120 Mo. 367, 377, 25 S.W. 175, 177 (1894).

[31] Allied Equipment Co. v. Weber Engineered Products, Inc., 237 F.2d 879, 882 (4th Cir. 1956).

[32] 52 Cal. 2d 607, 343 P.2d 1 (1959).

[33] *Id.* at 615, 343 P.2d at 5.

[34] *See generally* J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484 (N.D. Cal. 1954); Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Ltd., U.S.A., Inc., 256 Iowa 899, 129 N.W.2d 731 (1964); Colony Liquor Distributors, Inc., v. Jack Daniels Distillery-Lem Motlow Prop., Inc., 22 A.D.2d 247, 254 N.Y.S.2d 547 (1965).

[35] 123 F. Supp. 484 (N.D. Cal. 1954).

[36] *Id.* at 493.

[37] 22 A.D.2d 247, 254 N.Y.S.2d 547 (1965).

[38] *Id.* at 250, 254 N.Y.S.2d at 550. These victories for the franchisees were far from universal. Many courts continued to enforce contracts between similar parties to the letter. *See* Robert Porter & Sons, Inc. v. National Distillers Products Co., 324 F.2d 202 (10th Cir. 1963); Burger Brewing Co. v. Summer, 261 F.2d 261 (4th Cir. 1958); Gunter Bros., Inc. v. Cooper Tire & Rubber Co., 87 Ga. App. 626,

As implied terms of duration and notice were added by the courts, draftsmen for the franchisors began to counter by including express rights of termination in the contract.[39] These express terms in the contract were strictly construed in favor of the drafters. The courts thereafter continually held that so long as the terms of the provision were complied with, the parties were without cause to complain.[40]

B. *Developing Principles of Franchise Law*

The power to terminate is often conditioned on the occurrence of a specified event, such as failure to meet a sales quota. As long as the condition or quota is reasonable, the courts have been reluctant to look any further than to the contract itself.[41] This is the so-called freedom of contract approach.[42] The marketplace, not the courtroom, is the place that will correct any inequity in bargaining power; this is assumed to be so since the parties remain free to choose with whom they will deal.[43]

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74 S.E.2d 744 (1953); Goodman v. Motor Products Corp., 9 Ill. App. 2d 57, 132 N.E.2d 336 (1956).

Reasonable notice appears to have been the more broadly based of the early remedies applied by the courts. *See, e.g.*, Florida-Georgia Chemical Co. v. National Laboratories, Inc., 153 So. 2d 752 (Fla. App. 1963); Mayflower Air-Conditioners, Inc. v. West Coast Heating Supply, Inc., 54 Wash. 2d 211, 339 P.2d 89 (1959); California Wine Assoc. v. Wisconsin Liquor Co., 20 Wis. 2d 110, 121 N.W.2d 308 (1963).

[39] *Compare* E.I. DuPont De Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224, 225-26 (8th Cir. 1933) *with* Superior Motors, Inc. v. Winnebago Industries, Inc., 359 F. Supp. 773, 775 (D.S.C. 1973).

[40] *See generally* Rea v. Ford Motor Co., 497 F.2d 577 (3rd Cir.), *cert. denied*, 419 U.S. 868 (1974); Yamaha Parts Distributors, Inc., v. Ehrman, 316 So. 2d 557 (Fla. 1975); Cycleway, Inc. v. Kawasaki Motors Corp., U.S.A., 77 Misc. 2d 829, 354 N.Y.S.2d 812 (Sup. Ct. 1974); Division of Triple T Service, Inc. v. Mobil Oil Corp., 60 Misc. 2d 720, 304 N.Y.S.2d 191 (Sup. Ct. 1969).

[41] *See* Frank Chevrolet Co. v. General Motors Corp., 419 F.2d 1054 (6th Cir. 1969); Victory Motors of Savannah, Inc. v. Chrysler Motors Corp., 357 F.2d 429 (5th Cir. 1966) (quotas figured on national or regional average held to be reasonable term for cancellation). *But cf.* Madsen v. Chrysler Corp., 261 F. Supp. 488 (N.D. Ill. 1966), *vacated as moot*, 375 F.2d 773 (7th Cir. 1967) (sales quota viewed by manufacturer as performance goal rather than contractual condition and therefore not good cause for termination).

Quotas determined with reference to national averages raise serious questions of their own about fairness. For instance, in any average half of the statistical sample will be below average and half above. In effect, this grants the manufacturer the right to dismiss half of its dealer force at any time.

[42] Sir George Jessel is credited with the most famous statement of this view: "[M]en of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. . . . [Y]ou are not lightly to interfere with this freedom of contract." Printing & Numerical Registering Co. v. Sampson, 19 L.R.Eq. 462, 465 (1875).

[43] *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 630-31 (1943).

In the franchise situation, however, the parties' relationship extends beyond the contract. Principles of contract or agency law do not take into account the full nature of the ongoing relationship.[44] Without a strong network of viable dealerships, the franchisor's trademark is worth little more than its development cost.[45] By contrast, as the system expands and the mark becomes widely known, the licensor-franchisor is able to command a premium for its license.[46]

The franchisee sees the system as a method for providing easy access to a national advertising campaign, and the economies of scale inherent in a large corporation are presumably available to the franchisee. "The franchise method of operation has the advantage, . . . of enabling numerous groups of individuals with small capital to become entrepreneurs. . . . The franchise system creates a class of independent businessmen."[47]

It should be plain that more exists here than the standard sales agency relationship. From the first encounter, the parties expect more from each other than the "best efforts" duty of sales law.[48] The franchisor requires the distributors to maintain quality standards and uphold its local image. The local outlets need the national expertise in training and advertising along with the uniform product that gives the trademark a public identity. It is this blend of independent local input and the uniform national or regional character of the product and the system that makes franchising unique.[49]

C. *Modern Approaches to Franchising*

Recognition of the fact that franchising was distinct from historical contractual principles came slowly to the courts. While recognizing that the rights of the parties were supposed to be embodied in the agreement, courts have entertained outside evidence concerning the relationship beyond the contract.[50]

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[44] *See generally* Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971); Gelhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 468-71.

[45] *See* Gilson, *Trademarks*: Sine Qua Non *of Franchising*, 52 CHI. BAR RECORD 228 (1971).

[46] *See generally* Collison, *Trademarks, The Cornerstone of a Franchising System*, 24 SOUTH. L.J. 247, 248 (1970); Wilson, *An Emerging Enforcement Policy For Franchising*, 15 N.Y.L. FORUM 1, 16 (1969).

[47] Susser v. Carvel Corp., 206 F. Supp. 636, 640 (S.D.N.Y. 1962).

[48] U.C.C. § 2-306(2) (parties in an exclusive sales agency are under duty to use "best efforts" to promote sales).

[49] H. KURSH, THE FRANCHISE BOOM 23-51 (2d ed. 1968).

[50] *See, e.g.*, Atlantic Refining Co. v. FTC, 381 U.S. 357, 368 (1965); Mobil Oil Corp. v. Rubenfield, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (Civ. Ct. 1972), *rev'd*, 48 A.D.2d 428, 370 N.Y.S.2d 943 (1975).

Many courts continued to say, however, that the contract was the parties' final deal and that the judiciary was not at liberty to change it in any way.[51] Fairness was not something to be engrafted onto a contract by a court after its making.[52] If the contract failed to outline all of the parties' rights, a court could do nothing.[53]

At the opposite end of the spectrum were those judges who imposed various types of good faith duties on the parent company. Some courts removed the right to terminate the agreement entirely from the franchisor in the absence of some substantial failure of the dealer to perform his duties under the contract.[54] The parties had an obligation to continue dealing with each other until one of them exhibited bad faith by failing to perform his duties under the contract. In other words, as long as the dealer did his best, renewal of his contract was assured. These courts created a franchise in perpetuity.[55]

The leading case under this latter approach is *Shell Oil Co. v. Marinello*.[56] In that case the New Jersey Supreme Court held that the terms of the thirteen-year relationship between the parties were not adequately embodied in the written franchise contract. The court went on to rewrite much of that contract, finally deciding that unless Marinello failed to comply substantially with the agreement's terms, Shell owed its dealer a new contract.[57]

A middle ground was found by other courts who recognized that a franchise was more than a sales agency, yet not a contract for life. The contract was not the final statement of the parties' bargain, yet a right was retained in both parties to terminate the relationship. The right to terminate was, however, qualified. These courts attached a duty to *terminate* in good faith.[58] In *Zapatha v. Dairy Mart, Inc.*,[59] the court looked

[51] Tarr v. General Electric Co., 441 F. Supp. 40 (W.D. Pa. 1977); Texaco v. A.A. Gold, 78 Misc. 2d 1050, 357 N.Y.S.2d 951 (Sup. Ct. 1974), *aff'd*, 358 N.Y.S.2d 973 (1975); Mobil Oil Corp. v. Rubenfeld, 48 A.D.2d 428, 370 N.Y.S.2d 943 (1975).

[52] Texaco v. A.A. Gold, 78 Misc. 2d 1050, 357 N.Y.S.2d 951 (Sup. Ct. 1974), *aff'd*, 358 N.Y.S.2d 973 (1975).

[53] Tarr v. General Electric Co., 441 F. Supp. 40, 42 (W.D. Pa. 1977) (allegations of retaliatory termination held to be *damnum absque injuria*).

[54] Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973); Mobil Oil Corp. v. Rubenfeld, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (Civ. Ct. 1972).

[55] Shell Oil v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973); Mobil Oil Corp. v. Rubenfeld, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (Civ. Ct. 1972). *See also* Fornaris v. Ridge Tool Co., 423 F.2d 563 (1st Cir.), *rev'd on other grounds*, 400 U.S. 41 (1970).

[56] 63 N.J. 402, 307 A.2d 598 (1973).

[57] *Id.* at 410-11, 307 A.2d at 603.

[58] Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370 (Mass. 1980); Atlantic-Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978). *See also* Seegmiller v. Western Men, Inc., 20 Utah 2d 352, 437 P.2d 892 (1968).

[59] 408 N.E.2d 1370 (Mass. 1980).

at the written franchise cancellation clause, and viewed that clause in light of "general duty of good faith and fair dealing."[60] Dairy Mart was found to owe its franchisees a duty not to terminate in any manner that would be "unfair, deceptive or in bad faith."[61] In other words, as long as the parent company was fair in the way it exercised the termination clause, it was free to terminate the franchise relationship. The Pennsylvania Supreme Court found a similar duty in *Atlantic Richfield Co. v. Razumic*,[62] holding that Arco must follow "principles of good faith and commercial reasonableness"[63] when attempting to terminate a dealer.

The courts imposing good faith termination obligations looked at the manner in which the cancellation power was exercised.[64] Where the break was for honest reasons,[65] no judicial intervention was necessary. When the duty to deal in good faith was stressed, the manner in which the contract was performed was examined.[66]

D. *Problems in the Modern Approaches*

All of the above common law approaches include conceptual problems. The freedom of contract perspective fails to take into account the ongoing nature of the franchise relationship. The details of the day-to-day relationship between the parties change continually. Many of the terms embodied in the franchise contract recognize this need for change.[67] For example, the franchisor almost universally reserves the right to change the marks identifying the system.[68] This insures that the system as a whole will benefit from any later upgrading done by allowing retroactive changes to be made to the existing franchises.[69] Additionally, many

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[60] *Id.* at 1379.

[61] *Id.* at 1380.

[62] 480 Pa. 336, 390 A.2d 736 (1978).

[63] *Id.* at 342, 390 A.2d at 743.

[64] Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1376-78 (Mass. 1980); Atlantic-Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978).

[65] Amoco Oil Co. v. Dickson, 389 N.E.2d 406 (Mass. 1979) (fact that return on investment was less than one percent was valid business reason to cancel, hence no lack of good faith); Witmer v. Exxon Corp., 260 Pa. 537, 394 A.2d 1276 (1978) (failure to agree on increase in rent meant nonrenewal was in good faith). *But cf.* Milsen Company v. Southland Corp., 454 F.2d 363 (7th Cir. 1971) (refusal to submit to franchisor's price tying policies, allegedly in violation of antitrust laws, not a good faith reason to terminate).

[66] Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973); Mobil Oil Corp. v. Rubenfeld, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (1972).

[67] *See* note 15 *supra* and accompanying text.

[68] Bailey, *A Form Unit Franchise Agreement*, 1980 ARIZ. ST. L.J. 585, 597 [hereinafter cited as Bailey]. *See also* H. BROWN, FRANCHISING: REALITIES & REMEDIES 379 (2d ed. 1978) [hereinafter cited as H. BROWN]; H. KURSH, THE FRANCHISE BOOM 384-415 (App. H) (1968).

[69] Bailey, *supra* note 68, at 597 n.35.

franchises operate under guidelines set out in the franchise manual.[70] Where this is the case, the right to change the manual is reserved.[71] Suppliers, quality standards and product lines may all be changed by the franchisor from time to time.[72] On the other side of the relationship, the franchisee can vary the details of the day-to-day operation of the outlet upon request.[73] If an agreement cannot be reached, either party may submit the matter to arbitration.[74]

The parties' relationship changes almost constantly. This adaptivity, written into the standard form contract, gives franchise systems the flexibility to remain viable and competitive. To hold that a dynamic relationship like a franchise can be viewed in terms of static contract theory is to ignore its underlying nature. Often the agreement is on a printed form with little room for negotiation by the parties. This form merely provides the outline, or starting point, for the parties' relationship. The relationship is not static, rather it changes as the needs of both parties change. As illustrated, the formal writing is just a description of the parties' true agreement. Fixing on the writing alone ignores this dynamicism.

The mutual dependence of the parties also supports the conclusion that franchising is a dynamic, changing relationship. Though the franchisee may possess capital and the drive to succeed, he looks to the parent company to provide guidance in focusing these assets in the right direction.[75] In addition, the dealer needs the franchisor to provide the product or service which makes the system go.

The parent company needs strong outlets to remain viable. While no single franchisee makes the system successful, as a group the outlets *are* the system.[76] The dealers as a whole provide exposure for the product; this exposure in turn makes licenses of the trademarked product more valuable.[77] In short, both parties depend on each other for their continued existence and success.

This interdependence has the effect of transforming the relationship

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[70] This method is most common in a package type franchise, as where the parent licenses an entire method of doing business. The manual describes the details of the method. The package franchise contrasts with the product franchise where the franchisee is given the right to distribute the trademarked product. *See* note 15 *supra.*

[71] Bailey, *supra* note 68, at 593; H. BROWN, *supra* note 68, at 374-76.

[72] Bailey, *supra* note 68, at 593.

[73] *Id.* at 595.

[74] H. BROWN, *supra* note 68, at 396. *See also* Bailey, *supra* note 68, at 616 n.93.

[75] *See* note 10 *supra* and accompanying text.

[76] Gellhorn, *Limitations of Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 473.

[77] Without exposure the trademark would be unprotected. The licensor's exclusive rights in the trademark rest on its usage. Lanham Act, 15 U.S.C. §§ 1051 *et seq.* (1976). *See also* Trademark Cases, 100 U.S. 82 (1879).

from one solely based in contract into one which recognizes the mutual duties and rights of the parties. No longer do the parties conduct business at arm's length; in a sense they become partners or co-venturers, each mutually dependent on the other for survival.[78] Freedom of contract ignores the mutual dependence of the parties on one another, assuming that the day-to-day bargaining was done at arm's length.[79] A court which merely compares performance to the printed form ignores the changing nature of the agreement and the mutual dependence of the parties.

While freedom of contract does not adequately provide the dynamic framework which is needed to properly view franchising, neither does a theory which removes entirely from one party (the parent company) the right to end the parties' association.[80] The ongoing nature of the relationship creates duties beyond the contract. These duties include a duty to deal with each other honestly and to manage the venture for the benefit of each party.[81] No duty, however, exists to grant a license in perpetuity. Even fiduciaries with the highest standards for performance[82] may withdraw from the relationship. Yet the license in perpetuity remedy seems to be the thrust of the courts which follow *Marinello* principles.[83] Specific performance of the remaining license term, as a modification of the franchise for life approach, is likewise ill-suited in many instances.[84]

Much of the standard franchise contract's requirements are personal in nature, calling for personal satisfaction of the franchisor.[85] Courts

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[78] *See* Jirna, Ltd. v. Mister Donut of Canada, Ltd., 3 Ont. 629 (High Court of Justice 1970) (the character of a franchise relationship is that of co-venturers). *See also* Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971).

[79] *See generally* Dauer, *Contracts of Adhesion in the Light of The Bargain Hypothesis: An Introduction*, 5 AKRON L. REV. 1 (1972); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). *See also* Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).

[80] Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973).

[81] "Every contract implies good faith and fair dealing between the parties to it." Simon v. Etgen, 213 A.D. 589, 210 N.Y.S. 816 (1915). *See generally* 1 WILLISTON ON CONTRACTS § 104A, at 409-11 (3d ed. 1957).

[82] The standard has been described as "the finest loyalty. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

[83] *See, e.g.*, Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979). The court did not expressly adopt *Marinello*, but implied a renewability term into the contract. *Id.*

Several legislatures seem also to have adopted this approach in their attempts to provide remedies for franchise terminations. The legislative efforts in the area are more fully discussed in notes 91-187 *infra* and accompanying text.

[84] What is meant by specific performance is enforcement of the contract through to the conclusion of its term.

[85] *See* notes 68-74 *supra* and accompanying text.

have been reluctant to specifically enforce such subjective terms in contracts, reserving the remedy to cases where performance and satisfaction can be easily and objectively measured.[86] Another often-cited reason why the court will not specifically enforce the contract is the difficulty of supervision in such cases, as well as the problem of forcing the parties to continue a distasteful personal relationship.[87] Once the mutual decision to terminate the franchise relationship has been made, it should be respected by the courts.[88] The termination should, however, be carried out fairly. Neither side should be permitted to retain more than a fair share of the profits from the relationship.

The middle ground under the common law approaches requires good cause before the parties may terminate.[89] The focus is on the method of termination rather than the degree to which the subjective performance terms have been fulfilled.[90] This approach has been adopted by many of the legislatures considering the problems in the franchise area and discussion of this view is deferred for a review of the recent legislative developments.

III. LEGISLATIVE APPROACHES

Legislative attempts at resolution of the franchise termination problem have been concentrated into three basic areas based on the type of franchise. Motor vehicle franchises have received by far the most attention from legislatures.[91] Gasoline dealerships[92] and general franchise legislation[93] comprise the other areas receiving much legislative attention.

The focus of most of the statutory remedial efforts has been the addition of mandatory notice and "good cause" terms to the contracts between the parent and the dealer.[94] The results of the legislative actions in the area have been mixed. Certainly, the creation of a statutory cause of action has not lowered the number of cases coming before the courts.[95] This, however, is consistent with the intent behind most of the

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[86] 1 WILLISTON ON CONTRACTS § 1425, at 824-36 (3d ed. 1957).

[87] *Id.* § 1444, at 984-86.

[88] *But see* Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970) (damages are inadequate where the franchisee desires to sell cars, not live off of the damage award).

[89] *See* note 58 *supra*.

[90] Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370 (Mass. 1980).

[91] *See* notes 97-187 *infra* and accompanying text.

[92] *See* notes 188-235 *infra* and accompanying text.

[93] *See* notes 236-54 *infra* and accompanying text.

[94] *See, e.g.*, N.J. STAT. ANN. §§ 56:109-1 *et seq.* (West 1977); MASS. GEN. LAWS ANN. ch. 93B, §§ 1 *et seq.* (1975). *See also* notes 236-48 *infra* and accompanying text.

[95] *See generally* H. BROWN, *supra* note 68, at 210-37.

statutes.[96] An examination of the automobile dealers' acts bears out this conclusion.

A. *Automobile Dealer Franchise Acts*

Legislation in many states deals specifically with the rights and duties created by the automobile dealer franchise relationship. Additionally, the Automobile Dealer's Day in Court Act[97] was enacted in 1956 to provide a federal cause of action for aggrieved dealers.[98]

1. Automobile Dealer's Day in Court Act[99]

The Automobile Dealer's Day in Court Act was enacted in order to correct the imbalance of bargaining power in the industry between the automobile manufacturers and their dealers.[100] Not every grievance, however, was made actionable. To come within the purview of the statute, the manufacturer must have failed "to act in good faith in performing . . . [the] provisions of the franchise, or in terminating [the relationship]."[101] Sales recommendations and persuasion on the part of the franchisor were not made actionable. Actual coercion, intimidation or threats thereof must be shown by the dealer.[102] The difficulty in meeting the burden of showing coercion has emaciated the statute's effectiveness.[103]

The courts, when called upon to interpret the Dealer's Day in Court Act, have continually held that failure to act in good faith meant something more than arbitrariness or hard bargaining on the part of the manufacturer.[104] Good faith has been strictly construed.[105] In *Berry Bros.*

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[96] *See, e.g.*, [1956] U.S. CODE CONG. & AD. NEWS 4596.

[97] 15 U.S.C. §§ 1221 *et seq.* (1976).

[98] *Id.* § 1222.

[99] 15 U.S.C. §§ 1221 *et seq.* (1976).

[100] [1956] U.S. CODE CONG. & AD. NEWS 4596.

[101] 15 U.S.C. § 1222 (1956).

[102] [1956] U.S. CODE CONG. & AD. NEWS 4596, 4603.

[103] Brown, *A Bill of Rights for Auto Dealers*, 12 B.C. IND. & COM. L. REV. 758, 791-92 (1971); Freed, *A Study of Dealer's Suits Under the Automobile Dealers Franchise Act*, 41 U. DET. L.J. 245, 256-61 (1964). *See also* MaCauley, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Deals and the Legal System*, 1965 WIS. L. REV. 483.

[104] Overseas Motors, Inc. v. Import Motors Ltd., Inc., 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); Berry Bros. Buick, Inc. v. General Motors Corp. (Buick Motors Division), 257 F. Supp. 542 (E.D. Pa. 1966), *aff'd*, 377 F.2d 552 (1967). *See also* R.A.C. Motors, Inc. v. World-Wide Volkswagen Corp., 314 F. Supp. 681 (D.N.J. 1970). *But cf.* Madsen v. Chrysler Corp., 261 F. Supp. 488 (N.D. Ill. 1966) (sales quota held arbitrary and manufacturer breached act when it terminated dealer for failure to meet quota).

[105] Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901 (9th Cir.), *cert.*

Buick, Inc. v. General Motors Corp., the court held that while pressuring a dealer to take unwanted inventory might be coercive, it was not a per se violation of the statute unless an unreasonable demand was included with the pressure.[106] In order for a dealer to recover under the act, any coercion or intimidation alleged must include wrongful demands which, if not complied with, will result in sanctions. Thus, it is necessary to consider not only whether the manufacturer brought pressures to bear on the dealer, but also his *reasons* for doing so.[107] In addition, the burden of proof is entirely on the terminated dealer.[108]

Even with the conservative construction given the statute by the courts, many franchisees have been successful under the new federal cause of action.[109] The Automobile Dealer's Day in Court Act accomplished its purpose: It allowed car dealers a chance to state their case in the courtroom,[110] albeit not always successfully. More importantly, however, it blazed the trail for the states to enact their own solution to the termination problem.

2. State Legislation

As of this writing, forty-two states have enacted specific statutes directed at the motor vehicle franchise situation.[111] Though many of the

denied, 436 U.S. 946 (1978); Clifford Jacobs Motors, Inc. v. Chrysler Corp., 357 F. Supp. 564 (S.D. Ohio 1973).

[106] Berry Bros. Buick, Inc. v. General Motors Corp. (Buick Motor Division), 257 F. Supp. 542, 546 (E.D. Pa. 1966), *aff'd*, 377 F.2d 552 (1967). This is the type of action that the statute was enacted to prevent: "[M]anufacturer pressure . . . upon a dealer to accept automobiles . . . which the dealer does not need, want, or feel the market is able to absorb, may . . . constitute coercion or intimidation." [1956] U.S. CODE CONG. & AD. NEWS 4596, 4603.

[107] Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901 (9th Cir.), *cert. denied*, 436 U.S. 946 (1978).

[108] *See* Overseas Motors, Inc., v. Import Motors, Ltd., Inc., 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

[109] *See* Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978); Colonial Ford, Inc. v. Ford Motor Co., 577 F.2d 106 (10th Cir. 1978), *reh. denied*, 592 F.2d 1126 (1979); DeFilippo v. Ford Motor Co., 516 F.2d 1313 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975).

[110] [1956] U.S. CODE CONG. & AD. NEWS. 4596.

[111] *See* ARIZ. REV. STAT. ANN. §§ 28-1301 *et seq.* (1973); ARK. STAT. ANN. §§ 75-2301 *et seq.* (Supp. 1979); CAL. VEH. CODE ANN. §§ 3060 *et seq.* (West Supp. 1979); COLO. REV. STAT. ANN. §§ 12-6-120 *et seq.* (1977); FLA. STAT. ANN. §§ 320.641 *et seq.* (West Supp. 1980); GA. CODE ANN. §§ 84-6601 *et seq.* (Supp. 1979); HAWAII REV. STAT. §§ 437-27 *et seq.* (1976); IDAHO CODE §§ 49-2401 *et seq.* (Supp.1980); ILL. ANN. STAT. ch. 121½, §§ 751 *et seq.* (Smith-Hurd Supp. 1980); IND. CODE ANN. §§ 9-10-2-3 *et seq.* (Burns Supp. 1980); IOWA CODE ANN. §§ 322A.1 *et seq.* (West Supp. 1980); KAN. STAT. ANN. §§ 8-2301 *et seq.* (1975); KY. REV. STAT. ANN. § 190.010 (Baldwin 1977); LA. REV. STAT. ANN. §§ 32:1251 *et seq.* (Supp. 1980); ME. REV. STAT. ANN. tit. 10, §§ 1171 *et seq.* (Supp. 1980); MD.

state enactments speak in the same general terms as the federal Dealer's Day in Court Act, nearly all provide a cause of action for a wider scope of infractions.[112] Termination without cause and due notice, as well as coercion, remain statutory causes of action in all of the affected states.[113]

The states' regulatory schemes adopt essentially two patterns. The predominant enforcement mechanism under the state enactments is review and oversight by an administrative agency[114] or by the attorney general.[115] The states which do not follow this pattern have adopted essentially the structure of the federal system, choosing instead to provide a private cause of action and access directly to the courts.[116] Under both schemes, the aggrieved dealer may enjoin the manufacturer's termination decision.[117]

TRANSP. CODE ANN. §§ 15-201 *et seq.* (1976); MASS. GEN. LAWS ANN. ch. 93B (1975); MICH. STAT. ANN. § 445.521 (Supp. 1980); MISS. CODE ANN. §§ 63-17-51 *et seq.* (1972); MO. ANN. STAT. §§ 407.810 *et seq.* (Vernon Supp. 1980); MONT. REV. CODE ANN. § 51-601 (1977); NEB. REV. STAT. §§ 60-1401 *et seq.* (1979); NEV. REV. STAT. §§ 482.36311 *et seq.* (1979); N.H. REV. STAT. ANN. §§ 357-B:1 *et seq.* (Supp. 1979); N.M. STAT. ANN. §§ 57-16-1 *et seq.* (1978); N.Y. GEN. BUS. LAW § 197 (McKinney Supp. 1980); N.C. GEN. STAT. §§ 20-285 *et seq.* (1978); N.D. CENT. CODE §§ 51-07-01 *et seq.* (Supp. 1979); OHIO REV. CODE. ANN. §§ 4517.01 *et seq.* (Page Supp. 1980); OKLA. STAT. ANN. tit. 47, §§ 561 *et seq.* (1962); PA. STAT. ANN. tit. 63, §§ 801 *et seq.* (Purdon 1968); R.I. GEN. LAWS § 31-5.1 (Supp. 1980); S.C. CODE § 56-15-10 (1976); S.D. CODIFIED LAWS ANN. §§ 32-6A-1 *et seq.* (1976); TENN. CODE ANN. §§ 59-1714 *et seq.* (Supp. 1980); TEX. REV. CIV. STAT. ANN. art. 4413(36) *et seq.* (Vernon 1976); UTAH CODE ANN. § 13-14-1 (Supp. 1979); VT. STAT. ANN. tit. 9, §§ 4071 *et seq.* (Supp. 1980); VA. CODE §§ 46.1-515 *et seq.* (Supp. 1980); WASH REV. CODE ANN. §§ 46.70.005 *et seq.* (1970); W. VA. CODE §§ 47-17-1 *et seq.* (Supp. 1980); WIS. STAT. ANN. § 218.01 (West Supp. 1980); WYO. STAT. §§ 40-15-101 *et seq.* (1977). Delaware, Minnesota, New Jersey and Oregon regulate automobile franchises through their general franchise statutes. *See* notes 236-54 *infra*. Only Alabama and Alaska have no statute regulating the industry.

[112] *See, e.g.*, CAL. VEH. CODE ANN. § 3060 (West Supp. 1980); NEB. REV. STAT § 60-1401 (Supp. 1979); OHIO REV. CODE ANN. § 4517.50 (Page Supp. 1980) (franchisor must show cause in order to establish new dealership in existing dealer's territory). *See also* ILL. ANN. STAT. ch. 121½, § 751 (Smith-Hurd Supp. 1980); N.H. REV. STAT. ANN. § 357-B:1 (Supp. 1979) (establishing cause of action if manufacturer acts arbitrarily in dealing with franchisee). *But cf.* MD. TRANSP. CODE ANN. § 15-201 (1976); ARK. STAT. ANN. § 75-2301 (Supp. 1979) (adopting essentially same language as federal act).

[113] *See, e.g.*, CAL. VEH. CODE ANN. §§ 3060 *et seq.* (West Supp. 1979); NEB. REV. STAT. §§ 60-1401 *et seq.* (Supp. 1979); N.H. REV. STAT. ANN. §§ 357-B:1 *et seq.* (Supp. 1979); OHIO REV. CODE ANN. §§ 4517.40 *et seq.* (Page Supp. 1980).

[114] *E.g.*, CAL. VEH. CODE ANN. § 3000 (West Supp. 1979); OHIO REV. CODE ANN. § 4517.30 (Page Supp. 1980) (motor vehicle dealers board).

[115] MASS. GEN. LAWS ANN. ch. 93B, § 3(c) (1975).

[116] *E.g.*, COLO. REV. STAT. § 12-6-122 (1977); N.Y. GEN. BUS. LAW § 197a (McKinney Supp. 1980).

[117] *Compare* N.Y. GEN. BUS. LAW § 197 (McKinney Supp. 1980) *with* CAL. VEH. CODE ANN. §§ 3060, 3062 (West Supp. 1980).

The initial difference under the two schemes is the burden of proof which the terminated dealer must meet in order to stay termination by the manufacturer. In an agency review system, the cancellation is automatically enjoined pending a hearing by the motor vehicle board (once a protest to the proposed termination has been filed by the dealer).[118] The judicial review method requires the dealer to plead his case before a judge and win a preliminary injuction based on the traditional threshold standards required for equitable injunctive intervention.[119]

Agency review allows an instant uncontested injunction. The dealer must simply allege a prima facie case and file the protest complaint, and the manufacturer's decision thereafter is enjoined. By contrast, the dealer under a judicial review system faces a much more difficult course. To stay the termination decision, he must prove to a court in an adversary hearing that his chances of success at trial are great enough to merit retaining the status quo until that time.[120] This means that in addition to alleging a prima facie case of bad faith, he must show that the balance of hardships accrue to him and refute any contrary claim made by the manufacturer to the court. Absent this proof of success, the manufacturer may proceed as planned and cancel the dealership. Though the dealer retains his cause for monetary damages, he has in the meantime lost his business.[121]

Because agency review schemes retain the status quo in every case prior to a hearing on the merits, they come closer to a true balance of the equities. The dealer often has little more than his franchise as means of support. Failure to win a preliminary injunction under a judicial review scheme not only means the dealer loses his business, but at the same time, his sole source of monetary support in the face of what may be very costly litigation. The agency schemes also settle the action much more quickly than the judicial review approaches. Because the cases are heard before an administrative board with exclusive jurisdiction over cases of this nature, they are heard more quickly than if the cases were set on a trial calendar along with all other civil trials.

Several drawbacks can be found with the agency schemes, however. Chief among them is that because of the ease of enjoining the cancellation decision, many spurious claims and protests may be filed. That is, although the manufacturer has a valid reason to terminate the dealer, he must, in nearly every case, prove his motives to a third party: the

[118] CAL. VEH. CODE ANN. §§ 3060, 3062 (West Supp. 1980).

[119] N.Y. GEN. BUS. LAW § 197 (McKinney Supp. 1980).

[120] P.J. Grade, Inc. v. General Motors Corp., 472 F. Supp. 35 (E.D.N.Y. 1979); Tappan Motors, Inc. v. Volvo of America Corp., 102 Misc. 2d 579, 423 N.Y.S.2d 819 (Sup. Ct. 1980).

[121] Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970).

responsible agency. The effect is to increase the regulatory burden on the auto industry as a whole. This, of course, is not without a cost which finds its way into the price of the product.

Several constitutional problems are also raised by the preliminary injunction portions of the agency acts. In *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*,[122] the Supreme Court held the California act,[123] an agency review statute, valid in light of several constitutional challenges. The manufacturer claimed the automatic grant of a stay pending trial was a deprivation of due process. The court disagreed, saying in essence that "[California] may, . . . require businesses to secure regulatory approval before engaging in specified practices."[124] The temporary retention of the status quo prior to a hearing was not likened to an injunction but rather to a delay that accompanies many licensing processes including securities registration or pharmacy operating permits. The Court also found the act to be a valid delegation of legislative authority and to be a valid regulatory scheme under the Sherman Act.

On the whole, the agency review schemes seem to be better procedurally than the judicial review methods. They leave the status quo intact until a hearing and at the same time provide for quicker hearings while still leaving open the avenue of appeal to the judiciary.[125]

The substantive portions of both schemes also differ. Under all of the state statutory plans, once the dealer makes out a prima facie showing of bad faith, the burden shifts to the franchisor to show good cause to terminate.[126] While the procedural shifting of the burden is the same under all of the statutes, the statutory guidelines for determining good cause[127] differ widely. Most typically, the agency review statute's guidelines provide for an examination of the circumstances surrounding the franchise. Such circumstances frequently include the permanancy and amount of a dealer's investment.[128] The adequacy of the service provided to the public by the terminated dealer as compared to other similar dealers is also made a factor.[129] In addition, the degree to which the dealer has performed the obligations owed to the manufacturer

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[122] 439 U.S. 96 (1979).

[123] CAL. VEH. CODE ANN. §§ 3000 *et seq.* (West Supp. 1979).

[124] 439 U.S. at 108.

[125] *E.g.*, CAL. VEH. CODE ANN. § 3058 (West Supp. 1979).

[126] *Id.* § 3066(b) (West Supp. 1979).

[127] "Good cause" is the statutory standard for determining whether or not the franchisor may terminate the dealer without incurring the wrath of the statutory remedy schemes. The addition of a cause term to distributorship contracts was the most widely applied common law principle in the pre-statute cases. *See* notes 58-66 *supra*.

[128] *See, e.g.*, CAL. VEH. CODE ANN. § 3061 (West Supp. 1979).

[129] *Id.*

under the franchise contract is considered.[130] Each of the above factors is weighed[131] and if they balance in favor of the manufacturer, or in other words, if the dealer has failed to live up to his potential, then good cause is established and the manufacturer may terminate the franchise with a dealer. In the event that good cause is not found, the dealer may resort to the statutory remedies.

Under systems of judicial review, good cause is less formally defined. The statutes provide a cause of action that is more broadly based than the federal act[132] but most do not define good cause in any but the most general terms.[133] At least one judicial review state, however, has adopted the criteria found in the agency acts for defining good cause.[134]

The states have, under both types of statutes, moved away from the hard-line federal approach and have come closer to the ideals originally sought by the Automobile Dealer's Day in Court Act.[135] By allowing preliminary injuctions, by shifting the burden of proof to the franchisor and by liberalizing the definition of good faith, the states have restored some balance of power to the industry.

Good cause legislation is not, however, the best solution to the problems facing franchising. Good cause acts simply require the franchisor to have a valid reason before cancelling or failing to renew the dealer's contract.[136] All of the statutes require a disinterested party (in some

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[130] *Id. But see* MD. TRANSP. CODE ANN. § 15-209(a) (1976). The only criteria under the Maryland act are that the dealer must have "failed to comply substantially with the reasonable requirements" of the contract and been given notice of the manufacturer's decision to terminate the franchise. *Id.* The Maryland-type definition opens the door for abuse. Draftsmen for the franchisor can simply write into contracts performance clauses which are impossible for the dealers to obtain, thus effectively precluding the statutes' effectiveness. For example, the institution of a sales quota system allows a manufacturer the privilege of cancelling the contracts of half its dealer force at any time. *See* note 41 *supra.*

[131] Some states also require the manufacturer to show that the territory will not be abandoned. *See, e.g.*, IOWA CODE ANN. § 322A.2.2 (West Supp. 1980); NEB. REV. STAT. § 60-1427 (Supp. 1979). In these states the public welfare is made a part of the weighing process. The balance between the manufacturer and the dealer must favor the manufacturer, as must the balance between the manufacturer and the public. This unnecessarily harsh requirement for terminating a dealer is mitigated only if the manufacturer agrees not to establish any dealership in the area for a specified time period, usually five years. NEB. REV. STAT. § 60-1427 (1978).

[132] *Compare* Automobile Dealer's Day in Court Act, 15 U.S.C. § 1222 (1976), *with* MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(e) (1981).

[133] *See* MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(c): "It shall be [unlawful] for a manufacturer . . . to cancel or terminate the franchise . . . of any such dealer without good cause." *Id.*

[134] NEV. REV. STAT. § 482.36311 (1979). The agency acts use the circumstances detailed at notes 128-30 *supra* to determine whether good cause exists.

[135] *See* [1956] U.S. CODE CONG. & AD. NEWS 4596, 4603.

[136] *See* notes 126-34 *supra* and accompanying text.

cases a judge,[137] and in others an administrative board[138]) to examine the motive of the party desiring to terminate the contract.[139] Absence of a valid motive is rarely a problem for the manufacturer-franchisor, however.[140] In *Russ Thompson Motors, Inc. v. Chrysler*,[141] failure to meet a sales quota was held to be sufficient good cause to allow termination As has been previously pointed out, sales quotas set by reference to averages give the manufacturer the right to terminate fully *half of its dealer force* at any time.[142]

For the manufacturer, the decision to terminate is often made for purely business reasons. The franchise's profits or sales may have become stagnant[143] or the franchisee may have refused to honor customer warranty claims.[144] The decision to terminate may sometimes reflect the fact that the franchisor has been offered a higher price for the location. Without question, the first two decisions constitute good cause.[145] Almost as certainly, the third does not. Yet all stem from the business judgment of the franchisor and all involve a taking of the franchisee's right to continue in business. The fact that the statutory schemes arrive at different results merely underlines the fact that the effect of the termination is not related to the motive or cause for a termination.

The addition of a good faith motive requirement is often justified on public policy grounds.[146] The good cause term is added in order to alleviate the effects of a one-sided contract, to benefit the party whose

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[137] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 93B, § 4(3) (West Supp. 1981); COLO. REV. STAT. § 12-6-122 (1978); N.Y. GEN. BUS. LAW § 197(a) (McKinney Supp. 1980).

[138] CAL. VEH. CODE ANN. § 3000 (West Supp. 1979); OHIO REV. CODE ANN. § 4517.30 (Page Supp. 1980).

[139] CAL. VEH. CODE ANN. § 3060 (West Supp. 1979); MASS. GEN. LAWS ANN. ch. 93B, § 4(3) (West Supp. 1981).

[140] *See* Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676 (9th Cir. 1979) (dealer breached location provision of contract by unilaterally changing sites and leasing old site to competitor); Russ Thompson Motors, Inc. v. Chrysler Corp., 425 F. Supp. 1218 (D.N.H. 1977) (failure to meet sales quota); Sundown Imports, Inc. v. Arizona Dep't. of Transp., Motor Vehicle Division, 115 Ariz. 428, 565 P.2d 1289 (1977) (acquisition of second dealership concealed by franchisee). *See also* note 151 *infra*.

[141] 425 F. Supp. 1218 (D.N.H. 1977).

[142] *See* note 41 *supra*.

[143] Russ Thompson Motors, Inc. v. Chrysler Corp., 425 F. Supp. 1218 (D.N.H. 1977).

[144] American Motors Sales Corp. v. Semke, 384 F.2d 192 (10th Cir. 1967).

[145] Under the good cause criteria outlined at notes 128-31 *supra*, stagnating sales or failures to honor warranty claims would mean that the dealer's service obligation to both the manufacturer and to the public had not been fulfilled. This would likely tip the scales in favor of the manufacturer.

[146] Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 504.

bargaining power is relatively inferior.[147] To presume, however, that by requiring good motive a harsh bargain will be mitigated makes little analytic sense.[148] Motives or good cause bear no relation to the effect of the termination. The dealer under these circumstances has lost his right to do business.[149] He may retain his facilities, but he has lost the goodwill created by a going concern.[150] This loss is unconnected with the franchisor's reason for desiring to end the relationship.

Finally, good cause bills do not even attempt to deal with anything other than terminations without good cause. If all terminations were placed onto a spectrum, on one end would be terminations without cause. The next step toward the center would be those for a bad faith reason, followed by good cause. Only in the first two types of terminations do the statutes even attempt a remedy. Yet in the great multitude of cases, good cause exists and the dealer is left without any remedy.[151] He suffers very real losses from the loss of business that he may have spent years developing.

What is needed, then, is a system, statutory or otherwise, which recognizes the unique nature of the problem, and approaches it from a consistent theoretical framework while applying to it a logical remedy. The problem with this approach is how to adjust the equities of the parties to a franchise relationship once the decision has been made to discontinue the relationship. The proper approach must have as its goal the ultimate dissolution of the relationship.

From the outset, the relationship is founded upon mutual trust and a desire to work together toward a common goal, namely a net profit.[152] The decision to terminate means that, for whatever reason, at least one of the parties no longer has that desire. Any approach which ignores this crucial fact overlooks the very essence of the franchising relationship.

The good cause bills fundamentally represent that cancellation is permissible in some circumstances, and impermissible in others. From this beginning, the rules of the game have been developed; failure to prove to a judge's or administrative board's satisfaction that the facts sur-

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[147] *Id.*

[148] *Id.* at 505.

[149] *See* Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970).

[150] H. BROWN, *supra* note 68, at 54-55, 79-80, 88, 93.

[151] In New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 110 n.14 (1979), it was noted that of the forty-two protests under the act that made it to a hearing, only one matured into a permanent injunction, which was the exclusive remedy under the California act. Thus, in forty-one cases, good cause was shown. *Id.*

[152] H. BROWN, *supra* note 68, at 3-12; H. KURSH, THE FRANCHISE BOOM 22-25 (2d ed. 1968).

rounding a specific cancellation merits its placement in the "for cause" category results in a penalty being applied.[153]

The better approach is to allow cancellation in *all* cases. The parties should be free to come and go for whatever they feel are just reasons. The termination process itself should be monitored, however. The dealer should be compensated for his losses, the most substantial of which is the loss of the right to do business. In other words, if the effect of a disparity in bargaining power confers unreasonable gains upon dissolution, then the state should monitor the dissolution to insure that those gains are split equally. The existing automobile dealers' statutes fall short of this end, and it is for this reason they leave much room for improvement and development.

The statutory schemes, of course, are not entirely without merit. They have served to open the eyes of the courts to the problems of the parties.[154] In addition, the statutes are responsible, to some degree, for stopping the unfair practices of the manufacturers in their dealings with the franchisees.[155] But the primary contribution which the automobile dealers' acts have made to the developing law of franchising has been in the area of remedies. As could be expected, with forty-two states enacting regulatory schemes the remedial provisions have been mixed. The statutes provide several classes of remedies for breach, including private damages,[156] civil and criminal penalties[157] and equitable relief.[158] While the states' regulatory schemes split along two lines, the aforementioned remedies do not fall into neat groups.

A private right of action for damages is the most broadly based of the remedies provided.[159] Most states also include as an element the award

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[153] *See* Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19 (Del. Sup. Ct.), *cert. denied*, 404 U.S. 873 (1971).

[154] *Compare* E.I. DuPont De Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224 (8th Cir.), *cert. denied*, 290 U.S. 646 (1933) (contract held to be terminable at will) *with* Blankenship v. Atlantic-Richfield Co., 478 F. Supp. 1016 (D. Ore. 1979) (contract for definite term continues for another term if statute not complied with).

[155] *See generally* MaCaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers and the Legal System*, 1965 WIS. L. REV. 438; Freed, *A Study of Dealers' Suits Under the Automobile Dealers Franchise Act*, 41 U. DET. L.J. 245 (1964).

[156] *See* MASS. GEN. LAWS ANN. ch. 93B, § 12A (West Supp. 1981); MD. TRANSP. CODE ANN. § 15-212 (1977); OHIO REV. CODE ANN. § 4517.65(A) (Page Supp. 1980).

[157] *See* NEV. REV. STAT. § 482.36411 (1979); MD. TRANSP. CODE ANN. § 15-212 (1977); HAWAII REV. STAT. §§ 435-36 (1976).

[158] *See* OHIO REV. CODE ANN. § 4517.65(C) (Page Supp. 1980); ILL. STAT. ANN. ch. 121½, § 763 (Smith-Hurd Supp. 1980); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.02 (Vernon 1976).

[159] *E.g.*, COLO. REV. STAT. § 12-6-122 (1977); ILL. STAT. ANN. ch. 121½, § 763 (Smith-Hurd Supp. 1980); MASS. GEN. LAWS ANN. ch. 93B, § 12A (West Supp. 1981); NEV. REV. STAT. § 482.36411 (1979).

of attorney's fees.[160] By allowing counsel fees as part of the damage award if the dealer's claim should prove meritorious, at least one obstacle facing the franchisee has been removied, *i.e.*, the cost of litigation. But proof of actual damages is far from easy and rarely amounts to a great deal of money. With this in mind, some states provide for double and treble damages should any statutory violation be found.[161] At least one state (Nevada) also provides for the award of punitive damages if the violation can be shown to be willful.[162]

A better measure of damages in this type of case is the fair market value of the business.[163] The theory behind such an award is that the remedy for the breach is recission, not restitution.[164] This would also seem to be in line with the expectation of the parties to the contract. From the franchisee's point of view, all he could have expected from the business was that a source of income would be provided during the franchisee's tenure as owner, and then a modest profit upon its eventual sale. Thus, upon cancellation, he would receive exactly what he would have received from a voluntary sale—the fair market value of the business.

For this same reason, punitive damages are inappropriate. In general, punitive damages are reserved to cases where one party has maliciously or willfully harmed another. The large damage award serves as a deterrent against future injuries. In a franchise situation, if every termination required a payment to the franchisee an amount equal to the fair market value of the business, there would be no need for the deterrent. Each termination decision would be assessed independently, as it should, from a strictly business frame of reference. If it is less expensive to keep the outlet in operation than to buy out the franchise, then no termination should ensue. In short, by choosing the fair market value of the business as the damage measure, franchise terminations would be removed from the judicial arena and returned to the business sector.

A private cause of action for damages is far from an exclusive remedy under the states' schemes, however. A number of states have made no provisions whatsoever for damages, seeking instead to limit the remedy

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[160] *See, e.g.*, NEV. REV. STAT. § 482.36411 (1979); OHIO REV. CODE ANN. § 4517.65(A) (Page Supp. 1980). *Contra*, CAL. VEH. CODE ANN. §§ 3060 *et seq.* (West Supp. 1979); MASS. GEN. LAWS ANN. ch. 93B, § 12A (West Supp. 1981).

[161] OHIO REV. CODE ANN. § 4517.65(A) (Page Supp. 1980); COLO. REV. STAT. § 12-6-122 (1977).

[162] NEV. REV. STAT. § 482.36411 (1979).

[163] Ohio provides for an option in the damages award. Either double actual damages are allowed, OHIO REV. CODE ANN. § 4517.65(A) (Page Supp. 1980), or the fair market value of the franchisee's building, machinery and inventory is the measure, OHIO REV. CODE ANN. § 4517.65(B) (Page Supp. 1980). The choice is up to the winning franchisee.

[164] In this way the parties are returned to the status quo prior to entering the relationship.

thereunder to equitable relief.[165] A permanent injunction restraining the manufacturer from terminating a dealer without cause is also available in most, if not all, of the states allowing a private damage action.[166]

Injunctive remedies create their own problems. While a dealer may desire to remain in business rather than live off the damage award,[167] the parties' original relationship founded on mutual trust and good will has been limited or destroyed by the aborted termination. The manufacturer, having been reprimanded, will certainly harbor feelings of ill will toward the dealer. The franchisee-dealer, on the other side, will presume his conduct is being scrutinized by the parent with an eye to finding some good cause to terminate. For a court to assume the parties can carry on business as usual is to ignore the realities inherent in this type of situation.

Another issue raised by injunctive remedies is the length of time for which they remain effective. If they are to be truly "permanent" then they must be perpetual,[168] and the contract between the parties would be changed from one with a definite expiration date into a contract for an indefinite term. In effect, a court would be creating a franchise for life. Courts considering similar problems have arrived at different solutions. In *Blankenship v. Atlantic Richfield Co.*,[169] the court found that the defendant had not fully complied with the notice provisions of the statute,[170] and held that the franchisor could not terminate the contract.[171] The franchisor was bound to a new three-year contract with the dealer on the same terms.[172]

The North Carolina Appeals Court refused to reach such an obviously harsh result. In *Mazda Motors of America v. Southwestern Motors, Inc.*,[173] an attempted termination was found to be void as the manufacturer failed to provide proper notice.[174] The court held that the franchise

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[165] *E.g.*, CAL. VEH. CODE. ANN. §§ 3060 *et. seq.* (West Supp. 1979); NEB. REV. STAT. § 60-1420 (1978).

[166] Ohio also provides for a permanent injunction as an election of damages. OHIO REV. CODE ANN. § 4517.65(C) (Page Supp. 1980). Nevada, on the other hand, provides for an automatic stay in addition to a damage award. NEV. REV. STAT. § 482.36411 (1979).

[167] Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970).

[168] D. DOBBS, REMEDIES 106 (1973).

[169] 478 F. Supp. 1016 (D. Ore. 1979).

[170] At issue was the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* (West Supp. 1980). The act is similar to the car dealer's acts and serves as a useful analogy. For a more complete discussion of the statute see notes 194-235 *infra* and accompanying text.

[171] 478 F. Supp. at 1018.

[172] *Id.* at 1019.

[173] 36 N.C. App. 1, 243 S.E.2d 793 (1978).

[174] The North Carolina statute, N.C. GEN. STAT. §§ 20-285 *et seq.* (1978), requires notice to be given to the Commissioner of Motor Vehicles prior to the ef-

agreement remained in effect until notice was perfected, an additional term of at least ninety days.[175]

No court, in construing a state or the federal automobile dealers' statutes, has considered the equitable remedy of permanent injunction in this fashion.[176] But, obviously, both results are possible. The courts most likely would continue the contract until some valid cause was found by the franchisor, and the board or court or both parties consented to the cancellation. This construction would be in harmony with the statutory stricture allowing termination for cause only.[177]

The best approach from a strictly pragmatic view seems to be to eliminate injunctive remedies altogether,[178] and allow monetary recovery only. This view allows prompt adjudication[179] and a fair appraisal of each party's rights to the relationship.

The dealership statutes provide for the imposition of criminal penalties in addition to the private remedies. These penalties can be as severe as fines of $50,000[180] or a one-year jail term for the officers of the corporation violating the act.[181] As with punitive damages or injunctive remedies, criminal penalties seem out of place in the contract setting in which a franchise relationship is found.

The franchisors have not simply observed their bargaining position being eroded. Pressure has been applied on all fronts. Intense lobbying efforts by manufacturers were responsible for the toothlessness of the federal act.[182] This type of statutory scheme has also come under constitutional attack from the franchisors. In *New Motor Vehicle Board of*

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fective date of the termination. The manufacturer failed to do this, thus violating the act.

[175] 36 N.C. App. at 15, 243 S.E.2d at 803.

[176] In New Motor Vehicle Bd. of Cal. v. Orrin W. Fox, 439 U.S. 96 (1979), the court noted that "117 protests have been filed under § 3062 since the Act became effective [July 1, 1974]. . . . [O]nly one has been sustained by the Board. . . . Thus, of 117 automatic temporary injunctions issued by the Board, only one ever matured into a permanent injunction." *Id.* at 110 n.14. The case alluded to by the court is unreported.

[177] CAL. VEH. CODE ANN. § 3060(b) (West Supp. 1979); OHIO REV. CODE ANN. § 4517.54(A) (Page Supp. 1980); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(c) (1975).

[178] By this it is meant that permanent injunctions would be eliminated. Preliminary injunctions would remain available; in this way the franchisee's source of monetary support would not be removed and the status quo would be preserved until after a hearing on the merits or until a proper violation of the statute can be proven.

[179] The parties would not be constantly returning to court to find out whether the latest updating of their situation constitutes cause or not.

[180] MD. TRANSP. CODE ANN. § 15-212 (1976).

[181] HAWAII REV. STAT. § 437-38 (1976).

[182] Brown, *A Bill of Rights For Auto Dealers*, 12 B.C. IND. & COM. L. REV. 758, 791 (1971).

California v. Orrin W. Fox,[183] the Supreme Court found the California Act constitutional, but the court's failure to consider the contract clause question[184] leaves at least this avenue open in the federal courts.

Several state courts, however, have recently ruled on the contract clause question. Two courts have struck down their state's respective versions of the act and two have upheld it.[185] Thus, no clear trend has appeared as of yet, but one can assume that the more liberal judiciaries will repel the constitutional challenges, keeping the regulatory schemes more or less intact.[186]

To conclude, the auto dealers' acts have served their intended purpose. They have eliminated much of the arbitrary self-dealing on the part of manufacturers and have allowed the dealers a chance to voice their complaints to an impartial third party. The price for this reform has been a staggering increase in litigation. Only when the contract that underlies the transaction is changed will the flood of litigation cease.[187]

As has been mentioned, the statutory attempts are to be lauded for their contribution in the remedies area. The penalty is often in touch with the equities of the auto dealer's situation, even where the triggering event of good cause is not. The results have been mixed. Those dealers who were genuinely terminated without cause obtained the full benefit of the statutory remedies, and those who were cancelled for good reason received nothing. As such, room for improvement still exists. A survey of the other areas to which legislative efforts have been applied shows a similar need for rethinking and reworking.

B. *Gasoline Dealers Acts*

The gasoline distribution industry's problems are similar in many respects to those faced by the automobile dealers. While the station managers remain more or less independent of their suppliers on a daily basis, the overwhelming size of the oil companies in comparison to the

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[183] 439 U.S. 96 (1979).

[184] In other words, does the statutory remedy scheme remake the parties contract in derogation of the contract clause?

[185] Georgia Franchise Practices v. Massey-Ferguson, 244 Ga. 800, 262 S.E.2d 106 (1979); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So. 2d 557 (Fla. App. 1975), The Florida legislature has since reenacted portions of the act. *See* FLA. STAT. ANN. § 320.641 (West Supp. 1980).

[186] Mazda Motors of America v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978). *See also* Excello Wine Co. v. Monsieur Henri Wines, Ltd., 474 F. Supp. 203 (S.D. Ohio 1979); Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 381 N.E.2d 908 (Mass. 1978).

[187] This increase in litigation assumes a constant number of terminations coupled with an increasing awareness of legal rights by the franchisees. These assumptions are, however, reasonable. *See* Brown, *A Bill of Rights for Auto Dealers*, 12 B.C. IND. & COM. L. REV. 758, 785 (1971).

individual station operators means the oil company has the upper hand in dictating the terms of the contract between them.[188]

One major difference between the franchising of service stations and the auto dealers has caused the termination problem in the oil industry to go unnoticed until recently.[189] In the auto industry, the dealer-franchisees own the premises on which they do business; the car manufacturers license the use of the trademark. In the oil industry, the parent company owns or obtains a long term lease of the site on which the station is located, and then leases (or subleases) the station to the franchisee along with the license to use its trademarks. Thus, the oil company is both landlord and grantor of the privilege to use its marks.[190] This difference caused the service station operator's equity in his business to go unrecognized.[191]

Originally, the oil companies maintained that the relationship was purely one of lessor-lessee. This conclusion meant that the oil company, as lessor, retained control of any and all valuables in the site and the trademark. Gradually, the courts began to recognize that the operator worked not only for the oil company but also for himself, expecting to get the benefit of any equity developed in the business.[192] The gasoline dealers' acts followed a recognition by the judiciary of this equity.[193]

1. Petroleum Marketing Practices Act [194]

The Petroleum Marketing Practices Act[195] was enacted in 1978 to provide gasoline dealers with relief from the same onerous conditions which plagued the auto industry and prompted passage of the Dealer's Day in Court Act.[196] In contrast to the bare bones nature and strict

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[188] FTC v. Texaco, 393 U.S. 223, 226 (1968). *See also* Shell Oil Co. v. FTC, 360 F.2d 470, 487 (5th Cir.), *cert. denied*, 385 U.S. 1002 (1966).

[189] The Automobile Dealer's Day in Court Act, 15 U.S.C.A. §§ 1221 *et seq.* (1976), was adopted in 1956; the Petroleum Marketing Practices Act, 15 U.S.C.A. §§ 2801 *et seq.* (West Supp. 1980), was not enacted until June of 1978.

[190] FTC v. Texaco, 393 U.S. 223, 226-27 (1968).

[191] *See* Mobil Oil Corp. v. Rubenfeld, 48 A.D.2d 428, 370 N.Y.S.2d 943 (1975), reversing the lower court's holding that the oil company-dealer relationship "transcended that of lessor-lessee and was one of franchisor-franchisee." Mobil Oil Corp. v. Rubenfeld, 72 Misc. 2d 392, 401, 339 N.Y.S.2d 623, 632 (Civ. Ct. 1972). *See also* H. BROWN, *supra* note 68, at 86.

[192] Atlantic-Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978).

[193] The leading case in the area remains Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973), wherein the court held there was an implied convenant of renewability in a service station lease and dealer contract absent some showing by the oil company of a failure of the dealer to comply with the terms of the contract.

[194] 15 U.S.C.A. §§ 2801 *et seq.* (West Supp. 1980).

[195] *Id.* § 2801.

[196] 15 U.S.C. §§ 1221 *et seq.* (1976). *Compare* [1956] U.S. CODE CONG. & AD. NEWS 4596, 4596-4605 *with* [1978] U.S. CODE CONG. & AD. NEWS 873, 875-77.

burden of proof placed on the franchisee under the Dealer's Act,[197] the Petroleum Practices Act makes an honest attempt at balancing the equities of the parties.[198]

Under the Petroleum Act, termination without cause is strictly forbidden.[199] The Act also limits cause to five specific situations in the case of termination prior to the expiration of the contract term,[200] and four additional causes are provided in the case of a nonrenewal.[201] The Act is

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[197] *See* notes 101-10 *supra* and accompanying text.

[198] *Compare* Dealer's Day in Court Act, 15 U.S.C. § 1222 (1976) (giving dealer cause of action for failure of manufacturer to act in good faith) *with* Petroleum Marketing Practices Act, 15 U.S.C.A. § 2802 (West Supp. 1980) (sets forth in detail grounds for termination and rights of parties to the contract). *See also* Remarks of Mr. Dingell, H.R. 130, 95th Cong., 1st Sess., 123 CONG. REC. 10383.

[199] 15 U.S.C.A. § 2802(a) (West Supp. 1980).

[200] 15 U.S.C.A. § 2802(b)(2) (West Supp. 1980) states in relevant part:

> (b) (2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:
>
> (A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship . . .
>
> (B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—
>
> (i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions . . .
>
> (D) An agreement in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise . . .
>
> (E) . . . [a] determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—
>
> (i) such determination—
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date;
>
> (ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees of agents of the franchisor for such franchisor's own account. . . .

[201] 15 U.S.C.A. § 2802(b)(3) (West Supp. 1980) states in relevant part:

> (b) (3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:
>
> (A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—
>
> (i) such changes . . . [are made] in good faith and in the normal course of business; and
>
> (ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.
>
> (B) The receipt of numerous bona fide customer complaints by

essentially a "good cause" statute: Termination is allowed for breach of contract,[202] consent,[203] withdrawal from the market area by the franchisor[204] and other occurrences.[205] Nonrenewal upon expiration is authorized for a good faith failure to agree to new contract terms,[206] failure to cure customer complaints,[207] uncleanliness[208] and certain other good faith business decisions by the franchisor.[209] Those reasons are broad enough to encompass virtually every facet of the parties' relationship. The subjective good faith test that is used grants to the franchisors a great deal of discretion in their citing a cause for termination. In other words, when termination is desired, they can find good cause.[210] In the majority of the recent decisions holding for the dealer, the courts have relied on the failure of the parent company to comply with the notice provisions of the statute[211] rather than the failure to establish

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> the franchisor concerning the franchisee's operation of the marketing premises, if—
>
> (i) the franchisee was promptly apprised of the existence and nature of such complaints . . . and
>
> (ii) . . . the franchisee did not promptly take action to cure or correct the basis of such complaints.
>
> (C) A failure by the franchisee to operate the marketing premises in a clean, safe, and heathful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.
>
> (D) . . . [a] determination made by the franchisor in good faith and in the normal course of business, if—
>
> (i) such determination is—
>
> (I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,
>
> (II) to materially alter, add to, or replace such premises,
>
> (III) to sell such premises, or
>
> (IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor . . .
>
> (ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account."

Id.

[202] 15 U.S.C.A. § 2802(b)(2)(A), (B) (West Supp. 1980).

[203] *Id.* § 2802(b)(2)(D).

[204] *Id.* § 2802(b)(2)(E).

[205] 15 U.S.C.A. § 2802(b)(2)(C) (West Supp. 1980). *See* note 200 *supra*.

[206] 15 U.S.C.A. § 2802(b)(3)(A) (West Supp. 1980).

[207] *Id.* § 2802(b)(3)(B).

[208] *Id.* § 2802(b)(3)(C).

[209] *Id.* § 2802(b)(3)(D).

[210] Munno v. Amoco Oil Co., 488 F. Supp. 1114 (D. Conn. 1980) (200-300% increase in rent not in bad faith); Crown Central Petroleum Corp. v. Waldman, 486 F. Supp. 759 (N.D. Pa. 1980) (failure to remain open 24 hours per day, year round was good cause to terminate).

[211] 15 U.S.C.A. § 2804 (West Supp. 1980).

good cause.[212] This type of protection falls short of guarding the dealer's legitimate interest in his business' equity. What is needed is a system which allows termination in all cases, but adjusts the equities of the parties upon each termination.[213]

The statute was enacted to protect the dealer's interest in his business by statutorily increasing his bargaining strength.[214] It aids greatly in eliminating the arbitrary, self-serving conduct of the oil companies.[215] But, as with the automobile dealers' acts, its prohibitions are not related to the effect which they seek to prevent.[216]

Requiring cause for termination is not an effective method by which to protect a party's right to do business.[217] The terminated dealer needs relief from the effects of the cancellation, not from the parent company's arbitrariness or malice. Absent some very liberal construction on the part of the judiciary, this relief will not be forthcoming. The Act allows terminations, provided they are for good cause, but it does not require an accounting to the dealer of the equity inherent in the premises.[218]

The Petroleum Practices Act, by its terms, preempts the area.[219] Unlike the Automobile Dealer's Act, which allowed the states to develop consistent, parallel remedies,[220] the Petroleum Marketing Practices Act is exclusive.[221] The stated reason for this preemption is to provide a uniform rule under which the oil companies can develop consistent regional and national distribution plans.[222]

The cost for this unified plan has, however, come dearly to the industry as a whole. More than thirty states had developed plans of their own.[223] While some of the states developed rules similar to the federal

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[212] *E.g.*, Wojciechowski v. Amoco Oil Co., 483 F. Supp. 109 (E.D. Wis. 1980); Blankenship v. Atlantic-Richfield Co., 478 F. Supp. 1016 (D. Ore. 1979) (failure to give proper statutory notice meant attempted termination was ineffective). *But see* Marini v. Atlantic-Richfield Co., 475 F. Supp. 142 (D.N.J. 1979) (court granting stay where company pressured dealer to purchase motor oil by raising quotas then attempted termination when dealer failed to meet new quotas).

[213] *See* notes 152-53 *supra* and accompanying text.

[214] H. R. 130, 95th Cong., 1st Sess., 123 CONG. REC. 10378, 10384-88 (1977).

[215] *Id.*

[216] *See* notes 146-48 *supra* and accompanying text.

[217] *See generally* Gellhorn, *Limitations on Contract Terminations—Franchise Cancellations*, 1967 DUKE L.J. 465, 499-505.

[218] One interesting provision requires the franchisor to apportion any condemnation or eminent domain proceeds resulting from loss of business opportunity or goodwill between the dealer and the licensor. 15 U.S.C.A. § 2802(d)(1) (West Supp. 1980).

[219] 15 U.S.C.A. § 2806(a) (West Supp. 1980).

[220] 15 U.S.C. § 1225 (1976).

[221] 15 U.S.C.A. § 2806(a) (West Supp. 1980).

[222] H.R. 130, 95th Cong., 1st Sess., 123 CONG. REC. 10378, 10384 (1977).

[223] Among the state gasoline dealer acts are ARIZ. REV. STAT. §§ 44-1551 *et seq.* (Supp. 1980); CAL. BUS. & PROF. CODE ANN. §§ 20999 *et seq.* (West Supp.

statutes,[224] most had developed innovative approaches to the goodwill-dealer equity issue.[225] The federal plan substitutes for this innovativeness relatively little in the way of remedies.

The Petroleum Marketing Practices Act provides for a cause of action in a federal court to any dealer who has been wronged.[226] A preliminary stay is available where the dealer can show that the balance of hardships imposed by the termination runs to his favor.[227] Should the dealer later prove successful in a trial on the merits, the court is empowered to award both actual and exemplary damages.[228] However, absent some extremely harsh misdoings on the part of the franchisor, the dealer will find his right to do business unprotected. The most recent cases bear this conclusion out.

In *Munno v. Amoco Oil Co.*,[229] failure to agree to a 200-300% rent increase was found to be a valid reason not to renew the plaintiff-dealer's lease. The court said the test to be applied to the franchisor's motive was a "subjective good faith [test], *i.e.*, a 'good heart' without evil intent."[230] The court in *Pearman v. Texaco*[231] found that although the proposed changes in the franchise contracts[232] would have substantially affected the dealer's chance to make a profit, no question was presented under the act unless the changes were not made in good faith with normal business judgment.[233] Thus, the dealer is given protection against little more than arbitrary action on the company's part. His power to bargain with the parent oil company has barely increased.

1980); GA. CODE ANN. §§ 106-1101 *et seq.* (Supp. 1980); HAWAII REV. STAT. § 486H-1 (1976); IOWA CODE ANN. §§ 323.1 *et seq.* (Supp. 1980); LA. REV. STAT. ANN. §§ 51:1451 *et seq.* (West Supp. 1980); MD. CODE ANN. art. 56, §§ 157A *et seq.* (Supp. 1980); MASS. GEN. LAWS ANN. ch. 93B (1975); PA. STAT. ANN. tit. 73, §§ 202-1 *et seq.* (Purdon Supp. 1980); UTAH CODE ANN. §§ 13-21-1 *et seq.* (Supp. 1979). This list does not purport to be exhaustive; it is presented as merely a sample of the area.

[224] *E.g.*, ARIZ. REV. STAT. § 44-1554 (Supp. 1980); GA. CODE ANN. § 106-1101 (Supp. 1980).

[225] *See, e.g.*, HAWAII REV. STAT. § 486H-1 (1976) (franchisor is under duty to repurchase salable dealer inventory regardless of cause of termination); LA. REV. STAT. ANN. § 51:1451 (West Supp. 1980) (franchisee has cause for goodwill lost if company reopens station within one year after termination); MD. CODE. ANN. art. 56, § 157A (Supp. 1980) (company operated stations absolutely prohibited as anticompetitive); UTAH CODE ANN. § 13-12-1 (Supp. 1979) (dealer's equity is part of damages for termination without cause).

[226] 15 U.S.C.A. § 2805(a) (West Supp. 1980).

[227] *Id.* § 2805(b).

[228] *Id.* § 2805(d)(1).

[229] 488 F. Supp. 1114 (D. Conn. 1980).

[230] *Id.* at 1120.

[231] 480 F. Supp. 767 (W.D. Mo. 1979).

[232] The franchise contract in question comprised both the station lease and the dealer contract. *Id.*

[233] *Id.* at 767, 772.

The broad scope of circumstances comprising "good cause" that are included in the Act[234] means that the protective principles embodied in the statutory remedy will rarely be of use to the terminated dealer. As with the automobile dealer's acts,[235] the Petroleum Marketing Practices Act provides protection only to a very limited class of plaintiffs. The problem is broader than just termination without cause. The franchise area needs attention on a unified front. A system must be developed which is directed at the industry as a whole, not at one individual segment or facet of the termination problem.

C. *General Franchise Legislation*

The final class of franchise legislation is general in nature. By its terms, it is applicable to all licensing agreements in which there is a trademark and a community of interest present between the parties.[236] Several types of legislative actions of this class exist. First are good cause bills,[237] similar to the automobile and gasoline dealers' acts. The second type deals with the problem from a different perspective; disclosure legislation takes as a precept the view that if all the facts are before the party entering the franchise agreement, he will make an intelligent and fair bargain.[238] The final type is a hybrid; both disclosure and termination are covered.[239]

1. General Good Cause Bills

There is no general franchise good cause bill at the federal level, but several states have followed this approach to the problem.[240] The acts cover a broader range of types of businesses,[241] but in general they approach the termination issue from the same frame of reference as the other types of good cause bills.[242] Thus, the substantive portions of the acts share the same problems as the auto and gas dealers acts.

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[234] 15 U.S.C.A. § 2802(b)(2), (3) (West Supp. 1980).

[235] *See* note 151 *supra* and accompanying text.

[236] HAWAII REV. STAT. §§ 482-1 *et seq.* (1976); N.J. STAT. ANN. § 56: 10-3 (West Supp. 1980); WASH. REV. CODE ANN. § 19.100.010(4) (1978).

[237] DEL. CODE ANN. tit. 6, §§ 2551 *et seq.* (Supp. 1980); N.J. STAT. ANN. §§ 56:10-1 *et seq.* (West Supp. 1980); WIS. STAT. ANN. §§ 135.01 *et seq.* (West 1974).

[238] CAL. CORP. CODE §§ 31000 *et seq.* (West 1977); MINN. STAT. ANN. §§ 37-5A-1 *et seq.* (1977); VA. CODE §§ 13.1-557 *et seq.* (1978).

[239] HAWAII REV. STAT. §§ 482E-1 *et seq.* (1976); ILL. ANN. STAT. ch. 121½, §§ 701 *et seq.* (Smith-Hurd Supp. 1979); WASH. REV. CODE ANN. §§ 19.1-0.010 *et seq.* (1978).

[240] *See* note 237 *supra.*

[241] *Compare* N.J. STAT. § 56:10-3(a) (West Supp. 1980) *with* CAL. VEH. CODE ANN. § 3060 (West Supp. 1979) and Petroleum Marketing Practices Act, 15 U.S.C.A. § 2801(a)(A), (B) (West Supp. 1980).

[242] *Compare* N.J. STAT. ANN. § 56:10-5 (West Supp. 1980) *with* CAL. VEH. CODE § 3060 (West Supp. 1979), both statutes requiring 60 day notice and good cause.

The Delaware act[243] is interesting because of its unusual remedy provision.[244] Under the statute, damages for unjust termination include a portion of the franchisee's fixed assets, goodwill and lost profits equal to five times the last year of operation's profits. This remedy is a recognition by the Delaware legislature that the franchisee's business includes more than just unsold inventory. A damage measure of this type takes the true effect of termination into account. The loss of the right to do business may not be absolutely determinable in monetary terms,[245] but it should contain elements such as the fixed assets of the franchise, the dealer's goodwill and the business' earning potential.

The fact that damages under the Delaware act were mandatory and not necessarily dependent on proof of actual loss by the franchisee raised constitutional problems for the statute. The damages-remedy portion of the act was held to be violative of the Contracts Clause of the Constitution[246] in *Globe Liquor Co. v. Four Roses Distillers Company*.[247] The court found the damage provision caused a substantial change in the rights of the parties under their franchise contract in the nature of a penalty.[248] However, it must be noted that a damage provision drafted along these lines goes far toward recognizing the effect of a franchise cancellation. The remedy becomes truly recissionary, restoring the parties to the pre-contract status quo, each having received out of the bargain what he put into it.

2. Disclosure Legislation

Disclosure legislation adopts the view that if a party is apprised of the rights and duties of the relationship prior to entering into it, there will be fewer disputes later. Protection from fraud and misrepresentation are the primary goals of such legislation.[249] With these aims, the disclosure statutes require the franchisor to set out in advance the facts surrounding his business policies.[250] The pure disclosure or registration

[243] DEL. CODE ANN. tit. 6, §§ 2551 *et seq.* (Supp. 1980).

[244] DEL. CODE ANN. tit. 6, §§ 2553(e) *et seq.* (Supp. 1980).

[245] Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970).

[246] U.S. CONST. art. I, § 10, cl. 1.

[247] 281 A.2d 19 (Del. Super. Ct.), *cert. denied*, 404 U.S. 873 (1971).

[248] *Id.* at 21. The court's reliance on the mandatory, punitive nature of the remedy leaves at least some room for speculation that a discretionary remedy of the same character would be upheld. "The Law does not require that actual loss be proven. . . . The Law is mandatory that upon proof of a termination . . . the distributor shall recover the statutory damages. Thus it is that the statutory damages in the absence of any actual loss . . . are in fact punitive." *Id.* at 24.

[249] *See generally* Chisum, *State Regulation of Franchising*, 48 WASH. L. REV. 291, 299-313 (1973). *See also* Comment, *Franchise Regulation: An Appraisal of Recent State Legislation*, 13 B.C. INDUS. & COM. L. REV. 529, 538 (1971).

[250] *E.g.*, CAL. CORP. CODE §§ 31000 *et seq.* (West Supp. 1977); WASH REV. CODE ANN. §§ 19.100.010 *et seq.* (1978). The federal version requires registration with

statutes deal with the before-the-fact problems of the industry and afford little protection to the franchisee once his investment has been made.[251] As such, they are beyond the scope of this discussion.

3. Hybrid Statutes

The integrated hybrid registration-good cause acts[252] deal with the franchisor-franchisee relationship from its inception to its dissolution.[253] Like the disclosure statutes, they require the franchisor to provide the prospective franchisee with information about the franchisor's financial status and certain operating policies.

The "hybrids" are also similar to the good cause legislation, defining in broad terms when the franchisor may and may not terminate the franchisee. The protections they afford the dealers are essentially the same as those found in other good cause acts discussed earlier.[254] Like the good cause bills that regulate the automobile and service station industries, their emphasis on motive is misplaced. A more broadly based system is needed, which deals with all terminations, not just a small fraction thereof.

D. *Summary of Legislative Efforts*

All of the statutory schemes that grapple with the termination-cancellation issue approach it from the same frame of reference. All attempt to define a limited set of circumstances in which termination is prohibited. As has been noted, this approach falls short because the class it protects is so limited.

Under all of the statutory schemes discussed, several problems remain. Termination is restricted based on motive.[255] The manufacturer-

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the F.T.C. of all relevant information as well as making mandatory its dissemination to the prospective franchisee. No provision is included which allows the F.T.C. to prosecute violators, however. *See* 16 C.F.R. § 436 (1979).

[251] *Compare* CAL. CORP. CODE § 31300 (West Supp. 1979) (granting cause for damages or recission to franchisee harmed due to failure of franchisor to meet statutory disclosure requirements), *with* N.J. STAT. ANN. § 56:10-10 (West Supp. 1980) (granting civil cause of action for termination of franchise without just cause).

[252] *E.g.*, HAWAII REV. STAT. § 482E (1976); ILL. STAT. ANN. ch. 121½, §§ 701 *et seq.* (Smith-Hurd Supp. 1979); WASH. REV. CODE ANN. § 19.100 (1978).

[253] WASH. REV. CODE ANN. § 19.100.040 (1978), outlines the required content of the disclosure statement. Section 19.100.180 is a description of the statutorily imposed duties of the parties during the tenure of the relationship. The Washington statute is more fully discussed in Chisum, *State Regulation of Franchising*, 48 WASH. L. REV. 291, 334-90 (1973).

[254] *E.g.* HAWAII REV. STAT. § 482E-6(I), (J) (1976); ILL. ANN. STAT. ch. 121½, §§ 704.3, 704.4 (Smith-Hurd Supp. 1979); WASH. REV. CODE ANN. § 19.100.180(2)(i), (j) (1978).

[255] *E.g.*, CAL. VEH. CODE §§ 3060 *et seq.* (West Supp. 1979); N.J. REV. STAT. § 56:10-1 (West Supp. 1980); Petroleum Marketing Practices Act, 15 U.S.C.A. §§ 2801 *et seq.* (West Supp. 1980).

franchisor desiring to terminate does so at his peril.[256] His decision is second-guessed by a court or, under the auto dealers' statutes, by an administrative board.

The positive effects of this availability of review by the judiciary cannot be discounted. The just cause bills remove the threat of arbitrary or capricious action by the parent company from the relationship.[257] Many also provide a remedy which recognizes the very substantial loss which occurs upon termination of the franchise.[258]

This review and remedy should be available to all terminated franchisees. The equities in this situation should be adjusted based on the loss to the franchisee, not on the franchisor's motive for termination. To continue the spectrum analogy developed earlier, at one pole lies termination without cause, a case where the equities clearly lie with the terminated dealer. At the other end lies abandonment of the franchise by the dealer; the equities lie with the licensor. Somewhere in the center lies the termination or nonrenewal for cause. It is in this situation that a careful balancing of both parties' contributions to, and withdrawals from, the relationship is necessary. Good cause or other requirements which focus on motive are not the answer.

At least one commentator has suggested imposing a fiduciary duty on the franchisor as the answer to the termination problem.[259] The author relied on the element of control as being dispositive of the issue.[260] When control is reposed solely in one party, then a fiduciary duty results.[261]

In the ten years since the article was written, the industry has moderated its practices. No longer does the franchisor retain the exclusive right to modify or force changes in contracts.[262] Many contracts provide for the appointment of an impartial arbitrator in the event of any serious dispute.[263] Thus, the omnipotent control which may have characterized the relationship ten years ago has been somewhat eroded by the intervention of equity. No longer does the franchisor command

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[256] Globe Liquors Co. v. Four Roses Distillers Co., 281 A.2d 19, 21 (Del. Super. Ct.), *cert. denied*, 404 U.S. 873 (1971).

[257] *See* notes 146-48 *supra* and accompanying text.

[258] MASS. GEN. LAWS ANN. ch. 93B, § 4(1) (1975); ILL. ANN. STAT. ch. 121½, § 754(b) (Smith-Hurd Supp. 1979).

[259] Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971).

[260] *Id.* at 664.

[261] *Id.*

[262] *See* sample franchise agreement contained in Bailey, *A Form Unit Franchise Agreement*, 1980 ARIZ. ST. L.J. 585, 595 (suggesting that both sides be given the opportunity to modify the terms of the contract).

[263] Professor Brown himself acknowledges this trend. *See* H. BROWN, *supra* note 68, at 83-84, 116-17. *See also* Monroe, *Commercial Arbitration: A Substitute for Franchise Contract Litigaton?*, 26 ARBITRATION J. 147 (1971); Rudnick, *Arbitration of Disputes Between Franchisors and Franchisees*, 55 ILL. B.J. 54 (1966).

complete control over the franchise; it has become a *mutual* control.[264]

Yet, there remains the problem of how to end the relationship amicably. The equities of both parties to the venture must be adjusted in consideration of the contributions of each party during the term of the relationship. The answer lies in viewing franchising from a *sui generis* approach. The focus must lie on the effect of termination on the parties. From this focus an analytic framework can be drawn which recognizes the realities of the franchising concept.

Several recent cases serve to illustrate the need for a *sui generis* approach to the problem. In *Pearman v. Texaco, Inc.*,[265] the seven-year franchise relationship between the parties was terminated due to a failure to agree on an increase in rent. The cancellation was found to be for cause as Texaco acted in the normal course of business and in good faith.[266] The court denied Pearman an injunction, and Texaco was allowed to terminate the lease.[267] In *Tarr v. General Electric Co.*,[268] the defendant was allowed to terminate a ten-year dealership allegedly due to Tarr's earlier filing of a price-fixing complaint against General Electric.[269] The court, in granting a summary judgment for the defendant, labelled the action a tort, and then, on freedom of contract principles, went on to hold the claim was "*damnum absque injuria*."[270] In *Blankenship v. Atlantic-Richfield Co.*,[271] the oil company attempted termination for failure to cure valid customer complaints. The court held that the oil company's departure from the statutory notice provisions meant it must renew the dealership for another three-year term.[272]

Statutory schemes which do not provide protection from the loss of the basic right to do business, but prohibit a party from validly attempting to withdraw from the contract for just reasons, do not address the problems. The question of how to deal with franchise terminations is a subject that has received much attention from the commentators, but, as of yet, has inspired little agreement among them.[273] This lack of agreement, in the author's opinion, leaves room in the area for a new approach.

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[264] *See* notes 300-08 *infra*.

[265] 480 F. Supp. 767 (W.D. Mo. 1979).

[266] *Id.* at 771.

[267] *Id.* at 773.

[268] 441 F. Supp. 40 (W.D. Pa. 1977).

[269] *Id.* at 41.

[270] *Id.* at 42.

[271] 478 F. Supp. 1016 (D. Or. 1979).

[272] *Id.* at 1019.

[273] *Compare*, for example, Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971) [hereinafter cited as Brown] *with* Gelhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465 (the author proposed applying the doctrine of unconscionability to the problem).

IV. Franchising as a Joint Venture[274]

To this point, this Note has focused on the theories behind the common law as well as the statutory law's approach to franchise terminations. Discussion has involved the freedom of contract,[275] fiduciary[276] and good faith[277] approaches to the areas, as these have been the most widely endorsed.

As previously noted, any theory of franchise terminations must focus on the effect of a franchise termination on the parties, using as its perspective the realities of the business world in which the franchisor and franchisee operate. Joint venture theory[278] is well tailored for application in the franchise area.[279] Its tenets incorporate the interdependence of the parties to such a relationship, while at the same time recognizing the distinct and separate nature of each joint entrepreneur.

A. *Elements of a Joint Venture*

A joint venture has been defined as a contractual association among two or more parties who combine their resources to carry out a single business enterprise for a mutual profit.[280] The association must create a community of interest among the joint venturers, each of whom exercising some degree of control over the enterprise.[281]

The joint venture is quite similar to a partnership.[282] It remains distinct from a partnership, however, for several reasons very important to the franchise area. Partnerships, in many states, may not be entered into by a corporation, while a joint venture may be.[283] Joint ventures need no formal action in order to be dissolved, but a partnership, on the other hand, does. In addition, it has been generally held that joint

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[274] A substantial portion of the material in this section is drawn from 2 WILLISTON ON CONTRACTS §§ 318-20 (3d ed. 1959) [hereinafter cited as WILLISTON].

[275] *See* notes 76-79 *supra* and accompanying text.

[276] *See* notes 79-88 *supra* and accompanying text.

[277] *See* notes 146-49 *supra* and accompanying text.

[278] The terms joint enterprise and joint adventure have been applied interchangeably in place of joint venture.

[279] *But see* H. BROWN, *supra* note 68, at 55-56.

[280] WILLISTON, *supra* note 274, § 318, at 555. For one of the first cases to use the term "joint adventure," *see* Clark v. Sidway, 142 U.S. 682 (1892).

[281] WILLISTON, *supra* note 274, at 556.

[282] Taubman, *What Constitutes a Joint Venture?*, 41 CORNELL L.Q. 640, 641-42 (1956); Nichols, *Joint Ventures*, 36 VA. L. REV. 425, 442-44 (1950) [hereinafter cited as Nichols].

[283] WILLISTON, *supra* note 274, § 318, at 597-602; Nichols, *supra* note 282, at 444-46. That most franchisors are corporations is so obvious a statement it bears little more than mention.

venturers owe to each other the duties of good faith and fair dealing.[284] These duties are the foundation of a franchise relationship.[285]

To constitute a joint venture, all of the following elements must be present:

1) Each party must contribute property, knowledge, or some other asset to the enterprise;
2) There must be a community of interest in the subject of the venture;
3) The parties must have a right to mutually control or manage the enterprise;
4) The venture must be for profit;
5) Each party must participate in the profits;
6) The venture must be limited to a single enterprise.[286]

The actual intent of the parties is determinative. "The acts and conduct of the parties . . . may speak above the expressed declarations of the parties to the contrary."[287] Where the above elements are found to be present, contractual disclaimers cannot preclude the existence of a joint venture.[288]

The application of joint venture theory to the franchise relationship is desirable for several reaons. Foremost among these is the ease with which a joint venture may be dissolved. The dissolution decision may involve a breach of contract and consequential damages, but the termination remains effective.[289] Upon dissolution, the parties to the enterprise have available remedies based both in equity and at law.[290] In other words, the parties to a joint enterprise may bring an action in breach of contract for their proportionate share of the profits or sue in equity to compel an accounting.[291]

The franchise relationship is a joint venture between the parent and the licensee. Each outlet or distributorship is a single unique enterprise. The goal of the parties is to develop the market area of the outlet and

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[284] Nichols, *supra* note 282, at 431.

[285] *See* notes 80-81 *supra* and accompanying text.

[286] Nichols, *supra* note 282, at 433-34 and authorities cited therein. *See also* Taubman, *What Constitutes a Joint Venture?*, 41 CORNELL L.Q. 640 (1956).

[287] Simpson v. Richmond Worsted Spinning Co., 128 Me. 22, 145 A. 250, 254 (1929). *See also* Score v. Wilson, 611 P.2d 367 (Utah 1980).

[288] WILLISTON, *supra* note 274, § 318, at 578.

[289] Nichols, *supra* note 282, at 451; Taubman, *What Constitutes A Joint Venture?*, 41 CORNELL L.Q. 640, 646 (1956).

[290] WILLISTON, *supra* note 274, § 318, at 612-14; Nichols, *supra* note 282, at 450-53. *See also* Jaeger, *Joint Ventures: Recent Developments*, 4 WASHBURN L.J. 9, 17 (1964).

[291] *See, e.g.*, Parks v. Riverside Ins. Co. of America, 308 F.2d 175 (10th Cir. 1962); Miller v. Walser, 42 Nev. 497, 181 P. 437 (1919).

promote the franchisor's product. Each derives a distinct benefit from the venture: the parent in the form of royalties and the increase in the goodwill of its trademark,[292] and the franchisee in its profits and local goodwill it develops. A closer examination of the elements of a joint venture will sustain this conclusion.

1. Each Party Must Contribute Property, Knowledge or Some Other Asset to the Enterprise

In a franchise, the foundation of the relationship is a joint contribution by the parties. The franchisor invests his business knowledge and skill by training the franchisee. The franchisee is called on to make substantial commitments to the enterprise in the form of start-up capital. In addition, once trained by the parent, the franchisee often is required to contribute his labor at the beginning of the operation.[293] It has been generally held that the relative size or character of each party's contribution is immaterial to the question of whether a joint venture has been created; the property must simply have been contributed in order to promote the ends of the enterprise.[294]

2. There Must Be a Community of Interest in the Subject of the Undertaking

A community of interest is present in the franchise situation. The continuing relationship between the parties provides this element. For example, the parties generally agree to share advertising expenses in furtherance of the venture.[295] They also share in many of the managerial tasks involved in the operation, the franchisor undertaking those which can be best accomplished on a national scale, such as bookkeeping or purchasing, and the franchisee attending to the tasks best suited for local treatment (*e.g.*, hiring, firing and payroll).[296]

Many of the good cause acts already examined include a verbatim recitation of community of interest as an element of the statutory definition of franchising.[297] This merely lends further credence to the existence of this element of joint ventures in franchising.

In considering this requirement, a leading case has defined this term as "a mixture of identity of interest in a venture in which each and all

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[292] Lightman, *Economic Aspects of Trademarks in Franchising*, 14 IDEA 481, 488-91 (1970). *See also* Brown and Cohen, *Franchise Misuse*, 48 NOTRE DAME LAW. 1145, 1160-61 (1973) [hereinafter cited as *Franchise Misuse*].

[293] The commitments of both parties in a franchise is more fully discussed in the text accompanying notes 15-17 *supra*.

[294] MJB Investments v. Coxwell, 611 P.2d 438 (Wyo. 1980).

[295] *See* sample franchise agreements contained in Bailey, *supra* note 68.

[296] *Id.*

[297] *E.g.* MASS. GEN. LAWS ANN. ch. 93B, § 1(i) (1975); N.H. REV. STAT. ANN. § 357-B:1(IX) (Supp. 1979).

are reciprocally concerned and from which each and all derive a material benefit and sustain a mutual responsibility."[298] That franchisor-franchisees are reciprocally concerned with the business becomes evident when the third element, right to control, is considered. Both parties enjoy benefits from the contract in the form of profits and the accompanying increase in goodwill that flows from a successful operation.[299] In sum, the several interests of the parties in an individual outlet become commingled with time, thus creating the necessary community of interest.

3. The Parties Must Have a Right to Mutually Control or Manage the Enterprise

The right of each party to control or manage the venture is an important feature of a joint enterprise. The control need not be exercised equally in the day to day performance of the operation; it may be delegated to one of the parties.[300] The joint venturers each must, however, have the *right* to control the enterprise.[301]

The control that the parties exercise over the individual franchise outlet is generally delegated to the franchisee. He is responsible for seeing that the doors open every day or that the salesmen make their rounds. He is vested with the responsibility of making a profit for the venture.

The franchisor also possesses a right to control the operation. Most often this right is reflected in the quality control requirements attached to the trademark.[302] In addition, when the contract provides that the manual of operation may be changed, this gives the franchisor the right to control.[303]

The right to control becomes mutual when the parent's powers are examined in light of the recent antitrust decisions against the franchisors. The parent cannot unilaterally dictate the product mix[304] or the

[298] Carboneau v. Peterson, 1 Wash. 2d 347, 95 P.2d 1043, 1055 (1939). *See also* Sasportes v. M/V Sol de Copacabana, 581 F.2d 1204 (5th Cir. 1978); Gwynn v. Corpus Christi Bank & Trust, 589 S.W.2d 764 (Tex. Civ. App. 1979).

[299] *Franchise Misuse*, *supra* note 292, at 1161.

[300] House v. Mine Safety Appliances Co., 573 F.2d 609 (9th Cir. 1978); Murphy v. Redland, 178 Mont. 296, 583 P.2d 1049 (1978); *See also* WILLISTON, *supra* note 274, § 318A, at 570; Nichols, *supra* note 282, at 439.

[301] House v. Mine Safety Appliance Co., 573 F.2d 609 (9th Cir. 1978); Delgado v. Lohmar, 289 N.W.2d 479 (Minn. 1979); Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

[302] Collison, *Trademarks—The Cornerstone of a Franchise System*, 24 SW. L.J. 247, 253-58 (1970). *See also* Brown, *supra* note 273, at 665.

[303] *See* sample franchise agreement in Bailey, *supra* note 68.

[304] Full line forcing, as this practice is more popularly called, was held to be a violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1976), in Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1952).

prices that must be charged.[305] Both parties generally collaborate in these areas to reach mutually satisfactory ends.

The franchisor may, under the Lanham Act,[306] reserve the right to enter and manage the outlet in conformity with guidelines necessary to preserve the trademark. Yet this right is primarily for the benefit of the enterprise, as loss of the trademark is fatal to the system as a whole.

The standard franchise contract itself has been redrawn to reflect this mutuality of control.[307] Both parties commonly make the necessary changes needed to determine the direction of the business. It is this right to control for the benefit of the enterprise that is the substance of the mutuality of control test embodied in joint venture principles.[308]

4. The Venture Must Be for Profit

The "for profit" requirement is generally thought to be an indispensable element of a joint venture as the right to control.[309] The expectation of a monetary profit is the predominant purpose for entering a franchise relationship.[310] The franchisor typically takes his profit off the top in the form of a franchise royalty or license fee.[311] The franchisee realizes profit as salary or net income of the business.

There is, however, an additional profit element available to both in the form of goodwill developed by the business. This goodwill is developed on two levels: The outlet's success creates a goodwill inherent in the local site, and also contributes to the goodwill inherent in the trademark product or service.[312] Each of these two independently ac-

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[305] In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the Court held that the seller-franchisor has no power over the goods once they leave its possession. The franchisor may, however, suggest retail prices for its goods provided it does not force adherence to such prices. Santa Clara Valley Distributing Co. v. Pabst Brewing Co., 556 F.2d 942 (9th Cir. 1977); Siegal v. Chicken Delight, Inc., 311 F. Supp. 874 (N.D. Cal. 1970).

[306] 15 U.S.C. §§ 1055 *et seq.* (1976).

[307] *Compare* H. KURSH, THE FRANCHISE BOOM 384-415 (2d ed. 1968) (reserving almost unilateral control to franchisor) *with* Bailey, *supra* note 68 (providing both parties with an opportunity to vary contract).

[308] William McCrindle & Sons, Ltd. v. Durant, 611 F.2d 89 (5th Cir. 1980); Sasportes v. M/V Sol de Copacabana, 581 F.2d 1204 (5th Cir. 1978).

[309] *See* WILLISTON, *supra* note 274, § 318A, at 570-77; Nichols, *supra* note 282 at 436-38. Courts have often drawn the line between joint enterprise and joint venture based on this criterion. Ventures contain the profit element while enterprises are most often for pleasure. *Compare* Hanlon v. Melfi, 102 Misc. 2d 170, 423 N.Y.S.2d 132 (1979) (alleging joint venture) *with* Delgado v. Lohmar, 289 N.W.2d 479 (Minn. 1979) (finding joint enterprise). *See also* note 278 *supra*.

[310] *See* sample franchise inducement advertisement detailed at note 17 *supra*.

[311] *See* Bailey, *supra* note 68, at 600-01 (detailing franchise fee and royalty payment clauses). *See also* H. BROWN, *supra* note 68, at 378-81.

[312] This form of goodwill is generally reflected in the value of the trademark. In fact, until the mark is used and made known it is not protected by the

crued goodwill accounts[313] is a source of potential profit to the venturers. The goodwill that develops in the site or local goodwill is realized when the business is sold. The goodwill inherent in the trademark is reflected in the increased price that the franchisor receives for licensing its use.[314] Both of these sources, *i.e.*, the profit on resales and the goodwill of the business, are profit sources to the venture.

5. Both Parties Must Participate in the Profits

A realization that a franchise relationship meets this requirement should flow from the discussion immediately above. The franchisor receives two contributions of profit from the successful local operation. For its services (managing and advertising the venture), it gets a royalty in the form of a percentage of gross sales or a per-unit-sold fee.[315] In addition, when the system as a whole matures and becomes successful, the parent draws a profit by virtue of the increased price its trademark license commands.[316]

The franchisee, for its part, should receive a periodic profit and an accrued profit also. Its periodic profit is represented by the yearly salary which is drawn out of the business or the profit it retains from the sale of the trademarked goods or services. The accrued profit is the so-called "sweat equity"[317] which it invests in the local site.

This element of joint ventures has also been held to include participa-

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trademark laws. Lanham Act, 15 U.S.C. §§ 1051-1127 (1976); Trademark Cases, 100 U.S. 82 (1879). *See also* Collison, *Trademarks—The Cornerstone of a Franchise System*, 24 Sw. L.J. 247, 248 (1970).

This trademark goodwill may be difficult to conceptualize. The trademark itself is an intangible asset of the business. R. WIXON, W. KELL, & N. BEDFORD, ACCOUNTANT'S HANDBOOK § 19-1 (5th ed. 1970). After its development it should be recorded as an asset at its development cost. *Id.* at § 19-12. As the customer develops a preference for the goods or services that are the subject of the mark (or where several marks are licensed at once, the license), the mark becomes susceptible to independent valuation. This difference between the mark's historic, or development cost and its current sale price can be referred to as the trademark goodwill. Lightman, *Economic Aspects of Trademarks in Franchising*, 14 IDEA 481, 488-91 (1970). This increase in the mark's value, however, will never appear on the parent-franchisor books because the trademark must be carried at its development or acquisition cost. Accounting Principles Board, *Opinion No. 17, Intangible Assets* ¶28 (1970).

[313] Good accounting dictates the recognition of goodwill only when a realization event has occurred, such as the sale of the business. Even then it is only a residual value, the difference between the price paid for the business and the book or cost value of the assets. Accounting Principles Board, *Opinion No. 17, Intangible Assets* ¶26 (1970). *See also* Accounting Principles Board, *Opinion No. 16, Business Combinations* ¶87 (1970).

[314] Lightman, *Economic Aspects of Trademarks in Franchising*, 14 IDEA 481, 488-91 (1970).

[315] *See generally* note 311 *supra*.

[316] *See generally* note 312 *supra*.

[317] *See* H. BROWN, *supra* note 68, at 39, 67.

tion of the parties in any losses that might beset the enterprise.[318] Most illustrative of this feature in franchising is the tort area, where both the parent and the local licensee are routinely held jointly liable for the torts of the enterprise.[319]

Both parties imply this participation in the losses of the venture in a general way also. If, for example, the outlet should fail, the franchisee would lose the capital he had invested and the franchisor would lose his contribution of time devoted to the start up of the business.

6. The Venture is Limited to a Single Enterprise

This requirement has most often been used to distinguish a joint venture from a partnership.[320] The commentators, after stating this to be a necessary feature of joint ventures, go on to state that the distinction makes for a poorly-defined line at best.[321] The courts have recently considered the single enterprise question and have likewise announced the distinction, and then found many continuing businesses to be single enterprises.[322] The single enterprise criterion of joint ventures has, therefore, been more formal than real.

The franchise concept fits well within this description. It is for a fixed term, subject to renewal by the parties' mutual agreement. It is a "single enterprise" in that the parties do not contemplate an expanding intergrated operation.[323] Rather, the relationship is confined to a specific area, the dealings are in a single type or "line" of goods and the parties view it as so limited.

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[318] WILLISTON, *supra* note 274, § 318A, at 573-76; Nichols, *supra* note 282, at 436-38; Bank of St. Louis v. Morrissey, 442 F. Supp. 527 (E.D. Mo. 1978), *aff'd*, 597 F.2d 1131 (1979); Institutional Management Corp. v. Translation Systems, Inc., 456 F. Supp. 661 (D. Md. 1978); Producer's Livestock Marketing Ass'n v. Christensen, 588 P.2d 156 (Utah 1978).

[319] Germain, *Tort Liability of Trademark Licensors in an Era of Accountability: A Tale of Three Cases*, 69 TRADEMARK REP. 128 (1977).

[320] WILLISTON, *supra* note 274, § 318B, at 596; Nichols, *supra* note 282, at 449. *See also* Mechem, *The Law of Joint Adventures*, 15 MISS. L. REV 644, 659 (1930).

[321] "Perhaps the best that can be said is that 'single' . . . is largely a question of degree." WILLISTON, *supra* note 274, § 318B, at 594-95. "It is too plain for argument that joint adventures often require a much more extensive course of commercial dealings than some partnerships." Mechem, *The Law of Joint Adventures*, 15 MISS. L. REV. 644, 659 (1930). *See also* Nichols, *supra* note 282, at 440.

[322] Aigner v. Bell Helicopters, Inc., 86 F.R.D. 532 (N.D. Ill. 1980) (heli-skiing operation held to constitute joint venture); Modern Air Conditioning, Inc. v. Cinderella Homes, Inc., 226 Kan. 70, 596 P.2d 816 (1979) (real estate agent's and construction company's agreement to buy land, build homes, and later sell them found to be a joint venture); Hanlon v. Melfi, 102 Misc. 2d 170, 423 N.Y.S.2d 132 (Sup. Ct. 1979) (operation of wholesale and retail produce store found to be a joint venture); Engelke v. Crawford, 581 S.W.2d 217 (Tex. Civ. App. 1979) (agreement to construct building and operate store therein was joint venture contract).

[323] *See* Bailey, *supra* note 68, at 587-91.

In sum, the franchisor-franchisee relationship can be realistically viewed as a joint venture. It is conceded that franchising is not a traditional area in which the theory has been applied;[324] however, the diversity of endeavors and operations to which the theory has been adapted[325] leads this commentator to believe that franchising could be well served by its tenets.

The franchise relationship involves a contribution from all involved. It creates a community of interest in the subject of the franchise. The parties each possess the right to direct the course of the enterprise. It is "for profit" with both parties realizing a share of the profits. Finally, franchising is confined to a single enterprise. These have been the consistently announced criteria by which the joint venture has been judged[326] and this Note has attempted to mark their application to the franchise concept.

What follows is an examination of the principles of termination in joint ventures and comparison to the termination decision in franchising. Performance, abandonment, recission and mutual agreement are among the methods by which a joint venture relationship may be concluded.[327]

B. *Franchise Termination in a Joint Venture Light*

Joint venturers, unlike partners, have available both legal and equitable remedies.[328] This is in harmony with the development of statutory remedies in the franchise field.[329] The difference lies in the fact that the joint venturers' rights in equity are limited to an accounting,[330] while under many franchising statutes, injunctive relief is the sole equitable remedy.[331]

The equitable remedy of an accounting speaks more clearly to the realities of a termination situation than does injunctive relief. As previously noted,[332] once the decision to end the relationship has been

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[324] "The joint venture has been used for a great variety of undertakings . . . [and] a most prevalent type deals with land, options for the purchase thereof, and the mineral rights therein or thereunder." WILLISON, *supra* note 274, § 319, at 631-32. "[P]robably the most common of all joint ventures and the ones most frequently encountered in litigation involve the discovery, exploitation and development of mineral resources, such as coal, oil, and gas." *Id.* at 634-36.

[325] Joint ventures have been held to exist in farming operations, mining ventures, construction projects and in general to the management of nearly any type of business. *See* WILLISTON, *supra* note 274, § 319, at 631-36.

[326] *See* notes 280-88 *supra* and accompanying text.

[327] WILLISTON, *supra* note 274, § 319C, at 646.

[328] *Id.* at 647-48. *See also* Nichols, *supra* note 282, at 450-53.

[329] *See* notes 156-81 *supra* and accompanying text.

[330] WILLISTON, *supra* note 274, § 319C, at 647-48; Nichols, *supra* note 282, at 450-52.

[331] *E.g.*, CAL. VEH. CODE ANN. § 3067 (West Supp. 1979); NEB. REV. STAT. § 60-1420 (Supp. 1979).

[332] *See* notes 167-77 *supra* and accompanying text.

made, the mutual trust and good faith which form the basis of a franchise disappear. The court, if it is to enjoin the termination, must then monitor the continuing performance of both parties to insure this good faith.[333]

On the other hand, once an action for an accounting has been completed, the court's role is over. The relationship is ended, and each party receives its fair share and is free to enter other contracts or other ventures. This remedy is more in harmony with the realities of the franchise system. No attempt is made to force the parties into a franchise for life. Either side may decide to quit the relationship and, provided the profits are fairly split, may move on. The relationship is terminated fairly. With an accounting as the remedy, freedom of contract is preserved. At the same time, each party receives a fair reward for his performance.

C. *An Equitable Remedy for all Terminations*

The measure of damages in equitable accounting is a share of profits from the venture proportionate to the contribution made by the party.[334] In the franchise situation, the elements available to both parties as profit would include several items. The net profit of the outlet is the largest of the items: This should include both the franchisee's and the franchisor's shares of profit. The salary drawn by the individual operator as well as the franchise or license royalties should be considered a part of the profit.[335] The goodwill from the operation should also be equitably distributed. The local goodwill inherent in the site and the local outlet's contribution to the goodwill in the trademark should be proportionately distributed.[336]

The local goodwill element has been accepted as an element of termination damages by a far greater number of courts and legislators.[337]

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[333] The effect of this monitoring role of the court is to remove the impartiality of the judge. In other words, he must decide the case and then examine the parties' subsequent performance continually in order to insure compliance with the judgment decree. Requiring courts to exercise these extrajudicial powers of enforcement has been criticized as beyond the powers of the judiciary in Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

[334] WILLISTON, supra note 274, § 319C, at 648.

[335] *See* notes 309-11 *supra* and accompanying text.

[336] *See* notes 311-14 *supra* and accompanying text.

[337] Many legislatures have expressly included the local goodwill element as a part of the damage measure. *See, e.g.*, DEL. CODE ANN. tit. 6, § 2553(c)(2) (1974); HAWAII REV. STAT. § 482E-6(3) (1976). The Petroleum Marketing Practices Act, 15 U.S.C.A. § 2803(d)(1) (West Supp. 1980), mandates ratably apportioning the goodwill element in any eminent domain condemnation award between the franchisor and the franchisee.

Several courts have reached this result, namely, upon termination the franchisee must be paid for the goodwill he has developed in the business. *See, e.g.*, Westfield Centre Service, Inc. v. Cities Service Oil Co., 158 N.J. Super. 455, 386 A.2d 448, *supp. on other grounds*, 162 N.J. Super. 114, 392 A.2d 243 (1978).

While goodwill is an intangible asset, it is relatively easy to measure. Goodwill represents the difference between the fair market value of the outlet's tangible assets and the outlet's value as a going business.[338] These figures can be appraised with a good degree of accuracy. Once computed, this element should be added to the profit pool.

The final element of profit from the relationship is the trademark's goodwill.[339] Its value is not as easy to ascertain but several methods are available. The value of the privilege of doing business under the mark is approximated by the initial franchise fee currently being paid for new franchises.[340] This value could be compared to the price the franchisee actually paid at the inception of the relationship and a rough estimate of the increase in goodwill would be found.

An alternate method would be to appraise the value of the franchisor's business goodwill in a manner similar to that used for the local goodwill element. This figure could then be apportioned to the individual franchisee through a formula based on contribution to gross sales or net profits.[341]

The next step would be to sum the four elements and ratably apportion them based on the relative contribution of the parties to the relationship throughout its term. It is conceded that many hard questions remain unsolved, such as, at what basis the contribution element is to be measured. However, if the relationship was reduced to an arithmetic form, the results of the operation would more clearly present themselves. Each party would then receive the benefit of its work and input into the venture.

The joint venture dissolution method should be applied to franchise terminations. Its application is meant to go beyond the "bad faith" cases mentioned earlier and be more universally used, even where cause exists for termination. The procedures for dividing the "profits" detailed herein provide an accurate measure of the parties' contribution even where a once-successful franchise is cancelled for its recent failings. The formulas account for the parties' contributions over time, which is the heart of a continuing relationship such as franchising.

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[338] R. WIXON, W. KELL & N. BEDFORD, ACCOUNTANT'S HANDBOOK §§ 19-1, 19-14, 19-15 (5th ed. 1970).

[339] It should be noted that by "trademark goodwill" what is meant is the franchisee's undivided share in the goodwill that the system as a whole has developed in the franchisor's mark. *See* Lightman, *Economic Aspects of Trademark in Franchising*, 14 IDEA 481, 491 (1970).

[340] *See Franchise Misuse*, *supra* note 292, at 1145, 1161.

[341] It is not the aim of this Note to arrive at an exact figure for each of the suggested elements of the profit pool. An effort is simply being made to provide a framework within which each element can be viewed.

V. Conclusion

The dynamic nature of franchising has not gone unrecognized by either the commentators or the judiciary. However, the approaches followed have not been consistent with the realities of the subject system. The courts have found themselves constrained by the purely contractual appearance of franchising.

In their attempts to find easy solutions, the legislatures have restricted their efforts to the most obvious problem of the industry, incorrectly focusing on motive rather than on effect.

What has been presented is a *sui generis* approach to the problem. It is recognized that even the application of this approach by the judiciary or legislatures will do little to reduce the onslaught of litigation which has been seen in recent years. Only if the franchisors include such formulas in their contracts will the problem subside. Then the need for litigation will disappear. The parties will then have received the real benefit of their bargain.

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