GOODWILL INDEMNITY IN FRANCHISING: THE EUROPEAN GOODWILL RECOUPMENT DOCTRINE AS A FRAMEWORK FOR AMERICAN FRANCHISE RELATIONSHIPS

A Dissertation
Submitted to
the Temple University Graduate Board

In Partial Fulfillment
of the Requirements for the Degree
DOCTOR OF JURIDICAL SCIENCE

---

by
Erol Gokhan Tolay
August 2014

Examining Committee Members:

Jonathan Lipson, Advisory Chair, Beasley School of Law
Eleanor W. Myers, Beasley School of Law
Jeffrey L. Dunoff, Beasley School of Law

The Dissertation Committee for Erol Gokhan Tolay

certifies that this is the approved version of the following dissertation:

Goodwill Indemnity In Franchising: The European Goodwill Recoupment Doctrine As A Framework For American Franchise Relationships

_____

Chairperson: Jonathan Lipson

Date approved: July 27, 2014

ABSTRACT

Franchise contracts are often standard form contracts drafted by the franchisor and presented on a "take it or leave it" basis. Although these typically one-sided contracts may be necessary to prevent franchisees from harming the franchisor's brand name, in practice, the franchisors' contractual power can lead to franchisor-opportunism, in particular through wrongful terminations and nonrenewal, onerous transfer restrictions, and so on. Accordingly, federal government and some state legislatures have enacted specific franchise laws in order to balance potential power imbalance and to protect franchisees from opportunism. However, these laws have been criticized for being harmful to the franchising sector as they restrict franchisors' termination power, and thus, encourage franchisee-opportunism.

As current laws appear to be failing to provide a fair solution for both parties, this dissertation offers an alternative theory drawn from the European concept of goodwill recoupment. Under the proposed approach, once a franchise comes to an end, the franchisee would be entitled to a payment for its goodwill. The payment does not depend on the franchisor's wrongdoing; if and to the extent that a franchisee has positive local goodwill, the transfer of this value to the franchisor upon cessation justifies the payment. This payment would allow the franchisee to receive a fair return for its intangible investment without constraining the franchisor's monitoring power and flexibility. The proposed approach is a better-suited solution against opportunism than those currently used in the U.S. legal system. This approach would ultimately reduce both franchisee and franchisor opportunism, and incentivize investment and cooperation

To my wife, Dr. Juliette Tolay

ACKNOWLEDGMENTS

In these few lines, I would like to express my gratitude to everyone who has been part of my journey towards the finished dissertation – which was utterly labor-intensive, difficult at times, and extremely rewarding.

Foremost, I am grateful to my academic advisors, Professor Jonathan Lipson and Professor William Woodward. They were sources of inspiration and wonderful personal mentors: I am extremely thankful to Professor Lipson for his academic guidance and assistance, and for his constant effort to keep me on schedule – which was very much needed. I also would like to recognize the important role played by the initial support of Professor Woodward, and his encouragement throughout the process.

I also wish to thank Professor Eleanor Myers and Professor Jeffrey Dunoff for serving as committee members in my dissertation. Both have been very cooperative and helpful: I am indebted to their contributions to making this work more complete.

Professor Robin Nilon deserves a special mention here: she has provided steady personal support and encouragement. More importantly, she has become a great friend.

I would like to extend my gratitude as well to Karen McMichael (Director of International Programs) and Louis Thompson (Assistant Dean for Graduate and International Programs) for providing important and needed administrative help.

Finally, I shall mention my family, especially my parents and sister, who always believed in me and encourage me to pursue my dreams.

TABLE OF CONTENTS

INTRODUCTION

> "In the time of the legendary King Arthur, the quest for the Holy Grail was the highest spiritual pursuit for a knight. Today, franchise reformers search for their own Holy Grail -- a convenient formula to deliver balance and equity to the franchise relationship, which is commonly characterised by both power and information imbalances."[1]

Franchising is a constantly growing business model in the U.S. It supports nearly 18 million jobs and $2.1 trillion of economic output for the U.S. economy.[2] According to the International Franchise Association (IFA), a new franchise business opens every eight minutes in every business day.[3] As franchising grows, however, litigations over franchisor abuses also increase.[4] Accordingly, this dissertation analyzes existing legal mechanisms against a particular type of franchisor abuse, and proposes an alternative solution.

In principle, franchising is a form of marketing and distribution channel where one party, the franchisor, grants a license to the other party, the franchisee, to sell

---

[1] Andrew Terry & Cary Di Lernia, *Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?*, 33 Melb. U. L. Rev. 542, 543 (2009). Professor Elizabeth C. Spencer, author of "The Regulation of Franchising in the New Global Economy," begins her book with this quote. I hope she does not mind if I do the same. Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* 1 (2010).

[2] IFA, *New Research Reports Will Forecast Growth of Franchising Industry*, http:// www.franchise.org/Franchise-News-Detail.aspx?id=55468 (last accessed July 14, 2014).

[3] Export.gov, *Franchising*, http://www.export.gov/%5C%5C/industry/franchising/ index.asp (last accessed July 14, 2014).

[4] *See e.g.* Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471 (1994); Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 106 (2004).

trademarked products or services.[5] It creates a long-term cooperative relationship between two independent parties. Yet, many consider the franchise relationship to be "structurally centered on conflicts of interest."[6] The franchisor's interest in expanding its business model and "assuring a consistent level of standardized quality across franchise outlets" is indeed not always aligned with the franchisee's interest in maintaining its autonomy and profitability.[7]

In particular, the franchisor is compelled to monitor and control the quality of services that each franchisee provides.[8] Thus, the franchising model permits the franchisor to impose strict terms and conditions to protect and enhance the brand name, which benefits not only the franchisor but also all participating franchisees in that franchise chain. Hence, franchise contracts are often 'standard form contracts' drafted by the franchisor and presented on a 'take it or leave it' basis.[9] These typically one-sided contracts, – coupled with the fact that most prospective franchisees lack bargaining power and business experience – "lock the franchisee into an unknown future determined

---

[5] *Infra* Ch.1(B)(1).

[6] *E.g.* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 949 (1990).

[7] Scott Makar, *In Defense of Franchisors: The Law and Economics of Franchise Quality Assurance Mechanisms*, 33 Vill. L. Rev. 721, 722-23 (1988); Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 472 (1994).

[8] *Id.*

[9] *See e.g.* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess., 29 (June 24, 1999) (Statement Of Hon. John J. Lafalce, A Representative In Congress From NY).

by the unilateral decisions of the franchisor."[10] While the franchisors' controlling power may be necessary to prevent franchisees from harming the franchisor's brand name, in practice, the abusive use of this power leads to franchisor-opportunism.[11] "Once the franchisee has invested time and resources in establishing a local market for the franchisor's goods or services," the franchisor can exercise its discretionary rights, and simply take over profitable businesses.[12] In other words, the franchisor can misappropriate the local goodwill generated by the franchisee, even if the franchisee fully complies with the franchise agreement.

Currently, U.S. law struggles to provide appropriate solutions to deal with this problem. In most states, courts have developed common law policies that limit particular franchising practices to prevent the franchisor's appropriation of the franchisee's investment.[13] Yet, courts are usually reluctant to override express contract provisions by invoking common law principles. Accordingly, federal and state legislatures have enacted franchise laws in order to balance potential power-inequalities and to protect franchisees

---

[10] Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 114-15 (2004).

[11] *See e.g.* Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* 11 (2010); Harold Brown, *Franchising-A Fiduciary Relationship*, 49 Tex. L. Rev. 650, 654 (1971); Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess., 54 (June 24, 1999) (Statement Of Susan Kezios, President, American Franchisee Association, Chicago, IL).

[12] *LaGuardia Associates v. Holiday Hospitality Franchising, Inc.,* 92 F. Supp. 2d 119, 124 (E.D.N.Y. 2000).

[13] *Infra* Ch.2(C).

from opportunism.[14] At the federal level, comprehensive "disclosure requirements" have been the highlights of the regulatory efforts.[15] A number of states, however, have passed "franchise relationship laws" that considerably restrain franchisors' contractual power.[16] These statutes typically require franchisors to show "good cause" for terminations and non-renewals, in some cases before making any adverse decision. Under relationship laws, if the franchisor wrongfully terminates the franchise contract, the franchisee is entitled to damages that are typically calculated based on the fair market value of the franchised business.

Nevertheless, legal-economists and franchisor-advocates argue that existing protections – in particular, the state relationship laws – are harmful for the franchising sector as they restrict franchisors' termination power, and thus, encourage franchisee-opportunism.[17] Because of this strong opposition, the majority of the states decided not to enact franchise relationship laws.

As current franchise laws fail to provide a fair solution for both parties, this dissertation explores an alternative solution drawn from the European civil law system, and considers how it might be adapted to the U.S. system. Under the proposed solution,

---

[14] H.R. 1717, 104th Cong., 1st Sess. (1995) (finding "[m]any franchises reflect a profound imbalance of contractual power in favor of the franchisor"); Va. Code Ann. § 13.1-558 (Virginia Retail Franchising Act intended "to correct as rapidly as practicable such inequities as may exist ... so as to establish a more even balance of power between franchisors and franchisees").

[15] *Infra* Ch.2(B)(1)(a).

[16] *Infra* Ch.2(B)(2).

[17] *Infra* Ch.4(B)(1)(a)((2)).

once a franchise comes to an end, the franchisee would be entitled to a payment for its effort of creating a clientele network. Although the so-called European "goodwill recoupment doctrine"[18] was designed for commercial agency relationships, this dissertation argues that the idea is potentially transferable to the franchise relationship. This work, accordingly, outlines two options in which a protection for franchisees' goodwill could possibly be implemented. The first option involves a regulatory implementation of the European recoupment doctrine in to the U.S. legal system. Alternatively, the second option identifies certain refinements to existing common law concepts, so that they might better protect franchisees' goodwill.

The proposed solution differs from the existing theories in the U.S. legal system mainly because the recovery under the EU approach does not depend on the franchisor's wrongdoing. If and to the extent that a franchisee has positive local goodwill, the transfer of this value upon cessation justifies the payment. Unlike existing U.S. laws, however, the payment aims to recoup only a limited period of time in which the franchisor's extra earnings might still be traced back to the previous franchisee's local goodwill. Therefore, the recoupment doctrine offers a narrow but relatively precise protection for franchisees' goodwill. Moreover, because the proposed solution targets the source of franchisor-opportunism, there is no need for strict termination restrictions. In other words, the franchisor would be allowed to terminate a franchise contract as long as the franchisee is fairly compensated for its investment. Furthermore, while existing franchise laws in the

[18] Throughout this work "goodwill recoupment" refers to the doctrine in general; "goodwill indemnity" refers to the German system; and "goodwill compensation" refers to the French system.

US provide little guidance for assessing damages, the recoupment doctrine offers a comparatively comprehensive evaluation scheme that would increase certainty in franchise disputes.

In sum, this dissertation argues that the recoupment doctrine is a better-suited solution for the problem of opportunism than those currently used in the U.S. legal system. It would allow the franchisee to receive a fair return for its intangible investment without constraining the franchisor's monitoring power and flexibility. Ultimately, this approach would reduce both franchisee and franchisor opportunism, and incentivize investment and teamwork.

OUTLINE OF THE STUDY

This dissertation is divided into four chapters.

Chapter 1 describes the franchise relationship and the concept of goodwill.

Chapter 2 identifies and explains the existing mechanisms in the U.S. legal system that deal with franchising and its goodwill related problems. In Chapter 2, the first part focuses on franchise-specific regulatory developments at both the federal and state levels. This work, however, does not include areas that indirectly affect franchise relationships, such as antitrust law, consumer protection law, and intellectual property law. The second part of Chapter 2 provides a detailed explanation for each common law principle that is commonly used to address the problem of goodwill misappropriation.

Chapter 3 analyzes the European goodwill recoupment doctrine. It begins with an overview of the Commercial Agency Directive ("Directive"). The Directive is the regulatory framework that includes the recoupment doctrine. Then, Chapter 3 explains how the recoupment doctrine functions in the commercial agency setting. Lastly, Chapter 3 briefly discusses the analogous application of the doctrine to franchise relationships in EU Member States.

Finally, **Chapter 4** proposes two possible implementation methods of the recoupment doctrine, regulatory intervention and modified common law principles. The first part explains the potential benefits of the statutory implementation. It also provides an economic analysis of such implementation. Alternatively, the second part, suggests minor modifications of certain common law principles so that they can provide protection comparable to the recoupment doctrine. Nonetheless, for reasons explained in Chapter 4 this dissertation favors the statutory approach.

RESEARCH CONTRIBUTION

This dissertation contributes to the franchising literature by providing an original mechanism against franchisor-opportunism in the franchising system. Unlike existing debates, where the focus has been (and still is) on restricting the franchisors' termination power, this work highlights the underlying causes and effects of opportunism—the unbargained-for expropriation of franchisee goodwill.

By analyzing both U.S. and European laws, this study aims to develop a fresh perspective on existing mechanisms which may be particularly useful for future

legislative and scholarly debates. Moreover, this study can be a valuable guideline for practitioners, franchisors, and prospective franchisees for negotiating franchise agreements. As underlined in this work, the idea of goodwill recoupment can actually help to create healthier relationships for both parties. Hence, the parties may voluntarily implement the proposed mechanism to insure a better relationship.

Because franchising is a rapidly growing business model around the world,[19] the proposed solution may also shed some light on ongoing disputes in those places where franchisees face similar problems.

[19] *See generally* Elizabeth C. Spencer, *The Regulation of Franchising in the New Global Economy* (2010).

CHAPTER 1 FRANCHISING AND GOODWILL

A. Overview

Franchising has been one of the most successful business models for distributing goods and services in the United States. According to the U.S. Census Bureau, in 2007, franchised businesses operated over 828,000 establishments, which represented 2.8 percent of all nonfarm business establishments in the U.S.[20] Moreover, the 2007 Report showed that franchised businesses directly provided more than 9.1 million jobs, met a $304 billion payroll, produced $802 billion of output, and added over $468 billion of gross domestic product.[21]

In 2013, according to International Franchise Association's data, franchised businesses in the U.S. have continued to grow faster than other businesses.[22] Today, the franchising business model is used in a wide range of industries, such as quick-service and full-service restaurants, lodging, automotive, business and personal service, real estate businesses, and gasoline dealerships.[23] Although a number of factors affect the

---

[20] IFA, *The Economic Impact of Franchised Businesses: Volume III, Results for 2007,* http://www.buildingopportunity.com/impact/reports.aspx (last accessed 7/14/2014). *See also* for more updated estimates: IHS Global Insight, *Franchise Business Economic Outlook for 2013*, http://www.franchise.org/uploadedFiles/Franchise_Business_ Outlook_12-17-2012.pdf (last accessed 6/30/14).

[21] IFA, *The Economic Impact of Franchised Businesses: Volume III, Results for 2007*, I-14.

[22] IFA's first quarterly update to IHS Global Insight, *Franchise Business Economic Outlook for 2013*, http://emarket.franchise.org/Franchise_Business_OutlookMarch.pdf (last accessed 6/30/14).

[23] *See generally* IHS Global Insight, *Franchise Business Economic Outlook for 2013*, http://www.franchise.org/ uploadedFiles/Franchise_Business_Outlook_12-17-2012.pdf (last accessed 6/30/14).

success of the franchising method, it is largely attributable to "the capacity of franchising to combine the chain's comparative advantages in creating brand recognition and capturing economies of scale with the local entrepreneur's local knowledge and drive."[24]

Nevertheless, the basic structure of franchising is prone to generate major problems for its participants.[25] While the franchisor, as the owner of the system, constantly needs to monitor and control the quality of services that each franchisee provides, the franchisee faces troubles if the franchisor uses its power opportunistically.[26] Accordingly, the franchise relationship, as Professor Gillian Hadfield states, is "structurally centered on conflicts of interest. Overcoming these conflicts is the primary challenge of franchising."[27]

Before exploring the legal issues, this section covers the basics of franchising. Although the section focuses on U.S. franchises, a general discussion is relevant to franchise businesses across the world.

---

[24] Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 2 (2005). *See also* Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., pt. 1, at 8 (1965).

[25] *Infra* Ch.1(B)(4)&(5).

[26] *Infra* Ch.1(B)(5)(c).

[27] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 949 (1990).

B. The Franchise Relationship

1. What Is A Franchise?

Historically, a franchise was a privilege or exclusive right granted by a sovereign power to an individual or group enabling them to carry out some sort of public function.[28] In return, the grantee (or franchisee) was obliged to pay a fee, also known as "royalty".[29] Today, however, private companies also grant franchises.[30] Accordingly, a franchise, in the commercial sense, refers to a "contractual arrangement between two legally independent firms in which one firm, the franchisee, pays the other firm, the franchisor, for the right to sell the franchisor's product and/or the right to use its trademarks and business format in a given location for a specified period of time."[31] This study covers only business arrangements between private parties.

a. Statutory Definitions And Elements Of Franchising

Once a method of doing business is identified as a franchise, this business becomes subject to specific federal and/or state regulations. Therefore, defining the franchise

---

[28] Oxford English Dictionary, 3rd Edition, September 2009. For Common Law roots of franchising *see* David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37, 37-43 (1999); *see also* Francine Lafontaine & Roger D. Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States*, 3 Entrepreneurial Bus. L.J. 381, 382 (2009).

[29] Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 3 (2005) ("usually in the form of a share of the product or profit").

[30] Historical development of private franchising *see e.g.* David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37, 42-48 (1999).

[31] Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 3-4 (2005).

relationship, and distinguishing it from other business methods has been – and still is – an important issue for lawmakers.[32]

While each state defines the franchise relationship somewhat differently,[33] most definitions share the elements of the Federal Trade Commission's (FTC) Franchise Rule.[34] According to the FTC, franchising means "any continuing commercial relationship" in which the franchisee obtains, upon a payment, "the right to operate a business" or "to offer, sell or distribute" products that are "identified or associated with the franchisor's trademark" while the franchisor retains authority "to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation."[35]

Accordingly, a business arrangement has to satisfy three main elements in order to be considered a franchise relationship. The scope of each element, however, varies from state to state.[36] First of all, the franchisee must operate its business under the franchisor's license, or distribute goods or services associated with the franchisor's trademark or trade

---

[32] *See* Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. Rev. 905, 913 (1994). For various definitions and their analysis see John Stanworth & James Curran, *Colas, Burgers, Shakes and Shirkers: Towards a Sociological Model of Franchising in the Market Economy*, 14 J. Bus. Venturing 323, 324-327 (1999).

[33] *See generally* Thomas M. Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 Bus. Law. 289, 292 (1989) (revising the elements of franchises under various state franchise laws); Daniel J. Oates, Shannon L. McCarthy, Douglas C. Berry, *Substantial Association with A Trademark: A Trap for the Unwary*, 32 Franchise L.J. 130 (2013).

[34] 16 C.F.R. § 436 (West 2012).

[35] 16 C.F.R. § 436.1 (h) (West 2012).

[36] Thomas M. Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 Bus. Law. 289, 295-96 (1989).

name. While some states require that the business be 'substantially associated' with the franchisor's trademark, others construe the trademark element broadly, and require only that the franchisor's trademark identifies the goods or services sold, not the business itself.[37]

Second, the franchisee must operate its business under a marketing plan developed by the franchisor. Accordingly, the franchisor must have the right control and/or assist the business operation of the franchisee to maintain its uniform standards. Although there is no precise formula in determining the level of control or assistance indicative of a franchise, courts have noted the following means: creating a centralized advertising campaign, providing trainings and operational support, auditing of books and inspection of premises, control of lighting, employee uniforms, prices, trading stamps and hiring, establishing of sales quotas and management training and financial support.[38]

Finally, a franchisee is obligated to pay a fee for the right to do business under the franchise agreement.[39] This payment can be in lump sum or by installments of an initial capital investment fee, any fee or charges based upon a percentage of gross or net sales

---

[37] *Id.* at 294. *See e.g. Grand Light & Supply Co., Inc. v. Honeywell, Inc.*, 771 F.2d 672, 678 (2d Cir. 1985) (… at least … more than three percent of the franchisee's business be involved).

[38] *See e.g. Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1180 (2d Cir. 1995); *Grand Light & Supply Co., Inc. v. Honeywell, Inc*., 771 F.2d 672, 678 (2d Cir. 1985); *see also* 62B Am. Jur. 2d *Private Franchise Contracts* § 7 (2014).

[39] *See generally* Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 56-78 (2005).

whether or not referred to as royalty fees, any payment for goods or services, or any training fees or training school fees or charges.[40]

b. Nature of the Franchise Relationship

The exact nature of the franchise relationship is rather unclear.[41] In general, franchising is a contractual relationship between the franchisor and the franchisee in which continuing mutual rights and obligations arise.[42] While franchisees appear to have some autonomy similar to retail or wholesale dealers, they are also somewhat dependent to their franchisor as agents or employees.[43] Moreover, the franchise relationship is often compared to a partnership – or a marriage – since the parties depend on each other for their continued well-being, and the relationship is intended to continue for a long period of time.[44] Nonetheless, a franchise relationship is often recognized as a commercial relationship between independent parties with no fiduciary or employment obligations.[45]

---

[40] 62B Am. Jur. 2d *Private Franchise Contracts* § 15 (2014).

[41] *See e.g.* Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* 47 (2010); Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. Rev. 905, 912-913 (1994).

[42] *See e.g.* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 928 (1990).

[43] *Lobdell v. Sugar 'N Spice, Inc.*, 658 P.2d 1267, 1271 (Wash. App. Div. 1 1983); *Artman v. Intl. Harvester Co.*, 355 F. Supp. 482, 485 (W.D. Pa. 1973). For more discussion see Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 931-933 (1990).

[44] *See* David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37, 49-50 (1999).

[45] 19 Williston on Contracts § 54:6 (4th ed.). But franchisees have proved that under certain circumstances a fiduciary relationship may exist. *See generally* Harold Brown, *Franchising-A Fiduciary Relationship*, 49 Tex. L. Rev. 650, 664 (1971); Frank J. Cavico,

Despite various forms of franchising arrangements, there are two major categories of franchises: product distribution franchises and business format franchises.[46] Product distribution franchising is the traditional form of franchising.[47] Basically, the franchisor supplies products to its franchisee, and allows the franchisee to use its trademark, yet offers limited operational guidance. While the franchisor exercises less control, and the franchisee has more freedom to choose its business style, considerable interdependence between the franchisor and the franchisee distinguishes the relationship from other marketing systems.[48] Examples of product franchises include gas stations, tire dealers, auto dealers, and beverage bottlers.[49]

In a business format franchising, however, the franchisor promotes its entire business concept to market its products or services.[50] In other words, the franchisee replicates the franchisor's unique manner of doing business.[51] Hence, the franchisee operates its own business under a specified business framework that provides comprehensive operational

---

The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship, 6 Barry L. Rev. 61, 79 (2006).

[46] U.S. Dep't Of Commerce, Franchising In The Economy 1986-1988 3 (1988). *See e.g.* David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37, 48-50 (1999); Francine Lafontaine & Roger D. Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States*, 3 Entrepreneurial Bus. L.J. 381 (2009).

[47] David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37, 48 (1999).

[48] Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 6 (2005).

[49] *Id.*

[50] *See generally* Byron E. Fox & Henry C. Su, *Franchise Regulation - Solutions in Search of Problems?*, 20 Okla. City U. L. Rev. 241, 248-255 (1995).

[51] Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 6 (2005).

principles, training, quality control and continuing guidance. Restaurants, tax-preparation services and hotels are common examples of business format franchises.[52]

c. Economic Benefits of Franchising

Franchising has the potential to combine "the advantages of individual ownership with the efficiencies attending large-scale operations."[53] Therefore, the franchising model has important economic benefits for both franchisor and franchisee.[54] First of all, as an alternative to building a company-owned distribution chain, franchising gives the franchisor the ability to expand its business rapidly, without having to invest large amounts of its own capital. Moreover, franchising allows the franchisor to develop his distribution chain without the burden of day-to-day operations of company-owned stores.[55] Besides, the franchisor benefits from the strong self-motivation of individual franchisees, whose ownership dedication is generally far greater than employee managers of company-owned stores.[56]

In return, franchising offers the opportunity for individuals to open up their "own" businesses with access to continuing management and technical support provided by the

---

[52] Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 7 (2005).

[53] *LaGuardia Associates v. Holiday Hospitality Franchising, Inc.*, 92 F. Supp. 2d 119, 124-25 (E.D.N.Y. 2000) (citing Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., pt. 1, at 8 (1965)).

[54] *See generally* W. Michael Garner, *Franchise and Distribution Law and Practice* § 1:2 (WL 2013).

[55] *Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co*., 432 A.2d 48, 52 (1981).

[56] *LaGuardia Associates v. Holiday Hospitality Franchising, Inc.*, 92 F. Supp. 2d 119, 124-25 (E.D.N.Y. 2000).

franchisor. [57] So, under the franchise model, individuals can operate their independent business units, while they become a part of a larger organization.[58] Thus, especially for those who have no previous business experience, franchising is often considered as "a shortcut to ownership of a business" that already has a working system, and established brand recognition.[59]

2. The Franchise Relationship and Similar Distribution Channels

In essence, franchising is merely a method of distributing and marketing goods and services to customers. There are several other forms of distribution and marketing arrangements where one party uses other party's skill and efforts to bring its products to the market. These so-called intermediary relationships share mainly the same economic function. More importantly, in these relationships, intermediaries experience similar problems with their principals, as they are mostly dependent on them for their businesses.

In particular, franchisees have many characteristics in common with distributors, dealers and commercial agents.[60] Nonetheless, there are also basic differences among them. Since these intermediaries may not always enjoy the same degree of legal protection as

---

[57] *Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co.*, 432 A.2d 48, 52 (1981).

[58] David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37, 50 (1999).

[59] W. Michael Garner, *Franchise and Distribution Law and Practice* § 1:21 (WL 2013).

[60] *See* Richard M. Krumbein, *Protectionism in Puerto Rico: The Impact of the Dealers' Contracts Law on Multinational Companies Planning Operations in Puerto Rico*, 25 Case W. Res. J. Intl. L. 79, 96-98 (1993).

franchisees, – and yet are exposed to comparable forms of opportunism by their principals – it is important to identify the differences.[61]

More importantly, the similarities between franchisees and commercial agents play an important role for the purposes of this study as the proposed solution is originally designed for commercial agency relationships in the EU. While the bulk of this study focuses on franchising, commercial agency will be discussed again in Chapter 3 to introduce the European goodwill recoupment doctrine.

a. Distribution And Dealership Agreements

Distributorship and dealership are contractual relationships under which the manufacturer/supplier agrees to supply the distributor or dealer with products on a continuing basis, and the distributor or dealer agrees to purchase and resell the products to retailers or to the general public at retail.[62] Since each order and purchase of products constitutes a separate transaction, these relationships may be seen as " systemized buyer-seller relationships."[63] Yet, distributors and dealers are typically required to purchase inventories, and more importantly, to use their "best efforts" to promote the supplier's product.[64] Moreover, the manufacturer may grant the distributor or dealer an exclusive

---

[61] *Id*. *See also e.g.* Leonard D. Vines, *Dealerships and Distributorships - Beware of the Franchise Minefield*, 56 J. Mo. B. 163 (2000).

[62] W. Michael Garner, *Franchise and Distribution Law and Practice* § 1:11 (WL 2013); *See also* Heiko E. Burow & Raymond C. Kolls, *Basic Concepts and Issues: A Primer on Distribution and Sales Representative Agreements in the Medical Device and Durable Medical Equipment Industries*, 39 J. Health L. 165, 168-69 (2006).

[63] *Id*.

[64] *Id*. *See e.g. Mario R. Franceschini, Inc. v. Riley Co.*, 591 F. Supp. 414, 417 (D.P.R. 1984) (Plaintiff was not a distributor because he had no obligation to purchase

right to distribute its products in a designated territory, and may offer some minor assistance in marketing the products.[65]

Both distributorship and dealerships are very similar to franchises, particularly product franchises, and "in some instances are indistinguishable from them."[66] They all create, and/or maintain markets for their suppliers. Nonetheless, distributors and dealers do not pay fees for the right to sell the supplier's product, and their suppliers do not provide "the type of comprehensive marketing assistance that franchisors do."[67] Unlike the franchisor, the manufacturer typically generates income from the sale of the product to the distributor or dealer.[68] Therefore, in some states, distributors and dealers are protected under franchise laws only if they can demonstrate that share a "community of interest"[69] with their suppliers.[70]

---

inventories, had no warehouse facilities, employed no salesman nor had any of the inherent responsibilities of a distributor.)

[65] W. Michael Garner, *Franchise and Distribution Law and Practice* § 1:11 (1990 & Supp. 1995).

[66] *Id*. *See also* W. Michael Garner, *Franchise and Distribution Law and Practice* § 3:5 (1990 & Supp. 1995).

[67] *Id*.

[68] *Mario R. Franceschini, Inc. v. Riley Co.*, 591 F. Supp. 414, 416 (D.P.R. 1984). *See generally* Ellen Lokker et. al., *Definition of A Franchise or Dealer*, 19 Franchise L.J. 128 (2000).

[69] For instance, the Wisconsin law defines "community of interest" as "a continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods or services." Wis. Stat. Ann. § 135.02 (1) (West).

[70] Joseph P. Wright & Thomas B. Aquino, *Understanding the Wisconsin Fair Dealership Law*, 82 Wis. Law. 14 (November 2009). *See e.g. Cooper Distribg. Co., Inc. v. Amana Refrigeration, Inc.*, 180 F.3d 542 (3d Cir. 1999) (finding that the distributor's substantial

b. Commercial Agency Agreements (Sales Representatives)

Commercial agency is a contractual relationship under which "the commercial agent"[71] agrees to act on a continuing basis to negotiate or to conclude contracts on behalf of the principal. The scope of the commercial agent's authority may be broader or narrower as desired by the parties.[72] Typically, the commercial agent provides the principal with information concerning the contracts negotiated or concluded, the relevant market conditions, the solvency of and other characteristics relating to customers. As a true intermediary between the manufacturer and the purchaser, the commercial agent does not acquire title or ownership rights to the products it markets on behalf of the manufacturer. In consideration for the commercial agent's marketing efforts, the manufacturer typically pays the agent a commission, which is in most cases a percentage of the purchase price of the product.[73]

Similar to franchisees (in particular product distribution franchisees), commercial agents may have significant firm-specific investments in both goodwill and in specialized materials.[74] The commercial agent may be required to devote his/her time and effort to

---

investments and contribution to goodwill were 'franchise specific' and supported a jury finding of community of interest.)

[71] Commercial agents are often referred to as sales representatives or sales agents. For the purposes of this work, these terms will be treated interchangeably.

[72] For different arrangements see *Mario R. Franceschini, Inc. v. Riley Co.*, 591 F. Supp. 414, 418-19 (D.P.R. 1984).

[73] Heiko E. Burow & Raymond C. Kolls, *Basic Concepts and Issues: A Primer on Distribution and Sales Representative Agreements in the Medical Device and Durable Medical Equipment Industries*, 39 J. Health L. 165, 168-69 (2006).

[74] *See e.g. Moodie v. Sch. Book Fairs, Inc.*, 889 F.2d 739, 744 (7th Cir. 1989).

one principal, and to operate an efficient sales and service organization for the principal's products.[75] Moreover, the agent may be assigned to a specific territory, and required to sell or promote a minimum amount of goods, and/or to have a certain quantity of goods in stock.[76] Accordingly, like franchisees, commercial agents' financial future may depend strongly on their principals.[77] Thus, the typical commercial agent is concerned about the right to continue the relationship because often the agent's "most valuable interest is the continuing goodwill of the business."[78]

In the U.S., commercial agents often seek refuge under franchise laws.[79] Although they typically have similar economic functions as franchisees – especially distribution franchisees, (dealers, or distributors,) franchise laws do not always protect the agents. In general, courts refuse commercial agents' claims under franchise laws since the agents often do not have the right to commit the grantor to the sale of the product.[80]

---

[75] *See e.g. Bush v. Natl. Sch. Studios, Inc.*, 407 N.W.2d 883, 892 (Wis. 1987).

[76] *See e.g. Moodie v. Sch. Book Fairs, Inc.*, 889 F.2d 739, 744 (7th Cir. 1989).

[77] *See e.g. Foerster, Inc. v. Atlas Metal Parts Co.*, 313 N.W.2d 60, 66 (Wis. 1981).

[78] *Cf.* Kevin Scott Dittmar, *Foerster, Inc. v. Atlas Metal Parts - the Wisconsin Supreme Court Takes A Narrow View of the Dealer's Financial Interest Protected by the Wisconsin Fair Dealership Law*, 1985 Wis. L. Rev. 155, 180 (1985).

[79] John R. F. Baer, David A. Beyer, Scott P. Weber, *When Are Sales Representatives Also Franchisees?*, 27 Franchise L.J. 151 (2008); Stephen C. Root, *The Meaning of "Franchise" Under the California Franchise Investment Law: A Definition in Search of A Concept*, 30 McGeorge L. Rev. 1163, 1164-65 (1999).

[80] Joseph P. Wright & Thomas B. Aquino, *Understanding the Wisconsin Fair Dealership Law*, 82 Wis. Law. 14 (November 2009). *See also Durst v. Ill. Farmers Ins. Co.*, No. 05 C 574, 2006 WL 140546, Bus. Franchise Guide (CCH) ¶ 13,249 (N.D. Ill. Jan. 12, 2006) (Because the insurance agent was not in the business of offering, selling, or distributing insurance policies on its own, its relationship with the insurance company was not that of a franchise the Illinois Franchise Disclosure Act); *Edmands v. Cuno, Inc.*, 892 A.2d 938,

Nevertheless, despite controversies, courts are increasingly willing to find that a commercial agent may be considered a franchisee "if his contractual relationship with the principal shows that the agent has the duties, responsibilities, and liabilities normally associated with owning and operating a business"[81]

Bus. Franchise Guide (CCH) ¶ 13,302 (Conn. Mar. 21, 2006) (Sales representative is not a franchisee under the Connecticut Franchise Act since he had not satisfied his burden to demonstrate that the principal had sufficient control over the representative to find that the principal had prescribed in substantial part a marketing plan to be followed by the representative); *Home Protective Servs., Inc. v. ADT Security Servs.*, Inc., 438 F.3d 716, Bus. Franchise Guide (CCH) ¶ 13,266 (7th Cir. Feb. 13, 2006) (The commercial agent agreed with a principal to solicit sales contracts, but could transfer its customers to other principals. The court found that the relationship is not protected under the Wisconsin law since the parties did not share a "community of interest"); *Mario R. Franceschini, Inc. v. Riley Co.*, 591 F. Supp. 414, 417 (D.P.R. 1984) ("an individual who merely obtained purchase orders for a manufacturing firm and forwarded them to the firm for approval was not a [franchisee] within the meaning of the Puerto Rico Franchise Act.").

[81] Richard M. Krumbein, *Protectionism in Puerto Rico: The Impact of the Dealers' Contracts Law on Multinational Companies Planning Operations in Puerto Rico*, 25 Case W. Res. J. Intl. L. 79, 98 (1993); Steven D. Wiener, *Gentis v. Safeguard Business Systems, Inc. Liberal Construction of Remedial Statutes: What Is A Franchise?*, 17 Franchise L.J. 115, 117 (1998) ([I]t is obvious that the California courts will bend over backwards to find a franchise under the CFIL definition in order to permit free redress for aggrieved franchisees."). *See e.g. Charts v. Nationwide Insurance Co.*, 397 F. Supp. 2d 357 (D. Conn. 2005) (holding that an insurance agency relationship could be a franchise under the Connecticut law); *Gentis v. Safeguard Bus. Sys., Inc.*, 71 Cal. Rptr. 2d 122 (Cal. App. 2d Dist. 1998) (holding that a commercial agent who solicit orders, but lack the authority to enter into binding sales contracts, is a franchisee under the California law); *Blankenship v. Dialist Intern. Corp.*, 568 N.E.2d 503 (Ill. App. 5th Dist. 1991) (holding that a commercial agent, who sold a listfinder device designed for attachment to telephones under a marketing plan prescribed by the manufacturer, used the manufacturer's trade name, and paid a fee for the right to do so, was protected under the Illinois franchise law.)

3. The Franchise Contract

A franchise relationship is created by a contract. Although franchise contracts are formed and governed by the general principles of contract law, state and federal franchise statutes have power to override disputed contract provisions.[82]

Franchise contracts establish the rights and responsibilities of franchisors and their franchisees.[83] These contracts often contain provisions that can affect various areas of law, such as antitrust, intellectual property, securities, product liability, and agency law.[84]

Generally, franchise contracts are long-term, standard form contracts.[85] Although individual provisions and general operating methods might vary in each franchise,

---

[82] W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 8:2 (2013).

[83] Francine Lafontaine & Roger D. Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States*, 3 Entrepreneurial Bus. L.J. 381 (2009).

[84] David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37, 51 (1999); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 928-29 (1990).

[85] *See e.g*. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 946 (1990); Peter C. Lagarias, Edward Kushell, *Fair Franchise Agreements from the Franchisee Perspective*, 33 Franchise L.J. 3, 5 (2013) ("franchise agreements are typically one-sided adhesion agreements written by franchisors"); Robert W. Emerson, *Franchise Goodwill: Take A Sad Song and Make It Better*, 46 U. Mich. J.L. Reform 349, 365-66 (2013) ("Due to the unequal bargaining power of the "take it or leave it" form contracts, franchisees risk losing to franchisors their investment of both time and money in enhancing the goodwill of a franchise."); Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 Franchise L.J. 31, 32 (2009) ("The essential defining elements of such contracts are the lack of negotiation of terms and unequal bargaining power."). *See also Kubis & Perszyk Assocs., Inc. v. Sun Microsys.*, Inc., 680 A.2d 618 (N.J. 1996); *Indep. Ass'n of Mail Box Ctr. Owners v. Super. Ct*., 133 Cal. App. 4th 396 (2005); *Bolter v. Super. Ct*., 87 Cal. App. 4th 900 (2001); *Postal Instant Press v. Sealy*, 43 Cal. App. 4th 1704 (1996); *Ticknor v. Choice Hotels, Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001).

franchise agreements often address common issues, such as franchise fees, estimated costs, duration of the contract, exclusive territory, training programs, support, applicable financing programs, obligations of both parties, multi-unit rights, trademark rights, advertising and marketing, equipment, proprietary systems and products, and more.[86] Nevertheless, franchise contracts often address those issues by providing a general framework that empowers franchisors to decide on the aspects of the various transactions that take place within each franchise relationship.[87] Thus, in general, upon signing a franchise contract, franchisees surrender their rights to the franchisor, including but not limited to the right to control the details in which franchisees conduct their businesses.[88] The following two sections discuss relational and economic concerns associated with this choice.

4. Franchise Relationships as Relational Contracts

The franchise contract represents the parties' mutual commitments to the ongoing success of the franchise business.[89] However, a franchise contract is typically a long-term, incomplete[90] contract whose terms will be adapted as the relationship unfolds.[91]

---

[86] For the frequency of contract clauses see Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 939-946 (1990).

[87] *Id*. at 946-47.

[88] *See e.g. Snelling & Snelling, Inc. v. Watson*, 254 S.E.2d 785, 792 (N.C. App. 1979).

[89] Byron E. Fox & Henry C. Su, *Franchise Regulation - Solutions in Search of Problems?*, 20 Okla. City U. L. Rev. 241, 246 (1995).

[90] *See e.g.* Charles J. Goetz Robert, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1092 (1981) ("In conventional contracts, the parties generally are able to reduce performance standards to rather specific obligations. By contrast, relational contracts create unique, interdependent relationships, wherein unknown contingencies or the intricacy of the required responses may prevent the specification of precise performance

Accordingly, in the franchise literature franchise contracts are characterized as "relational contracts."[92]

Although a relational contract can be "economically efficient" when it "reduces the transactional costs of uncertain or complex agreements to acceptable levels,"[93] commentators consider the relational nature of franchise contracts as an important source of conflict.[94] Elizabeth Spencer, for instance, argues that the standard form and relational qualities of the franchise contract together intensify disparities between the contracting

---

standards."); Scott Makar, *In Defense of Franchisors: The Law and Economics of Franchise Quality Assurance Mechanisms*, 33 Vill. L. Rev. 721, 732 (1988) ("Completely specified contracts are frequently not feasible due to the continuous and lengthy nature of the contractual relationship which makes future contingencies uncertain or particularly difficult to specify.")

[91] Benjamin Klein, *Transactions Cost Determinants of "Unfair" Contractual Arrangements*, 70 Am. Econ. Rev. 356 (1980); Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. Cal. Interdisc. L.J. 227, 230-31 (2004).

[92] Professors Goetz and Scott describe a "relational contract" as follows:

> "A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance."

Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1091 (1981). *See generally* Ian Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980); Ian Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (David Campbell ed., 2001).

[93] 3 *Summers Oil and Gas* § 33:29 (3d ed.).

[94] *See e.g.* Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 Franchise L.J. 31, 36 (2009); Barbara Ann Banoff, *Vertical Integration, Relational Contracts, and Specialized Investment: A Response to Baker and Krawiec*, 33 Fla. St. U. L. Rev. 757 (2006); Antony W. Dnes, *Franchise Contracts, Opportunism and the Quality of Law*, 3 Entrepreneurial Bus. L.J. 257 (2009); David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 340 (1995).

parties, and "deprive the franchise contract of the essential element of bargained-for exchange."[95] She summarizes the problem as follows:

> The relational contract is about accommodating uncertainty by building in flexibility, reliance upon trust, and contextual interpretation. Relational contracts further erode the bargained-for exchange because parties must leave the terms of the contract unspecified to accommodate uncertainty. Where the relational contract is also a standard form contract and where a franchisor drafts the contract but does not negotiate, flexibility is given not reciprocally but to one party, the franchisor.[96]

Steinberg & Lescatre also state that "franchise contracts establish a relationship where the stronger party can unilaterally alter the fundamental nature of the obligations of the weaker party."[97] They further emphasize that the franchise relationship is "not a discrete transaction in an efficient market," but "an ongoing relationship commenced under conditions of informational and economic disparity between the parties and continued under conditions of economic and psychological dependence by the franchisee upon the franchisor."[98]

Ultimately, relationalists conclude that classical contract law, which usually focuses on the "four corners" of an incomplete contract, "leaves the franchise relationship vulnerable to opportunism and abuse."[99] While some commentators support increased

---

[95] Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 Franchise L.J. 31, 35 (2009).

[96] *Id.*

[97] Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 114 (2004).

[98] *Id*. at 298.

[99] Byron E. Fox & Henry C. Su, *Franchise Regulation - Solutions in Search of Problems?*, 20 Okla. City U. L. Rev. 241, 247 (1995). *But see* Tracey A. Nicastro, *How*

recognition of the traditional mechanisms of common law, such as the covenant of good faith and fair dealing to protect franchisees,[100] others suggest that "a revised regulatory process that includes all stakeholders would help to better integrate a deeper understanding at all levels of governance of … the franchise relationship."[101]

5. Fundamental Economic and Legal Issues in Franchising

a. Bargaining Power

Courts and legal commentators have long recognized that the franchisor typically has superior bargaining power compare to the franchisee.[102] The disparity in bargaining power, accompanied with the need for uniformity in the interests of brand quality, allows the franchisor to present one-sided, standardized contracts, and to offer to franchisees on

---

the Cookie Crumbles: The Good Cause Requirement for Terminating A Franchise Agreement, 28 Val. U. L. Rev. 785, 806 (1994).

[100] *See e.g*. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 930 (1990).

[101] Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 Franchise L.J. 31, 33 (2009).

[102] H.R. 1717, 104th Cong., 1st Sess. § 2(a)(3) (1995) ("Most prospective franchisees lack bargaining power ...."); S.Rep. No. 95–731, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 876 ("Central to the problems faced by franchisees in this regard is the disparity of bargaining power that exists between the franchisor and the franchisee."); *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 86 N.J. 453 (1981) ("Though economic advantages to both parties exist in the franchise relationship, disparity in the bargaining power of the parties has led to some unconscionable provisions in the agreements."); *Randall v. Lady of Am. Fran. Corp.*, 532 F. Supp. 2d 1071, 1087 (D. Minn. 2007) ("The Minnesota Franchise Act is an attempt to protect the franchisee from undue usurpation of the franchise relationship and to establish balance of bargaining power."); Peter C. Lagarias, Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, 29 Franchise L.J. 139 (2010). *But see* Byron E. Fox & Henry C. Su, *Franchise Regulation - Solutions in Search of Problems?*, 20 Okla. City U. L. Rev. 241, 279-85 (1995).

a take-it-or-leave-it basis.[103] This leads to agreements that give the franchisor maximum control over management of the franchise, while limiting its legal responsibilities.[104] In particular, the franchisor gains great flexibility regarding its rights to terminate the contractual relationship.[105] For instance, a California appellate court noted that "[f]ranchising involves the unequal bargaining power of franchisors and franchisees and therefore carries within itself the seeds of abuse. Before the relationship is established, abuse is threatened by the franchisor's use of contracts of adhesion presented on a take-it-or-leave-it basis."[106]

Furthermore, once the franchisee makes "substantial franchise-specific investments," it "loses all or virtually all of its original bargaining power regarding the continuation of

---

[103] Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* 89 (2010); Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 324 (June 24, 1999) (The attitude of some of the stronger franchisors is *"we don't sell franchises—we grant them."*). *See also* Harold Brown, *Franchising-A Fiduciary Relationship*, 49 Tex. L. Rev. 650, 661-62 (1971) ("This one-sided arrangement makes it doubtful that a contract exists at all, although the franchisor is usually quite careful to make the agreement sound like a contract.")

[104] *See e.g. Coast to Coast Stores (Cent. Org.), Inc. v. Gruschus*, 667 P.2d 619, 621 (Wash. 1983) ("The franchisor normally occupies an overwhelmingly stronger bargaining position and drafts the franchise agreement so as to maximize his power to control the franchisee"); Douglas C. Berry et. al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 872 (2009).

[105] *See e.g. Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 319 (3d Cir. 2001); Douglas C. Berry et. al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 872 (2009); David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 342 (1995).

[106] *Postal Instant Press, Inc. v. Sealy*, 43 Cal.App.4th 1704, 1716 (Cal. App. 2d Dist. 1996).

the franchise."[107] As the franchisee's dependency grows, the franchisor may unfairly alter the relationship knowing that the franchisee has lost his economic leverage to resist.[108] Hence, the nature of the franchise relationship makes the franchisee vulnerable, even if the franchise contract was initially formed upon arm's length negotiations.[109] The Seventh Circuit noted, accordingly, that "[t]he purpose of most franchise laws is to protect franchisees who have unequal bargaining power once they have made a firm-specific investment in the franchisor."[110]

b. Sunk Investment

In general, franchise contracts are commercial contracts in the sense that both parties are merchants. They should, at least in theory, possess certain qualities and skills that are necessary to survive in the marketplace. Hence, in principle, neither franchisors nor franchisees need any special protection in addition to the general protection that general

---

[107] *C.N. Wood Co., Inc. v. Labrie Envtl. Group*, CIV.A. 12-11778--RGS, 2013 WL 2433150 (D. Mass. 2013) (citing *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124, 140 (N.J. 1992)). *See also e.g*. David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 341-42 (1995).

[108] Joel Iglesias, *Applying the Implied Covenant of Good Faith and Fair Dealing to Franchises*, 40 Hous. L. Rev. 1423, 1428 (2004).

[109] *See* Chisum, *State Regulation of Franchising; The Washington Experience,* 48 Wash.L.Rev. 291, 297 (1973); *E.S. Bills, Inc. v. Tzucanow*, 700 P.2d 1280, 1288 (Cal. 1985). *But see Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001) ("Franchisees' bald assertion of inequality in bargaining power, based solely on general nature of franchisor-franchisee relationship, was insufficient basis on which to find arbitration agreement, or forum selection clause therein, unenforceable.")

[110] *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 135 (7th Cir. 1990); *see also* Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 Alb. L. Rev. 193, 196 (2013).

contract law provides.[111] Some commentators, for instance, argue that even the disparity of bargaining power during contract formation does not justify specific protection, since the franchisee has the option to walk away.[112] They claim, therefore, that a prospective franchisee chooses to sign a franchise contract because of "the desirability of the product offered by the franchisor, rather than the franchisor's superior bargaining power."[113] Moreover, economists assert that franchise contracts "balance the concerns of both parties," because franchisors usually offer a standardized contract to all prospective franchisees.[114]

Nonetheless, the franchise relationship often requires significant initial and subsequent investments. While some of these investments might have reasonable retail value upon termination (also known as 'recoverable' investment), others will be specific to a particular franchise business, and will largely be lost if the franchisor

---

[111] *See e.g.* Hesselink, M. W. *Commercial agency, franchise and distribution contracts (PEL CAFDC)* 93 (Oxford: Oxford University Press 2006); Franchising Relationship: Hearing Before the Subcom. On Commercial, & Administrative Law of the Committee on the Judiciary, 106th Cong. Serial No.106-92 at 153 (1999) available at http://commdocs.house.gov/committees/judiciary/hju63852.000/hju63852_0.HTM.

[112] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 341 (1995); *see e.g.* Byron E. Fox & Peter I. Hoppenfeld, *A Review of Nasaa's Model Franchise Investment Act*, 9 Franchise L.J. 7, 10-31 (1989).

[113] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 341 (1995).

[114] James A. Brickley, Sanjog Misra & R. Lawrence Van Horn, *Contract Duration: Evidence from Franchising*, 49 J.L. & Econs. 173, 174 (2006) ("Less sophisticated franchisees benefit from standardized contracts, since the agreement reflects the interests of the marginal franchisee, who is assumed to be relatively well informed.")

opportunistically brings the contractual relationship to an end.[115] To the extent that those investments are franchise-specific ('sunk investment'), the franchisee will become dependent on the continuity of the franchise relationship.[116] Accordingly, some commentators argue that 'sunk investment' alone might justify legal intervention in favor of franchisees.[117] Gillian Hadfield, for example, identifies sunk costs as being an important force that keeps the franchisee in the franchise business, even when the business is not as profitable as it should be:

> The key difference is that a business with recoverable fixed costs will shut down as soon as it shows losses, employing its capital more profitably elsewhere. A business with sunk costs, on the other hand, will continue to operate even though it has never recovered its investments in fixed costs, and it will not shut down until the amount it is losing exceeds what it would lose by simply abandoning the investment.[118]

c. Opportunism

A franchise system largely depends on "the development and maintenance of consumer demand and goodwill[119] for the franchised product or service."[120] Thus, in

---

[115] Hesselink, M. W. *Commercial agency, franchise and distribution contracts (PEL CAFDC)* 93 (Oxford: Oxford University Press 2006).

[116] *Id*.

[117] *See e.g.* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 951-52 (1990); Juliet P. Kostritsky, *When Should Contract Law Supply A Liability Rule or Term?: Framing A Principle of Unification for Contracts*, 32 Ariz. St. L.J. 1283, 1345 (2000); Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 Franchise L.J. 31, 35 (2009).

[118] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 951-52 (1990).

[119] Goodwill is discussed *infra* Ch.1(C).

principle, parties benefit "from working together and cooperating with one another."[121] However, as most commentators agree, there is an inherent conflict of interest in the franchising system. Typically, the franchisor aims "to sell more franchises and increase royalty revenues," while the franchisee "wants to maximize her profits from the operation of the outlet."[122] This tension creates an environment in which "opportunism"[123] is likely to occur.[124]

From the franchisor's perspective, economists argue that a self-interested franchisee will not "undertake any efforts or expenditures that will not compensate the undertaking," and by doing so the franchisee may get a "free ride" at the expense of the franchisor and other franchisees.[125] As a result of the franchisee's incentive to free-ride, the franchisor

---

[120] Scott Makar, *In Defense of Franchisors: The Law and Economics of Franchise Quality Assurance Mechanisms*, 33 Vill. L. Rev. 721, 729 (1988).

[121] Roger D. Blair, Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 Franchise L.J. 55, 59 (2006).

[122] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 950 (1990). *See also* Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 268 (2005) ("What [franchisees] own is different from what the franchisor owns and cares about, and thus their objectives also differ.")

[123] Fischel defines opportunistic behavior as one party's attempt "to obtain, at the expense of other, a benefit not contemplated by the initial agreement, either explicitly or implicitly." Daniel R. Fischel, *The Economics of Lender Liability*, 99 Yale L.J. 131, 138 (1989).

[124] Roger D. Blair, Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 Franchise L.J. 55, 59 (2006).

[125] Gillian K. Hadfield explains the concern as follows:

> "More formally, free-riding is an example of an economic externality. A profit-maximizing franchisee will choose quality levels at which the marginal revenue at her outlet equals her marginal cost. The franchisee's effort, however, will also affect marginal revenues for other franchisees and the franchisor. This external

defines, maintains and enforces uniform quality standards throughout the franchise system, and "exercise[s] control over many important aspects of the franchisee's business, including appearance, hours of operation, location, and product quality."[126] To this end, economists claim that the franchisor's right to end the relationship is a necessary mechanism to ensure franchisees maintain minimal levels of product quality.[127] Jonathan Klick et al. maintain that "the franchisor's power to terminate shirking franchisees allows for better quality control and greater total surplus, thereby making the franchisor and franchisees collectively better off than they would be if the franchisee had more freedom to behave opportunistically."[128]

> effect is ignored by the franchisee, leading her to choose too little effort relative to the level that would maximize joint profits for the entire franchise system."

Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 950 fn. 88 (1990). *See also* Joachim G. Frick, *Restrictions on the Termination of Franchise Agreements - A Foreigner's View*, 101 Com. L.J. 81, 104 (1996); Rau, *Implied Obligations in Franchising: Beyond Terminations,* 47 The Business Lawyer 1080 (1992); Roger D. Blair, Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 Franchise L.J. 55, 60 (2006); Richard E. Caves & William F. Murphy, II, *Franchising: Firms, Markets, and Intangible. Assets*, 42 S. Econ. J. 572, 577 (1976).

[126] Roger D. Blair, Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 Franchise L.J. 55, 60 (2006); Joachim G. Frick, *Restrictions on the Termination of Franchise Agreements - A Foreigner's View*, 101 Com. L.J. 81, 104-05 (1996); Donald P. Horwitz & Walter P. Volpi, *Regulating the Franchise Relationship*, 54 St. John's L. Rev. 217, 221 (1980).

[127] Joachim G. Frick, *Restrictions on the Termination of Franchise Agreements - A Foreigner's View*, 101 Com. L.J. 81, 104 (1996); Epstein, *Unconscionability: A Critical Reappraisal,* 18 J. Law & Econ. 293, 314 *et seq.* (1975); Patrick J. Kaufmann & Francine Lafontaine, *Costs of Control: The Source of Economic Rents for Mcdonald's Franchisees*, 37 J.L. & Econs. 417, 439 (1994) (contracts can and should be made privately enforceable by making sure that the party (parties) subject to incentive problems in a relationship will lose something valuable if the relationship is terminated.)

[128] Jonathan Klick et. al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009).

From the franchisee's perspective, however, a self-interested franchisor can "opportunistically" misuse its contractual rights to deprive the franchisee of economic benefits which the franchisee have established in relation to the business and business goodwill.[129] Gillian Hadfield, for instance, notes that "an unrestricted exercise of control by the franchisor will favor the franchisor's interests over the franchisee's and create an equally significant problem for the franchisee: the risk of opportunism."[130]

As the franchisee's investment increases, so does the risk of franchisor-opportunism. After investing significant amount of time, capital, and personal effort, the franchisee will most likely "concede to any requests made by the franchisor."[131] If the franchisee disagrees with the franchisor, the franchisor may basically terminate (or decide to not renew) the franchisee's contract, and misappropriate the franchisee's unamortized investment (including "local goodwill").[132] In other words "[a]s the franchisee's

---

[129] Australian Government Productivity Commission inquiry into: The market for retail tenancy leases in Australia, 2007. *But see* Joachim G. Frick, *Restrictions on the Termination of Franchise Agreements - A Foreigner's View*, 101 Com. L.J. 81, 105 (1996) ("The monitoring rights of the franchisor are not an unfair burden to the franchisees, but a necessary part of this special form of business organization.")

[130] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 951 (1990). *See generally* Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & Econ. 297 (1978).

[131] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 341-42 (1995); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 952 (1990) (The incentive that causes a business with sunk costs to stay in operation despite losses makes franchisees vulnerable to franchisor behavior known as 'opportunism."); *New Jersey Am., Inc. v. Allied Corp.*, 875 F.2d 58, 62 (3d Cir. 1989).

[132] Robert W. Emerson, *Franchise Goodwill: Take A Sad Song and Make It Better*, 46 U. Mich. J.L. Reform 349, 367 (2013). *See generally* Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & Econ. 345, 356 (1985);

dependency grows, the franchisor may attempt to impose unreasonable conditions on the franchisee through the threat of termination or nonrenewal."[133]

There are a number of ways that the franchisor can take opportunistic advantage of the franchisee. For example, it can charge higher fees, raise the price of goods supplied to the franchisee, increase rent, force to undertake unnecessary renovations, require to participate in promotional programs, etc.[134] More importantly, however, the franchisor can use its termination power to take over profitable franchises, even where the franchisee fully complies with the franchise contract.[135] In such a case, the franchisor may sell the profitable unit to a new franchisee for higher franchisee fees, or convert the unit to a company-owned outlet and transform the existing local goodwill into a profit stream for itself.[136] A commentator illustrates the issue in the following hypothetical:

> Alice, a middle class high school graduate, has saved her money and would like to have a business of her own. She decides to buy a cinnamon

---

Scott D. Makar, *In Defense of Franchisors: The Law and Economics of Franchise Quality Assurance Mechanisms*, 33 Vill. L. Rev. 721, 760 (1988); Oliver E. Williamson, *Credible Commitments Using Hostages to Support Exchange*, 73 Am. Econ. Rev. 519, 529 (1983).

[133] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 341-42 (1995).

[134] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 952 (1990); Roger D. Blair, Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 Franchise L.J. 55, 63 (2006).

[135] Jonathan Klick et. al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 952 (1990).

[136] Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 Chapman L. Rev. 1, 3 (2009); Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 271 (2005).

> roll franchise and operates it in the local shopping mall. Her franchise agreement provides that the franchisor may terminate the franchise agreement ... without cause. Alice invests large amounts of time and money into her business, and it shows in the profits. The ... franchisor, who has been monitoring Alice's profits, decides he wants the profits for himself [now that the reputation for the product has been established locally]. The franchisor terminates the franchise agreement and then continues to operate the business himself. Alice has nothing to show for her hard work, and there is nothing she can do because the termination was lawful under the contract.[137]

Nevertheless, some economists suggest that "the reputation mechanism"[138] can serve as a sufficient control against opportunistic termination by franchisors.[139] Others, however, argue that the reputation mechanism cannot eliminate the problem.[140] Uri Benoliel, for instance, explains that "as the franchisor's financial condition improves, the

---

[137] Tracey A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating a Franchise Agreement*, 28 Val. U.L.Rev. 785, 787 (1994).

[138] In theory, franchisors will incur substantial reputational losses if they attempt to exploit a discretionary termination authority. Accordingly, out of concern for their reputation, franchisors are not likely to opportunistically terminate the franchise contract. *See generally* Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 Chapman L. Rev. 1, 6 (2009); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1148 (1981); James A. Brickely, Sanjog Misra & R. Lawrence Van Horn, *Contract Duration: Evidence from Franchising*, 49 J. L. & Econ. 173, 178 (2006).

[139] *See generally* Jonathan Klick et. al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009); James A. Brickley et al., *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101, 103-09, 130 (1991); Benjamin Klein, *The Economics of Franchise Contracts*, 2 J. Corp. Fin. 9, 30 (1995); Michael J. Lockerby, *Franchise Termination Restrictions: A Guide for Practitioners and Policy Makers*, 30 Antitrust Bull. 791, 858-71 (1985). Cf. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293, 314-15 (1975).

[140] *See e.g*. Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 Chapman L. Rev. 1, 4 (2009); Steven Shavell, *Foundations of Economic Analysis of Law*, 323-24 (2004).

effectiveness of the reputation mechanism will steadily deteriorate."[141] Accordingly, he argues, at some point "the franchisor's reputation costs incurred from being perceived as unfair by present and prospective franchisees are likely to be lower than the benefits from opportunistic termination. Opportunistic termination therefore is likely to occur."[142] Hadfield highlights another problem with the reputation mechanism. Because the mechanism depends upon inferences, drawn by potential franchisees, about the franchisor's past actions, she claims, "the interdependence, the uncertainty, and the length of the relationship, as well as the inexperience of the franchisee all make the identification of franchisor opportunism very difficult."[143] Furthermore, reputation will be a weak deterrent for franchisors who do not intend to sell franchises in the future.[144]

In sum, franchisors can potentially protect themselves against franchisee-opportunism through self-enforcement mechanisms, while there is no such protection for franchisees who might lose everything they have built up in their businesses when franchisors opportunistically terminate or fail to renew franchise contracts. Accordingly, a number of commentators argue that franchising needs regulation that would strike an appropriate balance between the freedom of franchisors to run their businesses, and the

---

[141] Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 Chapman L. Rev. 1, 5 (2009).

[142] *Id.*

[143] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 978 (1990); Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 Chapman L. Rev. 1, 8 (2009). *Cf.* Daniel R. Fischel, *The Economics of Lender Liability*, 99 Yale L.J. 131, 139 (1989).

[144] Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 Chapman L. Rev. 1, 8 (2009); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373 (1990). *Cf.* Daniel R. Fischel, *The Economics of Lender Liability*, 99 Yale L.J. 131, 139 (1989).

legitimate interests of franchisees to have their hard-earned goodwill recognized and protected.[145] Although some states have passed franchise laws that aim to protect franchisees against opportunistic treatment by franchisors, legal economists challenge these laws, and argue that "existing laws will increase franchisor termination costs and therefore tempt the franchisee to cheat or at least to free ride."[146]

C. Goodwill

As mentioned in the previous section, goodwill is particularly important to both the franchisee and the franchisor, and plays an important role in the problem of opportunism.[147] It is generally accepted that "the primary characteristic of a franchise is the license given to the franchisee to trade upon and exploit the franchisor's goodwill during the course of the franchise relationship."[148] Yet, courts, legislators, and

---

[145] *See e.g.* Tracey A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating A Franchise Agreement*, 28 Val. U. L. Rev. 785, 788 (1994); Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 Franchise L.J. 31 (2009); Robert W. Emerson & Uri Benoliel, *Can Franchisee Associations Serve As A Substitute for Franchisee Protection Laws?*, 118 Penn St. L. Rev. 99 (2013); Peter C. Lagarias, Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, 29 Franchise L.J. 139, 146 (2010).

[146] *See e.g*. James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101, 104 (1991); Matthew Ellman, *Specificity Revisited: The Role of Cross-Investments*, 22 J.L. Econ. & Org. 234, 250 n.36 (2006); Richard L. Smith II, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J.L. & Econ. 125, 136 (1982).

[147] *See generally* Robert W. Emerson, *Franchise Goodwill: Take A Sad Song and Make It Better*, 46 U. Mich. J.L. Reform 349, 350 (2013) ("At the dispute's core is a clash over goodwill that frequently exposes glaring inconsistencies in the parties' understanding of their relationship.")

[148] *See generally* Benjamin A. Levin & Richard S. Morrison, *Who Owns Goodwill at the Franchised Location?*, 18 Franchise L.J. 85 (1999).

commentators have recognized that "a local goodwill necessarily becomes established in the minds of the public toward a particular business at a particular location."[149]

The following two subsections explain in general what goodwill means and how it is calculated. Then, the next subsection focuses on the goodwill in franchise relationships.

1. Defining Goodwill

Profitable businesses are often sold and bought for more than the total value of their identifiable assets.[150] This extra value comes from the fact that the revenue of an established business depends not only on its assets, but also on a number of other factors, such as location, reputation, business organization, or simply "the probability that the old customers will resort to the old place."[151] Because most of these aspects can be transferred with the business,[152] buyers commonly pay more for a business than its book value.[153] In principle, this additional value is identified as goodwill.[154]

---

[149] *Id*. (citing *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 171 (Tex. 1987) ("there exists not only business goodwill but also franchisee goodwill"); *Shakey, Inc. v. Martin*, 430 P.2d 504, 509 (Idaho 1967) (goodwill initially associated with the mark "becomes established in the minds of the public who patronize the establishment"); Wash. Rev. Code § 19.100.180(2)(I) (1998) (requiring franchisor who refuses to renew a franchise to compensate franchisee for inventory, supplies, equipment and goodwill of franchised business); Boyd Allan Byers, *Making a Case for Federal Regulation of Franchise Terminations—A Return-of-Equity Approach*, 19 J. Corp. L. 607, 652-54 (1994); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 986-89 (1990)).

[150] *See generally* Note, *An Inquiry into the Nature of Goodwill*, 53 Colum. L. Rev. 660 (1953).

[151] *Cruttwell v. Lye*, 34 Eng.Rep. 129, 134 (Ch. 1810). *See also* Rev. Rul. 59-60, 1959-1 C.B. 237 (1959).

[152] Note, *An Inquiry into the Nature of Goodwill*, 53 Colum. L. Rev. 660, 669 (1953) ("Indeed, there is no assurance that the transferer, if he continued his business, could

Goodwill is a type of intangible business asset that is often characterized as "the most intangible of intangibles."[155] Despite various attempts to define the concept of goodwill, for over two centuries courts and commentators have struggled to identify precisely "what is included under the term."[156] In 1901, Lord Macnaghten observed, for instance, that "[goodwill] is a thing very easy to describe, very difficult to define."[157] Disagreement over the components and nature of goodwill caused considerable litigation with varying and sometimes contradictory results.[158]

---

retain the patronage of every single customer. The subject matter of the transaction is, therefore, a probability a reasonable expectancy of future patronage.")

[153] *Id*. at 668-669. *See also* Darian M. Ibrahim, *The Unique Benefits of Treating Personal Goodwill As Property in Corporate Acquisitions*, 30 Del. J. Corp. L. 1, 5 (2005).

[154] *See e.g.* Andrew F. Halaby, *Treatment of Goodwill By the Seller Under I.R.C. Section 197*, 43 U. Kan. L. Rev. 903, 905 (1995).

[155] *Dugan v. Dugan*, 457 A.2d 1, 3 (N.J. 1983) (quoting Donald E. Kieso & Jerry J. Weygandt D. Kieso & J. Weygandt, *Intermediate Accounting* 570 (3d ed.1980)).

[156] Andrew F. Halaby, *Treatment of Goodwill by the Seller Under I.R.C. Section 197*, 43 U. Kan. L. Rev. 903, 904 (1995) (quoting *Metro. Nat. Bank v. St. Louis Dispatch Co.*, 149 U.S. 436, 446 (1893)).

[157] *Commissioners of Inland Revenue v Muller & Co Margarine*, AC215 (1901). *See also e.g.* Bryan Mauldin, Identifying, *Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 TUL. L. REV. 313, 313-14 (1981) ("Goodwill has long been an elusive concept. Defining an intangible frequently results in vagueness. Definitions of goodwill are not only imprecise, but they vary according to the circumstances of their application and are frequently confused with methods of valuation.").

[158] Andrew F. Halaby, *Treatment of Goodwill by the Seller Under I.R.C. Section 197*, 43 U. Kan. L. Rev. 903, 904 (1995). *See also* Alicia Brokars Kelly, *Sharing A Piece of the Future Post-Divorce: Toward A More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569, 577 (1999).

In accounting terms, goodwill is the amount in excess of a company's book value that a purchaser would be willing to pay to acquire it.[159] In another words, goodwill is the excess value that "cannot be attributable to specific tangible and intangible assets."[160] Since goodwill does not have an objective value until it has been established by an actual sale, it may not be recorded on a company's balance sheet.[161] Accordingly, goodwill is "a retrospective entry on a balance sheet after a sale."[162]

Economists, however, describe goodwill as "excess earnings power."[163] Under this view, all identified business assets have a fair return value, and the excess earnings are considered to be the result of business goodwill.[164] Both the accounting and economic

---

[159] *See e.g.* Alicia Brokars Kelly, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569, 578-79 (1999).

[160] Larry R. Ribstein, *A Theoretical Analysis of Professional Partnership Goodwill*, 70 NEB. L. REV. 38, 40 (1991).

[161] *Id*.

[162] Alicia Brokars Kelly, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569, 579 (1999). *See also* Allen Walburn, *Depreciation of Intangibles: An Area of the Tax Law in Need of Change*, 30 S.D. L. Rev. 453, 466 (1993).

[163] *See e.g.* Alicia Brokars Kelly, *Sharing A Piece of the Future Post-Divorce: Toward A More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569, 578-80 (1999).

[164] *See In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Cal. App. 3d Dist. 1974) (quoting Norton M. Bedford, *Handbook of Modern Accounting* 19 (1970)):

> [T]he conceptual view of the economic value of any asset is based on the future receipts which the asset will produce. Because individual assets are not used in isolation but as a part of an organized entity containing a variety of distinct assets, the economic concept of goodwill is introduced when the future receipts of the organization cannot be assigned as a contribution of a finite list of specific assets. That is, the search to assign a specific cause, in the form of a specific asset, for the expected future receipts requires the introduction of goodwill as an asset.

definitions, yet, avoid exploring the characteristics of goodwill. Instead, they focus on the value of goodwill. Professor Allen Parkman, for example, justifies this tendency by stating that "verbal descriptions of goodwill are inadequate and that the only way to determine what is meant by goodwill is to observe the way that it is measured."[165]

The legal definition of goodwill differs from both the accounting and economic definitions.[166] In common law, goodwill was first defined in an old English case, in which Lord Chancellor Eldon famously described goodwill as "nothing more than the probability that the old customers will return to the old place."[167] This narrow definition, however, lacked normative content and focused mainly on a particular effect of goodwill. Later, Justice Story formulated a detailed definition:

> The advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities, or prejudices.[168]

---

[165] Allen Parkman, *A Systematic Approach to Valuing the Goodwill of Professional Practices*, in Ronald L. Brown, Valuing Professional Practices and License, 3rd Edition, (Clifton, NJ: Prentice-Hall, 1998).

[166] Larry E. Ribstein, *A Theoretical Analysis of Professional Partnership Goodwill*, 70 Nebraska L Rev 38, 42-43 (1991) (Ribstein argues that the difference is "attributable simply to the economic ignorance of courts and legal commentators.")

[167] *Cruttwell v. Lye*, 34 Eng. Rep 129, 134 (Ch. 1810). *See generally* Gabriel A. D. Preinreich, *The Law of Goodwill*, 11 The Accounting Review, 317-329 (Dec., 1936).

[168] Joseph Story, *Commentaries On The Law Of Partnerships* § 99, at 157 (7th ed. 1881). *See generally* Alicia Brokars Kelly, *Sharing A Piece of the Future Post-Divorce: Toward A More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569, 577-78 (1999).

Lord Eldon and Justice Story's descriptions are still widely relied on in American case law today.[169] Accordingly, under the legal understanding, goodwill represents "the preference of customers" that "arises from such sources as excellence of reputation, efficiency of service and skill in utilization of trademarks, location, brand names and other forms of advertising."[170] The preference of customers gives an extra value to an existing business. Such a value needs to be considered in calculation of the total value of the business.

2. Valuation Of Goodwill

Valuation of goodwill is a difficult and fact intensive procedure that often causes uncertainties in practice.[171] There is no single formula or method in evaluating goodwill.[172] Courts may accept any one method, or a combination of methods.[173] Experts

---

[169] *See e.g. Golden Krust Patties, Inc. v. Bullock*, 2013 WL 3766551 (E.D.N.Y. 2013) ("Although not readily defined, good will has recently been described as the 'expectancy of continued patronage'"); *Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 702 N.W.2d 355, 369 (Neb. 2005) (good will is that "value which results from the probability that old customers will continue to trade or deal with the members of an established concern.") *But see Coca-Cola N. Am. v. Crawley Juice, Inc.*, 2011 WL 1882845 (E.D.N.Y. 2011) ("It typically includes not only the likelihood that customers will return to the old place of business, but the competitive advantage of an established business.")

[170] 38A C.J.S. *Goodwill* § 2 (2014).

[171] *See e.g. H & M, Inc. v. C.I.R.*, 104 T.C.M. (CCH) 452 (Tax 2012).

[172] *See e.g. People ex rel. Dept. of Transp. v. Dry Canyon Enterprises, LLC*, 149 Cal. Rptr. 3d 601, 606-07 (Cal. App. 2d Dist. 2012).

[173] *See e.g.* 20 Wash. Prac., Fam. And Community Prop. L. § 32.24; *Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co.*, 432 A.2d 48, 55 (N.J. 1981).

commonly use two approaches to assess the value of goodwill: the market value method and the capitalized excess earnings method.[174]

Under the market value method, goodwill is calculated by amounts actually paid on account of goodwill: by purchasers of the business, by purchasers of comparable business, or – under partnership settings – to individual withdrawing partners in the same or comparable firms.[175] If there exists no market value available for making the determination, experts use the capitalized excess earnings method for valuing goodwill of closely-held businesses.[176]

The capitalized excess earnings method, also known as the treasury method, was first introduced by the US Treasury Department in 1920, and updated and clarified by the Internal Revenue Service in Revenue Ruling 68–609.[177] Under this method, an appraiser first determines the normal rate of return for identifiable tangible and intangible assets.

---

[174] For various methods *see e.g. In re Marriage of Hall*, 692 P.2d 175, 179 (Wash. 1984); *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc*., 2009 WL 2365960 (N.J. Super. Ct. App. Div. July 30, 2009); John M. Payne, *A Survey of New Jersey Eminent Domain Law*, 30 Rutgers L.Rev. 1111, 1132-1160 (1977).

[175] *See generally* Nicole Liguouri Micklich, Michael W. Lynch, Ingrid C. Festin, *The Continuing Evolution of Franchise Valuation: Expanding Traditional Methods*, 32 Franchise L.J. 223 (2013); Alicia Brokars Kelly, *Sharing A Piece of the Future Post-Divorce: Toward A More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569, 605 (1999).

[176] *See e.g. Wright v. Wright*, 904 P.2d 403, 406 (Alaska 1995). *See generally* Shannon P. Pratt et al., *Valuing Small Businesses And Professional Practices* 211-27 (2d ed. 1993); Robert M. Lloyd, *Discounting Lost Profits in Business Litigation: What Every Lawyer and Judge Needs to Know*, 9 Transactions: Tenn. J. Bus. L. 9, 10 (2007); Martin G. Gilbert, *Proving Lost Profits Through Law Opinion Testimony - Is the Back Dorr Still Open?*, 22 Franchise L.J. 15 (2002).

[177] Rev. Rul. 68–609, 1968–2, C.B. 327; *see also e.g. McAffee v. McAffee*, 971 P.2d 734, 740 (Idaho App. 1999).

Once the total normalized earnings are assessed, this amount is subtracted from total earnings to establish excess earnings. Then, the amount of excess earnings, capitalized at a certain percentage[178], is the value of unidentified intangible assets–goodwill.[179]

So, for example, if a franchisee has annual profits of $200,000 (normalized earnings), and owns $1000,000 worth of tangible net assets, then under 10% rate of industry normal return on tangible net assets the franchisee's enhanced profits should be $100,000. Assuming that the industry capitalization rate is 20%, the franchisee's capitalized excess earning would be $500,000.

a. Tangible Net Assets of subject company $1000,000
b. Industry normal return on Tangible Net Assets 10%
c. Earnings attributable to Tangible Net Assets (a x b) $100,000
d. Normalized earnings of subject company $200,000
e. Excess earnings (d - c) $100,000
f. Industry capitalization rate 20%
→ Capitalized excess earnings (e / f) = Goodwill $500,000

Both methods are criticized for being highly subjective and unreliable.[180] In the franchising setting, assessment of local goodwill gets more complicated, and results

---

[178] Rev. Rul. 68-609, 1968-2 C.B. 327 (1968) ("… the 15 percent rate of capitalization are applied to … businesses with a small risk factor and stable and regular earnings; the … 20 percent rate of capitalization are applied to businesses in which the hazards of business are relatively high.")

[179] *Id. See e.g. Balsamides v. Protameen Chemicals, Inc.*, 734 A.2d 721, 727-28 (N.J. 1999); Allen Parkman, *A Systematic Approach to Valuing the Goodwill of Professional Practices*, in Ronald L. Brown, Valuing Professional Practices and License, 3rd Edition, (Clifton, NJ: Prentice-Hall, 1998).

[180] *See generally* Richard Dellinger, *Business Valuation for the Practitioner: Identifying the Common Areas of Manipulation by the Valuator*, 84 Fla. B.J. 59, 62

become less predictable. Assessment problems in franchising are discussed in the next chapter since some franchise laws explicitly require goodwill compensation. Furthermore, Chapter 3 and Chapter 4 also discuss valuation of goodwill as the proposed solution has its own assessment scheme.

3. Goodwill in Franchise Relationships

The district court in New York observed that "the hallmark of a franchise relationship is the exchange of 'goodwill' between the parties."[181] Indeed, the franchise agreement basically allows the franchisee to benefit from the established business reputation of the franchise network. In other words, by giving the franchisee the right to market its products or services using its trademark or trade name, the franchisor lends "its national goodwill to the franchisee."[182] At the same time, the franchisee, by investing its time, effort and capital, generates 'local goodwill', and contributes to the national goodwill of the franchisor.[183]

(September/October 2010); *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 508 (4th Cir. 1986); Kenneth M. Kolaski, Esquire, CPA & Mark Kuga, Ph.D., *Measuring Commercial Damages Via Lost Profits or Loss of Business Value: Are These Measures Redundant or Distinguishable?*, 18 J.L. & Com. 1 (1998); Alicia Brokars Kelly, *Sharing A Piece of the Future Post-Divorce: Toward A More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569, 611-18 (1999).

[181] *LaGuardia Associates v. Holiday Hospitality Franchising, Inc*., 92 F. Supp. 2d 119, 125 (E.D.N.Y. 2000). *See also* Scott Makar, *In Defense of Franchisors: The Law and Economics of Franchise Quality Assurance Mechanisms*, 33 Vill. L. Rev. 721, 729 (1988).

[182] *LaGuardia Associates v. Holiday Hospitality Franchising, Inc*., 92 F. Supp. 2d 119, 125 (E.D.N.Y. 2000).

[183] Benjamin A. Levin & Richard S. Morrison, *Who Owns Goodwill at the Franchised Location?*, 18 Franchise L.J. 85, 116 (1999).

Ideally, the mutual sharing of goodwill and interdependence between a franchisor and its franchisee will potentially increase consumer satisfaction, and ensure a successful and harmonious business relationship.[184] However, as discussed previously, serious imbalances of information and economic power between the parties can lead to franchisor opportunism that "may hinder respect and fair treatment."[185] Moreover, since a franchise generally grants the sole right of participating in a franchise system under the terms and conditions of the franchise agreement, without a contractual provision providing for entitlement for goodwill on expiry or termination, the franchisee forfeits its goodwill.[186]

One might argue that any entitlement for goodwill should be negotiated by the parties and recognized in the franchise contract.[187] However, economic dynamics of the franchise relationship makes such an arrangement very difficult. First of all, parties do not have the same bargaining power and business expertise.[188] The franchisor normally has a stronger bargaining position, and the economic dominance of the franchisor allows

---

[184] *See e.g. LaGuardia Associates v. Holiday Hospitality Franchising, Inc*., 92 F. Supp. 2d 119, 125 (E.D.N.Y. 2000); David J. Meretta, Eric H. Karp, *Regulation Fd: Roadmap to Better Relations Between Franchisors and Franchisees*, 26 Franchise L.J. 117 (2007).

[185] *Id*.

[186] *See e.g.* David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333 (1995); Benjamin A. Levin & Richard S. Morrison, *Who Owns Goodwill at the Franchised Location?*, 18 Franchise L.J. 85 (1999).

[187] *See e.g.* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 184, 185 (June 24, 1999); Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. Rev. 905, 964-65 (1994).

[188] Mass. Sen. 73, 188th Leg., §1(3) (2013) ("Most prospective franchisees lack bargaining power and generally invest substantial amounts to obtain a franchise business when they may be unfamiliar with operating a business, with the business being franchised and with industry practices in franchising.")

him to create a contract that may be unfair to the franchisee.[189] If the franchisor does not want to permit its franchisee to receive a payment for goodwill, it is very hard to imagine that the franchisee can negotiate such arrangement.[190] Moreover, neither franchisors nor franchisees can accurately estimate whether and to what extent a franchisee may generate local goodwill. Therefore, it may not be cost-effective for the parties to agree on a term at the ex ante stage of a long-term franchise contract.[191] Furthermore, throughout the relationship, because of the continuing sunk-investment of the franchisee, the franchisor may gain significant leverage to alter the contract in its favor.[192] That is to say,

---

[189] *See e.g. Postal Instant Press v. Sealy*, 51 Cal. Rptr. 2d 365, 373 (Cal. Ct. App. 1996); *Kubis & Perszyk Assoc., Inc. v. Sun Microsys., Inc.*, 680 A.2d 618, 627 (N.J. 1996) ("At the contract stage, the franchisor typically submits a standard contract and, depending on the potential value and profitability of the franchise, a franchisee may elect not to test the negotiability of terms of the contract to avoid the risk of antagonizing the franchisor and losing the franchise."); *Keating v. Superior Court*, 645 P.2d 1192, 1197 (Cal. 1982) ("It is undisputed that the franchise agreements in question here are standardized in form, … , and that they are drafted and imposed by [the franchisor], a large corporation of vastly superior bargaining strength, upon all parties desiring a 7-Eleven franchise."); *Coast to Coast Stores (Cent. Org.), Inc. v. Gruschus*, 667 P.2d 619, 621 (Wash. 1983). *See also* Douglas C. Berry et. al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 901 (2009); Mass. Sen. 73, 188th Leg., §4 (2013).

[190] *See e.g.* SB 610 Bill Analysis, Assembly Committee On Business, Professions And Consumer Protection, Susan A. Bonilla (August 13, 2013).

[191] *See generally* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373, 432-35 (1990).

[192] Robert Emerson has recently reviewed "one hundred fast-food, restaurant, and ice cream parlor franchise agreements dated from August 2007 to April 2011 and found that 95 percent contain a clause in which the franchisor declares it has developed goodwill for the benefit of the franchise system," with "controls over franchisee behavior thus necessary to maintain this goodwill." Robert W. Emerson, *Franchise Goodwill: Take A Sad Song and Make It Better*, 46 U. Mich. J.L. Reform 349, 352 (2013).

marketplace cannot provide adequate protection for franchisees' goodwill since the franchise relationship appears to be biased towards the franchisor.[193]

Similarly, U.S. case law, offers little shelter for franchisees' local goodwill. Traditionally, under common law, the goodwill of an individual franchise-unit belongs to the franchisor, and absent contractual provisions to the contrary, the franchisee has no right to compensation for goodwill upon termination or expiry of the franchise term.[194] Moreover, courts are reluctant to recognize franchisees' goodwill in certain disputes, such as encroachment and assignment. Thus, franchisees are often left with no means to recoup their investment in goodwill.[195]

---

[193] *See e.g* Boyd Allan Byers, Note, *Making a Case for Federal Regulation of Franchise Terminations--A Return-of-Equity Approach*, 19 Iowa J. Corp. L. 607, 621 (1994):

> "The franchising structure lends itself to franchisor opportunism. By exercising its termination power, the franchisor can unfairly capitalize on local goodwill built up by the franchisee through its investment of capital and labor. The franchisee's sunk investment also permits the franchisor to engage in opportunism short of actually exercising its termination power, as the threat of termination itself enables the franchisor to appropriate a portion of the franchisee's sunk investment for itself."

See also U.S. House of Representatives Committee on Small Business, Franchising in the US Economy: Prospects and Problems (US Government Printing Office, Washington DC, 1990), p. 76: ("[It is] not enough for federal policy to simply assure that prospective franchisees are provided with adequate information about franchise opportunities; it must also assure that a fair balance is maintained between franchisors and franchisees throughout the franchise relationship.")

[194] *See e.g.* Clay A. Tillack, Mark E. Ashton, *Who Takes What: The Parties' Rights to Franchise Materials at the Relationship's End*, 28 Franchise L.J. 88, 124 (2008); *Amerispec, Inc. v. Metro Inspection Services, Inc.*, CIV.A.3:01-CV-0946-D, 2001 WL 770999 (N.D. Tex. 2001); *Pappan Enterprises, Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 806 (3d Cir. 1998).

[195] *See e.g.* Robert W. Emerson, *Franchise Goodwill: Take A Sad Song and Make It Better*, 46 U. Mich. J.L. Reform 349, 365-75 (2013).

Although in recent decades legislatures and courts began to change their traditional view on the franchise relationship, – which has helped franchisees in their effort to protect their goodwill, and improved their position against franchisors – existing mechanisms are still insufficient to protect franchisees' goodwill against opportunistic franchisors.

D. Summary

In general, franchising permits franchisors to impose strict terms and conditions to protect and enhance their brand names.[196] Accordingly, franchise contracts are often 'standard form contracts' drafted by the franchisor and presented on a 'take it or leave it' basis.[197] Hence, by signing a franchise contract the franchisee accepts a long-term relationship in which the franchisor has the sole power to make any operational decision.[198] While this power is necessary to prevent franchisees from harming the

---

[196] *See e.g.* Jonathan Klick et al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009).

[197] *See* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 29 (June 24, 1999) (Statement Of Hon. John J. Lafalce, A Representative In Congress From NY):

> "[F]ranchisees confront the tremendous imbalance in franchise contracts that bind them to accept virtually all actions and decisions of their franchisor, no matter how arbitrary or abusive. The contracts have become 50-to 70-page documents that outline in great detail the duties, obligations, and restrictions on franchisees, while remaining almost silent on the obligations and promised services of franchisors. These contracts are nonnegotiable in almost every single instance. And franchisors have vigorously enforced these contracts with the help of courts that have most often refused to consider anything beyond the terms of the contract."

[198] *Id*.

franchisor's brand name, in practice, abusive use of this power leads to franchisor-opportunism.

By exercising their discretionary rights, franchisors can simply "take over profitable franchisees," and misappropriate their local goodwill, even where the franchisee is fully complying with the franchise contract. This problem is increasingly attracting the attention of federal and state legislatures and the legal community. In the next chapters, this work discusses the U.S. law that deals with goodwill in franchising.

CHAPTER 2 FRANCHISE LAWS AND GOODWILL ALLOCATION IN THE U.S.

A. Overview

As discussed in the previous chapter, franchising allows the franchisor – at the outset of the relationship – to create a franchise contract that is unfair to the franchisee. Moreover, franchisees argue that franchisors constantly revise their contracts to escape from any liability, and create a relationship that will only maximize their interest.[199] Accordingly, once the franchisee invests time and resources in establishing (or enhancing) market for the franchisor's products, the franchisor may act opportunistically and misappropriate the franchisee's goodwill. Especially, if the franchisor terminates or decides not to renew the franchise agreement opportunistically, the franchisee is left with nothing in return for its investment.

Thus, in order to equalize the potential power-imbalance and to protect local franchisees, federal and state legislatures enacted franchise laws. While some of these laws simply require the disclosure of certain information necessary for the franchisee to make an informed decision, others seek to intervene in the relationship and protect the franchisee by imposing upon franchisors a duty not to terminate (or fail to renew) its franchises except for "good cause." Moreover, in some state where there exists no specific franchise law, common law policies have emerged that limit particular

[199] *See e.g.* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 106-07 (2004).

franchising practices to prevent the franchisor's appropriation of the franchisee's goodwill.

B. Franchise Regulations And Goodwill

1. Federal Level

a. The FTC Disclosure Requirements

The Federal Trade Commission (FTC) has promulgated a rule, commonly know as the "Franchise Rule", that requires franchisors to disclose certain information to prospective franchisees before selling a franchise.[200] Information that the franchisor must disclose include the franchisor's audited financial statements, information about the franchisor's history, including litigation and bankruptcy history and operating experience, a description of the franchisor's termination, renewal and transfer rights, franchisees' estimated initial investment, and franchisees' territorial rights.[201]

The FTC believes that "informed investors can determine for themselves whether a particular deal is in their best interest."[202] According to the FTC, the Rule aims "to prevent deceptive and unfair practices in the sale of franchises … and to correct

---

[200] 16 C.F.R. § 436. *See generally* Disclosure Requirements and Prohibitions Concerning Franchising, 72 FR 15444-01 (March 30, 2007). *See also* Byron E. Fox & Henry C. Su, *Franchise Regulation - Solutions in Search of Problems?*, 20 Okla. City U. L. Rev. 241, 264-67 (1995).

[201] 16 C.F.R. § 436.5.

[202] Disclosure Requirements and Prohibitions Concerning Franchising, 72 FR 15444, 15445 (March 30, 2007).

consumers' misimpressions about franchise … offerings."[203] It is, therefore, purely a pre-sale disclosure rule; it does not require any filing or registration on the part of a franchisor, and it does not control the post-sale franchise relationship.[204] Additionally, the Franchise Rule does not provide a private cause of action for franchisees; the FTC is responsible for enforcing the Rule.[205]

While the FTC believes that "the market is the best regulator of franchise sales," some commentators and franchisee advocates argue that an average franchisee is not equipped to deal with all disclosure documents.[206] For instance, Emerson & Benoliel claim that prospective franchisees often "lack prior business ownership experience" which "presents significant cognitive obstacles for novice franchisees when attempting to consider all of the relevant information before acquiring a franchise unit."[207] Studies

---

[203] *Id.*

[204] 62B Am. Jur. 2d *Private Franchise Contracts* § 26 (2014).

[205] There have been several attempts to pass federal legislation to create a private cause of action under the FTC rule. None has prevailed. *See e.g.* The Small Business Franchise Act of 1999, H.R. 3308, 106th Cong. (1999). *See generally* Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 490-91 (1994).

[206] *See generally* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 292-99 (2004).

[207] Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 Alb. L. Rev. 193, 194 (2013). Robert Emerson explains:

> "Franchisees are like these consumers, especially as many are not even represented by counsel. With the franchise contract typically being over sixty pages long, state- or FTC-required disclosures frequently being much longer, and lengthy and detailed franchisor-issued operational manuals constantly being updated, the paperwork may read like a multi-volume phone directory--almost as long and just about as exciting. It is rife with opportunities for the franchisor to insert language that is advantageous to its own purposes." Robert W. Emerson,

show that over 80% of franchisees are first time business owners with limited understanding of market dynamics.[208] Emerson & Benoliel also state that franchisees often disregard disclosure documents, and "refrain from consulting with a specialized franchise attorney before signing the franchise agreement."[209]

Furthermore, some commentators argue that "the existing disclosure document is not only inadequate, it is counterproductive to the ostensible goal of disclosure."[210] They claim that franchisors exploit disclosure requirements, and use them to avoid lawsuits.[211] Therefore, according to franchisee advocates, more disclosure does not mean more protection for franchisees.[212]

Franchise Goodwill: Take A Sad Song and Make It Better, 46 U. Mich. J.L. Reform 349, 367 (2013).

[208] Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 Alb. L. Rev. 193, 206-07 (2013) (citing Kimberley A. Morrison, *An Empirical Test of a Model of Franchisee Job Satisfaction*, 34 J. Small Bus. Mgmt. 27, 30 (1996); Alden Peterson & Rajiv P. Dant, *Perceived Advantages of the Franchise Option from the Franchisee Perspective: Empirical Insights from a Service Franchisee*, 28 J. Small Bus. Mgmt. 46, 50 (1990)).

[209] Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 Alb. L. Rev. 193, 209 (2013); *see also* Franchising: Is Self-Regulation Sufficient? Hearing Before the House Comm. on Small Business, 103d Cong. 101-06 (1993).

[210] Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 302 (2004).

[211] *Id*. *See also* Don Sniegowski, *IFA Warns States Not to Interfere with Contracts*, http://www.bluemaumau.org/10473/ifa_warns_states_not_interfere_franchise_contracts (June 24, 2011).

[212] *See e.g.* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 302 (2004); Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 54 (June 24, 1999) (Statement Of Susan Kezios, President, American Franchisee Association, Chicago, IL).

Finally, franchisee advocates state that the existing legal structure for federal disclosure requirements has major enforcement problems.[213] On the one hand, the federal disclosure law gives no private cause of action for injured franchisees.[214] On the other hand, the FTC does not have enough personnel to deal with all existing complaints.[215] Consequently, franchisee advocates claim that additional protections are needed "to level the playing field that is inevitably skewed in favor of franchisors."[216]

b. Industry Specific Relationship Laws

---

[213] *See e.g.* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 60 (June 24, 1999) (Statement Of Susan Kezios, President, American Franchisee Association, Chicago, IL) ("The real problem with the FTC's franchise rule is that it gives the appearance of government oversight without any enforcement.")

[214] *See generally* Debra Burke & E. Malcolm Abel II, *Franchising Fraud: The Continuing Need for Reform*, 40 Am. Bus. L.J. 355, 361-70 (2003).

[215] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 21 (June 24, 1999) (Statement Of Susan Kezios, President, American Franchisee Association, Chicago, IL) ("Even the FTC says they do not have the capacity to enforce [the Franchise Rule.] In 1992, the General Accounting Office audited the FTC's enforcement of the rule on franchising. The GAO found that the FTC acted on less than 6 percent of all franchise complaints brought to it relative to presale.")

[216] Don Sniegowski, *IFA Warns States Not to Interfere with Contracts*, http:// www.bluemaumau.org/10473/ifa_warns_states_not_interfere_franchise_contracts (June 24, 2011). *See also e.g.* Debra Burke & E. Malcolm Abel II, *Franchising Fraud: The Continuing Need for Reform*, 40 Am. Bus. L.J. 355, 361-70 (2003); Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 55-56 (June 24, 1999) (Statement Of Susan Kezios, President, American Franchisee Association, Chicago, IL); Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 308 (2004).

The only federal substantive laws that govern franchise relationships directly are those regulating gasoline service stations[217] and automobile dealerships.[218] Essentially, these laws allow specified franchisees to protect their goodwill from opportunistic franchisors. However, instead of focusing on the value of local goodwill and its ownership, the laws reduce franchisees termination and nonrenewal rights, and allow franchisees to keep their businesses as long as they perform satisfactorily.

(1) The Dealer's Act

The Automobile Dealer Suits Against Manufacturers Act ("Dealer's Act") is a narrowly tailored federal statute formulated "to redress the economic imbalance and unequal bargaining power between large automobile manufacturers and local dealerships, protecting dealers from unfair termination and other retaliatory and coercive practices."[219] It provides a federal cause of action for an automobile dealer against a manufacturer for damages arising from the manufacturer's failure to act in good faith in performing or complying with the terms of the franchise agreement, or in terminating, or not renewing the dealer's franchise.[220] Under the Act, good faith is defined as the duty of a dealer and a manufacturer "to act in a fair and equitable manner toward each other so as

---

[217] 15 U.S.C.A. §§ 2801 to 2806, 2821 to 2824, 2841 (Petroleum Marketing Practices Act).

[218] 15 U.S.C.A. §§ 1221 to 1226 (Automobile Dealer Suits Against Manufacturers Act).

[219] *Maschio v. Prestige Motors*, 37 F.3d 908, 910 (3d Cir. 1994). *See generally* 1956 U.S.C.C.A.N. 4596, et seqq. *See also e.g. Stadium Chrysler Jeep, L.L.C. v. DaimlerChrysler Motors Co., LLC*, 324 F. Supp. 2d 587, 594 (D.N.J. 2004); *Lou Bachrodt Chevrolet Co. v. Gen. Motors LLC*, 2013 WL 3754833 (N.D. Ill. 2013; *Smith v. Chrysler Group LLC*, 2014 WL 1577515 (D. Ariz. 2014).

[220] 15 U.S.C.A. § 1222 (West). *See also* 1956 U.S.C.C.A.N. 4596, 4596.

to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party."[221]

Before the Dealer's Act was enacted, the FTC surveyed a large number of automobile dealership arrangements, and identified that dealership contracts were contracts of adhesion, and that manufacturers were behaving opportunistically after inducing their dealers to invest significant amount of capital, time and effort in their businesses.[222] Congress, accordingly, enacted the Act to protect dealers "by giving them a cause of action over and above common law remedies which are virtually nonexistent under terms of one-sided contracts."[223]

The Dealer's Act is silent on the measure of damages. Nonetheless, courts interpret the Act in a way that allows dealers to recover their goodwill.[224] According to courts, the proper measure of damages is the profits which the dealer would have earned from franchise for as long as dealer would have retained the franchise in the future.[225] For

---

[221] 15 U.S.C.A. § 1221(e) (West). *See also Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 911 (9th Cir.) cert. denied 436 U.S. 946 (1978) ("Good faith under the Dealers' Day in Court Act is more limited than the general good faith standard.")

[222] 1939 FTC Ann. Rep. 19-27. *See also* 1956 U.S.C.C.A.N. 4596, 4697; Carla Wong McMillian, *What Will It Take to Get You in A New Car Today?: A Proposal for A New Federal Automobile Dealer Act*, 45 Gonz. L. Rev. 67, 70-71 (2010).

[223] *Lewis v. Chrysler Motors Corp.*, 332 F. Supp. 1202, 1204 (E.D. Mo. 1971) *rev'd,* 456 F.2d 605 (8th Cir. 1972). *See also* 1956 U.S.C.C.A.N. 4596, 4599.

[224] *See e.g. Randy's Studebaker Sales, Inc. v. Nissan Motor Corp. in U.S.A.*, 533 F.2d 510, 514 (10th Cir. 1976); *Intl. Autosport, Inc. v. Saab Cars USA, Inc.*, 1991 WL 128592 (D. Kan. 1991); *Martin Motor Sales, Inc. v. Saab-Scania of Am., Inc.*, 452 F. Supp. 1047, 1052 (S.D.N.Y. 1978) *aff'd,* 595 F.2d 1209 (2d Cir. 1979); *Rea v. Ford Motor Co.*, 560 F.2d 554, 557 (3d Cir. 1977).

[225] *See generally* Scott Fuller, *The Federal Dealers Day in Court Act, A Misnomer*, 13 Ohio N.U. L. Rev. 447, 471-74 (1986).

instance, in *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp. in U.S.A*, the Circuit Court found that the manufacturer's threat of nonrenewal to coerce the dealer into a program was contrary to its duty of good faith as provided in the Dealer's Act, and held that the damages, which were calculated by a dealer's average annual income multiplied by 10 years, were properly awarded.[226] Although the dealership contract in this case was renewal on an annual basis, the Court decided that "recovery for loss of future profits is not necessarily limited to one year's lost profits even if franchise is renewable on an annual basis, and projection of lost profits over a ten-year period is not necessarily too speculative."[227]

(2) Federal Petroleum Marketing Act

The other industry specific federal franchise law is the Petroleum Marketing Practices Act (PMPA).[228] The Act regulates the relationship between a franchisor of gasoline products and a gas station franchise owner, and prohibits franchisors from terminating or failing to renew any franchise relationship unless notification requirements are met, and the termination or nonrenewal is based on specified grounds.[229] Under the PMPA, the franchisee is entitled to recover actual damages resulting from the franchisor's wrongful termination and non-renewal.[230] While the PMPA does not provide a guideline for the measurement of damages, franchisees are typically compensated for their lost (present

---

[226] 533 F.2d 510, 517 (10th Cir. 1976).

[227] *Id*. at 517-18.

[228] *See generally* Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 492-93 (1994).

[229] 15 U.S.C.A. § 2802 (West).

[230] 15 U.S.C.A. § 2805(d)(1)(A) (West).

and future) profits attributable to the unlawful conduct.[231] Moreover, under the PMPA, a franchisee may recover exemplary or punitive damages if the court determines that the conduct of the franchisor was in "willful disregard" of the statute or of the "rights of the franchisee thereunder..."[232]

Primarily, Congress enacted the PMPA "in response to concerns that due to unequal bargaining power, franchisors of petroleum products were often terminating franchise relationships for arbitrary or discriminatory reasons."[233] With the PMPA, Congress also articulated its desire "to prevent ... the appropriation of hard-earned goodwill which occurs when a franchisor arbitrarily takes over a business that the franchisee has turned into a successful going concern."[234]

Congress amended the PMPA in 1994, and prohibited states from requiring a franchisor to pay a franchisee for the value of the franchisee's goodwill upon termination or nonrenewal allowed by the Act.[235] Nonetheless, Congress explained that the amendment "was not intended to suggest … that the value of the franchisee's goodwill

---

[231] *See e.g. Four Corners Serv. Station, Inc. v. Mobil Oil Corp.*, 51 F.3d 306, 312 (1st Cir. 1995); *S. Nevada Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1110 (D. Nev. 1989). *See also* Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 492-93 (1994).

[232] 15 U.S.C.A. § 2805(d)(1)(B) (West).

[233] *Zad, LLC v. Bulk Petroleum Corp.*, 368 S.W.3d 122, 125 (Ky. App. 2012) (citing *Simmons v. Mobil Oil Corporation*, 29 F.3d 505, 509 (9th Cir.1994); S.Rep. No. 731, 95th Cong., 2d Sess. 15; *Mac's Shell Service, Inc. v. Shell Oil Products Co., LLC*, , 130 S.Ct. 1251, 1255 (2010)).

[234] *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1220 (7th Cir.1982) (citing 123 Cong.Rec. 10385 (remarks of Rep. Conte); *id*. at 10386 (remarks of Rep. Mikva)).

[235] 15 U.S.C.A. § 2806 (West). *See also* S. REP. 103-387, 2; *Millett v. Union Oil Co. of California*, 24 F.3d 10 (9th Cir. 1994) (Goodwill provisions of the Washington FIPA contradict the PMPA for preemption purposes).

may not be considered in determining the amount of the franchisee's damages … in the event of a termination or nonrenewal in violation of [the PMPA.]"[236] In other words, in case of an opportunistic termination or nonrenewal, the Act still protects the franchisee's goodwill.[237] If, however, an authorized termination or nonrenewal under the PMPA occurs, franchisees may not be able to sue for their loss of goodwill, even if a state law requires a payment under that particular termination or nonrenewal.[238]

c. Proposals for a General Federal Franchise Relationship Law

Since the early 1990s, Congress has considered several bills meant to regulate all franchise relationships. In the 103rd, 104th and 105th Congresses, Representative LaFalce (NY), Chair of the House Committee on Small Business, introduced a total of eight bills designed to establish minimum standards of fairness in franchise sales and business relationships, and to facilitate increased public disclosure.[239] In general, these

---

[236] S. REP. 103-387, 4.

[237] *See Zad, LLC v. Bulk Petroleum Corp.*, 368 S.W.3d 122, 125 (Ky. App. 2012); Carmen D. Caruso, *Franchisee Claims for Constructive Termination Under the Pmpa After Mac's Shell*, 30 Franchise L.J. 139, 143 (2011); *Brach v. Amoco Oil Co*., 677 F.2d 1213 (7th Cir. 1982).

[238] *See e.g. Millett v. Union Oil Co. of California*, 24 F.3d 10 (9th Cir. 1994). *See also* Carmen D. Caruso, *Franchisee Claims for Constructive Termination Under the Pmpa After Mac's Shell*, 30 Franchise L.J. 139, 143 (2011).

[239] H.R. 1315, 103rd Cong. (1993); H.R. 1316, 103rd Cong. (1993); H.R. 1317, 103rd Cong. (1993); H.R. 2593, 103rd Cong. (1993); H.R. 2596, 103rd Cong. (1993); H.R. 2595, 103rd Cong. (1993); H.R. 1717, 104th Cong. (1995); H.R. 2954, 105th Cong. (1997).

bills proposed to create a private cause of action for violations of certain standards, and for violation of the FTC disclosure requirements.[240]

Most recently, in the 106th Congress, Representative Coble (NC) introduced the Small Business Franchise Act (SBFA).[241] Similar to the previous bills, the SBFA was designed to "establish minimum standard of fair conduct" in franchise relationships between franchisors and franchisees.[242] Accordingly, the SBFA would provide the franchisee with a private cause of action in federal courts when a franchisor had breached the FTC's franchise rule or any provision in the SBFA.[243] Additionally, the proposed bill would allow the state attorney general to step in if they had reason to believe that their state was adversely affected because a franchisor violated the SBFA.[244]

In general, the SBFA would prohibit franchisors from terminating their franchisees without cause.[245] Moreover, a franchisee must be given 30-days to cure any defaults in following a franchisor's system standards.[246] The SBFA would also requir that each party act in 'good faith,' "obligat[ing] a party to a franchise to do nothing that w[ould] have the effect of destroying or injuring the right of the other party to obtain and receive the

---

[240] Debra Burke & E. Malcolm Abel II, *Franchising Fraud: The Continuing Need for Reform*, 40 Am. Bus. L.J. 355, 370 (2003).

[241] H.R. 3308, 106th Cong. (1999). *See generally* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 160 (2004); Michael J. Lockerby, *How SBFA Would Restructure Franchising Relationships*, Franchising Bus. & L. Alert 1 (June 1999).

[242] H.R. 3308, 106th Cong. (1999).

[243] § 12(a).

[244] § 7.

[245] § 4(b).

[246] § 4(b)(2)(A).

expected fruits of the contract and to do everything required under the contract to accomplish such purpose" and "requir[ing] honesty of fact and observance of reasonable standards of fair dealing in the trade."[247] The Act further imposed limited fiduciary duties on franchisors in performing certain services.[248]

While the proposed bill did not offer any safeguard against non-renewal, it indirectly recognized, and protected franchisees' goodwill. The SBFA clarified that "franchise businesses involve a joint enterprise between the franchisor and franchisees in which each party has a vested interest in the franchised business."[249] Accordingly, franchisees could continue their business at their location after the expiration of the franchise agreement.[250] Furthermore, franchisors were not allowed to place or license another franchise or outlet in an unreasonably close proximity to an established franchise unit.[251] The SBFA also included protections for a franchisee's right to transfer or assign an interest in a franchise, and it granted survivorship rights for designated family members of a deceased or incapacitated franchisee.[252]

Mainly because of the strong opposition of the franchisors and franchisors advocates, the Senate did not adopt the SBFA. However, these past proposals have at least shown

---

[247] § 5(a)(2).

[248] § 5.

[249] § 2(2).

[250] H.R. 3308, 106th Cong. § 4(c)(1) (1999) ("A franchisor shall not prohibit, or enforce a prohibition against, any franchisee from engaging in any business at any location after expiration of a franchise agreement.")

[251] § 11.

[252] § 8.

how controversial, and yet important, to enact a unified nationwide federal franchise relationship law might be.

2. State Level

a. Existing State Regulations

A number of states have enacted their own franchise laws in order to protect franchisees against franchisor abuses.[253] While some states have passed only registration and disclosure laws that regulate franchise sales,[254] others have also enacted franchise "relationship laws" governing the relationship of the parties during the period of operation under the franchise contract.[255] Currently, nineteen states[256], the District of Columbia, Puerto Rico, and the Virgin Islands have relationship laws of general applicability. Moreover, some states have formulated relationship laws to address specific

[253] David A. Beyer & Cheryl S. Lucente, *Florida Franchise Law*, SBP FL-CLE 13-1 ("24 states, the District of Columbia, and Puerto Rico regulate the franchise sales process, the franchise relationship, or both.")

[254] California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin.

[255] *See generally* Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 185, 187-88 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[256] Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Rhode Island, Virginia, Washington, and Wisconsin.

problems in different industry sectors, such as automotive, beer and wine, farm equipment, etc.[257]

In general, state relationship laws aim to prevent arbitrary and/or opportunistic termination of franchises by restricting franchisors' contractual power.[258] Most of these laws expressly acknowledge that the economic disparity between the parties allows franchisors to act opportunistically, and that traditional principles of contract law are insufficient to protect franchisees against opportunism. Remedies available under these laws may include repurchase of inventory and other items, injunctive relief, damages – including lost profits, unrecouped expenses, and punitive damages, – and attorneys' fees.[259] Additionally, some states relationship laws explicitly recognize 'payment for goodwill' under their remedial schemes.[260]

Essentially, the state relationship laws provide franchisees with an important legal source to recoup their goodwill in case of franchisor opportunism. In particular, these laws address four major areas of primary concern; termination, renewal, transfer of

---

[257] The industry-specific statutes are collected in Bus. Franchise Guide (CCH) at ¶¶ 4000 *et seq. See also* Barbara Suddath Strickland, *Overview Of State Laws Affecting Franchising*, FLP FL-CLE 6-1 , 19.

[258] W. Michael Garner, *Franchise and Distribution Law and Practice* § 1:5 (1990 & Supp. 1995).

[259] Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 492 (1994).

[260] *Infra* Ch.2(B)(2)(a)((5)).

franchise rights, and encroachment.[261] In all these areas, franchisees' goodwill appears to be the hidden value that is implicitly protected.

Nonetheless, franchisors and some commentators criticize state relationship laws.[262] They mainly argue that restricting franchisors' contractual rights allow franchisees to free ride. The problem of restricting franchisors' power and other concerns about the state laws are addressed in Chapter 4.

(1) Termination

In the absence of an applicable statute, the rights and obligations of franchisors and franchisees are defined and governed by the express terms of their respective franchise agreements. If a franchise agreement is silent as to its duration and the timing of, and the procedure for, termination, the franchise relationship is considered in most instances terminable at will.[263]

However, because franchisees invest large amounts of capital, time, and energy developing goodwill in their franchise businesses, unexpected terminations can cause

---

[261] Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 185, 187 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[262] *See e.g.* Francine Lafontaine & Fiona Scott Morton, *Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24(3) Journal of Economic Perspectives 233 (2010); Jonathan Klick et al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009).

[263] Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 476-77 (1994).

severe economic harm for franchisees.[264] Accordingly, in order to avoid forfeiture, most franchise relationship statutes require a showing of "good cause" for the termination of a franchise agreement.[265]

Minnesota[266], Nebraska[267], New Jersey[268], Rhode Island[269], and Wisconsin[270] define "good cause" as failure by the franchisee to substantially comply with the requirements

---

[264] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 343 (1995) (citing Martin D. Fern & Philip I. Klein, *Restrictions on Termination and Nonrenewal of Franchises: A Policy Analysis*, 36 Bus. Law. 1041, 1042 (1981) ("Apart from legitimate reasons for terminating a franchise, a franchisor may desire to terminate a franchise in bad faith. For example, the franchisor may terminate a good franchise for the purpose of reselling the franchise and obtaining a new franchise fee.")))

[265] Arkansas Franchise Practices Act, Ark. Code Ann. § 4-72-204; California Franchise Relations Act, Cal. Bus. & Prof. Code § 20020 (good cause only for termination); Connecticut Franchise Act, Conn. Gen. Stat. § 42-133f; Delaware Franchise Security Law, Del. Code Ann. tit. 6, § 2552 (prohibiting "unjust" termination, which means termination without good cause or in bad faith); Hawaii Franchise Investment Law, Haw. Rev. Stat. § 482E-6; Illinois Franchise Disclosu re Act of 1987, 815 Ill. Comp. Stat. §§ 705/19; Indiana Deceptive Franchise Practices Act, Ind. Code Ann. § 23-2-2.7-1; Iowa, Iowa Code Ann. § 537A.10; Michigan Franchise Investment Law, Mich. Comp. Laws § 445.1527; Minnesota Franchise Act. Minn. Stat. § 80C.14; Mississippi, Miss. Code Ann. § 75-24-53 (no good cause required, but written notice at least 90days in advance); Missouri Franchise Law, Mo. Rev. Stat. § 407.405 (no good cause required, but written notice at least 90days in advance); Nebraska Franchise Law, Neb. Rev. Stat. § 87-404; New Jersey Franchise Practices Act, N.J. Stat. Ann. § 56:10-5; Rhode Island Fair Dealership Act, R.I. Gen. Laws § 6-50-4; Virginia Retail Franchising Act, Va. Code Ann. § 13.1-564; Washington Franchise Investment Protection Act, Wash. Rev. Code Ann. § 19.100.180 (no good cause for nonrenewal); Wisconsin Fair Dealership Law, Wis. Stat. § 135.03; Puerto Rico Dealer's Act of 1964, P.R. Laws Ann. tit. 10, § 278b; Virgin Island Franchise Act, 12A V.I.C. § 132. *See generally e.g.* Tracey A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating A Franchise Agreement*, 28 Val. U. L. Rev. 785, 794-95 (1994).

[266] Minn. Stat. Ann. § 80C.14 Subd.3(3)(b) (West).

[267] Neb. Rev. Stat. § 87-402(8).

[268] N.J. Stat. Ann. § 56:10-5 (West) ("In the absence of a substantial failure of franchisee compliance, the statutory requirement of "good cause" prohibits a franchisor from terminating for other reasons, even if they reflect a sound and nondiscriminatory business

imposed by the franchise.[271] Iowa accepts "legitimate business reasons" as good cause so long as the termination is not arbitrary or capricious when compared to the franchisor's acts in similar circumstances.[272] Other states have chosen not to define "good cause", but instead they listed examples.[273] The failure of the franchisee to substantially comply with the franchise agreement is often just one example of "good cause" in these states.[274]

Courts in regulated states have also contributed to the definition of the term "good cause".[275] Some courts have interpreted the term in a way that protects the franchisee's reasonable expectations by allowing the franchisee to continue to operate the franchise as

---

strategy.") *See e.g. Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 975 A.2d 510, 519 (N.J. Super. App. Div. 2009) (citing *Westfield Centre Serv., Inc. v. Cities Serv. Oil Co.*, 86 N.J. 453, 460-61 (1981) *Cooper Distributing Co. v. Amana Refrigeration, Inc.*, 180 F.3d 542, 545 (3d Cir.1999)).

[269] R.I. Gen. Laws Ann. § 6-50-2(4) (West).

[270] Wis. Stat. Ann. § 135.02 (4)(a) (West). Wisconsin also offers an alternative definition: "Bad faith by the dealer in carrying out the terms of the dealership". Wis. Stat. Ann. § 135.02 (4)(b) (West).

[271] Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 194 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[272] Iowa Code Ann. § 523H.7(1) (West). *See gerenally* David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 354-58 (1995).

[273] *See generally* Tracey A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating A Franchise Agreement*, 28 Val. U. L. Rev. 785, 794-95 (1994); Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 194 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[274] *See e.g.* Ark. Code Ann. § 4-72-202 (7)(A)(West); Conn. Gen. Stat. Ann. § 42-133f (a)(West).

[275] *See generally* Legal Aspects of Selling and Buying § 9:73 (3d ed.).

long as it performs in a satisfactory manner.[276] Others have interpreted the requirement liberally, and allowed the franchisor to terminate its relationship under reasonable economic circumstances.[277]

(2) Renewal

Although franchisors may need the right to refuse renewal of a franchise at the expiration of the agreement to adjust to changed circumstances and to ensure brand protection, the broad ability to refuse to renew a franchise empowers the franchisor to use the threat of nonrenewal to impose new obligations on the franchisee.[278] Moreover, in the

---

[276] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 355 (1995).

[277] *See e.g. Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir.1990) (holding that internal economic reasons, without bad faith, did not constitute good cause); *Davis v. Gulf Oil Corp.*, 572 F.Supp. 1393 (C.D.Cal.1983) (finding that termination is for good cause where franchisor is withdrawing from market because of lack of success and where dealers were notified of planned market withdrawal); *Aurigema v. Arco Petroleum Products Co.*, 698 F.Supp. 1035 (D.Conn.1988) (holding that a unilateral decision to withdraw from market is not good cause to terminate); *Freedman Truck Center v. GMC*, 784 F.Supp. 167 (D.N.J.1992) (withdrawing from general market did not violate New Jersey Practices Act); *Moore v. American Suzuki Motor Corp.*, 416 S.E.2d 807 (Ga.Ct.App.1992) (reversing a directed verdict that franchisor had good cause when franchisee wanted to transfer franchise, as there was evidence the franchisor's refusal to transfer was arbitrary); *Dunkin' Donuts of America, Inc. v. Middletown Donut Corp.*, 495 A.2d 66 (N.J.1985) (finding that franchisor had good cause when franchisee underreported gross sales); *Westfield Centre Services, Inc. v. Cities Service Oil Co.*, 432 A.2d 48 (N.J.1981) (selling franchisee's business, even though in good faith, was without good cause).

[278] *See e.g.* David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 344 (1995). The American Franchisee Association, Franchisee Satisfaction Survey Report from 1996 shows that 40% of franchisees reported having been threatened by a representative of their franchisor. Having a franchisor threaten to terminate a franchisee agreement, not renew the agreement or prevent the franchisee from expanding has been experienced by 57.3% of franchisor-threatened franchisees. Franchising Relationship: Hearing Before the Subcom. On Commercial, & Administrative Law of the Committee on the Judiciary,

absence of a limitation, the franchisor may choose not to renew the franchise to exploit the franchisee's goodwill.[279] Because the threat of nonrenewal places the franchisee at a great risk of forfeiture and forces the franchisee to accept unreasonable demands, state relationship laws restrict the franchisor's ability to refuse to renew a franchise.[280]

State relationship laws provide diverse protections against opportunistic non-renewals.[281] In essence, however, they try to limit misappropriation of franchisees' goodwill by the franchisor. Accordingly, Delaware[282], Hawaii[283], New Jersey[284], Rhode

---

106th Cong. Serial No.106-92 at 63 (1999). *See also* Charles S. Modell & Genevieve A. Beck, *Franchise Renewals--"You Want Me to Do What?*," 22 Franchise L.J. 4, 4 (2002).

[279] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 318 (June 24, 1999) (Prepared Statement Of Steve Lewis, President, National Franchisee Association)

"Frankly, the franchisor can choose not to renew the license and assume the business location at or about the same vicinity, and immediately enjoy the franchisee's 15 to 20 years of "sweat equity". Or, the franchisee might try and sell in an effort to realize some value, albeit reduced value since their contract time is up. Again, the franchisor can buy the location at reduced value."

See also F Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 232 (June 24, 1999) (Prepared Statement Of Spencer P. Vidulich, O.D., Pearle Vision, Chicago, IL):

> "[W]e didn't have a gun to our heads when we signed our contracts, but at renewal time, after a franchisee has built his business, he is faced with the prospect of signing a new, usually more restrictive and less favorable franchise agreement or walking away from his investment. That is when the gun becomes locked and loaded."

[280] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 344 (1995).

[281] *See generally* Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 195, 203-05 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[282] Del. Code Ann. tit. 6, § 2552 (West).

[283] Haw. Rev. Stat. § 482E-6 (2)(H) (Lexis).

[284] N.J. Stat. Ann. § 56:10-5 (West).

Island[285], and Wisconsin[286] require good cause for nonrenewal.[287] Although the Iowa statute also requires good cause, it allows nonrenewal where the parties agree to the nonrenewal, or the franchisor completely withdraws from the geographic market served by the franchisee and agrees not to enforce a covenant not to compete.[288] In addition, under the Iowa statute, the franchisor must notify the franchisee at least six months prior to the expiration of the franchise agreement.[289]

While generally franchisors must show good cause in other regulated states, they are allowed to refuse renewal in certain cases as well. For example, California permits nonrenewal upon 180 days' notice for specified reasons, including failure by the franchisee to agree to the standard terms of the renewal franchise.[290] Nevertheless, California law reduces potential goodwill misappropriation by permitting the non-renewed franchisee to sell his business within 180 days to a purchaser meeting the franchisor's then current requirements for granting new franchises.[291] Additionally, California regulation does not allow a refusal to renew if it is "for the purpose of converting the franchisee's business premises to operation by employees or agents of the

---

[285] R.I. Gen. Laws Ann. § 6-50-4 (West).

[286] Wis. Stat. Ann. § 135.03 (West).

[287] *See generally* Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 195, 203 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[288] Iowa Code Ann. § 523H.8 (West). *See also* David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 357-58 (1995).

[289] Iowa Code Ann. § 523H.8 (West).

[290] Cal. Bus. & Prof. Code Ann. § 20025 (West).

[291] Cal. Bus. & Prof. Code § 20025(a) (West).

franchisor for such franchisor's own account."[292] Similarly, in Minnesota, nonrenewal is permitted if the franchisee has been given written notice, and an opportunity to operate the franchise over a sufficient period of time to enable the franchisee to recover the fair market value of the franchise as a going concern measured from the date of the failure to renew.[293] In Arkansas, the franchisor may refuse to renew so long as the nonrenewal is in accordance with a policy that is not arbitrary or capricious.[294]

Illinois, Michigan, and Washington allow nonrenewal generally, but also try to minimize goodwill misappropriation.[295] For instance, Illinois requires repurchase of the franchise where there is a noncompete requirement, or where notice of the nonrenewal is not given at least six months prior to expiration.[296] In Washington, the franchise regulation allows nonrenewals so long as the franchisor "fairly compensates the franchisee."[297] The compensation must include franchisee's goodwill, unless (i) the

---

[292] Cal. Bus. & Prof. Code § 20025(b)(1) (West).

[293] Minn. Stat. Ann. § 80C.14 (West). *See also* Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 195, 203-04 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[294] Ark. Code Ann. § 4-72-204(2) (West).

[295] *See* Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 195, 212 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[296] 815 ILCS 705/20.

[297] Wash. Rev. Code Ann. § 19.100.180 (West). *See e.g. Thompson v. A. Richfield Co.*, 649 F. Supp. 969, 971 (W.D. Wash. 1986)

> "This statute, on its face, clearly does not create an automatic right to renew a franchise. It simply says a franchisor may not refuse to renew a franchise without compensating the franchisee for the fair market value of the franchise, for his equipment, materials and goodwill. But the statute cannot be read as providing an unequivocal right to renewal. Instead, by implication it provides that a franchise is

franchisee has been given one year's notice of nonrenewal and (ii) the franchisor agrees in writing not to enforce any covenant which restrains the franchisee from competing with the franchisor.[298] Mississippi and Missouri have notice requirements regarding nonrenewal of the franchise agreement, but no substantive requirements.[299]

(3) Transfer

Nearly all franchise agreements require franchisor approval before a franchisee may transfer its interest in the franchise.[300] For franchisees, however, the transfer of their businesses may be the only way to obtain a fair return on their investments. In theory, transferring the franchise as a going concern may allow the franchisee to receive "the value of the goodwill engendered by the franchisor's trademark at that location."[301] A prominent franchise attorney highlighted briefly this issue during a federal hearing:

> The net effect of overreaching restrictions on transfer is to deny a franchisee the goodwill that (s)he may have spent years developing. In non-franchised businesses, an owner may offer to sell part or all of his or her business and the market will determine the selling price. In franchise systems, it is often the franchisor who determines who the buyer will be and, through the use of burdensome restrictions, the price that will be paid.[302]

---

terminable at will, as long as the franchisor fairly compensates the franchisee according to the specific terms of the statute."

[298] Wash. Rev. Code Ann. § 19.100.180 (West).

[299] Miss. Code. Ann. § 75-24-53 (West); Mo. Ann. Stat. § 407.405 (West).

[300] *See e.g.* David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 354 (1995).

[301] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 354 (1995).

[302] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 191-92 (June 24, 1999)

So, in order to balance parties' interests, most state relationship laws also regulate the franchisee's ability to sell, assign, or transfer its business, and the grounds for the franchisor to prevent such a transfer.

Iowa law contains the most extensive protection of franchisees' rights to transfer.[303] Accordingly, the franchisor may disapprove a transfer only if the proposed transferee does not meet the reasonable current qualifications of the franchisor, provided that the refusal is not arbitrary or capricious.[304] With this provision, Iowa law protects the franchise's investment, and at the same time, it allows the franchisor to maintain its standards for franchisees.[305] Moreover, under Iowa law, certain changes in ownership cannot be considered transfers requiring the consent of the franchisor.[306]

In Arkansas[307], Nebraska[308], and New Jersey[309], the franchisor can reject a proposed transfer of the franchise based on a material reason relating to the character, financial

---

(Prepared Statement Of Peter A. Singler, Esquire, Law Offices Of Peter Singler, Sebastopol, CA).

[303] *See generally* David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 360 (1995).

[304] Iowa Code Ann. § 523H.5 (West).

[305] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 360 (1995).

[306] *Id*. Examples in the Iowa statute are transfers by a sole proprietor franchisee to a wholly owned corporation, transfers of equity within an existing ownership group, and transfers to a spouse, child, or partner upon the franchisee's death or disability. The franchisor may not "interfere" with such transfers (no right of first refusal).

[307] Ark. Code Ann. § 4-72-205 (b)(1) (West).

[308] Neb. Rev. Stat. § 87-405.

[309] N.J. Stat. Ann. § 56:10-6 (West).

ability or business experience of the proposed transferee. If the franchisor does not reply within sixty days, his approval is deemed granted. The franchisor is nevertheless not required to do business with a transferee that does not agree in writing to comply with all the requirements of the franchise. In Hawaii[310] and Michigan[311], the franchisor may disapprove a transfer of a franchise only for good cause.

(4) Encroachment

"Encroachment" is the practice of a franchisor opening or licensing a competing business under the same brand name in close proximity to an existing franchisee.[312] Traditional law and economics analysis suggests that franchise encroachment "increases consumer welfare, mainly by increasing price and service competition among neighboring franchisees."[313] Franchisees, however, especially those who develop goodwill at a certain location, may be adversely affected by encroachment.[314] In fact,

---

[310] Haw. Rev. Stat. § 482E-6 (2)(I) (Lexis).

[311] Mich. Comp. Laws Ann. § 445.1527(g) (West).

[312] *See in general* Uri Benoliel, *Criticizing the Economic Analysis of Franchise Encroachment Law*, 75 Alb. L. Rev. 205 (2012); Robert W. Emerson, *Franchise Encroachment*, 47 Am. Bus. L.J. 191 (2010); 10 Bus. & Com. Litig. Fed. Cts. § 111:48 (3d ed.).

[313] Uri Benoliel, *Criticizing the Economic Analysis of Franchise Encroachment Law*, 75 Alb. L. Rev. 205, 206 (2012).

[314] *See e.g.* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 357 (June 24, 1999) (Prepared Statement Of Jeffery S. Haff, Dady & Garner, P.A., Minneapolis, MN); David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 344 (1995) (citing Monograph No. 17, Franchise Protection: Laws Against Termination and the Establishment of Additional Franchises, 1990 A.B.A. Sec. Antitrust 72). *See also* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 67 (June 24, 1999):

franchisors may potentially utilize encroachment in a way that drives a franchisee out of business, "thereby allowing franchisors to evade a contractual or statutory obligation to pay damages to [the] franchisee upon direct contract termination."[315]

Franchisors often reserve the right to operate or license a business anywhere they want.[316] Accordingly, some state relationship laws include provisions against encroachment.[317] For instance, the Iowa Act prohibits a franchisor from establishing a new franchise in unreasonable proximity to an existing franchisee, if this has an adverse effect on the gross sales of the existing franchisee's business.[318] Nonetheless, the

---

> "Forty percent of franchisees felt that the franchisor had encroached upon their business in some way. Of this group, 90.5% felt that their profits had suffered because of franchisor encroachment. The average amount of perceived decline in profit due to franchisor encroachment was 18.9%, with 81% reporting losses of between 9% and 40+%. Of franchisees feeling encroached upon and perceiving that profits had suffered because of the encroachment, only 2.9% indicated they were compensated for their losses by their franchisor."

[315] Uri Benoliel, *Criticizing the Economic Analysis of Franchise Encroachment Law*, 75 Alb. L. Rev. 205, 206 (2012); *see also* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 193 (June 24, 1999) (Prepared Statement Of Peter A. Singler, Esquire, Law Offices Of Peter Singler, Sebastopol, CA).

[316] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 194 (June 24, 1999) (Prepared Statement Of Peter A. Singler, Esquire, Law Offices Of Peter Singler, Sebastopol, CA). *See also e.g. Camp Creek Hospitality Inns, Inc., v. Sheraton Franchise Corp*. 130 F.3d 1009 (C.A. 11th Cir., 1997) ("By the express terms of the contract, therefore, Sheraton could have authorized a competing franchise directly across the street from the Inn, and Camp Creek would have little recourse.")

[317] Haw. Rev. Stat. § 482E-6 (2011); Iowa Code § 537A.10 (2011); Minn. R. 2860.4400(c) (2011); Wash. Rev. Code § 19.100.180 (2011); Wis. Stat. § 135.03 (2011); Ind. Code Ann. § 23-2-2.7-2 (West).

[318] Iowa Code Ann. § 523H.6 (West). *See generally* David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 359 (1995).

franchisor is allowed to encroach if the franchisor offers a right of first refusal to the existing franchisee or pays the franchisee compensation for diverted market share.[319]

Indiana law prohibits a franchisor from establishing a new franchise that competes unfairly with existing franchisees within an unreasonable proximity.[320] Although Washington[321], Hawaii[322], and Minnesota[323] also have laws with anti-encroachment provisions, they simply reaffirm the territorial exclusivity agreed upon in the franchise contract.[324] Even though Wisconsin does not have a specific encroachment provision, the law indirectly addresses the issue of encroachment by prohibiting a franchisor from substantially changing the competitive circumstances of a franchise without good cause.[325]

(5) Remedies – Compensating Goodwill

Generally, most of the state relationship statutes – directly or indirectly – acknowledge franchisees' interest in their business goodwill, and some protect this

---

[319] David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 359 (1995).

[320] Ind. Code Ann. § 23-2-2.7-2 (4) (West).

[321] Wash. Rev. Code Ann. § 19.100.180(2)(f) (West).

[322] Haw. Rev. Stat. § 482E-6 (2)(E) (Lexis).

[323] Minn. R. 2860.4400 (C).

[324] Uri Benoliel, *Criticizing the Economic Analysis of Franchise Encroachment Law*, 75 Alb. L. Rev. 205, 209 (2012).

[325] Wis. Stat. Ann. § 135.03 (West). *See e.g. Baur Truck & Equip., Inc. v. Svedala Industries, Inc.*, 501 N.W.2d 470 (Wis. App. 1993) (A franchisor's appointment of a competing franchisee in another franchisee's territory constituted a "substantial change in competitive circumstances" which deemed a wrongful termination under Wisconsin law.)

interest from above mentioned actions of franchisors.[326] Accordingly, a number of states provide a private right of action to franchisees who are injured by reason of a violation of the law. Although some statutes explicitly provide that an award of damages to the franchisee will include compensation for loss of goodwill, others leave determination of the components of a damage award to the courts.[327]

In Minnesota and Hawaii, for instance, a franchisor has to compensate its franchisee's loss of goodwill "if the franchisor refuses to renew a franchise for the purpose of converting the franchisee's business to one owned and operated by the franchisor."[328] In

---

[326] *See generally* Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 195, 213 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[327] *See e.g. JRS Products, Inc. v. Matsushita Elec. Corp. of America*, 115 Cal. App. 4th 168 (3d Dist. 2004) (holding that a franchisee's remedy for termination without good cause under California Franchise Relations Act was not limited to the repurchase of inventory, and the franchisee could also pursue breach of contract damages); *Kealey Pharmacy & Home Care Service, Inc. v. Walgreen Co.*, 539 F. Supp. 1357 (W.D. Wis. 1982), judgment aff'd, 761 F.2d 345 (7th Cir. 1985) (awarding damages which included losses from selling inventory the franchisor refused to purchase, miscellaneous expenses for sign removal, loss of promotional materials, losses on goods in stock, the expenses of converting the stores, and lost future profits, whether or not they could be calculated with mathematical certainty); *Zeidler v. A&W Restaurants, Inc.*, 2000 WL 122616 (N.D. Ill. 2000) (court found franchise agreement provision regarding limitation on damages void to the extent that it was a waiver of franchisee's rights to recover damages under Illinois law); *Sheldon v. Munford, Inc.*, 950 F.2d 403 (7th Cir. 1991) (franchisee entitled to recover lost profits, but jury award remitted for failure to account for imminent increase in rent); *Bush v. National School Studios, Inc.*, 139 Wis. 2d 635 (1987) (damages for wrongful termination may be measured either by lost profits or present business value); *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 86 N.J. 453 (1981) (damages for termination in violation of New Jersey Franchise Practices Act should be measured by the actual or reasonable value of the franchise at the time of termination, less the net worth of assets retained by the franchisee); *Payless Car Rental System, Inc. v. Draayer*, 716 P.2d 929 (Div. 3 1986) (awarding lost profits for wrongful termination).

[328] Minn. Stat. Ann. § 80C.14 (West); Haw. Rev. Stat. § 482E-6 (West).

Washington, franchisors need to "fairly compensate" all non-renewed franchisees.[329] Washington law explicitly requires that the compensation must include franchisee's goodwill.[330] Delaware and Puerto Rico statutes also consider loss of goodwill as a portion of damages that can be recovered in case of an "unjust" termination or nonrenewal.[331]

While Mississippi and Missouri laws do not require good cause for termination or nonrenewal, a written notice – at least 90 days in advance – is necessary for such termination or nonrenewal.[332] If franchisor fails to comply with the notice requirement, franchisee "may be awarded a recovery of damages sustained to include loss of goodwill."[333]

In some states, even though the franchise relationship statutes do not explicitly mention goodwill, courts have granted damages that include lost business goodwill. Under New Jersey law, for example, a franchisee may seek recovery for any harm it suffered by reason of any violation of the law,[334] "namely the reasonable value of the business less the amount realized on liquidation."[335] The reasonable value would be "the

---

[329] Wash. Rev. Code Ann. § 19.100.180 (West).

[330] Wash. Rev. Code Ann. § 19.100.180 (West) (unless "(i) the franchisee has been given one year's notice of nonrenewal and (ii) the franchisor agrees in writing not to enforce any covenant which restrains the franchisee from competing with the franchisor.")

[331] Del. Code Ann. tit. 6, § 2552 (West); Puerto Rico Dealer's Act of 1964, P.R. Laws Ann. tit. 10, § 278b.

[332] Miss. Code. Ann. § 75-24-53 (West); Mo. Ann. Stat. § 407.405 (West).

[333] Miss. Code. Ann. § 75-24-57 (West); Mo. Ann. Stat. § 407.410 (West).

[334] N.J. Stat. Ann. § 56:10-10 (West).

[335] *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 975 A.2d 510, 519 (N.J. Super. App. Div. 2009) (citing *Westfield Centre Serv., Inc. v. Cities Serv. Oil Co.*, 86 N.J. 453, 469 (1981)).

price upon which willing parties would agree for the sale of the franchisee's business as a going concern," which generally includes goodwill.[336] Alternatively, in Indiana and Wisconsin, courts allow franchisees to recover their lost future profits for reasonable length of time.[337]

Accordingly, under state relationship laws, franchisees have successfully argued that local goodwill associated with franchisees' businesses should at least partially belong to the franchisees, and therefore be compensated if the franchisor misappropriates this value.

Lastly, some states have industry specific provisions protecting franchisees' goodwill. For instance, Arkansas[338], California[339], Connecticut[340], Hawaii[341], Maryland[342] have provisions for petroleum products suppliers and distributors; Illinois[343], Indiana[344],

---

[336] *Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co., 432 A.2d 48, 55 (N.J. 1981)*; *see also Cooper Distribg. Co., Inc. v. Amana Refrigeration, Inc.*, 180 F.3d 542, 547 (3d Cir. 1999).

[337] *Wright-Moore Corp. v. Ricoh Corp.*, 794 F. Supp. 844, 865 (N.D. Ind. 1991) *aff'd,* 980 F.2d 432 (7th Cir. 1992) (citing *Kealey Pharmacy and Home Care Services, Inc. v. Walgreen Co.,* 761 F.2d 345 (7th Cir.1985)); *Joseph Schlitz Brewing Co. v. Central Beverage Co.,* 172 Ind.App. 81 (1977); *Reiman Associates v. R/A Advertising,* 102 Wis.2d 305 (1981).

[338] Ark. Code Ann. § 4-72-403 (including ascertainable loss of good will as a result of the termination of the franchise.)

[339] Cal. Bus. & Prof. Code § 20999.1 (West).

[340] Cal. Bus. & Prof. Code § 20999.1 (West).

[341] Haw. Rev. Stat. § 486H-2 (West).

[342] Md. Code Ann., Com. Law § 11-304 (West).

[343] Haw. Rev. Stat. § 486H-2 (West).

[344] IL ST CH 815 § 720/7 ("The fair market value of the wholesaler's business shall include, but not be limited to, its goodwill, if any.")

Michigan[345], Minnesota[346], Virginia[347] for beer franchisees; Michigan[348], Missouri[349], New Jersey[350], District of Columbia[351] for motor vehicle franchisees.

b. Recent Proposals

In response to frequent complaints of franchisor abuses, more states have recently considered bills designed to regulate franchise relationships. Among these proposals, Pennsylvania, Maine, Massachusetts, and California have drawn particular attention.

Pennsylvania House Bill 1620, known as the "Responsible Franchise Practices Bill", introduced by former Quiznos franchise owner Representative Peter Daley, aims to "promote the vitality of franchising through fair, equitable and responsible franchise practices."[352] The proposed bill states that "[t]raditional common law doctrines have not evolved sufficiently to protect franchisees adequately from fraudulent or unfair practices in the sale and operation of franchised businesses."[353] It also highlights that "a franchisor

---

[345] For wine wholesalers: Mich. Comp. Laws Ann. § 436.1305 (West); for beer wholesalers: Mich. Comp. Laws Ann. § 436.1403 (West).

[346] For wine wholesalers: Mich. Comp. Laws Ann. § 436.1305 (West); for beer wholesalers: Mich. Comp. Laws Ann. § 436.1403 (West).

[347] Va. Code Ann. § 4.1-409 (West); Va. Code Ann. § 4.1-508 (West).

[348] Md. Code Ann., Com. Law § 11-304 (West).

[349] Mo. Ann. Stat. § 407.825 (West).

[350] N.J. Stat. Ann. § 56:10-13.3 (West).

[351] D.C. Code § 36-303.04.

[352] Pa H. 1620, 197th Gen. Assembly (2013). *See also* PA's Responsible Franchise Practices Bill: Overview and Discussion, November 15, 2013 (last visited April 7, 2014: http://www.unhappyfranchisee.com/pas-responsible-franchise-practices-bill-overview-discussion/).

[353] Pa H. 1620, 197th Gen. Assembly § 902(3) (2013).

that simply acts in compliance with the terms of its franchise contract with a franchisee is not necessarily dealing with its franchisee fairly and in good faith."[354] Accordingly, among other things, the proposal requires that each party act in 'good faith,' and in a 'fair equitable manner' towards each other.[355] Moreover, it imposes limited fiduciary duties on franchisors, requiring them to "exercise the highest standard of care" in performing certain services.[356] The bill poses limitations on a franchisor's rights to terminate a franchise agreement and the reasons a franchisor may terminate the agreement.[357] It also protects franchisees from significant changes in renewals, limits on transfers and restriction on legal avenues in regards to franchisor-franchisee disputes.[358]

The proposed bill also implicitly recognizes franchisees' goodwill. For instance, under the bill, a franchisor may not grant or license a new franchise or otherwise establish a new channel of distribution for goods or services if this is in unreasonable proximity to an outlet or business owned or licensed to the franchisee.[359] If a franchisor violates this provision, it will be liable to the injured franchisee for "loss of income resulting from the reduction in gross sales; and reduction in value of the franchised business."[360] Furthermore, the bill makes an exception "if the franchisor agrees to compensate the

---

[354] § 902(5).

[355] § 905.

[356] § 906.

[357] § 916.

[358] §§ 910-915.

[359] § 909.

[360] *Id*.

existing franchisee for market sales diverted by" the encroachment.[361] Some commentators argue that the proposed bill is the most significant and far-reaching franchise relationship law in the country and will have a substantial impact on franchising in PA, "and, perhaps, even the laws of other states."[362]

The Maine Small Business Investment Protection Act (LD 1458)[363] and Massachusetts' Fair Franchise Act (S. 73)[364] are not substantially different from PA HB 1620. They also aim to protect franchisees in the sale and operation of franchise businesses, and establish a standard of reasonableness and good faith; provide limits on termination, cancellation or failure to renew a franchise without good cause, prior notice and the opportunity to cure.[365] The LD 1458 includes protections for a franchisee's right to transfer or assign an interest in a franchise.[366] It also provides for survivorship rights for a designated family member of a deceased or incapacitated franchisee.[367] Massachusetts' Fair Franchise Act highlights explicitly the apparent disparity between

---

[361] *Id*.

[362] *See e.g.* Don Sniegowski, *Franchisors and Franchisees Face Off in November on Pennsylvania's Franchise Protection Bill,* http://www.bluemaumau.org/13252/franchisors_and_franchisees_face_november_pennsylvania's_franchise_protection_bill (October 10, 2013); Erik Wulff & Abhishek Dubé, *States propose revising the "relationship" between franchisors and franchisees*, http://www.dlapiper.com/en/us/insights/publications/2013/11/states-propose-revising-the-relationship-between__/ (November 14, 2014).

[363] Me. H.1043, 126th Leg., 1st Reg. Sess. (2013). *See e.g.* Don Sniegowski, *Maine Introduces Groundbreaking Franchise Bill*, http://www.bluemaumau.org/12612/bill_introduced_maine_protect_franchisees (May 2, 2013).

[364] Mass. Sen. 73, 188th Leg. (2013).

[365] Me. H.1043, 126th Leg., 1st Reg. Sess. §§ 1299 (2013); Mass. Sen. 73, 188th Leg. §§ 5-9 (2013).

[366] Me. H.1043, 126th Leg., 1st Reg. Sess. § 1299-H (2013).

[367] *Id.*

the franchisor and franchisees, and imposes "an inventory repurchase obligation" on franchisors and precludes franchisors from taking various actions, including: blocking the right of free association among franchisees; requiring unreasonable standards of performance on a franchisee; and failing to deal in good faith with a franchisee.[368]

California has already a franchise relationship law, the California Franchise Relations Act (CFRA). Nonetheless, California proposed two new bills (A.B. 1141 and S.B. 610) to implement a requirement of good faith in the franchise relationship, and strengthen the rights of franchisees.[369]

PA HB 1620 was referred to the House's Consumer Affairs Committee in July 2013 and is expected to be the subject of a public hearing soon. Similarly, S. 73 and AB 1141 are waiting for action.[370] Maine's state senate, however, voted against LD 1458.[371]

---

[368] Mass. Sen. 73, 188th Leg. § 1(4) (2013) ("Many franchises reflect a profound imbalance of contractual power in favor of the franchisor, and fail to give due regard to the legitimate business interests of the franchisee, as a result of the franchisor reserving pervasive contractual rights over the franchise relationship.") *See* Erik Wulff & Abhishek Dubé, *States propose revising the "relationship" between franchisors and franchisees,* http://www.dlapiper.com/en/us/insights/publications/2013/11/states-propose-revising-the-relationship-between__/ (November 14, 2014).

[369] Cal. Sen. 610, 2013-2014 Reg. Sess. (2013) and Cal. Assembly 1141, 2013-2014 (2013).

[370] *See e.g.* Don Sniegowski, Franchise Protection Bills Introduced in California, March 3, 2013. (last visited: April 7, 2014 http://bluemaumau.org/12443/franchise_protection_bills_introduced_california).

[371] *See* Don Sniegowski, *Maine Senate Kills Franchise Protection Bill*, http://www.bluemaumau.org/13791/maine_senate_kills_franchise_protection_bill (April 4, 2014).

C. Common Law and Goodwill

The majority of the states do not have franchise relationship laws. In those state, franchisees still depend on conventional contract law doctrines to recoup their goodwill.[372] However, as franchise laws specifically recognize, existing legal tools – without any alteration – appear to be inadequate in dealing with the problems of modern franchise arrangements.[373] In particular, franchisee advocates claim that the disparity of bargaining power in the franchise relationship results in one-sided franchise contracts that simply prevent common law principles to address franchisor opportunism.[374]

While some courts have tried to customize remedies against opportunistic misappropriations of franchisees' goodwill, this attempt has produced confusing decisions, and created uncertainties in the franchising sector. Despite their low success rate, following common law doctrines have been frequently used by franchisee-attorneys.

1. Implied covenant of Good Faith and Fair Dealing

In an effort to protect franchisees against franchisors' opportunistic behaviors, courts have restricted certain franchisor-rights by applying the doctrine of the implied covenant

---

[372] Boyd Allan Byers, *Making A Case for Federal Regulation of Franchise Terminations--A Return-of-Equity Approach*, 19 J. Corp. L. 607, 631 (1994).

[373] *See e.g.* Pa H. 1620, 197th Gen. Assembly, § 902 (3) (2013) ("Traditional common law doctrines have not evolved sufficiently to protect franchisees adequately from fraudulent or unfair practices in the sale and operation of franchised businesses, and significant contractual and procedural restrictions have denied franchisees viable legal recourse to protect their interests in the businesses"); Mass. Sen. 73, 188th Leg. § 1(6) (2013) (same).

[374] *See e.g.* Jane Cohen & Larry Weinberg, *Good Faith and Fair Dealing: A Primer on the Differences Between the United States and Canada*, 22 Franchise L.J. 37 (2002).

of good faith and fair dealing to franchise contracts. Courts have noted in a number of cases that the good faith doctrine prohibits arbitrary decisions of franchisors if the goal is to misappropriate the goodwill value generated by the franchisee's effort.

US common law recognizes an implied covenant of good faith and fair dealing in every contract to prevent one party from unfairly taking advantage of the other party.[375] Both the Uniform Commercial Code[376] (UCC) and the Restatement of Contracts[377] also impose a duty of good faith and fair dealing on contracting parties. While the Restatement refrains from a definition,[378] UCC defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing."[379]

---

[375] *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933) ("in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.") *See also e.g. Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028, 1031 (8th Cir. 1996); 23 Williston on Contracts § 63:22 (4th ed.); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 378-404 (1980).

[376] U.C.C. § 1-304. *See generally* Robert S. Summers, "*Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va.L.Rev. 195, 207-216 (1968).

[377] Restatement (Second) of Contracts § 205 (1981).

[378] Restatement (Second) of Contracts § 205 comment a (1981):

> "'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness."

See also Baker v. Lafayette College, 504 A.2d 247, 255 (1986); Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 Iowa L. Rev. 689, 702-03 (2013).

[379] U.C.C. § 1-201(20).

Despite the statutory guidance and numerous cases on the doctrine of good faith, its role in contract law remains controversial.[380] Under the prevailing view, the implied covenant of good faith does not constitute an independent cause of action.[381] Therefore, most courts require a breach of an express term of the contract to find a breach of the implied covenant of good faith and fair dealing.[382] Under this view, the good faith doctrine functions as "an interpretive tool to determine the parties' justifiable expectations in the context of a breach of contract action."[383] As such, good faith is not an independent source of obligations, and, more importantly, it cannot be used to override an explicit

---

[380] *See generally* Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. Rev. 647, 679 (2009); *see also* Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation*, 80 St. John's L. Rev. 559 (2006).

[381] U.C.C. § 1-304 cmt. 1:

> "This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached."

See also e.g. Taylor Equip., Inc., 98 F.3d at 1031 (This covenant affords only contract remedies; there is no independent tort for its breach.); *Deom v. Walgreen Co.*, 3:12-CV-00719-H, 2013 WL 1703750 (W.D. Ky. 2013).

[382] 23 Williston on Contracts § 63:22 (4th ed.); Marvin E. Rooks, *Looking Through the Judicial Lens: The Implied Covenant of Good Faith and Fair Dealing in Franchise Relationships*, 4 Geo. Mason J. Int'l Com. L. 1, 28 (2012); *See* e.g. *Griffith v. Levi Strauss & Co.*, 85 F.3d 185, 187 (5th Cir. 1996); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1317 (11th Cir. 1999).

[383] *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 91 (3d Cir. 2000); *See* e.g. *Playboy Enterprises Intern., Inc. v. Smartitan (Singapore) Pte Ltd.*, 10-CV-4811, 2011 WL 3839711 (N.D. Ill. 2011) (citing *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1444 (7th Cir. 1992) (applying Illinois law)).

contractual term.[384] The doctrine has also been implemented as a gap-filling tool where the contract terms do not clearly express the parties' intent.[385] In this case, courts employ the covenant to accomplish the reasonable expectations of the parties.

Some courts, however, have found breach of the implied obligation of good faith where a party "opportunistically subvert[s] the legitimate expectations of the other party" while exercising some discretionary power under the contract.[386] Under this approach, a party may still violate the covenant of good faith despite an express term that gives discretionary power to her.[387] Likewise, in a series of articles, Steven Burton has argued that violation of the implied covenant necessitates two elements: contractual discretion

---

[384] *See e.g. Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 812 (D. Minn. 1989) (The covenants do not create independent substantive contractual rights.) *Triangle Mining Co., Inc. v. Stauffer Chemical Co.,* 753 F.2d 734, 739 (9th Cir.1985) (common law duty of good faith cannot alter unambiguous contract term); *Continental Bank, N.A. v. Everett,* 964 F.2d 701, 705 (7th Cir.); *Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028, 1032 (8th Cir. 1996). *But see Shell Oil Co. v. Marinello*, 307 A.2d 598 (1973).

[385] *E.g. Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) ("Good faith" is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties. When the contract is silent, principles of good faith fill the gap.); *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 280 (7th Cir. 1992) (Contract law imposes a duty, not to "be reasonable," but to avoid taking advantage of gaps in a contract in order to exploit the vulnerabilities that arise when contractual performance is sequential rather than simultaneous.); *see* also Jane Cohen & Larry Weinberg, *Good Faith and Fair Dealing: A Primer on the Differences Between the United States and Canada*, 22 Franchise L.J. 37, 40 (2002).

[386] *Curley v. Allstate Ins. Co.*, 289 F. Supp. 2d 614, 617 (E.D. Pa. 2003); *see also* 23 Williston on Contracts § 63:22 (4th ed.); *In re Kaplan*, 143 F.3d 807 (3d Cir. 1998) (applying Illinois law, remanding for determination of whether discretion was exercised in good faith or unreasonably, with an improper motive or arbitrarily).

[387] *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1153 (D.C. Cir. 1984) (the mere recitation of an express power is not always the test); *Dayan*, 466 N.E.2d at 972; Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. Rev. 647, 685 (2009).

and recapturing forgone opportunities.[388] According to him, the discretion-exercising party performs in bad faith when discretion is used to recapture opportunities forgone upon contracting as determined by the other party's reasonable expectations.[389]

Despite the disagreement in the meaning and scope of the duty, courts and legal commentators have widely accepted the application of the doctrine in franchise contracts.[390] Indeed, as a flexible litigation tool, the implied covenant has been applied in a variety of situations, particularly where the party with discretionary power (most often the franchisor) acts in a manner that upsets the other party's (the franchisee's) contractual expectations.[391] Specifically, in a number of cases, courts held that a franchisor's right to

---

[388] Steven J. Burton, *Breach of Contract and the Common Law Duty To Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980); Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 Iowa L. Rev. 1, 18-22 (1981); Steven J. Burton, *Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View*, 35 Wm. & Mary L. Rev. 1533, 1537-39 (1994).

[389] *See e.g.* Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 Iowa L. Rev. 689, 706-712 (2013).

[390] Jane Cohen & Larry Weinberg, *Good Faith and Fair Dealing: A Primer on the Differences Between the United States and Canada*, 22 Franchise L.J. 37, 41 (2002); *See Phillips v. Chevron U.S.A*., 792 F.2d 521 (5th Cir.1986); *Larese v. Creamland Dairies*, 767 F.2d 716, 717 (10th Cir.1985) (franchise relationship requires good faith and commercially reasonable dealings); *Randolph v. New Eng. Mut. Life Ins. Co.*, 526 F.2d 1383, 1386-87 (6th Cir.1975) (imposing duty of good faith on exercise of facially unrestricted termination clause); *deTreville v. Outboard Marine Corp*., 439 F.2d 1099 (4th Cir.1971) (express unilateral termination agreements must conform to equity and good conscience); *Tele-Controls, Inc. v. Ford Indus*., 388 F.2d 48 (7th Cir.1967) (termination of dealership contract must be in good faith); *Shell Oil Co. v. Marinello*, 307 A.2d 598 (1973) (public policy requires good cause for termination of franchise); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (1978) (franchisor under duty not to act arbitrarily in terminating franchise agreement); *Seegmiller v. Western Men, Inc*., 437 P.2d 892 (1968) (same); *see also* Ernest Gellhorn, *Limitations on Contract Termination Rights-Franchise Cancellations*, 1967 Duke L.J. 465 (1967).

[391] *Fleetwood v. Stanley Steemer Intern., Inc.*, 725 F. Supp. 2d 1258, 1274 (E.D. Wash. 2010) *aff'd sub nom. Fleetwood v. Stanley Steemer Intern.*, 446 Fed. Appx. 868 (9th Cir.

unilaterally terminate or not renew a contract must be exercised in good faith.[392] In most of these cases, the franchisor was "motivated by a desire to capitalize on the [franchisee's] business opportunities under the franchise agreement by constructively or pretextually terminating the franchise agreement without compensation."[393]

The Pennsylvania Supreme Court held in *Atlantic Richfield Co. v. Razumic*, that a franchisor violated the implied covenant when it terminated a franchisee without cause.[394] The court found that the termination of the franchise deprived the franchisee of the value of goodwill, which he had accumulated over years.[395] The court noted that:

> "[The franchisee] can justifiably expect that his time, effort, and other investments promoting the goodwill of [the franchisor] will not be destroyed as a result of [the franchisor's] arbitrary decision to terminate their franchise relationship. Consistent with these reasonable expectations, and [the franchisor's] obligation to deal with its franchisees in good faith and in a commercially reasonable manner, [the franchisor] cannot arbitrarily sever its franchise relationship with [the franchisee]. A contrary

---

2011)(unpublished) (citing W. Michael Garner, *The Implied Covenant of Good Faith in Franchising: A Model for Discretion*, 20 Okla. City U.L.Rev. 305, 306 (1995)).

[392] *See e.g.* T. Mark McLaughlin, *Termination of Franchises: Application of the Implied Covenant of Good Faith and Fair Dealing*, 7 Franchise L.J. 1 (1987). *But see Coca-Cola N. Am. v. Crawley Juice, Inc.*, 09 CV 3259 JG RML, 2011 WL 1882845 (E.D.N.Y. 2011) (New York law does not recognize a claim for breach of an implied covenant of good faith and fair dealing in "at-will" distribution contracts like the one at issue here.); Marvin E. Rooks, *Looking Through the Judicial Lens: The Implied Covenant of Good Faith and Fair Dealing in Franchise Relationships*, 4 Geo. Mason J. Int'l Com. L. 1, 33-34 (2012).

[393] *Piantes v. Pepperidge Farm, Inc.*, 875 F. Supp. 929, 939 (D. Mass. 1995).

[394] 390 A.2d 736 (Pa. 1978). *See also Arnott v. American Oil Co.*, 609 F.2d 873, 882 (8th Cir. 1979)("the franchise relationship imposes a duty upon franchisors not to act arbitrarily in terminating the franchise" because a franchisee "builds the goodwill of his own business and the goodwill of the franchisor"); Jane Cohen & Larry Weinberg, *Good Faith and Fair Dealing: A Primer on the Differences Between the United States and Canada*, 22 Franchise L.J. 37, 41-42 (2002).

[395] *Id*. at 741–743.

> conclusion would allow [the franchisor] to reap the benefits of its franchisees' efforts in promoting the goodwill of its name without regard for the franchisees' interests."[396]

In *Razumic*, the court refused to interpret the contract as at will, since that would allow the franchisor to engage in opportunistic behavior. Judge Vanartsdalen further examined *Razumic* in *Bicycle Corp. of Am. v. Meridian Bank*, and noted that:

> "By terminating the agreement without cause and assigning the franchise to another party, the franchisor would benefit itself, by acquiring the goodwill created by the franchisee, at the expense of the entire franchise agreement. Clearly, the franchisee would never have agreed to an explicit contract allowing the franchisor to steal the goodwill generated by the franchisee."[397]

Likewise, The Supreme Court of Utah in *Seegmiller v. Western Men, Inc*. held that when a franchise contract is silent regarding termination without cause, it should be implied that the parties intended that termination would only be for cause.[398] In its opinion, the court highlighted the relationship between the implied covenant of good faith and goodwill:

> "It is usually true that the actual understanding and expectation is that the franchisee will make a substantial commitment in time and/or money to develop and establish the business of selling the product or service of which the franchiser will also be a beneficiary. It obviously would be unfair for the franchiser to wait until this is done and then arbitrarily terminate the contract without cause, and thus compel the dealer to lose his investment in time and money."[399]

---

[396] *Id*. at 742.

[397] CIV. A. 95-6438, 1995 WL 695090 (E.D. Pa. 1995).

[398] 437 P.2d 892, 894 (Utah 1968).

[399] *Id*.

Courts have also shown willingness to sustain implied covenant claims in cases other than termination and non-renewal, such as unfair price setting[400], refusal to relocate[401], encroachment[402], rejecting assignment[403], favoritism among franchisees[404], inadequate support[405], etc. In almost every good faith case, the core of the claim is that the franchisor

---

[400] *See e.g. JOC, Inc. v. ExxonMobil Oil Corp*., No. 08-5344, 2010 WL 1380750, at 5 (D.N.J. Apr. 1, 2010) (citing *Wilson v. Amerada Hess Corp.*, 773 A.2d 1121, 1126 (N.J. 2001)) (Franchisor exercising its right to use discretion in setting price under a contract breaches the duty of good faith and fair dealing if that the franchisor exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the franchisee from receiving its reasonably expected fruits under the contract.)

[401] *See e.g. Town & Country Equip., Inc. v. Deere & Co.*, 133 F. Supp. 2d 665 (W.D. Tenn. 2000) (franchisor breaches the implied covenant of good faith and fair dealing by unreasonably denying the dealer's request to relocate its franchise, imposing unreasonable performance criteria on the dealer, and interfering with the dealer's efforts to sell the franchise); *Dunfee v. Baskin–Robbins, Inc.,* 720 P.2d 1148, 1153–1154 (1986) (franchisor refused to permit franchisee to move store to new shopping mall); *Hubbard Chevrolet Co. v. General Motors Corp.*, 682 F.Supp. 873, 876–877 (S.D.Miss.1987) *aff'd* 873 F.2d 873 (1989) *cert. den.* 493 U.S. 978 (1989) (refusal to allow relocation to more advantageous area.)

[402] *Venta, Inc. v. Frontier Oil & Refining*, 827 F. Supp. 1526 (D. Colo. 1993) (the implied covenant prohibited destructive competition); *Carlock v. Pillsbury Co.,* 719 F.Supp. 791, 817–820 (D.Minn.1989) (franchisor competed with franchisee through supermarket sales); *Mike Naughton Ford, Inc. v. Ford Motor Co.,* 862 F.Supp. 264 (D.Colo.1994) (franchisor authorized new franchisee to compete with plaintiff's franchise); *Super Valu Stores, Inc. v. D–Mart Food Stores, Inc.,* 431 N.W.2d 721, 725 (App.1988) (opening competing store).

[403] *See e.g. Richter v. Dairy Queen of Southern Arizona, Inc.,* 643 P.2d 508 (App.1982) (refusal of franchisor to consent to assignment made franchisee unable to recoup investment).

[404] *See e.g. Eastern Shore Markets v. J.D. Assoc. Ltd.*, 213 F.2d 175 (4th Cir. 2000) (the implied covenant prohibited favoritism among franchisees).

[405] *Hengel, Inc. v. Hot 'N Now, Inc., 825 F.Supp*. 1311 (N.D. Ill. 1993) (holding that franchisor breached its discretionary good faith by failing to support or assist the franchisee adequately); *B.P.G. Autoland Jeep–Eagle, Inc. v. Chrysler Credit Corp.,* 785 F.Supp. 222 (D.Mass.1991) (withdrawal of credit by franchisor).

has somehow diminished or destroyed the value of franchisee's investment in the franchise.[406]

Notwithstanding its flexibility and well-intended purpose, the implied covenant of good faith and fair dealing in franchising has been subject to criticism from various angles. In the chapter four, this work highlights the issues inherent in the good faith doctrine, and suggests changes that may enhance the doctrine's capability to deal with goodwill issues.

2. Tortious Interference

Another common law tool that could offers protection for franchisees in their contractual dealings with franchisors is the tortious interference doctrine. As the remedies available under contract principles do not always compensate franchisees' losses adequately, American courts have increasingly recognized a cause of action for tortious interference in franchising cases.[407] Examination of the franchisees' tortious interference cases reveals that, in most of these cases – despite the low success rate – franchisees try to receive compensation for their goodwill.[408]

---

[406] *Piantes v. Pepperidge Farm, Inc.*, 875 F. Supp. 929, 939 (D. Mass. 1995).

[407] *See* Jesse Max Creed, *Integrating Preliminary Agreements into the Interference Torts*, 110 Colum. L. Rev. 1253, 1256-68 (2010); Lillian R. BeVier, *Reconsidering Inducement*, 76 Va. L. Rev. 877, 909-916 (1990); Gaylen L. Knack, *Tortious Interference Claims: Applying Principles of Tort Liability in the Franchise Context*, 9 Franchise L.J. 1, 19 (1990).

[408] *See e.g.* 4B N.Y.Prac., Com. Litig. in New York State Courts § 88:19 (3d ed.) (This type of claim often arises in the context where a franchisor's policies allegedly interfere with customer patronage of the franchisee's business.)

The liability for tortious interference with business relations was initially developed to prevent intentional obstruction of dealings "by violence, fraud or defamation—conduct that was essentially tortious in its nature."[409] However, after *Lumley v. Gye*,[410] where the first time a court acknowledged "nontortious methods of inducement" of breach of contract as a separate tort, courts began to extend the application of the doctrine to various types of third-party interference.[411] Today, courts recognize causes of action for inducement of breach of an existing contract[412] and for interference with reasonable expectancies of business relations.[413] Yet, the scope of these claims differs in every state.[414]

Despite major differences in application of the doctrine, the basic form of tortious interference requires an existing contract or a prospective business relationship between

---

[409] Restatement (Second) of Torts § 766 comment c (1979) .

[410] *Lumley v. Gye*, (1853) 118 Eng. Rep. 749, 752-53.

[411] Restatement (Second) of Torts § 766 comment c and d (1979).

[412] Restatement (Second) of Torts § 766 (1979):

> "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."

[413] Restatement (Second) of Torts § 766B (1979):

> "One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation."

[414] *See* Restatement (Second) of Torts 9 37 Intro. Note (1979); Kevin M. Shelley, David W. Oppenheim, *When Conflicting Principles Collide: The Uncharted Boundary Between Fair Competition and Tortious Conduct*, 22 Franchise L.J. 184 (2003).

plaintiff and a third party; a defendant who intentionally and unjustifiably interferes with their relationship; and, as a result, economic harm to the plaintiff.[415] The main difference between tortious interference with contract and business expectancy is the presumption that an existing contractual relation deserves a higher level of protection than a mere prospective business.[416] Thus, where there is only interference with prospective business transaction, most courts require that "plaintiff must show more culpable conduct on the part of the defendant."[417] Nonetheless, the question whether and to what extend interference is wrongful is a question of fact, and decided under the particular facts of the individual case.[418]

In franchise settings, tortious interference cases often arise where a franchisor's plans disrupt its franchisee's business relationships with third parties.[419] In these cases, franchisees typically aim to prove that their franchisors harm them by misappropriating

---

[415] *See* Restatement (Second) of Torts § 766 and § 766B (1979).

[416] *See* Restatement (Second) of Torts § 766 comment b (1979) (When the interference is with a contract, an interference is more likely to be treated as improper than in the case of interference with prospective dealings); *Mason v. Funderburk*, 446 S.W.2d 543, 547 (Ark. 1969) (An existing contract may be a basis for greater protection, but some protection is appropriate against unjustified interference with reasonable expectancies of commercial relations even where an existing contract is lacking.)

[417] *Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1103 (N.Y. 2004); *see also* Kevin M. Shelley, David W. Oppenheim, *When Conflicting Principles Collide: The Uncharted Boundary Between Fair Competition and Tortious Conduct*, 22 Franchise L.J. 184, 185 (2003).

[418] The Restatement (Second) of Torts § 767 (1979) enumerates a number of factors to be considered in deciding whether interference is improper. *See also* W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 9:37 (2013).

[419] *See generally* W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 9:1 (2013); Gaylen L. Knack, *Tortious Interference Claims: Applying Principles of Tort Liability in the Franchise Context*, 9 Franchise L.J. 1, 19 (1990).

their clientele[420], or by improperly preventing a transfer and reducing their going concern value.[421] Although the tort of interference may exist with both prospective and existing contracts, courts provide little protection for an interest in a prospective relationship. U.S. Courts are divided in their responses to the question whether a franchisee, one party to the franchise agreement, may sue the franchisor in tort, where the franchisor interferes with a franchisee-customer relationship whose existence is directly related to the franchise.[422] In some states (the apparent minority), courts have required that "the tortfeasor be a 'third party,' or a 'stranger,' to the interrupted economic relationship."[423] In *Cook v. Little Caesar Enterprises*, for instance, the court precluded a tort claim brought by a franchisee against its franchisor because "Michigan courts have held that to maintain a cause of action for tortious interference, a plaintiff must establish that defendant was a 'third party' to the contract or business relationship."[424] In these cases, the assumption was that tort law does not have place in contract disputes.[425]

---

[420] *See e.g. Carvel Corp. v. Baker*, 79 F. Supp. 53 (D. Conn. 1997); *Eichman v. Fotomat Corp.*, 880 F.2d 149 (9th Cir. 1989); *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146 (S.D.N.Y. 1988); *Northside Mercury Sales & Serv., Inc. v. Ford Motor Co*., 871 F.2d 758 (8th Cir. 1989); *Mach. Maint. & Equip. Co. v. Cooper Industries, Inc.*, 661 F. Supp. 1112 (E.D. Mo. 1987); Hartford Donuts, Inc. v. Dunkin' Donuts Inc., Bus. Franchise Guide (CCH) ¶ 12,100 (D. Md. 2001); W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 9:38 (2013).

[421] *See e.g. Servpro Industries, Inc. v. Schmidt*, 905 F. Supp. 475, 482 (N.D. Ill. 1995). *But see James v. Whirlpool Corp.*, 806 F. Supp. 835 (E.D. Mo. 1992) (manufacturer's exercise of its contractual right to withhold its consent to transfer of distributor's rights under agreement would not subject it to tortious interference claim.)

[422] *Carvel Corp. v. Noonan*, 350 F.3d 6, 15 (2d Cir. 2003).

[423] *Id. See also* W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 9:37 (2013).

[424] *Cook v. Little Caesar Enterprises, Inc.*, 210 F.3d 653, 659 (6th Cir.2000). *See also Britt/Paulk Insurance Agency, Inc. v. Vandroff Insurance Agency, Inc.*, 952 F.Supp. 1575 (N.D.Ga.1996) ("Georgia law requires that a plaintiff show that the defendant is a

The majority view, however, is to treat a franchisee's claims for tortious interference against its franchisors "like any other claim against an intervenor in the franchisee's relationship with its customers."[426] Even though franchisees have difficulties to prove their cases, courts do not dismiss them simply because of an existing franchise contract.[427]

The Second Circuit and the New York Court of Appeals, in *Carvel Corp. v. Noonan*, analyzed the issues related to the application of the tortious interference doctrine between a franchisor and its franchisees.[428] In *Carvel*, franchisees claimed the franchisor's

---

'stranger' to the business and contractual relations at issue in order to prevail on tortious interference with business and contractual relations claims."); *JRS Products, Inc. v. Matsushita Elec. Corp. of Am.*, 8 Cal. Rptr. 3d 840, 852 (Cal. App. 3d Dist. 2004) ("Thus motive, regardless of how malevolent, remains irrelevant to a breach of contract claim and does not convert a contract action into a tort claim exposing the breaching party to liability for punitive damages.")

[425] *Carvel Corp. v. Noonan*, 350 F.3d 6, 15 (2d Cir. 2003).

[426] *Id.* (citing *Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc.*, 225 F.3d 876, 886–87 (7th Cir.2000) (applying Illinois law) (tort actionable, but not proven); *Brock v. Baskin Robbins, USA, Co.*, 2003 WL 21309428, at *6–*7 (E.D.Tex. Jan.17, 2003) (same); *Burger King Corp. v. Ashland Equities, Inc.*, 217 F.Supp.2d 1266, 1279–80 (S.D.Fla.2002) (same); *Dunkin' Donuts v. Shree Dev Donut LLC*, 152 F.Supp.2d 675, 678–79 (E.D.Pa.2002) (tort counterclaim survived summary judgment); *Harford Donuts, Inc. v. Dunkin' Donuts, Inc.*, No. Civ. L–98–3668, 2001 WL 403473, at *4–*5 (D.Md. April 10, 2001); *Clark v. America's Favorite Chicken Co.*, 916 F.Supp. 586, 594–95 (E.D.La.1996)). *See also* W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 9:37 (2013).

[427] *See, e.g. Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc.*, 225 F.3d 876, 886-87 (7th Cir.2000) (applying Illinois law) (tort actionable, but not proven); *Brock v. Baskin Robbins, USA, Co*., No. 5:99-CV-274, 2003 WL 21309428, at *6-*7 (E.D.Tex. Jan.17, 2003) (same); *Burger King Corp. v. Ashland Equities, Inc.*, 217 F.Supp.2d 1266, 1279-80 (S.D.Fla.2002) (same); *Dunkin' Donuts v. Shree Dev Donut LLC*, 152 F.Supp.2d 675, 678-79 (E.D.Pa.2002) (tort counterclaim survived summary judgment); *Harford Donuts, Inc. v. Dunkin' Donuts, Inc.*, No. Civ. L-98-3668, 2001 WL 403473, at *4-*5 (D.Md. April 10, 2001) (tort actionable, but not proven).

[428] *Carvel Corp. v. Noonan*, 350 F.3d 6 (2d Cir. 2003).

distribution of its products through supermarkets unlawfully interfered with franchisees' relationships with their customers.[429] In a detailed analysis, the Circuit Court examined several issues related to the tortious interference doctrine.[430] The court noted that "if a party to a contract does violate an 'independent duty,' it may be liable in tort," and a breach of a contract may constitute a breach of an independent duty in tort "if the defendant goes beyond a mere breach of the contract and acts in such a way that a trier of fact could infer that it willfully intended to harm the plaintiff."[431] However, the court was not able to conclude whether the franchisor's act could meet the "wrongful means"[432] requirement.[433] Consequently, the Court certified the question to the New York Court of Appeals.[434]

---

[429] *Id*. at 8.

[430] *Id*. at 15-22.

[431] *Id*. at 16 ("Absent some reason to think that New York courts would treat franchise agreements differently than other contracts, we would apply the general "independent duty" rule to the specific case of the franchisor-franchisee relationship.")

[432] Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract. *Treppel v. Biovail Corp.*, 2005 WL 427538 (S.D.N.Y. 2005*); In Touch Concepts, Inc. v. Cellco Partn.*, 13 CIV. 1419 PKC, 2013 WL 2455923 (S.D.N.Y. 2013).

[433] *Carvel Corp. v. Noonan*, 350 F.3d 6, 22 (2d Cir. 2003) *certified question answered,* 818 N.E.2d 1100 (N.Y. 2004) ("Although Carvel exerted economic pressure on its franchisees, it is unclear whether, under New York law, that pressure falls within the 'degrees' of pressure that constitute tortious conduct. We ask the New York Court of Appeals to clarify the issue.")

[434] *Id*. at 23:

> "Under applicable standards for a claim of tortious interference with prospective economic relations, did the evidence of the franchisor's conduct in each of the three trials on review in these consolidated appeals permit a jury finding in favor of the franchisee? In answering this question, the Court of Appeals might wish to inform us whether, in the context of a tortious interference claim, New York would view the franchisor in this case as a competitor of the franchisees for

The New York Court of Appeals answered the certified question in the negative.[435] The court stated that interference with prospective business relations, contrary to an existing contract, requires that defendants acted with a certain degree of culpability.[436] The court, then, explained that "as a general rule, the defendant's conduct must amount to a crime or an independent tort" because "[c]onduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other non-binding economic relations."[437] Finally, the court decided that the franchisees could not recover because the franchisor's conduct was not criminal or independently tortious.[438]

In concurring opinion, however, Judge Victoria Graffeo criticized the majority decision for being "too restrictive."[439] She argued that as franchisors are not true market competitors of their franchisees within the meaning of the Restatement, the court should

---

purposes of determining the applicable standard, and, if so, whether a plaintiff must show that a competitor-defendant acted 'wrongfully' but show that a non-competitor defendant acted only 'improperly.'"

[435] *Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1103 (N.Y. 2004) ("Carvel's conduct, which did not constitute a crime or an independent tort and was not aimed solely at harming franchisees, was also not the sort of egregious wrongdoing that might support a tortious interference claim in the absence of such an independently unlawful act or evil motive.")

[436] *Id.* (citing *Guard–Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445 (1980)).

[437] *Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1103 (N.Y. 2004).

[438] *Id*.

[439] *Id*. at 1106.

have applied the section 766B (improper means standard) rather than employing the section 768 (wrongful means standard).[440]

New Mexico, for example, follows the same approach as Judge Graffeo. Accordingly, courts in New Mexico recognize the tort of interference with prospective contractual relations in franchise settings, and apply "improper means" standard under the Section 766B.[441] Similarly, Kansas law allows a claim for tortious interference with prospective business advantage even when the alleged act of misconduct is a franchisor's breach of a franchise contract.[442] In such a case, Kansas Courts require simply the franchisee to allege in addition that the breach was committed upon the motive of (improperly) interfering with the prospective business relationships of the franchisee and third parties.[443]

In sum, under the majority view, a franchisor may be liable for tortious interference, if it uses wrongful or improper means to deal with a franchisee's customers or takes unfair advantage of its superior position, despite the fact that there exists a franchise contract between the parties.[444] Accordingly, the tort doctrine may sometimes help franchisees to recover damages not covered by pure contract doctrines.

---

[440] *Id*. at 1107 ("[r]ather, for the purposes of this claim, Carvel and its franchisees were more akin to economic partners, whose relationship contemplated cooperation, mutual promotion of Carvel products and a joint interest in maintaining consumer loyalty.")

[441] *See e.g. Knight v. Snap-On Tools Corp.*, 3 F.3d 1398, 1401 (10th Cir. 1993).

[442] *Pizza Mgt., Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1162 (D. Kan. 1990) *judgment entered,* 86-1664-C, 1990 WL 112967 (D. Kan. 1990).

[443] *Pizza Mgt., Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1161 (D. Kan. 1990) *judgment entered,* 86-1664-C, 1990 WL 112967 (D. Kan. 1990).

[444] *See e.g. American Business Interiors, Inc. v. Haworth, Inc*., 798 F.2d 1135 (8th Cir. 1986); *Conoco Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 1985-2 Trade Cas. (CCH) ¶

3. Unjust Enrichment

The doctrine of unjust enrichment is another weapon in the business-litigation arsenal of terminated franchisees to potentially recover their local goodwill. According to this doctrine, a person who is unjustly enriched at the expense of another is required to make restitution.[445] Restitution is measured in terms of the benefit one party conferred to another.[446] Furthermore, while a person may be unjustly enriched where he receives property or services, he can also be liable where he saves expense or loss.[447]

Franchisees who develop successful businesses in their territories typically claim in unjust enrichment cases that they spent substantial amount of resources over a period of time in promoting and developing their brand names, and that upon termination or non-renewal, franchisors seize their intangibles without fair/just compensation.[448] Thus, they claim restitution for the value of their local goodwill.

66823, 41 U.C.C. Rep. Serv. 1602 (8th Cir. 1985); *Consolidated Data Terminals v. Applied Digital Data Systems, Inc.*, 512 F. Supp. 581 (N.D. Cal. 1981). *Dupage Forklift Service, Inc. v. Machinery Distribution, Inc*., 1995 WL 623093 (N.D. Ill. 1995); *Lee v. GNC Franchising, Inc*., 73 Fed. Appx. 202 (9th Cir. 2003).

[445] Restatement (First) of Restitution § 1 (1937); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011); Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191 (1995).

[446] Restatement (First) of Restitution § 1 (1937) cmt. B. *See also e.g. Bright v. QSP, Inc.,* 20 F.3d 1300, 1311 (4th Cir.1994) (quoting *Dunlap v. Hinkle,* 173 W.Va. 423, 317 S.E.2d 508, 512 (1984)).

[447] *Id.*

[448] *See e.g. King of Prussia Equip. Corp. v. Power Curbers, Inc.*, 117 F. App'x 173, 176 (3d Cir. 2004); *LaPosta Oldsmobile, Inc. v. Gen. Motors Corp.*, 426 F. Supp. 2d 346, 356 (N.D.W. Va. 2006); *Cal Distributor, Inc. v. Cadbury Schweppes Americas Beverages, Inc.*, 06 CIV.0496 RMB JCF, 2007 WL 54534 (S.D.N.Y. 2007).

Most of the time, however, franchisees cannot prevail on their claims since their relationships are governed by an explicit franchise agreement.[449] U.S. courts repeatedly decided that unjust enrichment is not available where an express contract governs the relationship between two parties.[450] Courts have, often, observed that under most franchise contracts, franchisees are required to develop goodwill, and compensation thereof cannot be implied.[451] In other words, a franchisee's recovery is limited to the amount expressly provided in the franchisee agreement.[452]

For example, in *Tractor and Farm Supply, Inc. v. Ford New Holland, Inc.*, the court held that a claim for unjust enrichment for developing goodwill could not withstand summary judgment because the contract governs the relationship.[453] In this case, the franchisee alleged that the franchisor was unjustly enriched when it failed to renew the franchise agreement "without adequately compensating [the franchisee] for the valuable

---

[449] *See generally* W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 8:39 (2013).

[450] *See e.g. Hedging Concepts, Inc. v. First Alliance Mortg. Co.*, 49 Cal. Rptr. 2d 191, 197 (Cal. App. 2d Dist. 1996); *Stadium Chrysler Jeep, L.L.C. v. DaimlerChrysler Motors Co., LLC*, 324 F. Supp. 2d 587, 595 (D.N.J. 2004); *United Magazine Co. v. Murdoch Magazines Distribution, Inc.*, 146 F. Supp. 2d 385, 415 (S.D.N.Y. 2001) (citing *Patterson v. Village of Chesapeake,* No. 95CA19, 1996 WL 668831, at *2 (Ohio Ct.App. Nov. 15, 1996) ("Where there is an express contract between the parties, none can be implied.... That is to say that a theory of quasi contract or unjust enrichment is not available where there exists an express contract between the parties.")).

[451] *See e.g. King of Prussia Equip. Corp. v. Power Curbers, Inc.*, 117 F. App'x 173, 176 (3d Cir. 2004); *Tractor & Farm Supply, Inc. v. Ford New Holland, Inc.*, 898 F. Supp. 1198, 1206 (W.D. Ky. 1995).

[452] Consulting Agrmts Deskbook § 7:9 (WL 2014).

[453] 898 F. Supp. 1198, 1206 (W.D. Ky. 1995).

good will that [the franchisee] generated in [its] trade area."[454] The court, however, decided that the appropriation of franchisee's goodwill is not unjust since developing goodwill was part of the performance required in the franchise agreement.[455] Similarly, in *Fleetwood v. Stanley Steemer International, Inc.*, the court decided that the franchisor was not unjustly enriched by terminating its franchisee since the franchise contract specifically provided that the franchisor owns all associated goodwill.[456] The court described the franchisor's act as mere exercise of rights expressly granted by the contract.[457]

Nevertheless, some franchisees have successfully asserted their claim for unjust enrichment despite existing franchise contracts.[458] For example in *LaPosta Oldsmobile, Inc. v. Gen. Motors Corp*, the court decided that an automobile dealer was entitled to seek restitution for the benefits conferred to an automobile manufacturer.[459] In *LaPosta*, the manufacturer decided to discontinue a product line, and terminated the dealership.[460] The dealer, however, brought action against the manufacturer for, in part, unjust enrichment arguing that the elimination of the product line allowed the manufacturer to

---

[454] *Id.*

[455] *Id.*

[456] 725 F. Supp. 2d 1258, 1273 (E.D. Wash. 2010) *aff'd sub nom. Fleetwood v. Stanley Steemer Intern.*, 446 Fed. Appx. 868 (9th Cir. 2011) (unpublished).

[457] *Id.*

[458] *See e.g. LaPosta Oldsmobile, Inc. v. Gen. Motors Corp.*, 426 F. Supp. 2d 346 (N.D.W. Va. 2006); *Infra-Pak (Dallas), Inc. v. Carlson Stapler & Shippers Supply, Inc.,* 803 F.2d 862, 864-65 (5th Cir. 1986); *Hershey Foods, Inc. v. Ralph Chapek, Inc.,* 828 F.2d 989, 992, 999-1000 (3d Cir. 1987); *see also* 26 Williston on Contracts § 68:1 (4th ed.).

[459] 426 F. Supp. 2d 346 (N.D.W. Va. 2006).

[460] *Id.* at 348.

misappropriate the dealer's goodwill without fair compensation.[461] The dealer maintained that "it has spent substantial time and resources over the last thirty-two years and has expended valuable time and money promoting and developing the [brand name]."[462] The manufacturer moved to dismiss, arguing that the dealer's claim fails because an express contract governs the subject matter of the dispute.[463] The manufacturer, further, alleged that the agreement, in essence, obliged the dealer to invest time and effort to improve the brand name, and generate goodwill.[464] Nevertheless, the court denied the manufacturer's motion, and held the claim for unjust enrichment is not precluded because "the express terms of the Dealer Agreement do not cover the identical subject matter alleged in [the dealer's] complaint."[465] Similarly, in *Infra-Pak, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, a manufacturer was found liable under the unjust enrichment theory, where the manufacturer sold its products directly to the distributor's customers.[466] The manufacturer argued that the distribution agreement required the distributor to "use its best efforts to promote, market, and sell [the manufacturer's] products."[467] The trial court held that the distributor was entitled to a commission on the direct sale by the manufacturer, and the court of appeals affirmed the decision.[468] The appellate court

---

[461] *LaPosta Oldsmobile, Inc.*, 426 F. Supp. 2d at 356.

[462] *Id*.

[463] *Id*.

[464] *Id*.

[465] *LaPosta Oldsmobile, Inc.*, 426 F. Supp. 2d at 356.

[466] 803 F.2d 862 (5th Cir. 1986).

[467] *Id*. at 865.

[468] *Id*.

reasoned that the distributor's effort to find customers for the manufacturer "was extra work for which the distributorship agreement made no provision."[469]

In sum, a franchisee will not receive restitution "even if the franchisee spent extra time and money on the franchised business than anticipated" if generating goodwill falls within the scope of what the parties had expressly agreed upon.[470] Whether or to what extent investment in goodwill falls within the scope of the franchise agreement will be the main issue in such cases. Thus, although the doctrine is potentially capable of providing recovery for franchisees' loss of goodwill, it cannot override a well-drafted franchise contract.

4. Missouri Rule – The Recoupment Doctrine

In some states, courts apply an unusual equitable doctrine in order to avoid potentially unjust consequences of sudden franchise terminations.[471] Essentially, "the recoupment doctrine", also known as "Missouri Rule", creates an exception to the general rule that termination can occur at any time where the agreement is at will.[472] Under the

---

[469] *Id*. at 864.

[470] Consulting Agrmts Deskbook § 7:9 (WL 2014); *see also Hoff Supply Co. v. Allen-Bradley Co., Inc.*, 768 F. Supp. 132, 136 (M.D. Pa. 1991) ("the quality of [the franchisee]'s performance under the agreements, no matter how impressive, can not support a claim for unjust enrichment.")

[471] See *Ag-Chem Equip. Co., Inc. v. Hahn, Inc.*, 480 F.2d 482, 486 (8th Cir. 1973); Gellhorn, *Limitations on Contract Termination Rights–Franchise Cancellations*, 1967 Duke L.J. 465, 479-84.

[472] *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 918 (Mo. App. W. Dist. 1991); *see generally* Beata Krakus, John R.F. Baer, *Do Franchise Agreements Without Formal Expiration Dates Continue in Perpetuity?*, 28 Franchise L.J. 206 (2009); Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*,

doctrine, the franchisor must allow the at-will franchise relationship to continue for a reasonable period of time if a franchisee makes substantial investment into a franchise system.[473] Reasonableness in such a case is "measured by the length of time reasonably necessary for a [franchisee] to recoup its investment."[474]

The recoupment doctrine applies only to terminable-at-will agreements.[475] Courts reasoned that at-will franchise contracts leave franchisees "unprotected in the event of a sudden termination without just cause."[476] This is particularly true once a franchisee spends significant amount of time, effort, and money to build up a successful business.[477]

Under the recoupment doctrine, franchisees can only recover their un-recouped investment. Whether a franchisee had an adequate opportunity to recoup its investment is

---

62 UMKC L. Rev. 471, 484 (1994); W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 10:13 (2013); 19 Williston on Contracts § 54:54 (4th ed.).

[473] *See e.g. Schultz v. Onan Corp.*, 737 F.2d 339, 346 (3d Cir. 1984); *McGinnis Piano & Organ Co. v. Yamaha Int'l Corp.,* 480 F.2d 474, 479 (8th Cir.1973); Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 484 (1994).

[474] *Schultz v. Onan Corp.*, 737 F.2d 339, 346 (3d Cir. 1984) (A reasonable notice period prior to termination is also required.); *Ag-Chem Equip. Co., Inc. v. Hahn, Inc.*, 480 F.2d 482, 486-87 (8th Cir. 1973) ("reasonable[-ness]" varies with the circumstances of each case"); *McGinnis Piano & Organ Co. v. Yamaha Intern. Corp.*, 480 F.2d 474, 479 (8th Cir. 1973) ("Reasonable notice is that period of time necessary to close out the franchise and minimize losses.")

[475] *See e.g. Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 919 (Mo. App. W. Dist. 1991) (citing *Ag–Chem Equip. Co., Inc. v. Hahn, Inc.*, 480 F.2d 482, 487 (8th Cir.1973)); *Schultz v. Onan Corp.*, 737 F.2d 339, 347 (3d Cir. 1984) (provision allowing termination for any reason at any time upon sixty days notice rendered the agreement an at-will contract within the meaning of the recoupment doctrine.)

[476] *Schultz v. Onan Corp.*, 737 F.2d 339, 347 (3d Cir. 1984); *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 919 (Mo. App. W. Dist. 1991).

[477] *Armstrong Bus. Services, Inc. v. H & R Block*, 96 S.W.3d 867, 878 (Mo. Ct. App. 2002).

a question of fact.[478] Un-recouped investment is defined as "the initial or continuing investment required of the franchisee, reduced to the extent that profits were earned as a fruit of the investment."[479] Thus, lost future profits are not recoverable under the theory because the doctrine aims only to restore the franchisee's sunk-investment.[480]

D. Summary

After recognizing that "the inherent conflict between franchisor and franchisee cannot be addressed solely by market forces," lawmakers decided to regulate franchising.[481] First, they tried to fix the problem with disclosure requirements. Congress, accordingly, enacted the "Franchise Rule" that requires the disclosure of material information necessary for the franchisee to make an informed business decision. Disclosure requirements, however, did not stop the problems. Hence, Congress enacted industry specific "relationship laws" that regulate gasoline service stations and

---

[478] Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 484 (1994); *see also* W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 10:13 (2013) ("The length of time permitted for recoupment varies in the circumstances and has ranged from one to three years.")

[479] *Wright-Moore Corp. v. Ricoh Corp.*, 794 F. Supp. 844, 858 (N.D. Ind. 1991) *aff'd,* 980 F.2d 432 (7th Cir. 1992) (citing *Schultz v. Onan Corp.*, 737 F.2d 339, 348 (3d Cir. 1984)).

[480] *See Schultz v. Onan Corp.*, 737 F.2d 339, 348-49 (3d Cir. 1984) (The court distinguished this equitable award from damages awarded at law for the going value of the business); *McGinnis Piano & Organ Co. v. Yamaha Intern. Corp.*, 480 F.2d 474, 480 (8th Cir. 1973); *see also* Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 484 (1994); *But see Gen. Tire & Rubber Co. v. Distributors, Inc.*, 117 S.E.2d 479, 489 (N.C. 1960).

[481] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 330 (June 24, 1999) (letter from Michael Einbinder, Rosen, Einbinder, & Dunn, P.C.) ("The inherent conflict between franchisor and franchisee cannot be addressed solely by market forces.").

automobile dealerships. Although attempted several times, Congress could not pass a generally applicable franchise relationship law so far. Yet, a number of states have enacted franchise relationship laws that govern all franchise relationships.

The relationship laws restrict franchisors' contractual rights – especially, termination and nonrenewal – in order to level the playing field. Under this approach, franchisees are allowed to keep their businesses – thus their local goodwill – as long as they comply with their contracts.

However, franchisors and some commentators have been arguing that this approach does not level the playing filed but tip it in favor of franchisees. They claim that relationship laws reduce franchisors' controlling power significantly, and cause franchisee opportunism. Moreover, ambiguities regarding the assessment of damages under these laws create unpredictability in the franchise industry. The proposed solution in Chapter 4 addresses these issues.

Meanwhile, the majority of the states still do not have franchise relationship laws. In those states, common law governs the franchise relationship, and courts try to protect franchisees with traditional principles. While courts incline to stretch traditional doctrines in order to protect franchisees against opportunism, existing common law principles are often incapable of superseding the express provisions of the franchise contract.

CHAPTER 3 THE EUROPEAN GOODWILL RECOUPMENT DOCTRINE

A. Overview

As discussed in Chapter 2, the U.S. legal system provides some tools that may allow an American franchisee to protect its local goodwill from an opportunistic franchisor. These tools[482], however, have been criticized by franchisees and franchisee-advocates for their inadequacy in leveling the play field.[483] Conversely, franchisors and franchisor-advocates argue that existing protections – in particular, the state relationship laws – are harmful for the franchising sector as they restrict franchisors' controlling power, and encourage franchisee-opportunism.[484] Hence, under the circumstances, it seems that the U.S. franchising sector needs a different theory that would satisfy both parties' demands. Accordingly, this work suggests that the so-called "goodwill recoupment doctrine"[485] from the European legal system would address the concerns of both franchisors and franchisees. Under the doctrine, the franchisor would retain its termination power but required to compensate the franchisee for its local goodwill.[486] Therefore, the doctrine could essentially protect franchisees' investment in goodwill without limiting franchisors' monitoring power.

---

[482] Except a small number of state relationship laws that include strong pro-franchisee provisions.

[483] More on this discussion *infra* Ch.4(B)(1).

[484] More on this discussion *infra* Ch.4(B)(1)(a)((2)).

[485] Throughout this chapter "goodwill recoupment" refers to the doctrine in general; "goodwill indemnity" refers to the German system; and "goodwill compensation" refers to the French system.

[486] The advantages of the goodwill recoupment doctrine compare to the existing regulatory approach are discussed in Chapter 4.

The EU[487] codified the recoupment doctrine in a Council Directive.[488] Although the Directive is designed exclusively for commercial agency relationships, the goodwill recoupment provision is potentially applicable to franchise relationships since both arrangements have many characteristics in common.[489] In general, commercial agents use their skills and efforts to maintain and/or increase the volume of business for their principals.[490] While commercial agents solicit or transact business on behalf of and in the name of their principals, they are self-employed businesspersons. Similar to franchisees, commercial agents' financial future often depends strongly on their principals. Therefore, like franchisees, they are vulnerable to opportunism. In fact, a number of EU member states have already chosen to analogously apply the recoupment provision to franchise contracts.[491] Furthermore, EU members have been preparing a harmonized civil code that will most likely extend the recoupment provision explicitly to franchise, dealership, and distribution contracts.[492]

In this chapter, the first part describes briefly the European Commercial Agency Directive. The second part explains the goodwill recoupment doctrine. Finally, the last

---

[487] Then the European Communities (EC).

[488] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. Hereinafter "the Directive."

[489] *See generally* Mansur Pour Rafsendjani, *Der Goodwill-Ausgleichsanspruch des Franchisenehmers ein Vergleich des deutschen, französischen und US-amerikanischen Franchiserechts* (Frankfurt am Main: Lang 1998); Hubertus Thum, *Der Ausgleichsanspruch des Franchisenehmers: ein europäischer Rechtsvergleich* (Wien: Verlag Österreich 2012).

[490] *See e.g.* Martijn Willem Hesselink, *Commercial agency, franchise and distribution contracts (PEL CAFDC)* 157 (Oxford: Oxford University Press 2006).

[491] *Infra* Ch.3(D)(1).

[492] *Infra* Ch.3(D)(2).

section discusses the analogues application of the recoupment doctrine to franchise relationships.

B. EC Directive 653/86 on Self-employed Commercial Agents

1. In General

The commercial agency relationship has always been an important marketing and distribution arrangement in Europe.[493] Accordingly, in 1986, the European Commission enacted the Commercial Agency Directive to harmonize the substantive laws of the Member States relating to self-employed commercial agents.[494] The measures established by the Directive are intended to "reduce the differences affecting the conditions of competition, and to ensure a minimum level of social protection for commercial agents."[495]

The Directive is binding upon the Member States of the EU. It governs the relationship between commercial agents and their principals, and lays down default rules regarding the rights and obligations of the parties such as remuneration, term and termination of the contract. More importantly, the Directive requires each Member State

---

[493] A recent study shows that in Germany alone, Commercial Agencies generate a business turnover of approx. 175 billion Euro annually. The market share of Commercial Agents is estimated to be around 30% of the total domestic commodity flow. CDH, *Facts and Figures*, http://en.cdh.de/handelsvertreter/daten-fakten (last accessed June 4, 2014).

[494] Council Directive 86/653/EEC Preamble. *See also* Robert D. Kullgren, *Commercial Agency Law in Europe: Representing the Michigan Principal*, 69 Mich. B.J. 654 (July 1990); Küstner/Thume /Thume, S. 794 Rdnr. 2335; E/B/J/ W. Hakenberg Vor § 84 Anh. I Rdnr. 1.

[495] *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc*., Case C-381/98, 2000 E.C.R. I-9305, para 50. *See also* Council Directive 86/653/EEC Preamble; Wesphal, Diss., S. 33; Hagemeister, Diss., S. 13.

to implement national laws to ensure that, after termination of the contract, every commercial agent receives a fair level of payment for loss of goodwill.

2. Substance of the Directive

The Directive defines the commercial agent as "a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, … or to negotiate and conclude such transactions on behalf of and in the name of that principal."[496] In accordance with the definition, commercial agents must carry their own businesses, and act as businessmen in the market with the intention of earning money. Moreover, commercial agents must hold "continuing authority" to negotiate or conclude transactions on behalf of principals.[497] "Continuing authority" in this context often results in a long-term relationship, and highlights the relational nature of the commercial agency contract.

The Directive, then, identifies the rights and duties of the parties. Accordingly, a commercial agent is obliged to "look after his principal's interests and act dutifully and in good faith."[498] In particular, a commercial agent must follow the principal's instructions, report all the necessary information to the principal, and "make proper effort" to negotiate and conclude the transactions.[499] The principal has corresponding obligations under the Directive. S/he must also act in good faith, and "inform the commercial agent

---

[496] Council Directive 86/653/EEC Art. 1(2).

[497] *Id.*

[498] Art. 3(1).

[499] Art. 3(2)

within a reasonable period of his acceptance [or] refusal" of a transaction solicited by the agent.[500]

The Directive includes a complex remuneration scheme. In general, commercial agents are entitled to commissions on commercial transactions concluded "as a result of their effort."[501] Moreover, an agent entrusted with a specific area or group of customers receive payments also for transactions not resulting from his effort, if such transactions have been entered into with customers belonging to that area or group.[502]

Under the Directive, either party can terminate a contract of an indefinite duration by giving the other party notice.[503] The period of notice is one month for the first year of the contract, two months for the second year, and minimum three months for the third and subsequent years.[504] Furthermore, a "contract for a fixed period which continues to be performed by both parties after that period has expired" will be considered as an agency contract for an indefinite period.[505] The Directive, also, allows the Member States to provide the right for immediate termination of the agency contract for breach or "exceptional circumstances."[506]

---

[500] Art. 4(1-3).

[501] Art. 7(1) ("(a) where the transaction has been concluded as a result of his action; or (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.")

[502] Art. 7(2).

[503] Art. 15.

[504] Art. 15(2-4).

[505] Art. 14.

[506] Art. 16. The Directive did not define "exceptional circumstances."

Most importantly, the Directive formulates a detailed framework that exclusively deals with the problem of goodwill allocation in commercial agency relationships. Article 17 of the Directive requires Member States to take the measures necessary to ensure that the commercial agent is, after cessation of the agency contract, "indemnified" or "compensated" for its goodwill. Fundamentally, the Directive forces the Member States to institute "a mechanism for providing reparation to the commercial agent after termination of the contract."[507]

The Member States are allowed to choose between the indemnity system and the compensation system.[508] Under the indemnity system, the agent is entitled, upon cessation of the contract, to payment of an indemnity "if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers."[509] Additionally, the payment of the indemnity should be "equitable having regard to all the circumstances."[510] Under the compensation system, the agent is entitled to compensation for the damages he presumably suffers as a result of the termination.[511] Such damage is deemed to occur particularly when the termination takes place in circumstances: "(a) depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst

---

[507] *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*, Case C-381/98, 2000 E.C.R. I-9305.

[508] Art. 17(1). *See also* EU Report COM(96) 364 final, p. 1.

[509] Art. 17(2)(a).

[510] *Id*.

[511] Art. 17(3).

providing the principal with substantial benefits linked to the commercial agent's activities, (b) and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice."[512]

In principle, both "indemnity" and "compensation" systems serve the same purpose, compensating the commercial agent for his effort to generate goodwill during the contractual relationship. Originally, the Directive was planned to include only the German system of indemnity on contract termination. France, however, blocked the proposal. Finally, the EC included the French system of "compensation" into the Directive, and allowed Member States to choose between two alternative systems.[513] The following section describes these two systems. The German system, however, is discussed in greater depth since the large majority of Member States opted for the indemnity.

C. The Goodwill Recoupment Doctrine

1. Indemnity – Under German Law

The indemnity system of the Directive was modeled on Article 89b of the German Commercial Code. The European Commission, therefore, acknowledged that German

[512] *Id*.

[513] EU Report COM(96) 364.

case law and practice offer "invaluable assistance to the Courts of other Member States when seeking to interpret the provisions of Article 17(2) of the Directive."[514]

a. Underlying Theory

In Germany, the regulation providing a goodwill indemnity for full-time, self-employed commercial agents was first adopted in 1953. At the time, the German Legislature had followed the models of the Swiss and Austrian regulations, yet deviated in significant points.[515] The regulation was amended in 1976 by expanding the indemnity provision over contract terminations by the agent caused by age or health conditions.[516] Furthermore, in 1990, Germany revised its regulation to comply with the Directive.[517] Nevertheless, until 2009, the goodwill indemnity norm remained unchanged in its main features.[518] Finally, in 2009, following a decision of the European Court of Justice,[519] the German legislature amended the goodwill provision, and improved significantly the position of commercial agents.

The dogmatic classification and justification of the goodwill indemnity remain controversial in German academia.[520] The law presumes that the commercial agent deserves an additional payment for creating an established clientele from which the

---

[514] *Id*.

[515] Government Explanation for the Draft Bill, BT-Drucks. 1/3856 S. 34.

[516] Saenger, DB 2000 p. 130; Sonnenschein in Heymann, HGB, § 89b Rdnr. 2.

[517] Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 3.

[518] Ankele, DB 1989 S. 2212; Kindler, RIW 1990 S. 361; Künstner/von Manteuffel, BB 1990 S. 297.

[519] *Semen v. Deutsche Tamoil*, Case C 348/07 ECJ 2009.

[520] Claus-Wilhelm Canaris, Handelsrecht, S. 347 Rdnr. 98 (23d ed., Muenchen 2000).

principal continues to receive substantial benefits after the cessation of the agency contract.[521] In other words, commissions during the duration of the contract do not typically reflect the value of the goodwill generated for the principal.[522] Hence, the generally accepted view considers the indemnity an "entitlement to remuneration" for the prospective transactions that would be traced back to the agent's effort.[523] However, indemnity is not a pure remuneration, such as commission.[524] The German Legislature noted that the indemnity regulation also aims to improve the economic status of commercial agents, and provide social protection for them.[525] Consequently, the entitlement and the amount of the indemnity – at least partially – depend on consideration of equity.[526]

b. Requirements of the Goodwill Indemnity

---

[521] BGH, II ZR 318/56, BB 528 (1957); BGH, VII ZR 123/62, BB 699 (1964). For the foundation of HGB § 89b *see also*; Government Explanation, BT-Drucks. 1/3856 S. 33; Hans Hermann Eberstein, Der Handelsvertretervertrag, 96 (Heidelber 1999); Küstner/Thume /Küstner, Book II S. 7 Rdnr. 13 et seqq.; Brüggemann in Großkomm. HGB § 89b Rdnr. 2 et seqq.; Sonnenschein in Heymann, HGB, § 89b Rdnr. 3 et seq.; Baumbach/Hopt/ Hopt, § 89b Rdnr. 2.

[522] COM(96) 364 final p. 1.

[523] Küstner/Thume /Küstner, Book II S. 18 Rdnr. 47.

[524] BGH, II ZR 318/56, BB 528 (1957); Sonnenschein in Heymann, HGB, § 89b Rdnr. 4; Küstner/Thume /Küstner, Book II S. 18 Rdnr. 48; Baumbach/Hopt/ Hopt, § 89b Rdnr. 3.

[525] BVerfG, B. v. 22.8.1995 – 1 BvR 1624/92, NJW 1996 S. 381; Begr. zum RegE, BT-Drucks. 1/3856 S. 33 ff.; Canaris, Handelsrecht, S. 349 Rdnr. 104; Saenger, Der Ausgleichsanspruch des Handelsvertreters bei Eigenkündigung, S. 13; *but see* Martinek, ZHR 161 (1997) S. 74.

[526] Baumbach/Hopt/ Hopt, § 89b Rdnr. 3; Küstner/Thume /Küstner, Book II S. 19 Rdnr. 48.

Article 17(2)(a) of the Directive, which corresponds to § 89 b (1) (Nr. 1-2) HGB, lists the requirements of the goodwill indemnity. Accordingly, (a) after the contract comes to an end, the commercial agent can demand reasonable indemnity from its principal if (b) the principal continues to derive substantial benefits from business relations with new customers solicited by the commercial agent, and (c) the payment is equitable after consideration of all the circumstances.

(1) Cessation of the contract

The goodwill indemnity becomes due with the cessation of the contractual relationship.[527] It is not important why the relationship has ended or how long it has lasted.[528] The reason of the contract ending will be taken into consideration in the exclusion determination of the claim[529] and/or within the scope of the fairness test.[530] Partial termination of a uniform contractual relationship – such as cancelling a product line – is generally not accepted as termination.[531] This can be admissible, however, if the

---

[527] Article 17(1); HGB §89b (1) (1). *See e.g.* BGH, I ZR 269/88, NJW-RR 1991 S. 485; BGH, VIII ZR 92/96, NJW 1998 S. 75. *See generally* Baumbach/Hopt/ Hopt, § 89b Rdnr. 7; Ball in: Saenger/Schulze (Hrsg.), Der Ausgleichsanspruch des Handelsvertreters, S. 21.

[528] BGH, VII ZR 48/67, BGHZ 52 S. 12 ff.; LG Freiburg, 12 O 140/98, NJW-RR 2000 S. 110; *see also* Eberstein, Der Handelsvertretervertrag, S. 97; Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 43; Baumbach/Hopt/ Hopt, § 89b Rdnr. 7; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 28.

[529] Article 18; HGB § 89b (3).

[530] Article 17(2)(a); HGB § 89b (1) Nr. 2. *See e.g*. BGH, I ZR 122/86, NJW 1989 S. 36; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 28; Küstner/Thume /Thume, S. 711 Rdnr. 2067; Eberstein, Der Handelsvertretervertrag, S. 97.

[531] BGH, I ZR 175/75, BB 1977 S. 964 ff.; Sonnenschein in Heymann, HGB, § 89b Rdnr. 17; Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 47; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 50.

principal has reserved himself the partial termination, or the termination affected only one part of two independent and only formally joint contracts.[532] In such a case, the principal has to pay indemnity to the agent, if the partial ending changes the present contractual relationship substantially, such as significant district reduction,[533] or restriction of the customer circle[534] reserved to the commercial agent.[535]

The indemnity is also payable at the end of a fixed term contract.[536] It is, however, controversial whether the indemnity should be granted to a void (or voidable) contract.[537]

(2) Continuing Benefits for the Principal

The commercial agent is entitled to an indemnity if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers, and the principal continues to derive substantial benefits from the business with such customers.[538]

---

[532] BGH, I ZR 175/75, BB 1977 S. 964 ff.; *see also* Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 47; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 51; Baumbach/Hopt/ Hopt, § 89b Rdnr. 10.

[533] *See generally* Küstner/Thume /Küstner, Book II S. 125 Rdnr. 326 ff.

[534] *See* Küstner/Thume /Küstner, Book II S. 128 Rdnr. 333 ff.

[535] MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 52; Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 45; Baumbach/Hopt/ Hopt, § 89b Rdnr. 10; Küstner/Thume /Thume, S. 712 Rdnr. 2068; *but see* Sonnenschein in Heymann, HGB, § 89b Rdnr. 18.

[536] COM(96) 364 final p. 2.

[537] BGH, VIII ZR 95/94, BGHZ 129 S. 290 ff.; *see also* Küstner/Thume /Küstner, Book II p. 158 Rdnr. 419; Eberstein, Der Handelsvertretervertrag, S. 98; Ruß in HK-HGB, § 89b Rdnr. 10b; Herbert, BB 1997 p. 1321; Scherer, DB 1996 S. 1709; *but see* Sonnenschein in Heymann, HGB, § 89b Rdnr. 20.

[538] Article 17(2)(a); HGB § 89 b (1) (Nr. 1). *See also* Brüggemann in Großkomm. HGB § 89b Rdnr. 33; Baumbach/Hopt/ Hopt, § 89b Rdnr. 14; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 55 ff.

New customers are those with whom the principal did not establish a business connection before the involvement of the agent.[539] Business relations with existing customers remain, therefore, out of consideration, unless, the agent extends the relations with an old customer so substantially that it economically corresponds to the recruitment of a new customer.[540] Courts decide whether an expansion corresponds to the acquisition of a new customer on a case-by-case basis.[541] Old customers, whose business relations had broken off with the principal and restored by the commercial agent, are also considered as new customers.[542]

Moreover, new customers for the purpose of the indemnity norm are those whose recruitments can be traced back on the efforts of the commercial agent.[543] Even a small level of involvement is sufficient.[544] Under German jurisprudence, a business relation with a new customer exists if within a foreseeable period of time supplementary

---

[539] Sonnenschein in Heymann, HGB, § 89b Rdnr. 24; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 58.

[540] So-called intensified old customer. *See* HGB § 89 b (1) (2). *See also* BGH, VII ZR 23/70, BB 1971 S. 843; Sonnenschein in Heymann, HGB, § 89b Rdnr. 25; Baumbach/Hopt/ Hopt, § 89b Rdnr. 13; Küstner/Thume /Thume, Book II S. 178 Rdnr. 471 ff.

[541] An increase about 100% can be seen as an essential expansion: OLG Celle, 7 U 227/68, BB 1970 S. 227; OLG Nürnberg, 12 U 2405/86, not published; Brüggemann in Großkomm. HGB § 89b Rdnr. 36.

[542] MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 59; Küstner/Thume /Thume, Book II S. 172 Rdnr. 457 ff.; Eberstein, Der Handelsvertretervertrag, S. 104 ff.; Baumbach/Hopt/ Hopt, § 89b Rdnr. 12.

[543] Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 51; BGH, I ZR 78/78, NJW 1989 S. 1793; BGH, VIII ZR 7/95, NJW 1996 S. 2304; Canaris, Handelsrecht, S. 350 Rdnr. 107; Baumbach/Hopt/ Hopt, § 89b Rdnr. 14.

[544] COM(96) 364 final p. 2.

[re]orders are to be expected.[545] The existence of a business connection requires, therefore, certain continuity of the relationship with the principal; it, therefore, occurs only with "regular customers", not with "chance customers."[546]

Nonetheless, a payment of indemnity is required only if the principal continues to receive substantial benefits from the business connections after the cessation of the contractual relationship. The "benefit" does not necessarily mean actual commercial profits from subsequent transactions.[547] Rather, it is sufficient that the principal – regarding the established clientele and the expected subsequent transactions – has the opportunity to gain profits.[548] The requirement may also be fulfilled if the principal sells his business (or client list), and the new owner has the opportunity to use the clientele.[549] The agent, however, could not receive an indemnity if s/he continues to deal with her clientele.

Furthermore, only substantial benefits are taken into consideration. The substantiality depends on the magnitude and the expected continuity of the provided new businesses

---

[545] BGH, I ZR 104/82, BB 1985 S. 291; BGH, I ZR 32/89, NJW-RR 1991 S. 157; BGH, VIII ZR 150/96, NJW 1998 S. 68; *see also* Brüggemann in Großkomm. HGB § 89b Rdnr. 37; Küstner/Thume /Thume, Book II S. 182 Rdnr. 485.

[546] BGH, VIII ZR 58/00, WM 2003 S. 493; Baumbach/Hopt/ Hopt, § 89b Rdnr. 12; Ruß in HK-HGB, § 89b Rdnr. 17b.

[547] Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 60; Baumbach/Hopt/ Hopt, § 89b Rdnr. 15.

[548] Canaris, Handelsrecht, S. 350 Rdnr. 108; Küstner/Thume /Thume, S. 712 Rdnr. 2069 ff.

[549] COM(96) 364 final p. 2.

compared to old ones, not to the whole business of the principal.[550] A growth in overall sales is, therefore, not a condition. Accordingly, an advantage can still exist with a decrease of the overall turnover.[551]

(3) Fairness

The payment of the indemnity must be "equitable having regard to all the circumstances."[552] The fairness test matters not only for the calculation of the indemnity, but also as an independent material condition for the claim.[553] Thus, the principle of fairness may increase, reduce or eliminate the indemnity payment.[554]

However, the scope of "all the circumstances" is still controversial. Although some scholars argue that the test has to be limited to contract-related circumstances, this restriction is not to be inferred from the law.[555] Therefore, all circumstances in a specific case, which speak for or against the indemnity, should be included in the fairness

---

[550] BGH, I ZR 142/89, BB 1991 S. 1210; BGH, VIII ZR 150/96, NJW 1998 S. 68; BGH, VIII ZR 92/96, NJW 1998 S. 74; Sonnenschein in Heymann, HGB, § 89b Rdnr. 30; Baumbach/Hopt/ Hopt, § 89b Rdnr. 15.

[551] BGH, I ZR 2/89, NJW 1990 S. 2890; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 80.

[552] Article 17(2)(a); HGB § 89 b (1) (Nr. 2).

[553] BGH, I ZR 173/91, NJW-RR 1993 S. 221; Sonnenschein in Heymann, HGB, § 89b Rdnr. 42; Baumbach/Hopt/ Hopt, § 89b Rdnr. 31; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 98.

[554] BGH, I ZR 150/91, WM 1993 S. 1681 ff.; BGH, VIII ZR 22/96, NJW 1997 S. 655 ff.; BGH, VIII ZR 211/01, NJW 2003 S. 1244 ff.; Brüggemann in Großkomm. HGB § 89b Rdnr. 66; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 99; Küstner/Thume /Thume, Book II S. 380 Rdnr. 1060; E/B/J/ Löwisch § 89b Rdnr. 102; *see also* OLG Bremen, 2 U 58/64, BB 1966 S. 877; Westphal in: Saenger/Schulze (Hrsg.), Der Ausgleichsanspruch des Handelsvertreters, S. 34 ff.

[555] *See* Brüggemann in Großkomm. HGB § 89b Rdnr. 67; Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 75; Baumbach/Hopt/ Hopt, § 89b Rdnr. 33; Ruß in HK-HGB, § 89b Rdnr. 27.

determination, even purely personal circumstances such as social and financial position of the involved parties.[556]

c. Calculation of the indemnity

The indemnity system has a very detailed calculation method that leads to a more predictable outcome.[557]

First of all, the number of new customers and the increased volume of business with existing customers are determined. After identifying these customers, the gross commission on them, including any fixed remuneration – is calculated for the last 12 months of the agency contract.

Second, the likely future duration of the business connections between the principal and the new clientele is forecasted.[558] The forecast covers only a reasonable period of time, and require case-by-case analysis.[559] The market conditions at the time of termination, for example, play an important role in this assessment.[560] In practice, the usual period is often 2-3 years, but it can be as much as 5 years.[561] Essentially, though, the reasonable period of time represents the time frame where the potential transactions

---

[556] BGH, VII ZR 240/63, BGHZ 43 S. 162 ff.; BGH, VIII ZR 211/01, NJW 2003 S. 1244 ff.; Eberstein, Der Handelsvertretervertrag, S. 113; Sonnenschein in Heymann, HGB, § 89b Rdnr. 43; Canaris, Handelsrecht, S. 351 Rdnr. 111 ff.; E/B/J/ Löwisch § 89b Rdnr. 104.

[557] COM(96) 364 final p. 5.

[558] BGH, I ZR 173/91, NJW-RR 1993 S. 221; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 81.

[559] MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 82.

[560] Brüggemann in Großkomm. HGB § 89b Rdnr. 45; Küstner/Thume /Thume, S. 713 Rdnr. 2074; E/B/J/ Löwisch § 89b Rdnr. 29 ff.

[561] COM(96) 364 final p. 3.

with the new customers could still be – at least partially – traced back to the terminated agent's effort.

Third, the rate of customer-migration is reflected. Customer-migration in this context means that some customers will be lost as they naturally move away.[562] The rate of migration is measured as a percentage, and depends on the agent's business sector.[563]

Fourth, because the agent would have received the money otherwise distributed over a longer period of time, the total amount is reduced to the actual cash value.[564]

Fifth, although this rarely happens in practice, the amount is adjusted for reasons of equity. In such a case, the following factors would be considered: whether the agent is working for other principals; the fault of the agent; the principal financial situation; payment of pension contribution by the principal; the existence of non-compete clause.[565]

Lastly, the total amount should not exceed the average of the last five years of the annual commissions or any other annual reimbursement. If the contractual relationship have lasted less than 5 years, the maximum indemnity is calculated on the average for the period in question. Average annual commissions represent not only transactions with new customers, but the agent's overall commissions. Although the maximum limit is merely a

---

[562] COM(96) 364 final p. 3.

[563] Although the rate of migration varies, the average rate is considered as 38%. COM(96) 364 final p. 3.

[564] BGH, I ZR 269/88, BB 1991 S. 368 ff.; Baumbach/Hopt/ Hopt, § 89b Rdnr. 48; E/B/J/ Löwisch § 89b Rdnr. 128.

[565] COM(96) 364 final p. 3.

final adjuster, in some Member States, it is simply used as a rapid way of measurement.[566]

The calculation method is illustrated in the following example:

Commission on new customers and/or intensified customers over last 12 months of agency		$100.000
Anticipated duration of benefits is 3 years with 20% migration rate		
Year 1	$100.000 – $20.000 ➔	$80.000
Year 2	$80.000 – $16.000 ➔	$64.000
Year 3	$64.000 – $12.800 ➔	$51.200
Total lost commission		$195.200
Correction to present value with 10%. [This amount is the actual indemnity.]		$175.680
The actual indemnity might be adjusted for reasons of equity. [This rarely happens in practice]		– / +
A final reduction should be made if the amount exceeds the statutory ceiling. [The agent's average annual remuneration over the preceding five years.]		–

[566] BGH, VIII ZR 22/96, NJW 1997 S. 656; Sonnenschein in Heymann, HGB, § 89b Rdnr. 73.

d. Exclusion of the Indemnity Claim

In three situations the indemnity is excluded: (a) termination of the relationship by the agent, (b) good cause termination by the principal, and (c) third party assignment.[567] These exclusion requirements are interpreted very narrowly because they would still be taken into consideration in the fairness evaluation.[568]

(1) Termination by the Commercial Agent

A commercial agent cannot receive indemnity, if s/he terminates the contractual relationship.[569] So, it is irrelevant whether the agent terminates the contract with or without prior notice.[570] Termination with a unilateral declaration by the agent without involvement of the principal is sufficient for the exclusion.[571] If the agent rejects continuation of a contract that includes a renewal clause, this is tantamount to a termination. The same result happens if the agent triggers a condition that ends the contract.[572]

---

[567] Article 18 of the Directive; HGB § 89 b (3).

[568] BGH, VIII ZR 95/94, BGHZ 129 S. 294MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 152; BGH, I ZR 138/74, NJW 1975 S. 671; Saenger, Der Ausgleichsanspruch des Handelsvertreters bei Eigenkündigung, S. 9; Baumbach/Hopt/ Hopt, § 89b Rdnr. 52.

[569] Article 18(b); HGB § 89 b (3) (Nr. 1).

[570] MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 155; Baumbach/Hopt/ Hopt, § 89b Rdnr. 53.

[571] MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 158; E/B/J/ Löwisch § 89b Rdnr. 49.

[572] BGH, VIII ZR 61/95, NJW 1996 S. 848; Brüggemann in Großkomm. HGB § 89b Rdnr. 93; Sonnenschein in Heymann, HGB, § 89b Rdnr. 83; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 157.

However, there are two exceptions to the general principle.[573] First of all, the indemnity may still be payable if the actions of the principal constitute sufficient grounds for the termination. Such a ground does not need to be a culpable one, or a behavior contrary to the terms of the agreement.[574] Under the prevailing view, "actions of the principal" have to be interpreted broadly; for example, a change of the economic situation resulted by the conduct of the principal can constitute a sufficient ground.[575] In other words, any action by the principal that causes an intolerable situation for the agent is enough.[576]

Moreover, the indemnity may still exist if the agent cannot reasonably continue his activities due to his age or his health conditions. Courts decide on a case-by-case basis; for example, reaching the retirement age is generally accepted.[577]

(2) Good Cause termination by the Principal

The indemnity is excused, if the principal terminates the contract on a significant ground caused by a culpable behavior of the agent.[578] Not every termination due to an important reason excuses the indemnity; only a culpable behavior of the commercial

---

[573] Article 18(b); HGB § 89 b (3) (Nr. 1).

[574] BGH, VII ZR 174/66, BGHZ 52 S. 8; Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 86.

[575] BGH, VII ZR 174/66, BGHZ 52 S. 8; BGH, VIII ZR 61/95, ZIP 1996 S. 330; Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 86; Saenger, DB 2000 S. 131.

[576] BGH, I ZR 51/85, NJW 1987 S. 778; BGH, VIII ZR 61/95, NJW 1996; *see also* Sonnenschein in Heymann, HGB, § 89b Rdnr. 84; Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 86; Saenger, DB 2000 S. 130.

[577] MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 170; Brüggemann in Großkomm. HGB § 89b Rdnr. 17; Sonnenschein in Heymann, HGB, § 89b Rdnr. 87; Baumbach/Hopt/ Hopt, § 89b Rdnr. 61.

[578] Article 18(a); HGB § 89 b (3) (Nr. 2).

agent can justify the principal's termination. [579] Moreover, there must be a causal link between the culpable behavior and the termination.[580] Accordingly, the principal cannot raise the important reason at a later time.[581] Had the principal acquired the knowledge about the important reason after the occurrence of the notice, this reason can be taken into consideration within the scope of the fairness adjustment.[582]

(3) Assignment

Lastly, the indemnity is excused, if the commercial agent transfers his rights and duties under the agency contract to another person.[583] The underlying idea is that the departing agent accepts such an agreement only if the third party or the principal pay for his goodwill.[584] Hence, the purpose of this exclusion is that the agent exiting from the contractual relationship should not receive a double payment.[585]

---

[579] Sonnenschein in Heymann, HGB, § 89b Rdnr. 91; Canaris, Handelsrecht, S. 352 Rdnr. 118; Ruß in HK-HGB, § 89b Rdnr. 15.

[580] Canaris, Handelsrecht, S. 353 Rdnr. 119; Küstner/Thume /Thume, Band II S. 478 Rdnr. 1326; Baumbach/Hopt/ Hopt, § 89b Rdnr. 66; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 173.

[581] Canaris, Handelsrecht, S. 353 Rdnr. 119; E/B/J/ Löwisch § 89b Rdnr. 66.

[582] Küstner/Thume /Thume, Book II S. 478 Rdnr. 1326.

[583] Article 18(c); HGB § 89 b (3) (Nr. 3).

[584] Ankele, DB 1989 S. 2213; *see also* BT-Drucks. 11/3077 S. 9; Künstner/von Manteuffel, BB 1990 S. 298.

[585] Künstner/von Manteuffel, BB 1990 S. 298.

e. Indispensability

The parties may not waive the right for the indemnity, or alter it to the detriment of the commercial agent before the agency contract expires.[586] The indispensability provision aims to protect the economically weaker commercial agent. The German Federal Supreme Court noted that the agent should be protected from the danger to get involved in disadvantaging agreements because of his weaker bargaining position.[587]

f. Deadline for asserting the claim

The commercial agent should notify the principal within a year upon the contract cessation.[588] Thereby, the deadline is a material condition that may exclude the claim.[589] Commercial agents or their representatives can demand indemnity without any formal requirement, and even prior to the contract cessation.[590] An explanation, or a legal reasoning is not necessary.[591]

2. Compensation – Under French Law

---

[586] Article 19; HGB § 89 b (4) (1). *See also* BGH, I ZR 32/89, NJW-RR 1991 S. 158; OLG Köln, 19 U 206/00, VersR 2001 S. 1377.

[587] BGH, VIII ZR 261/95, NJW 1996 S. 2868; Küstner/Thume /Thume, Book II S. 570 Rdnr. 1585.

[588] Article 17(5); HGB § 89 b (4) (2).

[589] Sonnenschein in Heymann, HGB, § 89b Rdnr. 99; Baumbach/Hopt/ Hopt, § 89b Rdnr. 79; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 204.

[590] Küstner in Röhricht/Graf v. Westphalen (Hrsg.), HGB, § 89b Rdnr. 96; Baumbach/Hopt/ Hopt, § 89b Rdnr. 77.

[591] BGH, VII ZR 49/61, BB 1962 S. 1101; MünchKommHGB/ von Hoyningen-Huene, § 89b Rdnr. 207; Ruß in HK-HGB, § 89b Rdnr. 31.

The Directive provides an alternative method for goodwill recoupment. Accordingly, Member States may choose the compensation system (French model) outlined in Article 17(3).[592] Under this scheme, the agent is entitled "to compensation for the damage he suffers as a result of the termination of his relation with his principal."[593] The Directive presumes that the damage occurs if the termination: (a) deprives "the commercial agent of the commission which 'proper performance'[594] of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities", and/or (b) prevents "the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice."[595]

The compensation system comes from French law, which dates from 1958.[596] The French jurisprudence acknowledges that the commercial agent helps the principal to develop its business, and therefore, has a share in the goodwill of the principal's business.[597] Because the principal keeps the goodwill after the termination of the relationship, French law provides the agent with the compensation.[598] The compensation,

---

[592] Only France, England, and Ireland apply this method. [The United Kingdom chose both systems, in the sense that it allowed the parties to opt for an indemnity under article 17(2) but provided that in default of agreement the agent should be entitled to compensation under article 17(3)].

[593] Article 17(3).

[594] *Graham Page v. Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656 ("in the normal manner in which the parties intended [the contract] to be performed.").

[595] *Id*.

[596] COM (1996) 364 final p.5.

[597] *Lonsdale v. Howard & Hallam Limited* [2007] UKHL 32 para. 9.

[598] *Id*.

accordingly, aims to cover "the cost of purchasing the agency to the agent's successor," or alternatively "the time it takes for the agent to re-constitute the client base which he has been forcefully deprived of."[599]

In the UK, the Supreme Court (then the House of Lords) offered an explanation for the compensation theory under the Directive:

> "This elegant theory explains why the French courts regard the agent as, in principle, entitled to compensation. It does not, however, identify exactly what he is entitled to compensation for. One possibility might have been to value the total goodwill of the principal's business and then to try to attribute some share to the agent. But this would in practice be a hopeless endeavour and the French courts have never tried to do it. Instead, they have settled upon compensating him for what he has lost by being deprived of his business. … The French case law makes it clear that this ordinarily involves placing a value upon the right to be an agent. That means, primarily, the right to future commissions 'which proper performance of the agency contract would have procured him' ... In my opinion this is the right for which the directive requires the agent to be compensated."[600]

Although the French jurisprudence provides no method of calculation, in general, the compensation is equal to "the global sum of the last two years commission, or the sum of two years commission calculated over the average of last three years of the agency contract."[601] Nevertheless, the courts are allowed to award a different amount depending on the particular circumstances of the case.[602]

---

[599] COM (1996) 364 final p.5.

[600] *Lonsdale v. Howard & Hallam Limited* [2007] UKHL 32 para. 10.

[601] COM (1996) 364 final p.5.

[602] *Id.* ("where the principal brings evidence that the agent's loss was in fact less, for example, because of the short duration of the contract or where, for example, the agent' s loss is greater because of the agent's age or his length of service.")

Unlike the indemnity system, the compensation method has no ceiling on the level of payment. Moreover, this method makes no distinction between old and new customers. Furthermore, because the payment targets to compensate the agent's lost market share, and this loss is fixed at the time of termination, future events do not change the result, "such as the principal ceasing to trade, the agent continuing to work with the same clients in the market place."[603]

Lastly, similar to indemnity, compensation is excused if (a) the principal terminates the agency contract because of default attributable to the commercial agent, (b) the commercial agent terminates the agency contract, or (c) the commercial agent assigns his rights and duties under the agency contract to another person.[604]

D. The Goodwill Recoupment Doctrine and Franchise Relationships in the EU

1. Analogous Application in Member States

In principle, the goodwill recoupment doctrine is developed for the commercial agency relationship. However, with the growth of franchising in the EU, it has been extensively debated, whether, and to what extent, the doctrine is applicable to franchise relationships.[605] While some Member States have already decided to apply the rule by way of analogy to franchise contracts, others have chosen not to allow such

[603] COM (1996) 364 final p.6.

[604] Art. 18 of the Directive.

[605] Schmidt, Handelsrecht, S. 770; Eckert, WM 1991 S. 1237.

application.[606] Nonetheless, majority of the Member States have not decided yet.

In the EU, most Member States do not have specific franchise laws.[607] Therefore, in these states, courts apply existing regulations, which govern similar contractual relationships, to franchise contract as they fit. To this point, Austrian and Finnish law has clearly recognized that the indemnity provision is analogously applicable to franchise contracts.[608] Under German law, although the Federal Supreme Court has left the question unanswered, several Regional Courts have decided to apply the goodwill indemnity analogously to certain franchise agreements.[609]

Accordingly, in these Member States, upon cessation of the franchise contract, the franchisee is entitled to goodwill indemnity if the franchise arrangement in question resembles the commercial agency relationship. In such a case, the franchisee must satisfy two conditions. First of all, the franchisee must have the same economic function as the commercial agent, namely being an integrated part of the sales force of the franchisor. In the absence of this condition, courts characterize the franchise arrangement as a mere buyer-seller relationship, and dismiss the indemnity claim. Courts evaluate a number of

---

[606] Austria and Finland have accepted analogous application. England, Scotland, and Sweden decided not to allow goodwill recoupment for franchisees. *See* Hesselink, M. W. *Commercial agency, franchise and distribution contracts (PEL CAFDC)* 93 (Oxford: Oxford University Press 2006).

[607] Only France, Sweden (Disclosure laws), and Italy (Relationship law) have specific franchise laws. *See generally* Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* 152-180 (2010).

[608] Notes IV.(10) to DCFR Art. IV.E.–2:305.

[609] LG Frankfurt, 3-8 O 28/99, EWIR 2004 S. 69; BGH, I ZR 209/84, NJW-RR 1987 S. 612 ff.; *see also* Köhler, NJW 1990 S. 1689 ff.; Eckert, WM 1991 S. 1245 ff.; Bodewig, BB 1997 S. 637 ff.; Küstner, ZAP 2005 S. 659 ff.

criteria in deciding whether the franchise agreement integrates the franchisee into the franchisor's sales organization. For example, the franchisee should have a duty to promote the franchisor's products. Moreover, the franchisee should be under a minimum purchase obligation. Together with minimum purchase obligation, the franchise should be obliged to keep a minimum inventory to be able to maintain a viable business. Furthermore, the franchisee should contribute to the advertisement efforts of the franchisor by either advertising as a unit, or by taking part of the national advertisement campaign. Additionally, the franchisor should have a right to control/monitor the franchisee. This includes the right to inspect the franchisee's financial data, the right to inspect the franchisee's business location, and the right to give instructions. Moreover, the franchisee should not be able to compete with the franchisor.

The second condition is that the franchisee transfers its clientele to the franchisor upon cessation of the franchise contract. If the franchisee keeps the business location, for instance, this requirement fails. German law requires an explicit contract provision stating that the franchisee leaves the clientele at the end of the relationship.

Yet the main problem with the analogous application of the goodwill indemnity is the calculation of the payment. Unlike commercial agents, franchisees do not receive commissions for their activities. Moreover, it is often more difficult for a franchisee to identify his clientele. Nonetheless, courts have developed a number of procedures to reduce these issues. For example, in some cases where the clientele cannot be individually identified, courts allowed market analyses showing that the clientele consist of regular customers. Furthermore, courts have implemented a particular discount item,

namely the "pulling effect of the brand", to reflect the franchisor's national goodwill in calculating indemnity. Some courts have used a higher rate of "customer-migration" instead of the additional discount item.

2. "Draft Common Frame of Reference" and Goodwill Indemnity for Franchisees

In 2001, the European Commission initiated a research project to assess the problems arising from differences between the contract laws of the Member States.[610] The results triggered an Action Plan to establish a "Common Frame of Reference" (CFR) containing model rules to be used by the Union legislator when making or amending legislation.[611] In the mean time, the Commission funded an international academic network that carried out a Draft CFR (DCFR).[612] The final Draft CFR presented in 2008 consisted of principles, definitions, and model rules of civil law, including franchise law.[613] Although its function as a legal authority is controversial, this highly academic work aimed to be the prospective model for a European Code of Obligation.[614]

---

[610] COM(2001) 398, 11.7.2001.

[611] COM(2003) 68, 12.2.2003. *See generally* Martijn W. Hesselink, *The Common Frame of Reference As A Source of European Private Law*, 83 Tul. L. Rev. 919 (2009).

[612] COM(2010) 348, 1.7.2010.

[613] Von Bar, C., Clive, E. and Schulte Nölke, H. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, (Munich, Sellier, 2009).

[614] *Id*. at §6.

Book IV Part E of the DCFR covers commercial agency, franchise, and distribution contracts.[615] According to the DCFR, all these intermediaries, including the franchisee, are explicitly entitled to an indemnity for goodwill.[616] The Draft prefers the German indemnity system, and makes no reference to the French compensation system. Nonetheless, the DCFR recognizes difficulties that may arise from the implementation of the indemnity to franchise relationships.[617]

The DCFR justifies the entitlement to goodwill indemnity with the principles of unjust enrichment. It argues that the franchisor "should not be unjustifiable enriched" as the result of the cessation "of a long-term commercial contract."[618] The DCFR further explains that the value of business goodwill must be differentiated from the expectation interest under the contract, and this value should be indemnified regardless of "any sort of fault."[619]

E. Summary

The European recoupment doctrine deals specifically with the problem of goodwill allocation in long-term marketing and distribution relationships. Under the doctrine, a franchisee might – at least partially – recover its loss of goodwill once the franchise

---

[615] DCFR Art. IV.E.–1:101 et seqq.

[616] DCFT Art. IV. E. – 2:305: Indemnity for goodwill.

[617] Comment D to DCFR Art. IV.E.–2:305 ("[I]n the case of franchise the goodwill is rarely the goodwill of the franchisee since, typically, clients are attracted by the image of the brand and the network.").

[618] Hesselink, M. W. *Commercial agency, franchise and distribution contracts (PEL CAFDC)* 141 (Oxford: Oxford University Press 2006).

[619] *Id*.

contract comes to an end. The doctrine does not require strict termination restrictions for the parties. It differs from the existing theories in the U.S. legal system mainly because the recovery under the EU approach does not depend on the franchisor's wrongdoing, but on the harm to the franchisee that in return benefits the franchisor. Moreover, the assessment scheme provided by the doctrine aims to generate greater certainty and predictability in practice.

In the next chapter, this work discusses the implementation possibilities, and potential benefits of the goodwill recoupment doctrine in the US legal system.

CHAPTER 4 GOODWILL RECOUPMENT FOR AMERICAN FRANCHISEES

A. Overview

Despite its advantages, the franchise relationship has an inherent conflict of interest that makes the contracting parties vulnerable to opportunistic behavior by either franchisors or franchisees.[620] Under the current U.S. economic and legal system, however, franchisees appear to be more vulnerable to opportunism than franchisors.[621]

Meanwhile, although franchising is considered "a bedrock of the American economy,"[622] recent studies suggest that the franchise method might not be as good as it seems. For example, the International Franchise Association (IFA)[623], for years, advertised franchising as a very safe and successful business model with "a 96.9% success rate for franchisees."[624] However, several studies have discovered that franchises

---

[620] *See supra* Ch.1(B)(4)&(5).

[621] *See e.g*. Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* 11 (2010); Harold Brown, *Franchising-A Fiduciary Relationship*, 49 Tex. L. Rev. 650, 654 (1971); Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 54 (June 24, 1999) (Statement Of Susan Kezios, President, American Franchisee Association, Chicago, IL).

[622] *See e.g. Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 441. (3d Cir. 1997).

[623] IFA is headquartered in Washington, where it lobbies Congress to oppose regulation of franchising. See Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 121-22 (2004).

[624] Arthur Andersen and Co. 1992. *Franchising in the Economy: 1989-1992*. Washington, D.C.: International Franchise Education Association. The IFA Education Foundation and Arthur Anderson & Co. claimed that "96% of the franchised units opened with the last five years are still in operation today."

fail at "higher rates than independent businesses."[625] In 1994, Professor Timothy Bates conducted a comprehensive study and concluded that "the young firms started without the benefit of a parent franchisor were significantly more profitable than the franchise firms."[626] In two separate studies, the federal government's Small Business Administration confirmed Professor Bates findings.[627] Subsequent studies also found that not only overall franchisee failure rate is very high, but it also appears to be increasing.[628]

In addition to high turnover rates, the American Franchisee Association (AFA)'s Franchisee Satisfaction Survey Report revealed other problematic aspects of the franchise method.[629] According to the Report, the quality of the relationship between franchisees and franchisors may not be as good as franchisor advocates present. Approximately 40% of franchisees report that "they have an unsuccessful relationship with their franchisor, have been encroached upon by their franchisor, have been threatened by a representative

---

[625] *See* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 139-47 (2004); Erwin J. Keup, *Franchise Bible: How to Buy a Franchise or Franchise Your Own Business* 6 (4th ed., 2000).

[626] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 159 (June 24, 1999) (Statement of Timothy Bates, College of Urban, Labor & Metropolitan Affairs, Wayne State Univ.). ("if you were looking at two firms of identical size and capitalization, then that gap would be much, much wider than the 6 percent. The failure rate for the franchisees would be more on the order of 50 percent higher, controlling for firm size and capitalization.")

[627] *See* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 146-47 (2004).

[628] *See e.g.* Stevan R. Holmberg & Kathryn Boe Morgan, *Franchise Turnover and Failure New Research and Perspectives*, 18 J. Buss. Venturing 403 (2003).

[629] Wadsworth, Frank H. & Wayne Jones (1996), *Franchisee Satisfaction Survey Report*, Proceedings of the Third Annual Convention of the American Franchisee Association, Washington, D.C.

of the franchisor, and are/have been in a dispute with their franchisor."[630] Moreover, the report shows that 46.3% of responding franchisees believe that discounting and promotional activities are forced on them by the franchisor and that they have suffered on average a 9.8% decline in profits because of these activities.[631] Further, a majority of franchisees also feel that they purchase goods and services from franchisors that are inflated in price.[632] Finally, the study found that about 65% of the responding franchisees "feel that they are not getting the full value of their advertising fees and that support services from franchisors are inadequate."[633]

Economic studies support franchisee advocates in their effort to push for legislation. In the past, systematic abuses by franchisors led the federal and state governments to enact various "disclosure and registration requirements" for franchised businesses.[634] However, a number of commentators argue that not only these disclosure laws are insufficient to reduce franchisor abuses, they also actually reinforce franchisors' misbehavior.[635]

Furthermore, in recent decades several proposals of federal and state franchise "relationship regulations" has been considered. Despite strong lobbying efforts of

---

[630] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 63 (June 24, 1999).

[631] *Id*.

[632] *Id*.

[633] *Id*.

[634] *See supra* Ch.2(B)(1).

[635] *See generally* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 302-05 (2004).

franchisor associations against such regulations, some states have already passed relationship laws.[636] Yet, a federal regulation seems to be more difficult to accomplish.[637]

Under these circumstances – potential franchisor opportunism, market's failure to eliminate problems, and tendency towards regulation, – the franchise sector needs a solution that will provide a specific method of protection against a fundamental problem in franchising without impairing the ability of the franchisor to maintain system quality. In other words, the solution should satisfy both parties.

Accordingly, this work proposes that the ideal solution to reduce franchisor-opportunism is to provide a protection for franchisees' hard-earn equity. As discussed above, franchisees' goodwill often happens to be the fundamental reason for franchisor opportunism. Thus, franchisees who comply with their franchise contracts need protection from franchisors who might desire to capture the goodwill of their franchisees. Protection for franchisees' goodwill would provide a reasonable solution for everyone involved in a franchise relationship. Although it is difficult to quantify the benefits of goodwill protection in a tangible way, this solution will certainly help to create healthier franchise relationships without generating undue burden for the contracting parties. A

---

[636] *See e.g.* Kirk Victor, *Franchising Fracas*, 138 Cong. Rec. E3131-03 (Oct. 9, 1992) ("The IFA and its members spent " well in the six figures" in Iowa and are prepared to do that in every state.")

[637] *See* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 168 (June 24, 1999) (Statement Of Dennis E. Wieczorek, Esquire, Partner, Rudnick & Wolfe, Chicago, IL) ("On the Federal level, since the late-1970's, proponents of franchise legislation are batting 0 for 10. Ten bills were introduced, and none of them have gone anywhere.")

properly implemented goodwill protection could likely reduce cost of unfair practices, strengthen franchisee confidence and stimulate investment.[638]

This work outlines two options in which a protection for franchisees' goodwill could possibly be implemented. The first part discusses a regulatory implementation of the European recoupment doctrine in to the U.S. legal system. The second part suggests refinements to existing common law concepts, so that they might better protect franchisees' goodwill. In both cases, this work argues that the outcome would be more fair and efficient than the current U.S. system.

B. Methods of Implementation

1. Regulatory Intervention

In principle, lawmakers should be cautious when intervening in the franchise contract negotiated and concluded between two parties. They should nevertheless provide a foundation that will promote fair bargaining between contracting parties.[639] Like any other business arrangement, franchising creates financial risks for its participants, but franchisors are usually better able to shift their risks to franchisees who then bear the cost of unfair practices and failed businesses.[640] In most states, franchisors can arbitrarily and unilaterally increase their opportunities for profit at the expense of franchisees; they can

---

[638] *See infra* Ch.4(B)(1)(b).

[639] *See* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 29 (June 24, 1999) (Statement Of Hon. John J. Lafalce, A Representative In Congress From NY).

[640] *See e.g.* Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* 11 (2010).

arbitrarily and unilaterally change the terms of their contracts; and they can reject ordinary common law duties of good faith, fair dealing and due care.[641] Yet, in most states, franchising is a relatively less scrutinized business arrangement.[642] Accordingly, a number of commentators agree that market inefficiencies and social welfare problems in franchising justify government intervention to level the playing field for franchisees.[643]

Today, the main question is not whether to regulate the franchise relationship, but how to regulate it so that systematic abuses disappear without undue cost to the system. So far, regulatory efforts in the U.S. could not fully satisfy the franchising industry since their focus has been to significantly limit franchisors' contractual rights.[644] Hence, this work proposes an alternative approach: a regulatory solution that would explicitly protect franchisees' goodwill without extensively restraining the franchisors' contractual rights. This approach could help to minimize unfair practices in franchising, and improve the strength and competitiveness of the entire franchise industry.

---

[641] *See* Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 60 (June 24, 1999) (Statement Of Susan Kezios, President, American Franchisee Association, Chicago, IL)

[642] *Id*. *But see* Byron E. Fox & Henry C. Su, *Franchise Regulation - Solutions in Search of Problems?*, 20 Okla. City U. L. Rev. 241 (1995).

[643] *See e.g.* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 124 (2004) ("This paper proposes that federal regulation …"); Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* 11 (2010); Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 Vand.L.Rev. 1503, 1512 (1990); Roland J. Santoni, *Franchising: A Critical Assessment of State and Federal Regulation*, 14 Creighton L.Rev. 67, 97 (1980-81).

[644] *See supra* Ch.2(B)(2)(a).

This work is of the opinion that the European recoupment doctrine could provide an outline for such regulation. Accordingly, if a franchisee generates positive goodwill, and the goodwill will be transferred to the franchisor upon contract cessation, the franchisee should be entitled to a payment for its share. The payment should become due with the cessation of the franchise contract.[645] The reason for the contract ending would be taken into consideration in the exclusion determination of the claim and/or within the scope of the fairness test.[646] The franchisor must be able to continue to benefit from the goodwill after the end of the franchise relationship.[647] For instance, the franchisor might convert the terminated unit to a company's own unit, resell it to a new franchisee, or benefit from the termination in other ways.[648] Hence, if the franchisor withdraws from the market, there will be no recoupment under the proposed solution since the franchisor will not be benefiting from its franchisees' goodwill.[649] The recoupment should also be excluded if

---

[645] *See supra* Ch.3(C)(1)(b)((1)) 'Cessation of the Contract'.

[646] *See supra* Ch.3(C)(1)(b)((3)) 'Fairness'.

[647] *See supra* Ch.3(C)(1)(b)((2)) 'Continuing Benefits for the Principal'.

[648] The franchisor may eliminate a franchisee, and renew other franchisees' contracts in the same territory with better terms, higher royalties, etc. *See e.g.* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 116 (2004).

[649] Franchisor market withdrawal is one of the problematic areas in franchising today. The goodwill recoupment doctrine would address this problem. For issues regarding franchisor market withdrawals *see* Rose Marie Reynolds, *Good Cause for Franchise Termination: An Irreconcilable Difference Between Franchisee Fault and Franchisor Market Withdrawal?*, 1992 B.Y.U. L. Rev. 785 (1992); Ann Hurwitz Dallas, Texas, *Franchisor Market Withdrawal: "Good Cause"' for Termination?*, 7 Franchise L.J. 3 (1987); Michael J. Lockerby, *Market Withdrawal: Judges and Juries Aren't Buying What Terminated Dealers Are Selling*, 22 Franchise L.J. 151 (2003).

the franchisee terminates the relationship.[650] Moreover, there will be no payment if the franchisor terminates the contract on a narrowly defined "justified ground."[651] Payment will also be excused if the franchisee transfers its franchise to another person.[652]

While this regulation could benefit from the existing calculation methods in Europe, it could also provide a method (or methods) that reflects existing techniques in the US.[653] Furthermore, lawmakers could decide whether there should be a maximum limit for the recoupment.[654] The grant of such a recoupment would not, however, prevent the franchisee from seeking other damages.[655] Lastly, the law should be mandatory; the parties should not be able to waive the recoupment right.[656]

The following two subsections identify likely advantages of a statutory goodwill recoupment. The first part highlights problems associated with existing state laws, and

---

[650] *See supra* Ch.3(C)(1)(d)((1)) 'Termination of the Relationship by the Commercial Agent'. In the EU, there are however two exceptions to this exclusion: (1) if the franchisor forces franchisee to terminate; (2) if the franchisee has to terminate due to age or health reasons.

[651] Justified ground, however, should be interpreted very narrowly. In EU, only very serious reasons, such as criminal acts, can justify such terminations. *See supra* Ch.3(III)(A)(4)(b) 'Good Cause termination by the Principal'.

[652] *See supra* Ch.3(C)(1)(d)((3)) 'Assignment'.

[653] *See supra* Ch.1(C)(2) & Ch.2(B)(2)((5)).

[654] *See supra* Ch.3(C)(2)(c) 'Calculation of the Indemnity'. While under the German system the maximum amount cannot exceed the average of the last five years of the annual commissions, the French system has no limit.

[655] For a similar argument *see* Boyd Allan Byers, *Making A Case for Federal Regulation of Franchise Terminations--A Return-of-Equity Approach*, 19 J. Corp. L. 607, 650 (1994).

[656] *See supra* Ch.3(C)(1)(e) 'Indispensability'.

explains how the goodwill recoupment doctrine would address them. The second part provides an economic analysis of a potential goodwill recoupment regulation.

a. Goodwill Recoupment and Existing Franchise Laws

In principle, state franchise relationship laws provide franchisees with legal tools to recover their hard-earned goodwill from opportunistic franchisors.[657] As discussed previously, these laws basically aim to prevent franchisor opportunism and create healthier franchise relationships.[658] To achieve this goal relationship laws restrict certain fundamental rights of franchisors, such as termination, refusal to renew, and denial of potential transfers. By doing so, the state laws allow franchisees to keep their businesses as going-concern providing they perform satisfactorily under their contracts.[659] Accordingly, if franchisors violate the statutory restrictions, franchisees are entitled to compensation. In some states, franchisees receive – implicitly or expressly – payment for their business goodwill.[660]

Existing laws, however, appear to be inadequate to achieve their goals, and more importantly to protect franchisees' goodwill.[661] First of all, as the state laws provide

---

[657] *See generally supra* Ch.2.

[658] *Id*.

[659] *See e.g. BP Products N. Am., Inc. v. Hillside Serv., Inc.*, CIV. 9-4210, 2011 WL 4343452 (D.N.J. 2011); Craig R. Tractenberg, Robert B. Calihan, & Ann–Marie Luciano, *Legal Considerations in Franchise Renewals,* 23 SPG Franchise L.J. 198, 200 (2004).

[660] *See supra* Ch.2(B)(2)(a)((5)) 'Remedies – Compensating Goodwill'.

[661] *See e.g.* Boyd Allan Byers, *Making A Case for Federal Regulation of Franchise Terminations--A Return-of-Equity Approach*, 19 J. Corp. L. 607, 636-39 (1994); David A. Eisenberg, *Balancing A Relationship - "Good Cause" Termination of Franchise Agreements in Michigan*, 72 U. Det. Mercy L. Rev. 369, 394-95 (1995).

compensation for lost goodwill only under certain violations, franchisors may still opportunistically capture franchisees' goodwill if they fulfill the statutory requirements. Moreover, attempting to eliminate franchisor-opportunism by restricting fundamental contractual rights of franchisors has received strong criticism from a number of economists and legal commentators.[662] Besides, courts and legal practitioners have been struggling with the laws since they do not provide sufficient guidance, especially regarding the assessment of goodwill compensation.[663] Lack of guidance results in contradictory court decisions and creates uncertainties. As a result of these concerns, the states that offer protection for franchisees are still very limited in number.[664]

Because the fundamental reason for post-contract opportunistic behavior by the franchisor is often the franchisee's investment in goodwill, the relationship laws should mainly focus on compensating the franchisee's goodwill. Below this work highlights three areas that a statutory goodwill recoupment would help to improve.

(1) Payment for Lost Goodwill – Regardless of Wrongdoing

The European goodwill protection differs from state relationship statutes in that the EU provision is a compensatory arrangement in which the goodwill payment does not depend on a violation.[665] Once the relationship ends, the agent is entitled to a goodwill

---

[662] *See infra* Ch.4(B)(1)(a)((2)) 'Less Restriction For Franchisors'.

[663] *See infra* Ch.4(B)(1)(a)((3))((a)) 'Measuring Problems with Current Laws – Full Goodwill'.

[664] Among regulated states (~ 20), *very few* (~ 5) include goodwill as an item to compensate.

[665] Byers was proposing a similar idea. Boyd Allan Byers, *Making A Case for Federal Regulation of Franchise Terminations--A Return-of-Equity Approach*, 19 J. Corp. L. 607, 646 (1994); *see also* David A. Eisenberg, *Balancing A Relationship - "Good Cause"*

payment providing that the agent has goodwill, and the principal will continue to receive benefits from the agent's goodwill. Under this approach, the nature of the termination can only affect the amount of the payment, not the existence of the claim.[666]

State relationship laws should contain a similar provision requiring payment for goodwill upon cessation regardless of any wrongdoing. Basically, if a franchisee creates local goodwill that will continue to benefit the franchisor, the franchisee should be able to receive a payment for this value. Such payment would protect the franchisee's investment in local goodwill without dealing with a lengthy lawsuit regarding the nature of a termination.

In fact, a very small number of states have actually recognized this approach in their laws. These laws, however, provided no guidance for their schemes. Washington, for instance, allows nonrenewal for any reason if a non-renewing franchisor pays the franchisee for the market value of its goodwill.[667] Because the Washington Law does not explain how to assess the value of franchisees' goodwill, it is unclear if the payment depends on certain conditions, for example, whether the franchisor will be benefiting from the franchisee's goodwill.[668] Moreover, it is equally unclear, whether a bone fide

---

Termination of Franchise Agreements in Michigan, 72 U. Det. Mercy L. Rev. 369, 394-95 (1995).

[666] *See supra* Ch.3(C)(1)(b)((1)) 'Cessation of the Contract'.

[667] Wash. Rev. Code Ann. § 19.100.180(2)(i) (West) ("compensation need not be made to a franchisee for good will if (i) the franchisee has been given one year's notice of nonrenewal and (ii) the franchisor agrees in writing not to enforce any covenant which restrains the franchisee from competing with the franchisor.") *See also* Douglas C. Berry et. al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 891 (2009).

[668] Berry et. al illustrates this issue:

nonrenewal with legitimate business reasons will have the same consequences as a wrongful termination.[669] Similarly, Massachusetts has recently introduced a bill that would require goodwill compensation even in the absence of a violation.[670] The proposed bill states that "upon termination of a franchise for whatever cause or reason, … the franchisor shall fairly compensate the franchisee" including "the fair market value of good will."[671] Massachusetts' Bill also makes no distinction between legitimate business reasons and wrongful termination, and offers no guidance regarding the assessment of "the fair market value of goodwill."

As explained below, under the proposed (European) approach, goodwill compensation would be assessed differently for material breach or bad-faith termination/nonrenewal, and for legitimate business reasons.

(2) Less Restriction For Franchisors

The main response of current state relationship laws towards franchisor opportunism is to limit franchisors' contractual rights. While restrictions may potentially reduce

---

> "[T]he nonrenewal of a franchise simply means the franchisee continues to operate the same business at the same location, doing no more than re-flagging the location from which it operates. This is common with franchises in the hotel, real estate brokerage, and gas station businesses. It is doubtful that the legislature intended a franchisor to pay "good will" calculated in a similar fashion to both the franchisee that continues to operate the business from the same location, and the franchisee that has effectively been placed out of business by the nonrenewal." Douglas C. Berry, David M. Byers & Daniel J. Oates, *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 826 (2009).

[669] *See e.g. Thompson v. A. Richfield Co.*, 649 F. Supp. 969, 971 (W.D. Wash. 1986).

[670] Mass. Sen. 73, 188th Leg. (2013).

[671] § 9(a).

opportunism, and thus protect franchisees' goodwill, this approach has been widely criticized by franchisor-advocates and a number of commentators.[672] Critics mainly argue that franchisors need to maintain quality control, and the threat of termination or nonrenewal is the most effective way to accomplish this objective.[673] Moreover, they emphasize that termination or nonrenewal for the purposes of quality control, or other legitimate business reasons is necessary to preserve the goodwill of the franchise network, which in return benefit all other franchisees in the system.[674] According to critics, the existing state relationship laws impose an undue burden on franchisors, and therefore, encourage franchisee-opportunism, increase litigation, and ultimately increase the cost of doing business.[675]

Some commentators further argue that requiring good cause for termination and nonrenewal has "the potential of turning franchise relationships into perpetual

---

[672] *See generally e.g*. Francine Lafontaine & Fiona Scott Morton, *Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24(3) Journal of Economic Perspectives 233 (2010); Jonathan Klick et al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009); Hearing 1999 at 44-48.

[673] Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 185, 211 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008); David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 355-56 (1995).

[674] Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 185, 211 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

[675] *See e.g.* Jonathan Klick et al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009); Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 185, 211 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008) ("The relationship laws place the burden on the franchisor to prove that there was good cause. This makes termination more difficult and costly, even where good cause exists.")

relationships."[676] The New Jersey Supreme Court, for instance, noted in *Dunkin' Donuts of America, Inc. v. Middletown Donut Corp* that "once a franchise relationship begins, all that a franchisee must do is comply substantially with the terms of the agreement, in return for which he receives the benefit of an 'infinite' franchise—he cannot be terminated or refused renewal."[677]

Although this outcome may protect the franchisee's goodwill, it is not an ideal situation for successful franchising since the franchisor's success usually depends on the ability to adjust its business model to changing market conditions.[678]

Ideally, lawmakers should address both parties' objectives. Thus, state lawmakers should implement a goodwill indemnity provision in their relationship laws, and reduce limitations on franchisors' termination and nonrenewal rights. Essentially, a franchisor would be able to end a franchise contract for bona fide reasons if the franchisor fairly compensates its franchisee's lost goodwill. However, unlike compensation in a wrongful

---

[676] Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 185, 205 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008). *See also* David E. Krischer, *Franchise Regulation: An Appraisal of Recent State Legislation*, 13 B.C.Ind. & Com.L. Rev. 529, 564 (1972).

[677] 100 N.J. 166, 185 (1985); *see also BP Products N. Am., Inc. v. Hillside Serv., Inc.*, CIV. 9-4210, 2011 WL 4343452 (D.N.J. 2011); Craig R. Tractenberg, Robert B. Calihan, & Ann–Marie Luciano, *Legal Considerations in Franchise Renewals,* 23 SPG Franchise L.J. 198, 200 (2004) (interpreting NJFPA as creating a right to "unlimited renewals" absent good cause for nonrenewal).

[678] *See e.g*. Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 185, 207 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008); David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 358 (1995); *Ziegler Co., Inc. v. Rexnord, Inc.*, 433 N.W.2d 8, 12 (Wis. 1988).

termination case, the new compensation scheme would have certain limitations.[679] Under the alternative approach, franchisors could develop their business models without having to comply with strict good cause requirements. At the same time, a successful franchisee would have the leverage to protect its franchise from opportunistic takeovers for short-term gains. Moreover, unlike franchisor-advocates' claims against the existing laws, the goodwill indemnity approach would most likely not create incentives for franchisee noncompliance since termination or nonrenewal would still remain a potential threat.[680]

(3) Differentiated & More Predictable Calculation

(a)Measuring Problems with Current Laws – Full Goodwill

Existing relationship laws that require goodwill compensation provide little guidance for measurement of goodwill.[681] This approach gives courts great discretion to accept any method of calculation that the parties' experts may offer in a wrongful termination case.[682]

Typically, however, U.S. courts prefer two methods of measuring damages: lost future profits, and lost business value. "Lost future profits" is the present value of the

---

[679] *See infra* Ch.4(B)(1)(a)((3))((b)) 'Calculation under the Proposed Approach – Limited Goodwill'.

[680] For a similar discussion *see* Boyd Allan Byers, *Making A Case for Federal Regulation of Franchise Terminations--A Return-of-Equity Approach*, 19 J. Corp. L. 607, 651-52 (1994).

[681] *See generally* Nicole Liguouri Micklich, Michael W. Lynch, Ingrid C. Festin, *The Continuing Evolution of Franchise Valuation: Expanding Traditional Methods*, 32 Franchise L.J. 223 (2013).

[682] *Id*.; *see also e.g*. *Lapinee Trade, Inc. v. Boon Rawd Brewery Co., Ltd.*, 91 F.3d 909, 911 (7th Cir. 1996) ("*Unfortunately, the district court had a devil of a time figuring out the appropriate measure of damages*.")

future profits the franchise would have earned had there been no wrongful termination.[683] The second method, "lost business value", is the difference between values that a franchisee would have received in a hypothetical sale on the market before and after a wrongful act.[684] Although the jury decides the final amount of compensation, theoretically, both methods should give similar results, and both methods should include the goodwill value.[685]

Nevertheless, decisions display wide variations since courts have unrestricted power to address the critical questions, such as the length of a reasonable time for lost future profits[686]; the time of calculating fair market value[687]; and deciding mitigation elements.[688] The following two cases from two different states illustrate the existing problem in the franchise laws. In *Baur Truck,* the court held that under Wisconsin law the manufacturer breached its distributorship contract by licensing a second distributor in the

---

[683] *See e.g. Bush v. Natl. Sch. Studios, Inc.*, 389 N.W.2d 49 (Wis. App. 1986) aff'd, 407 N.W.2d 883 (Wis. 1987).

[684] *E.g.* Nicole Liguouri Micklich, Michael W. Lynch, Ingrid C. Festin, *The Continuing Evolution of Franchise Valuation: Expanding Traditional Methods*, 32 Franchise L.J. 223, 232 (2013).

[685] *E.g. Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 507 (4th Cir. 1986).

[686] *See e.g. Lapinee Trade, Inc. v. Boon Rawd Brewery Co., Ltd.*, 91 F.3d 909, 912 (7th Cir. 1996) ("the district court was free to fashion a reasonable period of lost profits in excess of one year." "[The Franchisee] presented testimony from a number of lay and expert witnesses in support of their request for 10 years of lost profits. The district court awarded three years of lost profits in the amount of $668,022.63."); *Wright-Moore Corp. v. Ricoh Corp.*, 794 F. Supp. 844, 865 (N.D. Ind. 1991) *aff'd,* 980 F.2d 432 (7th Cir. 1992) ("the court finds that as a matter of law, plaintiff is entitled to lost future profits for a reasonable length of time.")

[687] *See e.g. Cooper Distribg. Co., Inc. v. Amana Refrigeration, Inc.*, 180 F.3d 542 (3d Cir. 1999).

[688] *See e.g. Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 508 (4th Cir. 1986).

initial distributor's territory.[689] Similarly, in *Cooper*, the court decided that the manufacturer had violated the distributor's rights under the New Jersey Franchise Practices Act by directly selling its products to retailers in the distributor's territory, and by refusing to renew the distributorship.[690] In both cases, courts found wrongful termination under relationship laws. While in *Baur Truck,* the Court of Appeals of Wisconsin decided that the proper period for measuring the damages was the two years of operation before the wrongful termination,[691] in *Cooper* the Third Circuit Court of Appeals held that the years before the actual termination could not be used to measure damages for lost profits.[692] More importantly, although in *Cooper,* the court noted that a franchise may be valued as either the present value of lost future profits or the present market value of the lost business,[693] on the second appeal, in *Cooper II,* the Third Circuit changed its view.[694] In *Cooper II* the court stated that a reasonable value should be the price on which willing parties would agree for the sale of the franchisee's business at the date of termination, and removed an award of $4.375 million in damages.[695] Accordingly,

---

[689] *Baur Truck & Equip., Inc. v. Svedala Industries, Inc.*, 501 N.W.2d 470 (Wis. App. 1993).

[690] *Cooper Distribg. Co., Inc. v. Amana Refrigeration, Inc*., 63 F.3d 262 (3d Cir. 1995).

[691] *Baur Truck & Equip., Inc. v. Svedala Industries, Inc.*, 501 N.W.2d 470 (Wis. App. 1993).

[692] *Cooper Distribg. Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 278 (3d Cir. 1995). *See also* Nicole Liguouri Micklich, Michael W. Lynch, Ingrid C. Festin, *The Continuing Evolution of Franchise Valuation: Expanding Traditional Methods*, 32 Franchise L.J. 223, 230 (2013).

[693] *Cooper Distribg. Co., Inc. v. Amana Refrigeration, Inc*., 63 F.3d 262, 278 (3d Cir. 1995).

[694] *Id*.

[695] *Id*.

the result at the second damages trial was a finding that a willing buyer would not be willing to pay anything for a terminated franchise.[696] In contrast, the Wisconsin court allowed the lost future profits method, and affirmed the jury's award of $1.5 million.[697] The differences among the calculation methods, and courts' preferences concerning key issues create uncertainties in the franchise world.[698] Thus, in order to improve foreseeability and consistency, the state laws should at least provide certain guideline for measurement of lost goodwill value in wrongful termination cases.

(b) Calculation under the Proposed Approach – Limited Goodwill

As highlighted above, existing relationship laws mainly protect franchisees' goodwill when the franchisor violates the laws. What the laws try to accomplish is to compensate franchisees "expectation interest" in case of a violation. Accordingly, courts measure the non-breaching franchisee's damages where the franchisee would have been

---

[696] *See generally* Bruce S. Schaeffer & Susan Ogulnick, *Why Valuing Franchise Businesses Is Different from Valuing Other Businesses*, BUS. APPRAISAL PRACTICE 37-41 (2008); *see also Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc.*, A-1485-07T2, 2009 WL 2365960 (N.J. Super. App. Div. 2009).

[697] *Baur Truck & Equip., Inc. v. Svedala Industries, Inc*., 501 N.W.2d 470 (Wis. App. 1993). *See also* Nicole Liguouri Micklich, Michael W. Lynch, Ingrid C. Festin, *The Continuing Evolution of Franchise Valuation: Expanding Traditional Methods*, 32 Franchise L.J. 223, 226 (2013).

[698] *See* Nicole Liguouri Micklich, Michael W. Lynch, Ingrid C. Festin, *The Continuing Evolution of Franchise Valuation: Expanding Traditional Methods*, 32 Franchise L.J. 223, 234 (2013); Brian J. Neff & Kenneth K. Lehn, *Damages Recoverable in Franchise Termination Cases,* 201-FEB N.J. Law. 40, 43 (2000).

if there had been no breach.[699] Under this approach, some states allow the franchisee to fully recover its goodwill.

The European approach however seeks to compensate the franchisee for its goodwill regardless of the franchisor's wrongdoing. The payment under this approach intents to cover the franchisee's "restitution interest" since upon termination or nonrenewal the goodwill value generated – at least partially – by the franchisee will be transferred to the franchisor.[700] In such a case, without reimbursing the value, the European approach presumes that the franchisor will be unjustly enriched.[701]

Therefore, the calculation of this restitution interest will be limited compared to the expectation interest. While a wrongful termination entitles the franchisee for potentially lifelong compensation, the EU approach will compensate a period of time in which the franchisor's business profits might still be traced back to the previous franchisee's investment in goodwill.

Accordingly, the EU Directive introduces two calculation methods, indemnity system under German law, and compensation system under French law.[702] Both methods are similar to the "lost future profits" calculation in the U.S. While the French approach does not provide a detailed formula, in practice, courts often grant a total of two years

---

[699] *See e.g. Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 507 (4th Cir. 1986); Joseph Schumacher & Kimberly Toomey, *Recovering Lost Future Royalties in A Franchise Termination Case*, 20 Franchise L.J. 116 (2001).

[700] *See e.g.* Martijn Willem Hesselink, *Commercial agency, franchise and distribution contracts (PEL CAFDC)* 141 (Oxford: Oxford University Press 2006).

[701] *Id.*

[702] *See generally supra* Ch.3(C)(1)(c) & (2).

profits. The German approach provides a detailed calculation method.[703] Typically, however, courts award an indemnity for one year calculated from the agent's average annual remuneration over the preceding five years.

Essentially, the idea behind the limited goodwill recovery is that the franchisor's (principal's) excess profit, at least for a while, could be traced back to the terminated franchisee's (agent's) efforts. This connection, though, will break after a certain period of time. While according to French courts a period of two years seems appropriate, for German courts one year is sufficient to break the agent-customer connection.

This approach is not entirely unrecognized in the U.S. A few relationship laws have provisions that are similar to the European ones. Puerto Rico, for example, allows franchisees to recover "the amount of the profit obtained … during the last five years, or if less than five, five times the average of the annual profit obtained during the last years."[704] In *Ballester Hermanos, Inc. v. Campbell Soup Co.*, the U.S. District Court explained that under the law a franchisee may be "indemnified for the value of the good will associated with the product because of its efforts."[705] The Court further justified that a franchisee must be indemnified to the extent that what "it had expected to enjoy will be enjoyed by another company after the [franchise] is terminated."[706] However, the law of

---

[703] *Id*.

[704] 10 L.P.R.A. § 278b Termination of relationship— Damages.

[705] CIV. 92-1096 (JP), 1993 WL 269656 (D.P.R. 1993) (citing *San Juan Mercantile v. Canadian Transport Co.*, 108 D.P.R. 211 (1978) ("creation of market and winning of clients justify award of damages.")).

[706] *Ballester Hermanos, Inc. v. Campbell Soup Co.*, CIV. 92-1096 (JP), 1993 WL 269656 (D.P.R. 1993).

Puerto Rico allows this recovery only in a wrongful termination or nonrenewal case.[707] Similarly, Delaware law allows a franchisee to recover its lost profits which is "presumed to be no less than 5 times the profit obtained by the [franchisee], in the most recently completed fiscal year."[708] Also Delaware law permits this recovery in wrongful termination or nonrenewal cases.[709]

Moreover, as discussed in *Lapine Trade, Inc. v. Boon Rawd Brewery Co., Ltd.*, in some specialized franchise sectors, industry practices and custom may require a payment similar to the idea of goodwill recoupment.[710] In *Lapine Trade, Inc.*, the court noted that the industry practice and custom in the beer distribution sector is that the beer manufacturers (franchisors) pay one year of damages to distributors/franchisees when the manufacturer wishes to break a distributorship agreement.[711] The court further explained that the payment is only for "negotiated settlements, not for compensating a manufacturer's wrongful termination."[712]

b. Economic Analysis of Goodwill Regulation

Although current trend indicates that a statutory solution is needed, IFA and some commentators claim that any relationship regulation will have a negative effect on

---

[707] 10 L.P.R.A.§ 278b Termination of relationship— Damages.

[708] Del. Code Ann. tit. 6, § 2553(c)(3) (West); *see also* W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 10:34 (2013) ("This rule of thumb may eliminate the need for expert testimony in proving lost profits.")

[709] Del. Code Ann. tit. 6, § 2553(a) (West).

[710] 91 F.3d 909, 912 (7th Cir. 1996).

[711] *Lapinee Trade, Inc. v. Boon Rawd Brewery Co., Ltd.*, 91 F.3d 909, 912 (7th Cir. 1996).

[712] *Id*.

franchising in the U.S.[713] They mainly argue that regulations will (1) increase termination costs and therefore encourage franchisee opportunism; (2) increase litigation; and finally (3) increase overall cost of franchising, which will either reduce the number of franchised establishments, or create additional burden for franchisees since the cost will most likely be reflected to them. The following subsections discuss the validity of these points.

(1) Termination Costs and Franchisee Opportunism:

From a law and economics perspective, limitation on franchisors' termination power is the main concern about any franchise regulation.[714] Economists generally claim that franchise relationship regulations increase the cost of termination, and therefore threaten franchisors' ability to maintain brand quality.[715] They suggest that "the franchisor's ability to terminate shirking franchisees is an important self-enforcement mechanism for

---

[713] *See e.g.* David J. Kaufmann, *Franchising Is Alive and Well, So Let's Kill It*, N.Y.L.J. 2 (Sep. 25, 1990) (arguing that proposals for increased franchise regulation "threaten the very economic balance and structure that have driven [franchising's] success"); Andrew C. Seldon, *Public Regulation of Franchising: Choking the Goose that Lays the Golden Eggs?*, 9 Franchise L.J. 1, 16 (1989) (stating that franchising is "too valuable a contribution to the economy in terms of jobs, sales, and consumer welfare to risk stifling by unneeded, counterproductive, or inefficient regulatory intrusion").

[714] *E.g.* Jonathan Klick et. al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009).

[715] *See e.g.* Thomas J. Collin, *State Franchise Laws and the Small Business Franchise Act of 1999: Barriers to Effcient Distribution*, 55 Bus. Law. 1699, 1701-02 (2000) (State franchise laws … have been used repeatedly to shield the inefficient, unproductive or underperforming dealer or distributor.); *See also e.g.*, James A. Brickley et al., *The Economic Effects of Franchise Termination Law*, 34 J.L. & Econ. 101, 104 & 110 (1991); Benjamin Klein, *The Economics of Franchise Contracts*, 2 J. Corp. Fin. 9, 30 (1995); Michael J. Lockerby, *Franchise Termination Restrictions: A Guide for Practitioners and Policy Makers*, 30 Antitrust Bull. 791, 860 (1986).

reducing monitoring and other agency costs."[716] Ultimately, they argue, these laws "create inefficient economic results"[717] and "make franchising less desirable as an organizational form."[718] Similarly, IFA has been arguing for years that franchise relationship laws could "lead to the destruction of franchising" because higher termination costs will most likely encourage franchisees to free ride and cheat [franchisee opportunism.][719] Therefore, a number of economists and IFA strongly oppose any relationship regulation that limits franchisors' termination rights.

Yet, today, unconstrained termination power appears to be the main reason for franchisor opportunism and a major source for litigation.[720] Although the traditional law and economics analysis highlights the possible adverse effects of termination laws, regulations could actually "make franchising more desirable as an organizational form."[721] Economists suggest that if franchisees are risk averse and the laws reduce uncertainty about potential franchisor-opportunism, "the demand curve for franchises

---

[716] Uri Benoliel, *The Expectation of Continuity Effect and Franchise Termination Laws: A Behavioral Perspective*, 46 Am. Bus. L.J. 139, 176 (2009).

[717] *See e.g.* James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101, 104-109 (1991).

[718] James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101 (1991).

[719] Uri Benoliel, *The Expectation of Continuity Effect and Franchise Termination Laws: A Behavioral Perspective*, 46 Am. Bus. L.J. 139, 141 (2009); Klick et al., at 16 ("As long as the franchisee gains more from future franchise rents than it can get from cheating, the broad termination provision will induce the franchisee not to cheat.").

[720] *See supra* Ch.1 & Ch.2.

[721] James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101, 104 (1991).

would shift to the right."[722] Hence, a regulation that is specifically tailored to reduce franchisor-opportunism, and that does not increase the costs of controlling quality, would most likely "result in more franchising".[723]

A statutory goodwill protection, similar to the European provision discussed in Chapter 3, would satisfy the conditions above mentioned. Such a regulation could balance the conflicting interests of the parties and help to overcome the fundamental challenge of opportunism. Furthermore, while a goodwill regulation would specifically target a major source of franchisor opportunism, it would not raise the costs of controlling brand quality since non-opportunistic terminations would be out of the scope of goodwill protection.

In essence, goodwill protection would only offer leverage and protection for franchisees that generate positive goodwill value, which could have continued to benefit the franchisor upon termination. In other words, goodwill protection provides a safeguard for franchisees' equity build-up in their businesses through capital investment and hard work that eventually belong [should have belonged] to individual franchisees. Accordingly, franchisors will be able to terminate underperforming franchisees without

---

[722] *Id*.

[723] *Id.* Authors argue, though, regulations should not be mandatory, and if it really works why the parties do not adopt the idea without regulation. Nonetheless, according to the Authors, another possible scenario is "protectionist arguments" scenario. Under this understanding regulations will reduce franchisors' opportunistic gains, and thus cause higher franchise prices. Consequently, the quantity of franchises will decline. However, there will be a potential social gain with the reduction of franchising since some franchisees were paying effective prices above their true reservation prices.

any additional compensation.[724] Thus, there should be no additional obstacle for franchisors if terminations are aimed to protect their brand quality. Essentially, goodwill protection might increase the 'termination cost' *only if* a franchisor terminates a non-shirking franchisee without a justified reason, and *if,* upon termination, the franchisor continues to benefit from the franchisee's goodwill.[725]

Brickley et al. give a few examples to demonstrate the negative effects of existing termination regulations. They first discuss *Kealey Pharmacy and Home Care Service, Inc. v. Walgreen Co.*[726] to prove their assumption that termination laws increase the costs of termination and nonrenewal.[727] In this case, Walgreen decided to withdraw from an entire geographic area and terminated all of its 1,400 drug franchises for "economic reasons".[728] The court ruled that this reason did not constitute "good cause" and awarded monetary damages to only fourteen Wisconsin franchisees.[729] Because the franchisee units in states (without termination laws) were not entitled to similar damages, the authors concluded that termination laws in Wisconsin increased termination costs.[730]

---

[724] Assuming that underperforming franchisees will most likely have no positive goodwill value.

[725] Under certain circumstances, such as criminal acts, bankruptcy, and repeated contractual violation, franchisees lose their right to receive goodwill recoupment. *See supra* Ch.3(C)(1)(d)((2)).

[726] 761 F.2d 345 (7th Cir. 1985).

[727] James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101, 113 (1991).

[728] *Kealey Pharm. & Home Care Services, Inc. v. Walgreen Co.*, 761 F.2d 345, 348 (7th Cir. 1985).

[729] *Id*.

[730] James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101, 113 (1991).

Under a regulatory goodwill protection similar to the European provision, this case would have been decided differently. Since the franchisor (Walgreen) planned to withdraw from a market, (assuming that there were no undisclosed reasons; such as changing the brand name, or transferring the licenses to another brand) it could not have misappropriated franchisees' goodwill, and thus the court could not have awarded extra damages.[731] So, under the goodwill protection scheme, the franchisor's (Walgreen) termination costs would have been the same as in states without termination laws.

Another example Brickley et al. discuss is *Martino v. McDonald's Corp.,* where McDonald's did not renew a franchise because the company found the franchisee to be not in 'good standing'.[732] The authors argue that franchise regulations would not have allowed McDonald's to not renew, thus increase the termination costs.[733] Yet again, goodwill protection would not have increased the termination costs in this case. In order to receive goodwill recoupment, terminated franchisees must prove that they have generated positive goodwill value, which would benefit the franchisor upon termination. Hence, franchisors could terminate underperforming franchisees without having to worry about additional payments.

As illustrated above, a statutory protection for franchisees' goodwill would most likely not increase termination costs so long as the franchisor did not try to capture its

---

[731] Under the EU regulation, to receive a goodwill compensation, agents should prove that their principals will continue to use agents' goodwill after termination.

[732] *Martino v. McDonald's Corp.*, 304 N.W.2d 780 (Wis. 1981).

[733] James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101, 114 (1991).

franchisee's equity. Accordingly, although the application of goodwill protection would depend on the circumstances faced by the parties in each case, it appears that a goodwill regulation would not increase the cost of controlling brand quality. Furthermore, as explained below, goodwill protection could help creating healthier franchise relationships and encourage franchisees to invest more into their franchises.

(2) Litigation Cost

While IFA and some commentators argue that any relationship regulation encourages litigation and has a chilling effect on the franchising market,[734] there are several reasons why these assertions will be less likely with goodwill protection, or might be overstated in general.

First of all, a well-drafted statutory goodwill protection would most likely not increase litigation and/or encourage amiable resolutions. Franchisees whose goodwill was misappropriated have already been seeking relief in courts, often with legal theories that are not designed for such challenges. As discussed in Chapter 2, franchisees make use of all possible legal theories under common law – and state relationship laws – to recover their goodwill losses. However, this 'creative approach' often results in lengthy litigation

[734] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 168 (June 24, 1999) (Statement Of Dennis E. Wieczorek, Esquire, Partner, Rudnick & Wolfe, Chicago, IL) ("The major defect with franchise relationship legislation is the inducement that is created to litigate."); *id.* at 73 (Statement Of Michael F. Adler, Chairman, President, And Ceo, Moto-Photo, Inc., Franchisor, Dayton, Oh, On Behalf Of International Franchise Association) ("The proposed legislation … just encourages litigation.").

and unpredictable outcomes.[735] Especially, in cases where franchisors evidently abuse their power, courts are eager to provide remedy to franchisees, whilst stretching legal tools to a point that creates extreme uncertainty. Therefore, with a clear statutory guidance, parties would be more likely to settle both before and during litigation.[736]

Moreover, although the correlation between franchise regulations and litigation has been a major point of discussion during legislative debates, there is not much data on this subject. In their recent article Kersi Antia et al. underlined this point: "To the best of our knowledge, our study is the first rigorous, multiyear, multifranchise system assessment of both [registration and relationship] laws."[737]

Kersi Antia et al. observed 75 franchise systems over nearly two decades, and found that "the additional disclosure elicited by registration law serves to reduce the incidence of serious conflict (i.e., litigation) between franchisors and their franchisees systemwide."[738] They argued that "registration law–induced transparency of franchisors' operations effectively reduces miscommunication and unmet expectations, thereby promoting more harmonious relations."[739] More importantly, the study discovered that "franchise systems that have a significant presence in relationship law states and rely on a higher proportion of franchisee-owned outlets experience greater environment–strategy

---

[735] *See id* at 228 (Statement Of Peter A. Singler, Esquire, Law Offices Of Peter Singler, Sebastopol, CA).

[736] *Id.*

[737] Kersi D. Antia, Xu (Vivian) Zheng, & Gary L. Frazier, *Conflict Management and Outcomes in Franchise Relationships: The Role of Regulation*. 50 Journal of Marketing Research 577, 587 (October 2013).

[738] *Id.* at 586.

[739] *Id.*

alignment" which results in "a reduced propensity for litigation between the parties."[740] Accordingly, the study concludes that the impact of franchise regulations is "positive", and regulations "bode well for franchisor-franchisee partnerships."[741]

Another study, very limited in scope, found that litigation level in Iowa did not change significantly after the 1992 Iowa Franchise Law and its 1995 Amendments.[742] Justice Brent R. Appel of the Iowa Supreme Court, also supported this limited study. He argued that after enacting one of the most restrictive franchise relationship laws, Iowa faced no significant litigation.[743] In fact, he claimed that since the Iowa Franchise Act was passed in 1992, there still has not been one reported appellate case in the Iowa state courts under it, and the only reported federal court case was an action that was brought by franchisors challenging the constitutionality of the measure.[744]

Jeffery S. Haff, a prominent franchisee attorney, also made a similar remark regarding the Minnesota Franchise Act. He states that despite his firm's Minnesota address, over 80% of his work involves disputes having no connection to Minnesota.[745]

---

[740] *Id*. at 587.

[741] *Id*. at 588.

[742] Angela Hurst, Thesis, *The Impact of the Iowa Franchise Law on Restaurant Franchisor Expansion Strategy: An Exploratory Study* (April 1997).

[743] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 312 (June 24, 1999).

[744] *Id.*

[745] *Id.* at 353 (Prepared Statement Of Jeffery S. Haff, Dady & Garner, P.A., Minneapolis, MN).

Accordingly, he argues that the perceived reduction in litigation is, at least in part, due to the regulation, which provides clear guidance for parties' rights and obligations.[746]

So, the above-mentioned statements indicate that relationship laws did not cause a significant increase in lawsuits so as to have a chilling effect on franchising. On the contrary, it might even decrease the level of litigation. Accordingly, this paper claims that a goodwill regulation would not have a negative impact on litigation because this protection tends to be more problem-oriented and less intrusive than existing relationship laws.

(3) Overall Cost of Doing Business:

Finally, this paper argues that a nation-wide goodwill protection will most likely *not* increase the overall cost of franchising. Even if it, hypothetically, increases the cost of doing business, this cost would be outweighed by the benefits that goodwill protection provides.

(a) The Overall Cost will not go up:

First of all, as discussed above, a statutory goodwill protection should not have a significant impact on termination and/or litigation costs. Moreover, in regulated states, these costs should be reduced if, as a result of the goodwill regulation, those states loosen their termination restrictions.

Furthermore, because in non-regulated states goodwill protection would potentially reduce a major source of conflict, namely franchisor-opportunism, franchisees would be

[746] *Id*.

more likely to buy franchises, banks would be more likely to lend to a franchisee, and, ultimately, franchise returns would presumably improve.[747]

Uri Benoliel, for instance, argues that "an increase in the expectation of continuity is likely to beneficially enhance the relational behavior" within the franchise relationship.[748] He observes that "the expectation of continuity is inherently at risk" in franchising since franchisors are "often tempted to erratically interrupt the continuity of the relationship for self-interested reasons even if the [franchisee] fully complies with the franchise agreement."[749] Accordingly, he suggests, if the expectation of continuity increases, "the relationship will benefit from joint action, expression of trust, and fair treatment of both parties."[750] *Benoliel* also provides empirical data showing that such relational improvements "enhance the dyadic level of performance, satisfaction, flexibility, safety of specific investments."[751] Finally, he concludes that a regulatory scheme that increases the expectation of continuity "will generate desirable outcomes, thereby negating the legal economists' prediction of free riding."[752]

---

[747] *See* Antony W. Dnes, *Franchise Contracts, Opportunism and the Quality of Law*, 3 Entrepreneurial Bus. L.J. 257, 274 (2009).

[748] Uri Benoliel, *The Expectation of Continuity Effect and Franchise Termination Laws: A Behavioral Perspective*, 46 Am. Bus. L.J. 139, 142 (2009).

[749] *Id*.

[750] *Id*.

[751] *Id*. at 154.

[752] *Id*. at 176-77.

(b) The Overall Cost Might Go Up, But Benefits Outweigh The Additional Cost

Even if we accept the hypothesis that a mandatory goodwill regulation could generate at least additional compliance costs, and that the regulation might even increase litigation and termination costs,[753] this study maintains that benefits will outweigh this added cost.

Assuming that the statutory goodwill protection would increase the cost, – as economists suggest for similar regulations – franchisors would have two viable options: (1) not choosing franchising as a way of doing business, and finding alternative methods, (2) reflecting the cost to franchisees by increasing fees and royalties. Below, this work shows that the expected negative effects do not happen even with much harsher state relationship laws. One could argue that this shows the need for regulation in franchising industry.

i. First, 'not choosing franchising as a way of doing business, and finding alternative methods':

Franchising is just a way of doing business. There are several other methods for expanding or starting a business. Therefore, if franchising costs more than its alternatives, we should observe a decline in the franchise sector. Accordingly, some economists argue

[753] As discussed above, this work expects no such increase.

that franchise regulations will most likely increase the cost of doing business and thus lead to a reduction in the number of franchised units.[754]

One of the first empirical studies to evaluate the correlation between relationship regulations and number of franchised establishments was conducted by Brickley et al.[755] They hypothesized that relationship laws restricting franchisors' termination power will lead to less franchising.[756] So, after analyzing industry-level data from 1985 and firm level-data from 1984 to test cross sectionally whether the amount of franchising is different in the state which have termination laws, Brickley et al. found that "laws reduce the amount of franchising relative to company ownership in industries where individual units are prone to serving transient customers."[757] The study, however, had a very limited data set, and the most recent data in this study is now over 25 years old.[758]

In a more recent study, Klick et al. also maintained that regulation leads to a reduction on the number of franchised units.[759] They used firm-level disclosure data on

---

[754] James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & ECON. 101 (1991); J. Howard Beales III & Timothy J. Muris, *The Foundations of Franchise Regulation: Issues and Evidence,* 2 J. CORP. FIN. 157 (1995) (examining state regulation of the franchise contract); Howard P. Marvel, *Tying, Franchising, and Gasoline Service Stations*, 2 J. Corp. Fin. 199 (1995) (examining FTC regulation of gasoline franchising); Richard L. Smith II, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J.L. & Econ. 125 (1982).

[755] James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101 (1991).

[756] *Id*. at104-09.

[757] *Id*. at 130.

[758] See for critics Jonathan Klick et. al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355, 365-66 (2009).

[759] *Id.*

franchising in the fast-food industry to examine the effect of the Iowa Franchise Law.[760] The Iowa law, which is "uniformly regarded as the most unfavorable to franchisors," was passed in 1992, and amended in 1995.[761] Accordingly, the study gathered data that cover the period from 1989-2001. This study, however, has also a significant drawback. The Iowa Franchise Law was strongly opposed by IFA and some of its members, and during the passage of the law, they attempted to "organize a boycott of Iowa to attempt to gain political leverage with the state legislature."[762] Therefore, the reduction on the number of franchised units could arguably be the result of this boycott.[763]

Today, we have two very comprehensive and reliable reports to observe the franchise sector. The IFA published the Economic Impact of Franchising Vol. 2 in 2005, and Vol. 3 in 2007. The reports strongly suggest that the previous studies, which indicated a

---

[760] *Id*.

[761] *Id*.

[762] Franchising Relationship: Hearing Before the Subcomm. On Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. 312 (June 24, 1999); *see also* Tracy Kolody, *Franchisees Take Step Ahead With Experience, Growth Comes Power, Influence*, http://articles.sun-sentinel.com/1993-06-27/business/9301210095_1_international-franchise-association-bill-cherkasky-franchising-executive (last accessed July 14, 2014).

[763] Iowa Coalition for Responsible Franchising (ICRF), a group representing franchisors, conducted a study in 1995. They claimed that 70 percent of franchisors reduced or stopped expansion in Iowa, and will not resume expansion plans until the law is repealed or reformed. They also alleged that the survey showed that franchising in Iowa grew much slower than its surrounding states. However, Brent Appel, a prominent franchisee lawyer in Iowa, had argued that "franchising is doing well in Iowa." He had further told that he has "not seen any credible study to suggest that there is a significant loss of jobs and revenue." The Daily Reporter, Feb 28, 1996, p. 12 available at http://news.google.com/newspapers?nid=1907&dat=19960228&id=SOAxAAAAIBAJ&sjid=1mgFAAAAIBAJ&pg=1786,3342667 (last accessed July 14, 2014).

negative correlation between relationship laws and franchising growth, might be overstated and not reflect the whole picture.

For instance, between 2004 and 2007 after the franchise law had settled in, Iowa saw significantly more growth (app. 10%) compared to the national average (-8.9%) and saw the fastest growth compared to neighboring states (app. -5%).[764] Moreover, franchised businesses in Iowa have added jobs faster than neighboring states by over 136%.[765]

Although it appears to be difficult to draw clear conclusions, one can argue that there is a noteworthy question concerning the net effect of franchise regulations on franchise relationships. Klick et al. observes:

> "If the costs of franchisor opportunism are likely to outweigh those of franchisee opportunism, laws restricting termination rights could make both franchisors and franchisees better off. For example, the law could encourage franchisees to invest more in market discovery and development by helping franchisors make commitments not to skim off the best franchises."[766]

According to the insight of Klick et al., it is possible to argue that "the costs of franchisor opportunism [outweighed] those of franchisee opportunism" in Iowa. Yet, Iowa is not the only regulated state where franchising grew more than the national average. In fact, according to IFA Reports Vol. 2 and Vol. 3, there is no significant

---

[764] IFA Reports Vol. 2 and Vol. 3.

[765] Jim Coen, *Franchised Units Increase in Iowa 300% More than Adjacent States*, http://www.mainefranchiseowners.org/franchised-units-increase-in-iowa-300-more-than-adjacent-states (February 25, 2014).

[766] Jonathan Klick et. al., *Federalism, Variation, and State Regulation of Franchise Termination, 3 Entrepreneurial Bus*. L.J. 355 (2009).

reduction in any regulated state. So, since even under stricter regulations franchising continues to flourish, this paper suggests that a well-drafted goodwill protection would not lead to a reduction on the number of franchised units – if not it will cause better growth rate. Thus, generally speaking, this effect does not seem to be likely.

ii. Second, 'reflecting the cost to franchisees':

Assuming that a goodwill regulation will benefit franchisees only by transferring some property rights to them, franchisors could offset some of the expected gains by adjusting the pricing of franchise contracts.[767] So, franchisors might choose to increase franchise fees and/or royalties if they anticipate paying an extra sum of money at the end of their contractual relationships with "some franchisees."

John Gordon, a chain restaurant earnings and economics expert, supports this proposition:

> "The economics of franchising is that franchisors use others' money, not the franchisor's, to power the system. Should a franchisor actually realize incremental costs of any kind relating to regulations, they would likely eventually be passed on to its franchisee community via incremental royalties, other fees or other revenue — or cost recovery methods that spread the cost to the entire franchisee community."[768]

James Brickley makes also a similar observation. In his 2002 article, he examines how state franchise termination laws affect franchise contract in terms of royalties and

---

[767] James A. Brickley, *Royalty Rates and Upfront Fees in Share Contracts: Evidence from Franchising*, 18 J.L. Econ. & Org. 511, 531 (2002).

[768] Don Sniegowski, *IFA Warns States Not to Interfere with Contracts*, http:// www.bluemaumau.org/10473/ifa_warns_states_not_interfere_franchise_contracts (June, 24, 2011).

upfront fees.[769] His study discovered that "franchise companies that are headquartered in termination-law states charge higher royalty rates than companies headquartered in other states (around 1% higher)."[770] Accordingly, Brickley concludes that franchisees pay "a higher price for franchises in states with protection laws" since franchisors can easily reflect any potential cost to their contracts.[771] Brickley argues that his findings are consistent with the hypothesis that termination laws increase franchisors' costs to control system quality.[772]

Consequently, although this work expects a different outcome, one can presume a price increase as a result of a goodwill regulation. In this case, we will observe two different possibilities: (a) the cost of doing business might indeed go up due to actual payments [or related burdens], or (b) the cost might – in practice – not go up due to above mentioned reasons.

If franchisors' costs go up in practice:

After collecting an extra sum of money, the franchisor might actually be required to recoup its franchisees for their goodwill value. In this case, goodwill payments will be counterbalanced by higher royalties. Nonetheless, a franchisee will only be recovering its

---

[769] James A. Brickley, *Royalty Rates and Upfront Fees in Share Contracts: Evidence from Franchising*, 18 J.L. Econ. & Org. 511 (2002) (finding some evidence that franchisors headquartered in termination states charge significantly higher royalty rates combined with a lower franchise fee).

[770] *Id.* Under Brickley's calculation, at the end of a 20-year period, an average franchisee in a regulated state pays $39,000 more than the one in non-regulated state.

[771] James A. Brickley, *Royalty Rates and Upfront Fees in Share Contracts: Evidence from Franchising*, 18 J.L. Econ. & Org. 511, 511 (2002).

[772] *Id*.

premium if the franchisee has generated positive goodwill, which should still continue to benefit the franchisor upon termination, and if the payment has not been excluded for any reason.[773] If, however, the requirements are not met, the franchisee will lose its premium.

So, while goodwill protection provides a safeguard for successful franchisees against opportunistic terminations, it creates no, or little burden for franchisors. In other words, franchisees will pay a price for the protection, but a higher price does not necessarily mean that franchisees will be made worse off by the law.[774] In contrast, the protection might only mean higher royalties for franchisees who are not eligible for goodwill payment. In this case, prospective franchisees will possibly be more cautious while investing in a franchise system, which will work as another layer of pre-sale screening, and 'marginal royalty-increase' will be decreasing since the franchisor will pool the left-over value (lost premiums).

What if the actual cost does not increase?

As discussed above, a goodwill regulation might not increase the overall cost of doing business. Nonetheless, franchisors might increase franchisee royalties assuming that the regulation will create extra burden. In this case, franchisors might have higher profit margins in short term. In a competitive market, however, this profit rise will be corrected. Thus, the market should bring the fees down to a before-regulation level. Once

[773] Goodwill payments can be excluded for several reasons, such as termination with 'justified reason', self-termination, etc. For more information see *supra* Ch.3(C)(1)(d).

[774] *See* James A. Brickley, *Royalty Rates and Upfront Fees in Share Contracts: Evidence from Franchising*, 18 J.L. Econ. & Org. 511, 532 (2002) ("The empirical results, however, suggest that franchisees pay a price for this protection.")

again, even if fees do not go down immediately, franchisees will be paying premiums for having a safer relationship.

Moreover, whether actual costs increase or not, both franchisors and franchisees will enjoy relational improvements that will in turn enhance the profitability of franchising as a whole.[775]

2. Goodwill Recoupment under Common Law

While this work favors a regulatory solution for protecting franchisees' goodwill, existing common law doctrines could still provide a comparable protection. Such a result may be achieved by adjusting existing tools.

As discusses previously, the majority of the U.S. states do not have franchise laws.[776] In these states courts still rely on common law principles. The existing common law doctrines, however, are inadequate to protect franchisees from franchisor-opportunism.[777] Generally, these tools do not protect franchisees against express provisions of their agreements. Moreover, these tools often produce inconsistent results, and cause uncertainties in the franchising industry.[778] Therefore, in the absence of statutory

---

[775] *See* Uri Benoliel, *The Expectation of Continuity Effect and Franchise Termination Laws: A Behavioral Perspective*, 46 Am. Bus. L.J. 139, 153-54 (2009).

[776] *See e.g.* Peter C. Lagarias, Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, 29 Franchise L.J. 139, 144 (2010); Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship*, 6 Barry L. Rev. 61, 75 (2006).

[777] *See e.g.* Pa H. 1620, 197th Gen. Assembly (2013); Mass. Sen. 73, 188th Leg. (2013).

[778] *See e.g.* Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. Rev. 905, 912-13 (1994).

regulation, common law tools need to be reformed to protect franchisees' legitimate business interests, and to reduce uncertainties.

The goodwill recoupment doctrine – especially, the indemnity system – may assist U.S. courts in their effort to enhance existing tools. Once franchisees' share in goodwill is recognized,[779] and an appropriate assessment method is implemented, this value – if any – would be used as an important criterion in evaluating the validity of claims under existing common law doctrines.

The following two sections discuss the potential use of the recoupment doctrine within common law. Although the theory of goodwill recoupment could be introduced into most common law tools that deal with franchisees' goodwill, the implied duty of good faith seems to be the most appropriate tool for an effective implementation.

a. Implied Covenant of Good Faith and Fair Dealing

The good faith doctrine has been an important judicial tool for courts in their efforts to "police opportunistic behavior in contractual relations."[780] Critics, however, believe that uncertainties inherent in the doctrine diminish its overall reliability in franchise

---

[779] *See* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 986-87 (1990) ("Courts should stop conceiving of the franchise relation as one solely dedicated to protecting the franchisor's trademark and goodwill. The franchise relation is a mutual exchange.")

[780] Jonathan C. Lipson, *Governance in the Breach: Controlling Creditor Opportunism*, 84 S. Cal. L. Rev. 1035, 1069 (2011); *See also e.g. Bicycle Corp. of Am. v. Meridian Bank*, CIV. A. 95-6438, 1995 WL 695090 (E.D. Pa. 1995); *Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028, 1033 (8th Cir. 1996).

disputes.[781] They argue that good faith is a vague and "amorphous term" to be applied to the franchisor in its relationship with the franchisee.[782] Critics accordingly claim that the doctrine, without objective standards, brings frustration and confusion in the franchise sector.[783]

The goodwill recoupment doctrine together with Steven Burton's "foregone opportunities" approach to good faith may bring clarity to the implied duty. Burton focused on two requirements: use of discretion, and attempt to recapture foregone opportunities. According to him, violation of good faith occurs if "an exercise of discretion in performance" aims "to recapture opportunities foregone at formation."[784] He argued that "[a] reasonable person … would enter a contract that confers discretion on the other party only on the belief that the discretion will not be used to recapture foregone opportunities." [785]

---

[781] *See e.g.* Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship*, 6 Barry L. Rev. 61, 75 (2006).

[782] Pa H. 1620, 197th Gen. Assembly, Comment 2 (2013). *See also e.g.* Lee A. Rau, *Implied Obligations in Franchising: Beyond Terminations*, 47 Bus. Law. 1053 (1992); Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith As A Limitation on the Landlord's Right to Terminate*, 19 Ga. L. Rev. 483, 525 (1985).

[783] Pa H. 1620, 197th Gen. Assembly, Comment 2 (2013). *See also* Dr. Alan D. Miller & Dr. Ronen Perry, *Good Faith Performance*, 98 Iowa L. Rev. 689, 710 (2013); *Humantech, Inc. v. Caterpillar, Inc.*, 11-14988, 2012 WL 6214371 (E.D. Mich. 2012) (underlining the absence of "sound policy, strong logic, and firm precedent" regarding the application of good faith).

[784] Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 387 (1980); *see also Dayan v. McDonald's Corp.*, 466 N.E.2d 958, 971 (Ill. App. 1st Dist. 1984); Dr. Alan D. Miller & Dr. Ronen Perry, *Good Faith Performance*, 98 Iowa L. Rev. 689, 706 (2013).

[785] Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 387 (1980); *see also* Gillian K. Hadfield, *Problematic*

The assessment scheme provided by the recoupment doctrine – particularly, the indemnity system – might be used to measure, at least partially, "foregone opportunities." In practice, good faith violation cases often involve terminations, nonrenewal, refusal to approve transfers, and encroachment.[786] As explained earlier, in such disputes, the common denominator appears to be the misappropriation of franchisees' sunk investment, especially their local goodwill.[787] Accordingly, the European framework could offer a guideline for judges and lawyers in determining more precisely whether and/or to what extend the particular franchisee generated local goodwill, which in turn made economic sense for the franchisor to attempt to recapture this foregone opportunity. By doing so, courts would be able to employ a less amorphous and more quantified analysis in their assessment of whether a party has breached the implied obligation of good faith.

While some commentators argue that good faith should not be defined purely in economic terms, in practice, economic motives happen to be the central point for most franchise disputes.[788] Commonly, franchisees invest substantial amounts of time and money in building the franchise, and local goodwill might be the most important asset in

---

Relations: Franchising and the Law of Incomplete Contracts, 42 Stan. L. Rev. 927, 952 (1990).

[786] *See e.g.* Kathryn Lea Harman, *The Good Faith Gamble in Franchise Agreements: Does Your Implied Covenant Trump My Express Term?*, 28 Cumb. L. Rev. 473, 474 (1998).

[787] *E.g. Piantes v. Pepperidge Farm, Inc.*, 875 F. Supp. 929, 938 (D. Mass. 1995) (citing *Gram v. Liberty Mutual Insurance Co.,* 384 Mass. 659, 667, 429 N.E.2d 21 (1981); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 987 (1990)).

[788] *E.g.* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 404 fn. 80 (1980).

a particular business.[789] So, as the franchisee's investment and goodwill increases, the franchisor's incentives to act opportunistically increase.[790] Accordingly, once the goodwill value reaches a certain level, the franchisor might be tempted to use his discretion to capture this value.[791] In this case, the implied covenant should prevent the franchisor to take advantage of the franchisee's vulnerable position.[792] In the end, it is the franchisee who has everything to lose since "the going business and trade he built up remain with the old [location]."[793] In other words, a franchise as a going business has a much greater value because of its goodwill, and loss of this value is "arguably a sufficient threat of forfeiture to justify implying contractual obligations to protect a franchisee's investment."[794]

---

[789] *See e.g.* Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith As A Limitation on the Landlord's Right to Terminate*, 19 Ga. L. Rev. 483, 523 (1985) ("The franchisee's resulting financial loss may be great if he has invested a considerable amount of time and money to promote the product.")

[790] *See* James A. Brickley, Sanjog Misra, R. Lawrence Van Horn, *Contract Duration: Evidence from Franchising*, 49 J.L. & Econs. 173, 178 (2006); Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105, 194 (2004).

[791] *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 280 (7th Cir. 1992); Ofer Grosskopf, *Dividing the Surplus Upon Termination: The Case of Relational Contracts*, 48 Am. Bus. L.J. 1, 15 (2011).

[792] *See e.g. Piantes v. Pepperidge Farm, Inc.*, 875 F. Supp. 929, 938 (D. Mass. 1995) citing *Gram v. Liberty Mutual Insurance Co.*, 429 N.E.2d 21 (1981) ("Court should look 'at the consequences of the termination' to determine if it resulted in a 'depriv [ation] of earnings, loss of good will, or loss of investment,' …").

[793] *Shell Oil Co. v. Marinello*, 307 A.2d 598, 602 (N.J. 1973).

[794] Lee A. Rau, *Implied Obligations in Franchising: Beyond Terminations*, 47 Bus. Law. 1053, 1069 (1992); *see also Weight Watchers of Quebec Ltd. v. Weight Watchers Intern., Inc.*, 398 F. Supp. 1047, 1054 (E.D.N.Y. 1975).

In short, this work suggests, if a franchisee generates positive goodwill value, and the franchisor will continue to benefit from this value, the franchisor's termination (nonrenewal, or even refusal to approve a transfer) should be presumed to violate the implied duty of good faith. Under this approach, the European goodwill recoupment doctrine would be a valuable resource to substantiate the concept of franchisee's local goodwill.

b. Other Doctrines

In principle, any common law tool that deals with goodwill related issues could benefit from the recoupment doctrine. The framework provides not only an assessment – and calculation – method, it also brings viewpoints that would strengthen courts' position in protecting franchisees' legitimate business interests from opportunistic franchisors.

(1) Tortious Interference (Intentional Interference)

In an intentional interference case, a franchisor might be liable to pay damages in tort (which may include punitive damages) for improper actions intended to interfere with the franchisee's prospective or existing contractual relations with others.[795] In such cases, courts consider a number of factors to decide whether a franchisor's interference is improper.[796] This work, accordingly, suggests that existence of franchisees' goodwill should be an important aspect in deciding whether a franchisor's interference is improper.

---

[795] *See supra* Ch.2(C)(2).

[796] *See* Restatement (Second) of Torts § 767 (1979); *See also e.g. Intl. Sales & Serv., Inc. v. Austral Insulated Products, Inc.*, 262 F.3d 1152 (11th Cir. 2001); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500-01 (Colo. 1995).

Although it is controversial, intentional interference doctrine often functions as a supplementary legal tool in franchise disputes; it comes into play where contract remedies fail to fully compensate the franchisee.[797] BeVier, for instance, argues that in a tortious interference case, courts should focus on the under-compensatory effect of contract damages rather than the nature of the interfering act.[798] She identifies that franchisees make significant, relation-specific investments that are often not recouped under contract law (damages.)[799] Accordingly, she maintains that by supplementing contract damages with inducement liability, tortious interference provides a mechanism for fully compensating the franchisee.[800]

In practice, however, BeVier's explanation appears to be not very popular. Courts often permit recovery if franchisees can prove criminal conduct, independently tortious conduct, or conduct engaged in solely for the purpose of harming the franchisee.[801]

---

[797] Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher As Wrongdoer*, 47 Buff. L. Rev. 645, 685 (1999). *See also Dunkin' Donuts v. Shree Dev Donut LLC*, 152 F. Supp. 2d 675, 678-79 (E.D. Pa. 2001); *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994).

[798] Lillian R. BeVier, *Reconsidering Inducement*, 76 Va. L. Rev. 877, 924-25 (1990); *See also* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 88 (1982); Jesse Max Creed, *Integrating Preliminary Agreements into the Interference Torts*, 110 Colum. L. Rev. 1253, 1262-63 (2010).

[799] Lillian R. BeVier, *Reconsidering Inducement*, 76 Va. L. Rev. 877, 909 (1990). *See also* William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 Minn. L. Rev. 1103, 1150 (1996).

[800] Lillian R. BeVier, *Reconsidering Inducement*, 76 Va. L. Rev. 877, 924 (1990).

[801] *See e.g. Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1103 (N.Y. 2004) (citing *Guard–Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445 (1980); *Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc*., 225 F.3d 876, 886-87 (7th Cir.2000) (applying Illinois law) (tort actionable, but not proven); *Burger King Corp. v.*

Moreover, some courts decided that franchisees could not recover damages in tort for breach of contract.[802] Furthermore, in some states (the apparent minority), courts have refused franchisees' claims against franchisors stating that the tortfeasor must be a 'third party,' or a 'stranger,' – which the franchisor is not, according to these courts – to the interrupted economic relationship."[803]

Until contract damages include fair goodwill compensation, courts may/should incline to allow franchisees' goodwill recovery under tortious interference doctrine. Thus, in determining whether the interference is improper, it should be very important to ascertain whether the franchisor was motivated, in whole or in part, by a desire to interfere with/misappropriate its franchisee's business success. In this case, the recoupment framework could help judges and lawyers to estimate franchisees' un-recouped damages.

Nonetheless, since a great deal of tortious interference cases deal with franchisors' attempt to recapture franchisees' goodwill, an independent goodwill recoupment

---

Ashland Equities, Inc., 217 F.Supp.2d 1266, 1279-80 (S.D.Fla.2002); *Clark v. America's Favorite Chicken Co.*, 916 F.Supp. 586, 594-95 (E.D.La.1996)).

[802] *See e.g. JRS Products, Inc. v. Matsushita Elec. Corp. of Am.*, 8 Cal. Rptr. 3d 840, 849 (Cal. App. 3d Dist. 2004) ("Thus motive, regardless of how malevolent, remains irrelevant to a breach of contract claim and does not convert a contract action into a tort claim exposing the breaching party to liability for punitive damages" at 852.)

[803] *Carvel Corp. v. Noonan*, 350 F.3d 6, 15 (2d Cir. 2003) *certified question answered,* 818 N.E.2d 1100 (N.Y. 2004) *See also Britt/Paulk Insurance Agency, Inc. v. Vandroff Insurance Agency, Inc.,* 952 F.Supp. 1575 (N.D.Ga.1996) ("Georgia law requires that a plaintiff show that the defendant is a 'stranger' to the business and contractual relations at issue in order to prevail on tortious interference with business and contractual relations claims."); W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 9:37 (2013).

regulation seems to be a more appropriate response.[804] If franchisees are compensated for their goodwill under a more suitable legal source, the interference doctrine could deal with 'real' tortious interference cases where the act constitutes independent tort, such as defamation, coercion, etc.[805]

(2) Missouri Rule

The Missouri rule provides a limited protection for franchisees that made substantial investments in reliance upon continued performance under their franchise agreements.[806] Accordingly, if a franchisee investments into a franchise system, the franchisor must allow the relationship of indefinite duration to continue for a period of time that is "reasonably necessary for a [franchisee] to recoup its investment."[807] The principle is noteworthy since it reiterates the issue of sunk investment in franchise

---

[804] *See e.g. Dunkin' Donuts v. Shree Dev Donut LLC*, 152 F. Supp. 2d 675, 678-79 (E.D. Pa. 2001) ("plaintiffs' true motivation was to reap a $750,000 financial windfall by preventing the transfer of the [franchisees'] stores."); *Luso Fuel Inc. v. BP Products N. Am., Inc.*, CIV.A. 08-CV-3947DMC, 2009 WL 1873583 (D.N.J. 2009) ("by 'suddenly and unilaterally' seeking to end the franchise relationship and by 'seeking to eviscerate the business relationships and goodwill' developed by [the franchisee] with others."); *Lee v. Gen. Nutrition Cos., Inc.*, 2001 WL 34032651 (C.D. Cal. 2001) ("greedily and intentionally drive these franchisees out of business, thereby usurping for itself the goodwill created by these franchisees.")

[805] *See* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 89 (1982); *Stillwell v. RadioShack Corp.*, 676 F. Supp. 2d 962, 977-78 (S.D. Cal. 2009).

[806] *See generally* Ch.2(III)(C).

[807] *Schultz v. Onan Corp.*, 737 F.2d 339, 346 (3d Cir. 1984) ("A reasonable notice period prior to termination is also required"); *Ag-Chem Equip. Co., Inc. v. Hahn, Inc.*, 480 F.2d 482, 486-87 (8th Cir. 1973) ("reasonable[-ness]" varies with the circumstances of each case"); *McGinnis Piano & Organ Co. v. Yamaha Intern. Corp.*, 480 F.2d 474, 479 (8th Cir. 1973) ("Reasonable notice is that period of time necessary to close out the franchise and minimize losses.").

relationships; the threat of termination becomes a powerful weapon for the franchisor once the franchisee spends time, effort, and money to build a successful business.[808] The Missouri rule – with its equitable roots – aims to balance the disparity by providing a minimum safeguard for franchisees against sudden terminations. However, the rule is merely "intended to restore the franchisee's lost [capital] investment."[809] Hence, the doctrine offers no assistance for franchisees to recover intangible portions of their goodwill.[810]

If Missouri rule is the only common law tool that could protect franchisees in a particular state, then it could simply be enhanced by allowing an extra amount of time also for successful franchisees. This extra time would give the franchisee a better chance to wind up the business and redeploy its resources.[811]

---

[808] *See e.g. Armstrong Bus. Services, Inc. v. H & R Block*, 96 S.W.3d 867, 878 (Mo. Ct. App. 2002); *Schultz v. Onan Corp.*, 737 F.2d 339, 346 (3d Cir. 1984).

[809] *Schultz v. Onan Corp.*, 737 F.2d 339, 348-49 (3d Cir. 1984). *See also e.g. Sofa Gallery, Inc. v. Stratford Co.*, 872 F.2d 259, 263 (8th Cir. 1989); *Ag-Chem Equip. Co., Inc. v. Hahn, Inc.*, 480 F.2d 482, 487 (8th Cir. 1973).

[810] Ernest Gellhorn, *Limitations on Contract Termination Rights-Franchise Cancellations*, 1967 Duke L.J. 465, 482 (1967); *C. States Distribg., Inc. v. Minnesota Min. and Mfg. Co.*, 97 C 622, 1998 WL 60839 (N.D. Ill. 1998); *but see* Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 Cornell L. Rev. 617, 643 fn 171 (1983).

[811] This solution, however, might be problematic for franchisors. Because franchisors would most likely want to appropriate goodwill without disruption, they might either block this solution with an express contract provision, or figure out an alternative resolution.

(3) Unjust Enrichment

In the EU, the goodwill recoupment doctrine is considered a specialized form of the unjust enrichment theory.[812] The DCFR states that local goodwill in a long-term intermediary relationship has its own value which may upon termination unjustifiably enrich the principal if it is not refunded.[813]

In the U.S., however, the general understanding is that unjust enrichment is not available where there exists an express contract between the parties. Courts often contend that unjust enrichment should not be available if the franchisee has rendered services in order to advance its own interests.[814] Moreover, they maintain that under most franchise contracts, franchisees are required to develop goodwill, and compensation thereof cannot be implied.

Nonetheless, a small number of U.S. courts have taken a position that is similar to the European one. In *LaPosta*, for instance, the court allowed the franchisee's unjust enrichment claim against the franchisor for appropriating its local goodwill since – according to the court – the franchise contract did not cover the franchisee's "valuable time and money" for promoting and developing the franchisor's brand. The court noted that a claim for unjust enrichment is not precluded where the subject matter of the implied and express contracts are not identical.

---

[812] *See e.g.* Martijn Willem Hesselink, *Commercial agency, franchise and distribution contracts (PEL CAFDC)* 141 (Oxford: Oxford University Press 2006).

[813] *Id*.

[814] W. Michael Garner, 2 *Franchise and Distribution Law and Practice* § 8:39 (2013).

If more courts take *LaPosta*'s position, franchisees might be better protected against opportunistic franchisors. In those cases, the recoupment doctrine could offer guidance for assessment of franchisees' goodwill. Moreover, this approach would urge franchisors to include provisions that explicitly govern local goodwill.

CONCLUSION

Franchising and problems associated with franchising continue to grow in the U.S. This work has challenged one particular type of franchising problem, namely franchisor opportunism. As illustrated in this work, franchisor opportunism has been an important concern in the franchising industry.

While lawmakers and legal commentators have mostly dealt with instruments by which franchisors may behave opportunistically (termination, non-renewal, not allowing transfer, etc.), this work has focused on the main source and result of the problem (the loss of goodwill), thus highlighting the importance of the franchisee's local goodwill in franchisor opportunism.

After analyzing the existing legal mechanisms against franchisor opportunism, this study identified the following issues:

- *Existing common law principles are insufficient to provide the necessary protection for franchisees*.

  This is mainly because one-sided franchise agreements essentially permit certain opportunistic behaviors. Once opportunism occurs, courts are often incapable of overriding unfair contractual provisions with existing common law principles. This work has also found that when courts attempt to protect franchisees' interests by either overriding an express provision, or interpreting the contract in a way that helps a franchisee, they present different (and sometime contradictory) justifications, and accordingly cause unpredictability in the franchising industry.

- *Federal disclosure requirements are unable to stop opportunistic franchisors.*

  First of all, while disclosure is necessary for franchisees to make informed decisions, opportunistic franchisors have been using the lengthy disclosure documents as a shield against lawsuits.

  Moreover, federal law has enforcement problems. On one hand, it does not allow private cause of action for injured franchisees. On the other hand, the FTC lacks the resources to investigate complaints.

- *Federal relationship laws cover only two specific franchise settings; gasoline service stations and automobile dealerships. Despite numerous attempts, Congress was unable to pass a generally applicable relationship law.*

  Since 1990, Congress has considered four proposals, and all have been defeated. Two main reasons have been identified for this outcome. First of all, the lobbying effort of the franchisor associations, in particular the International Franchise Association, was an important reason for the inaction. Second, and maybe more importantly, the restrictive characteristic of the existing regulatory approach has raised some legitimate concerns on the minds of lawmakers.

- *Currently, only 19 States, the District of Columbia, Puerto Rico, and the Virgin Islands have franchise relationship laws.*

  State relationship laws offer substantial protection for franchisees. However, the majority of the states refused to pass relationship laws because franchisors and

franchisor-advocates claim that strict termination restrictions required by these laws encourage franchisee opportunism, and thus is bad for the franchising industry.

Because of the shortcomings of the current mechanisms, this dissertation has proposed an alternative solution. The idea was inspired from the European concept of goodwill recoupment, which has been described in detail in Chapter 3. Accordingly, the franchisee should be entitled to a payment for its local goodwill once the franchise contract comes to an end providing that the franchisee developed goodwill, and the franchisor will continue to receive benefits from that goodwill. According to this approach, the nature of the termination could only affect the amount of the payment, not the existence of the claim.

This work has presented thee main points in which the proposed mechanism differs from and improves upon the existing theories in the U.S. legal system:

- *The recovery should not depend on the franchisor's wrongdoing.*

  If and to the extent that a franchisee has local goodwill, the transfer of this value upon cessation justifies the payment.

- *The payment should cover only a limited period of time in which the franchisor's excess earnings might still be traced back to the previous franchisee's local goodwill.*

  The recoupment doctrine offers a narrow but relatively precise protection for franchisees' goodwill. Moreover, the doctrine provides a fairly comprehensive evaluation scheme which would increase certainty in franchise disputes.

- *There should be no strict termination restrictions.*

  In other words, the franchisor would be allowed to terminate a franchise contract (if permitted by contract) as long as the franchisee is properly compensated for its local goodwill.

  Moreover, an economic impact analysis has shown that the implementation of the goodwill recoupment doctrine would be an economically viable solution.

This research has also identified a number of implications for future research.

- More analysis is required for the economic impact of the franchise regulations. Both franchisees and franchisors make assertions about termination costs without having sufficient data.

- Similar to this work, a comparative study of the mechanisms used in other jurisdictions would be useful for developing new solutions for the franchising issues.

- This work was limited to the franchise relationship, but the idea goodwill recoupment is theoretically applicable to other intermediary relationships. Thus, the application of the recoupment doctrine to other relationships should also be explored.

- This work did not provide an institutional preference for the implementation of the goodwill recoupment doctrine. The advantages and disadvantages of both the federal and state implementations should be examined.

In sum, this dissertation has argued that the recoupment doctrine suits the nature of the franchise relationship and its unusual capacity to permit opportunism. It is thus capable of addressing the concerns of both franchisors and franchisees. Protecting franchisees' goodwill without limiting franchisors' monitoring power would likely reduce both franchisee and franchisor opportunism, promote cooperation and guarantee that each party fulfills their obligations voluntarily. In Professor MacNeil's terms, goodwill protection increase the likelihood that franchisees will be "getting something back for something given."[815]

[815] Ian R. Macneil, *Relational Contract Theory: Challenges and Queries,* 94 Nw. U. L. Rev. 877, 879 (2000).

BIBLIOGRAPHY

Articles, Books, Other Publications – English

Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 Iowa L. Rev. 689 (2013).

Alden Peterson & Rajiv P. Dant, *Perceived Advantages of the Franchise Option from the Franchisee Perspective: Empirical Insights from a Service Franchisee*, 28 J. Small Bus. Mgmt. 46 (1990).

Alicia Brokars Kelly, *Sharing A Piece of the Future Post-Divorce: Toward A More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569 (1999).

Allen Parkman, *A Systematic Approach to Valuing the Goodwill of Professional Practices*, in Ronald L. Brown, Valuing Professional Practices and License, 3rd Edition, (Clifton, NJ: Prentice-Hall, 1998).

Allen Walburn, *Depreciation of Intangibles: An Area of the Tax Law in Need of Change*, 30 S.D. L. Rev. 453 (1993).

Andrew C. Seldon, *Public Regulation of Franchising: Choking the Goose that Lays the Golden Eggs?*, 9 Franchise L.J. 1 (1989).

Andrew F. Halaby, *Treatment of Goodwill By the Seller Under I.R.C. Section 197*, 43 U. Kan. L. Rev. 903 (1995).

Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191 (1995).

Angela Hurst, *The Impact of the Iowa Franchise Law on Restaurant Franchisor Expansion Strategy: An Exploratory Study* (1996).

Ann Hurwitz Dallas, Texas, *Franchisor Market Withdrawal: "Good Cause"' for Termination?*, 7 Franchise L.J. 3 (1987).

Antony W. Dnes, *Franchise Contracts, Opportunism and the Quality of Law*, 3 Entrepreneurial Bus. L.J. 257 (2009).

Arthur Anderson and Co. 1992. *Franchising in the Economy: 1989-1992*. Washington, D.C.: International Franchise Education Association.

Barbara Ann Banoff, *Vertical Integration, Relational Contracts, and Specialized Investment: A Response to Baker and Krawiec*, 33 Fla. St. U. L. Rev. 757 (2006).

Beata Krakus, John R.F. Baer, *Do Franchise Agreements Without Formal Expiration Dates Continue in Perpetuity?*, 28 Franchise L.J. 206 (2009).

Benjamin A. Levin & Richard S. Morrison, *Who Owns Goodwill at the Franchised Location?*, 18 Franchise L.J. 85 (1999).

Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & Econ. 345 (1985).

Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & Econ. 297 (1978).

Benjamin Klein, *The Economics of Franchise Contracts*, 2 J. Corp. Fin. 9, 30 (1995)

Benjamin Klein, *Transactions Cost Determinants of "Unfair" Contractual Arrangements*, 70 Am. Econ. Rev. 356 (1980).

Boyd Allan Byers, *Making A Case for Federal Regulation of Franchise Terminations--A Return-of-Equity Approach*, 19 J. Corp. L. 607, 631 (1994).

Brian J. Neff & Kenneth K. Lehn, *Damages Recoverable in Franchise Termination Cases,* 201-FEB N.J. Law. 40, 43 (2000).

Bruce S. Schaeffer & Susan Ogulnick, *Why Valuing Franchise Businesses Is Different from Valuing Other Businesses*, Bus. Appraisal Practice 37-41 (2008).

Bryan Mauldin, Identifying, *Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 TUL. L. REV. 313 (1981).

Byron E. Fox & Henry C. Su, *Franchise Regulation - Solutions in Search of Problems?*, 20 Okla. City U. L. Rev. 241 (1995).

Byron E. Fox & Peter I. Hoppenfeld, *A Review of Nasaa's Model Franchise Investment Act*, 9 Franchise L.J. 7 (1989).

Carla Wong McMillian, *What Will It Take to Get You in A New Car Today?: A Proposal for A New Federal Automobile Dealer Act*, 45 Gonz. L. Rev. 67 (2010).

Carmen D. Caruso, *Franchisee Claims for Constructive Termination Under the PMPA After Mac's Shell*, 30 Franchise L.J. 139 (2011).

Carmen D. Caruso, *Franchising's Enlightened Compromise: The Implied Covenant of Good Faith and Fair Dealing*, 26 Franchise L.J. 207 (2007).

Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. Rev. 647 (2009).

CDH, *Facts and Figures*, http://en.cdh.de/handelsvertreter/daten-fakten (last accessed June 4, 2014).

Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (1981).

Charles S. Modell & Genevieve A. Beck, *Franchise Renewals--"You Want Me to Do What?*," 22 Franchise L.J. 4 (2002).

Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher As Wrongdoer*, 47 Buff. L. Rev. 645 (1999).

Clay A. Tillack, Mark E. Ashton, *Who Takes What: The Parties' Rights to Franchise Materials at the Relationship's End*, 28 Franchise L.J. 88 (2008).

Consulting Agreements Deskbook (WL 2014)

Craig R. Tractenberg, Robert B. Calihan, & Ann–Marie Luciano, *Legal Considerations in Franchise Renewals,* 23 SPG Franchise L.J. 198 (2004).

Dan L. Burk & Brett H. McDonnell, *Trademarks and the Boundaries of the Firm*, 51 Wm. & Mary L. Rev. 345 (2009).

Daniel J. Oates, Shannon L. McCarthy & Douglas C. Berry, *Substantial Association with A Trademark: A Trap for the Unwary*, 32 Franchise L.J. 130 (2013).

Daniel R. Fischel, *The Economics of Lender Liability*, 99 Yale L.J. 131 (1989).

Darian M. Ibrahim, *The Unique Benefits of Treating Personal Goodwill As Property in Corporate Acquisitions*, 30 Del. J. Corp. L. 1 (2005).

David A. Eisenberg, *Balancing A Relationship - "Good Cause" Termination of Franchise Agreements in Michigan*, 72 U. Det. Mercy L. Rev. 369 (1995).

David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373 (1990).

David E. Krischer, *Franchise Regulation: An Appraisal of Recent State Legislation*, 13 B.C.Ind. & Com.L. Rev. 529 (1972).

David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37 (1999).

David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333 (1995).

David J. Kaufmann, *Franchising Is Alive and Well, So Let's Kill It*, N.Y.L.J. 2 (Sep. 25, 1990).

David J. Meretta, Eric H. Karp, *Regulation Fd: Roadmap to Better Relations Between Franchisors and Franchisees*, 26 Franchise L.J. 117 (2007).

Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith As A Limitation on the Landlord's Right to Terminate*, 19 Ga. L. Rev. 483 (1985).

Debra Burke & E. Malcolm Abel II, *Franchising Fraud: The Continuing Need for Reform*, 40 Am. Bus. L.J. 355 (2003).

Dennis D. Palmer, *Franchises: Statutory and Common Law Causes of Action in Missouri Revisited*, 62 UMKC L. Rev. 471, 490-91 (1994).

Don Sniegowski, *IFA Warns States Not to Interfere with Contracts*, http:// www.bluemaumau.org/10473/ifa_warns_states_not_interfere_franchise_contracts (June 24, 2011).

Donald E. Kieso & Jerry J. Weygandt D. Kieso & J. Weygandt, *Intermediate Accounting* 570 (3d ed.1980).

Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. Cal. Interdisc. L.J. 227 (2004).

Donald P. Horwitz & Walter P. Volpi, *Regulating the Franchise Relationship*, 54 St. John's L. Rev. 217 (1980).

Donald S. Chisum, *State Regulation of Franchising; The Washington Experience,* 48 Wash.L.Rev. 291 (1973).

Douglas C. Berry et. al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811 (2009).

Dr. Alan D. Miller & Dr. Ronen Perry, *Good Faith Performance*, 98 Iowa L. Rev. 689 (2013).

Dubroff, *The implied Covenant of Good Faith in Contract Interpretation*, 80 St. John's L. Rev. 559 (2006).

Eduardo M.R.A. Engel, Ronald D. Fischer & Alexander Galetovic, *Least-Present-Value-of-Revenue Auctions and Highway Franchising*, 109 J. Pol. Econ. 993 (2001).

Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 Franchise L.J. 31 (2009).

Elizabeth C. Spencer, *The Regulation of Franchising in the New Global Economy* (Edward Elgar Publg. 2010).

Ellen Lokker et. al., *Definition of A Franchise or Dealer*, 19 Franchise L.J. 128 (2000).

Epstein, *Unconscionability: A Critical Reappraisal,* 18 J. Law & Econ. 293 (1975).

Erik Wulff & Abhishek Dubé, *States propose revising the "relationship" between franchisors and franchisees*, November 14, 2014 (last visited: http://www.dlapiper.com /en/us/insights/publications/2013/11/states-propose-revising-the-relationship-between__/).

Ernest Gellhorn, *Limitations on Contract Termination Rights-Franchise Cancellations*, 1967 Duke L.J. 465 (1967).

Erwin J. Keup, *Franchise Bible: How to Buy a Franchise or Franchise Your Own Business* (4th ed., 2000).

Francine Lafontaine & Fiona Scott Morton, *Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24(3) Journal of Economic Perspectives 233 (2010).

Francine Lafontaine & Roger D. Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States*, 3 Entrepreneurial Bus. L.J. 381 (2009).

Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship*, 6 Barry L. Rev. 61 (2006).

Gabriel A. D. Preinreich, *The Law of Goodwill*, 11 The Accounting Review 317 (Dec., 1936).

Gaylen L. Knack, *Tortious Interference Claims: Applying Principles of Tort Liability in the Franchise Context*, 9 Franchise L.J. 1 (1990).

Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927 (1990).

Harold Brown, *Franchising-A Fiduciary Relationship*, 49 Tex. L. Rev. 650 (1971).

Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61 (1982).

Heiko E. Burow & Raymond C. Kolls, *Basic Concepts and Issues: A Primer on Distribution and Sales Representative Agreements in the Medical Device and Durable Medical Equipment Industries*, 39 J. Health L. 165 (2006).

Hesselink, M. W. *Commercial agency, franchise and distribution contracts (PEL CAFDC)* (Oxford: Oxford University Press 2006).

Howard P. Marvel, *Tying, Franchising, and Gasoline Service Stations*, 2 J. Corp. Fin. 199 (1995).

Ian Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980).

Ian R. Macneil, *Relational Contract Theory: Challenges and Queries,* 94 Nw. U. L. Rev. 877 (2000).

Ian Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (David Campbell ed., 2001).

IFA Education Foundation, *Economic Impact of Franchised Businesses, Report Vol. 2 (2005)* and *Report Vol. 3 (2007)* D.C.:IFA.

J. Howard Beales III & Timothy J. Muris, *The Foundations of Franchise Regulation: Issues and Evidence,* 2 J. Corp. Fin. 157 (1995).

James A. Brickely, Sanjog Misra & R. Lawrence Van Horn, *Contract Duration: Evidence from Franchising*, 49 J. L. & Econ. 173 (2006).

James A. Brickley, Frederick H. Dark & Michael S. Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101 (1991).

James A. Brickley, *Royalty Rates and Upfront Fees in Share Contracts: Evidence from Franchising*, 18 J.L. Econ. & Org. 511 (2002).

Jane Cohen & Larry Weinberg, *Good Faith and Fair Dealing: A Primer on the Differences Between the United States and Canada*, 22 Franchise L.J. 37 (2002).

Jesse Max Creed, *Integrating Preliminary Agreements into the Interference Torts*, 110 Colum. L. Rev. 1253 (2010).

Joachim G. Frick, *Restrictions on the Termination of Franchise Agreements - A Foreigner's View*, 101 Com. L.J. 81 (1996).

Joel Iglesias, *Applying the Implied Covenant of Good Faith and Fair Dealing to Franchises*, 40 Hous. L. Rev. 1423 (2004).

John Bourdeau, et. al., *62B Am. Jur. 2d Private Franchise Contracts* (WL 2014).

John M. Payne, *A Survey of New Jersey Eminent Domain Law*, 30 Rutgers L.Rev. 1111 (1977).

John R. F. Baer, David A. Beyer & Scott P. Weber, *When Are Sales Representatives Also Franchisees?*, 27 Franchise L.J. 151 (2008).

John Stanworth & James Curran, *Colas, Burgers, Shakes and Shirkers: Towards a Sociological Model of Franchising in the Market Economy*, 14 J. Bus. Venturing 323, (1999).

Jonathan C. Lipson, *Governance in the Breach: Controlling Creditor Opportunism*, 84 S. Cal. L. Rev. 1035 (2011).

Jonathan Klick et al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355 (2009).

Joseph P. Wright & Thomas B. Aquino, *Understanding the Wisconsin Fair Dealership Law*, 82 Wis. Law. 14 (November 2009).

Joseph Schumacher & Kimberly Toomey, *Recovering Lost Future Royalties in A Franchise Termination Case*, 20 Franchise L.J. 116 (2001).

Joseph Story, *Commentaries On The Law Of Partnerships* § 99 (7th ed. 1881).

Juliet P. Kostritsky, *When Should Contract Law Supply A Liability Rule or Term?: Framing A Principle of Unification for Contracts*, 32 Ariz. St. L.J. 1283 (2000).

Kathryn Lea Harman, *The Good Faith Gamble in Franchise Agreements: Does Your Implied Covenant Trump My Express Term?*, 28 Cumb. L. Rev. 473 (1998).

Kenneth M. Kolaski, Esquire, CPA & Mark Kuga, Ph.D., *Measuring Commercial Damages Via Lost Profits or Loss of Business Value: Are These Measures Redundant or Distinguishable?*, 18 J.L. & Com. 1 (1998).

Kersi D. Antia, Xu (Vivian) Zheng, and Gary L. Frazier, *Conflict Management and Outcomes in Franchise Relationships: The Role of Regulation*, 50 J. Mktg. Research 577 (October 2013).

Kevin M. Shelley & David W. Oppenheim, *When Conflicting Principles Collide: The Uncharted Boundary Between Fair Competition and Tortious Conduct*, 22 Franchise L.J. 184 (2003).

Kevin Scott Dittmar, *Foerster, Inc. v. Atlas Metal Parts - the Wisconsin Supreme Court Takes A Narrow View of the Dealer's Financial Interest Protected by the Wisconsin Fair Dealership Law*, 1985 Wis. L. Rev. 155 (1985).

Kimberley A. Morrison, *An Empirical Test of a Model of Franchisee Job Satisfaction*, 34 J. Small Bus. Mgmt. 27 (1996).

Kirk Victor, *Franchising Fracas*, 138 Cong. Rec. E3131-03 (Oct. 9, 1992).

Larry R. Ribstein, *A Theoretical Analysis of Professional Partnership Goodwill*, 70 NEB. L. REV. 38 (1991).

Lee A. Rau, *Implied Obligations in Franchising: Beyond Terminations*, 47 Bus. Law. 1053 (1992).

Legal Aspects of Selling and Buying § 9:73 (3d ed. WL 2014).

Leonard D. Vines, *Dealerships and Distributorships - Beware of the Franchise Minefield*, 56 J. Mo. B. 163 (2000).

Lillian R. BeVier, *Reconsidering Inducement*, 76 Va. L. Rev. 877 (1990).

Mark A. Zupan, *Cable Franchise Renewals: Do Incumbent Firms Behave Opportunistically?*, 20 RAND J. ECON. 473 (1989).

Martijn W. Hesselink, *The Common Frame of Reference As A Source of European Private Law*, 83 Tul. L. Rev. 919 (2009).

Martijn Willem Hesselink, *Commercial agency, franchise and distribution contracts (PEL CAFDC)* (Oxford: Oxford University Press 2006).

Martin D. Fern & Philip I. Klein, *Restrictions on Termination and Nonrenewal of Franchises: A Policy Analysis*, 36 Bus. Law. 1041 (1981)

Martin G. Gilbert, *Proving Lost Profits Through Law Opinion Testimony - Is the Back Dorr Still Open?*, 22 Franchise L.J. 15 (2002).

Marvin E. Rooks, *Looking Through the Judicial Lens: The Implied Covenant of Good Faith and Fair Dealing in Franchise Relationships*, 4 Geo. Mason J. Int'l Com. L. 1 (2012).

Matthew Ellman, *Specificity Revisited: The Role of Cross-Investments*, 22 J.L. Econ. & Org. 234 (2006).

Michael J. Lockerby, *Franchise Termination Restrictions: A Guide for Practitioners and Policy Makers*, 30 Antitrust Bull. 791 (1985).

Michael J. Lockerby, *How SBFA Would Restructure Franchising Relationships*, Franchising Bus. & L. Alert (June 1999).

Michael J. Lockerby, *Market Withdrawal: Judges and Juries Aren't Buying What Terminated Dealers Are Selling*, 22 Franchise L.J. 151 (2003).

Nancy Saint-Paul, *Summers Oil and Gas* (3d ed. 2014).

Nicole Liguouri Micklich, Michael W. Lynch & Ingrid C. Festin, *The Continuing Evolution of Franchise Valuation: Expanding Traditional Methods*, 32 Franchise L.J. 223 (2013).

Norton M. Bedford, *Handbook of Modern Accounting* (1970).

Note, *An Inquiry into the Nature of Goodwill*, 53 Colum. L. Rev. 660 (1953).

Ofer Grosskopf, *Dividing the Surplus Upon Termination: The Case of Relational Contracts*, 48 Am. Bus. L.J. 1 (2011).

Oliver E. Williamson, *Credible Commitments Using Hostages to Support Exchange*, 73 Am. Econ. Rev. 519 (1983).

Oxford English Dictionary, 3rd Edition, September 2009.

PA's Responsible Franchise Practices Bill: Overview and Discussion, November 15, 2013 (last visited April 7, 2014: http://www.unhappyfranchisee.com/pas-responsible-franchise-practices-bill-overview-discussion/).

Patrick J. Kaufmann & Francine Lafontaine, *Costs of Control: The Source of Economic Rents for Mcdonald's Franchisees*, 37 J.L. & Econs. 417 (1994).

Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 Penn St. L. Rev. 105 (2004).

Peter C. Lagarias, Edward Kushell, *Fair Franchise Agreements from the Franchisee Perspective*, 33 Franchise L.J. 3 (2013).

Peter C. Lagarias, Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, 29 Franchise L.J. 139 (2010).

Rau, *Implied Obligations in Franchising: Beyond Terminations,* 47 The Business Lawyer 1080 (1992).

Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293 (1975).

Richard A. Lord, *Williston on Contracts* (4th ed. 2010).

Richard Dellinger, *Business Valuation for the Practitioner: Identifying the Common Areas of Manipulation by the Valuator*, 84 Fla. B.J. 59 (September/October 2010).

Richard E. Caves & William F. Murphy, II, *Franchising: Firms, Markets, and Intangible. Assets*, 42 S. Econ. J. 572 (1976).

Richard L. Smith II, Franchise Regulation: *An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J.L. & Econ. 125 (1982).

Richard M. Krumbein, *Protectionism in Puerto Rico: The Impact of the Dealers' Contracts Law on Multinational Companies Planning Operations in Puerto Rico*, 25 Case W. Res. J. Intl. L. 79 (1993).

Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 Cornell L. Rev. 617 (1983).

Robert D. Kullgren, *Commercial Agency Law in Europe: Representing the Michigan Principal*, 69 Mich. B.J. 654 (July 1990).

Robert M. Lloyd, *Discounting Lost Profits in Business Litigation: What Every Lawyer and Judge Needs to Know*, 9 Transactions: Tenn. J. Bus. L. 9 (2007).

Robert S. Summers, "*Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va.L.Rev. 195 (1968).

Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 Alb. L. Rev. 193 (2013).

Robert W. Emerson & Uri Benoliel, *Can Franchisee Associations Serve As A Substitute for Franchisee Protection Laws?*, 118 Penn St. L. Rev. 99 (2013).

Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. Rev. 905 (1994).

Robert W. Emerson, *Franchise Encroachment*, 47 Am. Bus. L.J. 191 (2010).

Robert W. Emerson, *Franchise Goodwill: Take A Sad Song and Make It Better*, 46 U. Mich. J.L. Reform 349 (2013).

Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 Vand.L.Rev. 1503 (1990).

Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* (2005).

Roger D. Blair & Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 Franchise L.J. 55 (2006).

Roland J. Santoni, Franchising: *A Critical Assessment of State and Federal Regulation*, 14 Creighton L.Rev. 67 (1980-81).

Rose Marie Reynolds, *Good Cause for Franchise Termination: An Irreconcilable Difference Between Franchisee Fault and Franchisor Market Withdrawal?*, 1992 B.Y.U. L. Rev. 785 (1992).

Scott D. Makar, *In Defense of Franchisors: The Law and Economics of Franchise Quality Assurance Mechanisms*, 33 Vill. L. Rev. 721 (1988).

Scott Fuller, *The Federal Dealers Day in Court Act, A Misnomer*, 13 Ohio N.U. L. Rev. 447 (1986).

Shannon P. Pratt et al., *Valuing Small Businesses And Professional Practices* (2d ed. 1993).

State Franchise Laws and the Small Business Franchise Act of 1999: Barriers to Effcient Distribution, 55 Bus. Law. 1699, 1701-02 (2000).

Stephen C. Root, *The Meaning of "Franchise" Under the California Franchise Investment Law: A Definition in Search of A Concept*, 30 McGeorge L. Rev. 1163 (1999).

Stephen Lease, 38A C.J.S. *Goodwill* (WL 2014).

Stevan R. Holmberg, Kathryn Boe Morgan*, Franchise Turnover and Failure New Research and Perspectives*, 18 J. Buss. Venturing 403 (2003).

Steven D. Wiener, *Gentis v. Safeguard Business Systems, Inc. Liberal Construction of Remedial Statutes: What Is A Franchise?*, 17 Franchise L.J. 115 (1998).

Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980).

Steven J. Burton, *Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View*, 35 Wm. & Mary L. Rev. 1533 (1994).

Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 Iowa L. Rev. 1 (1981).

Steven Shavell, *Foundations of Economic Analysis of Law* (2004).

T. Mark McLaughlin, *Termination of Franchises: Application of the Implied Covenant of Good Faith and Fair Dealing*, 7 Franchise L.J. 1 (1987).

Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, *in* Fundamentals Of Franchising 185 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

Thomas M. Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 Bus. Law. 289 (1989).

Tracey A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating a Franchise Agreement*, 28 Val. U.L.Rev. 785 (1994).

U.S. Dep't Of Commerce, *Franchising In The Economy* 1986-1988 3 (1988).

Uri Benoliel, *Criticizing the Economic Analysis of Franchise Encroachment Law*, 75 Alb. L. Rev. 205 (2012).

Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 Chapman L. Rev. 1 (2009).

Uri Benoliel, *The Expectation of Continuity Effect and Franchise Termination Laws: A Behavioral Perspective*, 46 Am. Bus. L.J. 139 (2009).

Von Bar, C., Clive, E. & Schulte Nölke, H. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Munich, Sellier, 2009).

W. Michael Garner, *Franchise and Distribution Law and Practice* (WL 2013).

W. Michael Garner, *The Implied Covenant of Good Faith in Franchising: A Model for Discretion*, 20 Okla. City U.L.Rev. 305 (1995).

Wadsworth, Frank H. & Wayne Jones, *Franchisee Satisfaction Survey Report*, Proceedings of the Third Annual Convention of the American Franchisee Association, Washington, D.C. (1996).

William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 Minn. L. Rev. 1103 (1996).

Cases, Codes, Statutes, and Other Administrative Materials – U.S.

123 Cong.Rec. 10385.

15 U.S.C.A. §§ 1221 to 1226 (Automobile Dealer Suits Against Manufacturers Act).

15 U.S.C.A. §§ 2801 to 2806, 2821 to 2824, 2841 (Petroleum Marketing Practices Act).

16 C.F.R. § 436 (West 2012).

1939 FTC Ann. Rep. 19-27.

1956 U.S.C.C.A.N. 4596.

815 ILCS 705/20.

Ag-Chem Equip. Co., Inc. v. Hahn, Inc., 480 F.2d 482 (8th Cir. 1973).

American Business Interiors, Inc. v. Haworth, Inc., 798 F.2d 1135 (8th Cir. 1986).

Amerispec, Inc. v. Metro Inspection Services, Inc., CIV.A.3:01-CV-0946-D, 2001 WL 770999 (N.D. Tex. 2001).

Amoco Oil Co. v. Ervin, 908 P.2d 493 (Colo. 1995).

Ark. Code Ann. § 4-72-204.

Armstrong Bus. Services, Inc. v. H & R Block, 96 S.W.3d 867 (Mo. Ct. App. 2002).

Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979).

Artman v. Intl. Harvester Co., 355 F. Supp. 482 (W.D. Pa. 1973).

Atlantic Richfield Co. v. Razumic, 390 A.2d 736 (1978).

Aurigema v. Arco Petroleum Products Co., 698 F.Supp. 1035 (D.Conn.1988).

Australian Government Productivity Commission inquiry into: The market for retail tenancy leases in Australia, 2007.

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

B.P.G. Autoland Jeep–Eagle, Inc. v. Chrysler Credit Corp., 785 F.Supp. 222 (D.Mass.1991).

Baker v. Lafayette College, 504 A.2d 247 (1986).

Ballester Hermanos, Inc. v. Campbell Soup Co., CIV. 92-1096 (JP), 1993 WL 269656 (D.P.R. 1993).

Balsamides v. Protameen Chemicals, Inc., 734 A.2d 721 (N.J. 1999).

Baur Truck & Equip., Inc. v. Svedala Industries, Inc., 501 N.W.2d 470 (Wis. App. 1993).

Beraha v. Baxter Health Care Corp., 956 F.2d 1436 (7th Cir. 1992).

Bicycle Corp. of Am. v. Meridian Bank, CIV. A. 95-6438, 1995 WL 695090 (E.D. Pa. 1995).

Blankenship v. Dialist Intern. Corp., 568 N.E.2d 503 (Ill. App. 5th Dist. 1991).

Bolter v. Super. Ct., 87 Cal. App. 4th 900 (2001).

BP Products N. Am., Inc. v. Hillside Serv., Inc., CIV. 9-4210, 2011 WL 4343452 (D.N.J. 2011)

Brach v. Amoco Oil Co., 677 F.2d 1213 (7th Cir.1982).

Bradley v. Harris Research, Inc., 275 F.3d 884 (9th Cir. 2001).

Bright v. QSP, Inc., 20 F.3d 1300 (4th Cir.1994).

Britt/Paulk Insurance Agency, Inc. v. Vandroff Insurance Agency, Inc., 952 F.Supp. 1575 (N.D.Ga.1996).

Brock v. Baskin Robbins, USA, Co., 2003 WL 21309428 (E.D.Tex. Jan.17, 2003).

Burger King Corp. v. Ashland Equities, Inc., 217 F.Supp.2d 1266 (S.D.Fla.2002).

Burger King Corp. v. Weaver, 169 F.3d 1310 (11th Cir. 1999).

Bush v. National School Studios, Inc., 139 Wis. 2d 635 (1987).

C. States Distribg., Inc. v. Minnesota Min. and Mfg. Co., 97 C 622, 1998 WL 60839 (N.D. Ill. 1998).

C.N. Wood Co., Inc. v. Labrie Envtl. Group, CIV.A. 12-11778--RGS, 2013 WL 2433150 (D. Mass. 2013).

Cal Distributor, Inc. v. Cadbury Schweppes Americas Beverages, Inc., 06 CIV.0496 RMB JCF, 2007 WL 54534 (S.D.N.Y. 2007).

Cal. Assembly 1141, 2013-2014 (2013).

Cal. Bus. & Prof. Code § 20020 (California Franchise Relations Act).

Cal. Sen. 610, 2013-2014 Reg. Sess. (2013).

Camp Creek Hospitality Inns, Inc., v. Sheraton Franchise Corp. 130 F.3d 1009 (C.A. 11th Cir. 1997).

Carlock v. Pillsbury Co., 719 F. Supp. 791 (D. Minn. 1989).

Carvel Corp. v. Baker, 79 F. Supp. 53 (D. Conn. 1997).

Carvel Corp. v. Noonan, 350 F.3d 6 (2d Cir. 2003).

Carvel Corp. v. Noonan, 818 N.E.2d 1100 (N.Y. 2004).

Charts v. Nationwide Insurance Co., 397 F. Supp. 2d 357 (D. Conn. 2005).

Clark v. America's Favorite Chicken Co., 916 F.Supp. 586 (E.D.La.1996).

Coast to Coast Stores (Cent. Org.), Inc. v. Gruschus, 667 P.2d 619 (Wash. 1983).

Coca-Cola N. Am. v. Crawley Juice, Inc., 2011 WL 1882845 (E.D.N.Y. 2011).

Commissioners of Inland Revenue v Muller & Co Margarine, AC215 (1901).

Conn. Gen. Stat. § 42-133f (Connecticut Franchise Act).

Conoco Inc. v. Inman Oil Co., Inc., 774 F.2d 895, 1985-2 Trade Cas. (CCH) ¶ 66823, 41 U.C.C. Rep. Serv. 1602 (8th Cir. 1985).

Consolidated Data Terminals v. Applied Digital Data Systems, Inc., 512 F. Supp. 581 (N.D. Cal. 1981).

Continental Bank, N.A. v. Everett, 964 F.2d 701 (7th Cir.).

Cook v. Little Caesar Enterprises, Inc., 210 F.3d 653 (6th Cir.2000).

Cooper Distribg. Co., Inc. v. Amana Refrigeration, Inc., 180 F.3d 542 (3d Cir. 1999).

Cooper Distribg. Co., Inc. v. Amana Refrigeration, Inc., 63 F.3d 262 (3d Cir. 1995).

Cruttwell v. Lye, 34 Eng.Rep. 129 (Ch. 1810).

Curley v. Allstate Ins. Co., 289 F. Supp. 2d 614 (E.D. Pa. 2003).

Davis v. Gulf Oil Corp., 572 F.Supp. 1393 (C.D.Cal.1983).

Dayan v. McDonald's Corp., 466 N.E.2d 958 (Ill. App. 1st Dist. 1984).

Del. Code Ann. tit. 6, § 2552 (Delaware Franchise Security Law).

Deom v. Walgreen Co., 3:12-CV-00719-H, 2013 WL 1703750 (W.D. Ky. 2013).

deTreville v. Outboard Marine Corp., 439 F.2d 1099 (4th Cir.1971).

Disclosure Requirements and Prohibitions Concerning Franchising, 72 FR 15444-01 (March 30, 2007).

Dugan v. Dugan, 457 A.2d 1 (N.J. 1983).

Dunfee v. Baskin–Robbins, Inc., 720 P.2d 1148 (1986).

Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 495 A.2d 66 (N.J.1985).

Dunlap v. Hinkle, 317 S.E.2d 508 (1984).

Durst v. Ill. Farmers Ins. Co., No. 05 C 574, 2006 WL 140546, Bus. Franchise Guide (CCH) ¶ 13,249 (N.D. Ill. Jan. 12, 2006).

E.S. Bills, Inc. v. Tzucanow, 700 P.2d 1280 (Cal. 1985).

Eastern Shore Markets v. J.D. Assoc. Ltd., 213 F.2d 175 (4th Cir. 2000).

Edmands v. Cuno, Inc., 892 A.2d 938, Bus. Franchise Guide (CCH) ¶ 13,302 (Conn. Mar. 21, 2006).

Eichman v. Fotomat Corp., 880 F.2d 149 (9th Cir. 1989).

Ernst v. Ford Motor Co., 813 S.W.2d 910 (Mo. App. W. Dist. 1991).

Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812 (Fla. 1994).

Fleetwood v. Stanley Steemer Intern., 446 Fed. Appx. 868 (9th Cir. 2011).

Fleetwood v. Stanley Steemer Intern., Inc., 725 F. Supp. 2d 1258 (E.D. Wash. 2010).

Four Corners Serv. Station, Inc. v. Mobil Oil Corp., 51 F.3d 306 (1st Cir. 1995).

Franchising Relationship: Hearing Before the Subcom. On Commercial, & Administrative Law of the Committee on the Judiciary, 106th Cong. Serial No.106-92 (1999).

Freedman Truck Center v. GMC, 784 F.Supp. 167 (D.N.J.1992).

Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc., 702 N.W.2d 355 (Neb. 2005).

Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296 (3d Cir. 2001).

Gen. Tire & Rubber Co. v. Distributors, Inc., 117 S.E.2d 479 (N.C. 1960).

Gentis v. Safeguard Bus. Sys., Inc., 71 Cal. Rptr. 2d 122 (Cal. App. 2d Dist. 1998).

Golden Krust Patties, Inc. v. Bullock, 2013 WL 3766551 (E.D.N.Y. 2013).

Gram v. Liberty Mutual Insurance Co., 667, 429 N.E.2d 21 (1981).

Grand Light & Supply Co., Inc. v. Honeywell, Inc., 771 F.2d 672 (2d Cir. 1985).

Griffith v. Levi Strauss & Co., 85 F.3d 185 (5th Cir. 1996).

Guard–Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445 (1980).

H & M, Inc. v. C.I.R., 104 T.C.M. (CCH) 452 (Tax 2012).

H.R. 1315, 103rd Cong. (1993).

H.R. 1316, 103rd Cong. (1993).

H.R. 1317, 103rd Cong. (1993).

H.R. 1717, 104th Cong. (1995).

H.R. 2593, 103rd Cong. (1993).

H.R. 2595, 103rd Cong. (1993).

H.R. 2596, 103rd Cong. (1993).

H.R. 2954, 105th Cong. (1997).

H.R. 3308, 106th Cong. (1999).

Harford Donuts, Inc. v. Dunkin' Donuts, Inc., No. Civ. L–98–3668, 2001 WL 403473 (D.Md. April 10, 2001).

Haw. Rev. Stat. § 482E-6 (Hawaii Franchise Investment Law).

Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., pt. 1 (1965).

Hedging Concepts, Inc. v. First Alliance Mortg. Co., 49 Cal. Rptr. 2d 191 (Cal. App. 2d Dist. 1996).

Hengel, Inc. v. Hot 'N Now, Inc., 825 F.Supp. 1311 (N.D. Ill. 1993).

Hershey Foods, Inc. v. Ralph Chapek, Inc., 828 F.2d 989 (3d Cir. 1987).

Hoff Supply Co. v. Allen-Bradley Co., Inc., 768 F. Supp. 132, 136 (M.D. Pa. 1991).

Home Protective Servs., Inc. v. ADT Security Servs., Inc., 438 F.3d 716, Bus. Franchise Guide (CCH) ¶ 13,266 (7th Cir. Feb. 13, 2006).

Hubbard Chevrolet Co. v. General Motors Corp., 682 F.Supp. 873 (S.D.Miss.1987) *aff'd* 873 F.2d 873 (1989).

Humantech, Inc. v. Caterpillar, Inc., 11-14988, 2012 WL 6214371 (E.D. Mich. 2012).

815 Ill. Comp. Stat. §§ 705/19 (1987) (Hawaii Franchise Investment Law).

In re Kaplan, 143 F.3d 807 (3d Cir. 1998).

In re Marriage of Hall, 692 P.2d 175 (Wash. 1984).

In re Marriage of Lopez, 113 Cal. Rptr. 58 (Cal. App. 3d Dist. 1974).

In Touch Concepts, Inc. v. Cellco Partn., 13 CIV. 1419 PKC, 2013 WL 2455923 (S.D.N.Y. 2013).

Indep. Ass'n of Mail Box Ctr. Owners v. Super. Ct., 133 Cal. App. 4th 396 (2005).

Ind. Code Ann. § 23-2-2.7-1 (Indiana Deceptive Franchise Practices Act).

Infra-Pak (Dallas), Inc. v. Carlson Stapler & Shippers Supply, Inc., 803 F.2d 862 (5th Cir. 1986).

Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124 (N.J. 1992).

Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc., 225 F.3d 876 (7th Cir.2000).

Intl. Autosport, Inc. v. Saab Cars USA, Inc., 1991 WL 128592 (D. Kan. 1991).

Intl. Sales & Serv., Inc. v. Austral Insulated Products, Inc., 262 F.3d 1152 (11th Cir. 2001).

James v. Whirlpool Corp., 806 F. Supp. 835 (E.D. Mo. 1992).

JOC, Inc. v. ExxonMobil Oil Corp., No. 08-5344, 2010 WL 1380750 (D.N.J. Apr. 1, 2010).

Johnson v. Oroweat Foods Co., 785 F.2d 503 (4th Cir. 1986).

Joseph Schlitz Brewing Co. v. Central Beverage Co., 172 Ind.App. 81 (1977).

JRS Products, Inc. v. Matsushita Elec. Corp. of Am., 8 Cal. Rptr. 3d 840 (Cal. App. 3d Dist. 2004).

Kealey Pharmacy & Home Care Service, Inc. v. Walgreen Co., 539 F. Supp. 1357 (W.D. Wis. 1982), judgment aff'd, 761 F.2d 345 (7th Cir. 1985).

Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982).

Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990).

King of Prussia Equip. Corp. v. Power Curbers, Inc., 117 F. App'x 173 (3d Cir. 2004).

Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163 (N.Y. 1933).

Knight v. Snap-On Tools Corp., 3 F.3d 1398 (10th Cir. 1993).

Kubis & Perszyk Assocs., Inc. v. Sun Microsys., Inc., 680 A.2d 618 (N.J. 1996).

LaGuardia Associates v. Holiday Hospitality Franchising, Inc., 92 F. Supp. 2d 119 (E.D.N.Y. 2000).

Lapinee Trade, Inc. v. Boon Rawd Brewery Co., Ltd., 91 F.3d 909 (7th Cir. 1996).

LaPosta Oldsmobile, Inc. v. Gen. Motors Corp., 426 F. Supp. 2d 346 (N.D.W. Va. 2006).

Larese v. Creamland Dairies, 767 F.2d 716 (10th Cir.1985).

Lee v. Gen. Nutrition Cos., Inc., CV 00-13550LGB(AJWX), 2001 WL 34032651 (C.D. Cal. 2001).

Lee v. GNC Franchising, Inc., 73 Fed. Appx. 202 (9th Cir. 2003).

Lewis v. Chrysler Motors Corp., 332 F. Supp. 1202 (E.D. Mo. 1971) *rev'd,* 456 F.2d 605 (8th Cir. 1972).

Lobdell v. Sugar 'N Spice, Inc., 658 P.2d 1267 (Wash. App. Div. 1 1983).

Lou Bachrodt Chevrolet Co. v. Gen. Motors LLC, 2013 WL 3754833 (N.D. Ill. 2013).

Lumley v. Gye, (1853) 118 Eng. Rep. 749.

Luso Fuel Inc. v. BP Products N. Am., Inc., CIV.A. 08-CV-3947DMC, 2009 WL 1873583 (D.N.J. 2009).

Mac's Shell Service, Inc. v. Shell Oil Products Co., LLC, , 130 S.Ct. 1251 (2010).

Mach. Maint. & Equip. Co. v. Cooper Industries, Inc., 661 F. Supp. 1112 (E.D. Mo. 1987).

Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc., 975 A.2d 510 (N.J. Super. App. Div. 2009).

Mario R. Franceschini, Inc. v. Riley Co., 591 F. Supp. 414 (D.P.R. 1984).

Martin Motor Sales, Inc. v. Saab-Scania of Am., Inc., 452 F. Supp. 1047, 1052 (S.D.N.Y. 1978) *aff'd,* 595 F.2d 1209 (2d Cir. 1979).

Martino v. McDonald's Corp., 304 N.W.2d 780 (Wis. 1981).

Maschio v. Prestige Motors, 37 F.3d 908 (3d Cir. 1994).

Mass. Sen. 73, 188th Leg. (2013).

Mason v. Funderburk, 446 S.W.2d 543 (Ark. 1969).

McAffee v. McAffee, 971 P.2d 734 (Idaho App. 1999).

McGinnis Piano & Organ Co. v. Yamaha Int'l Corp., 480 F.2d 474 (8th Cir.1973).

Me. H.1043, 126th Leg., 1st Reg. Sess. (2013).

Metro. Nat. Bank v. St. Louis Dispatch Co., 149 U.S. 436 (1893).

Mike Naughton Ford, Inc. v. Ford Motor Co., 862 F.Supp. 264 (D.Colo.1994).

Millett v. Union Oil Co. of California, 24 F.3d 10 (9th Cir. 1994).

Minn. Stat. § 80C.14 (Minnesota Franchise Act).

Miss. Code Ann. § 75-24-53.

Mo. Rev. Stat. § 407.405 (Missouri Franchise Law).

Moore v. American Suzuki Motor Corp., 416 S.E.2d 807 (Ga.Ct.App.1992).

Neb. Rev. Stat. § 87-404 (Nebraska Franchise Law).

New Jersey Am., Inc. v. Allied Corp., 875 F.2d 58, 62 (3d Cir. 1989).

N.J. Stat. Ann. § 56:10-5 (New Jersey Franchise Practices Act).

Northside Mercury Sales & Serv., Inc. v. Ford Motor Co., 871 F.2d 758 (8th Cir. 1989).

Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78 (3d Cir. 2000).

Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273 (7th Cir. 1992).

Pa H. 1620, 197th Gen. Assembly (2013).

Pappan Enterprises, Inc. v. Hardee's Food Sys., Inc., 143 F.3d 800 (3d Cir. 1998).

Patterson v. Village of Chesapeake, No. 95CA19, 1996 WL 668831 (Ohio Ct.App. Nov. 15, 1996).

Payless Car Rental System, Inc. v. Draayer, 716 P.2d 929 (Div. 3 1986).

People ex rel. Dept. of Transp. v. Dry Canyon Enterprises, LLC, 149 Cal. Rptr. 3d 601, 606-07 (Cal. App. 2d Dist. 2012).

Petereit v. S.B. Thomas, Inc., 63 F.3d 1169 (2d Cir. 1995).

Phillips v. Chevron U.S.A., 792 F.2d 521 (5th Cir.1986).

Piantes v. Pepperidge Farm, Inc., 875 F. Supp. 929 (D. Mass. 1995).

Pizza Mgt., Inc. v. Pizza Hut, Inc., 737 F. Supp. 1154 (D. Kan. 1990).

Playboy Enterprises Intern., Inc. v. Smartitan (Singapore) Pte Ltd., 10-CV-4811, 2011 WL 3839711 (N.D. Ill. 2011).

Postal Instant Press, Inc. v. Sealy, 43 Cal.App.4th 1704 (Cal. App. 2d Dist. 1996).

P.R. Laws Ann. tit. 10, § 278b (Puerto Rico Dealer's Act of 1964).

Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997).

Randall v. Lady of Am. Fran. Corp., 532 F. Supp. 2d 1071 (D. Minn. 2007).

Randolph v. New Eng. Mut. Life Ins. Co., 526 F.2d 1383 (6th Cir.1975).

Randy's Studebaker Sales, Inc. v. Nissan Motor Corp. in U.S.A., 533 F.2d 510 (10th Cir. 1976).

Rea v. Ford Motor Co., 560 F.2d 554 (3d Cir. 1977).

Regulatory Impact Statement: Franchising Policy Reforms And The Government Response To The Joint Committee On Corporations And Financial Services' Report On Franchising (2009), available at http://www.treasury.gov.au/PublicationsAndMedia/Publications/2009/Franchising-Code-of-Conduct-RIS.

Restatement (First) of Restitution (1937).

Restatement (Second) of Contracts (1981).

Restatement (Second) of Torts (1979).

Restatement (Third) of Restitution and Unjust Enrichment (2011).

Rev. Rul. 59-60, 1959-1 C.B. 237 (1959).

Rev. Rul. 68–609, 1968–2, C.B. 327 (1968).

R.I. Gen. Laws § 6-50-4 (Rhode Island Fair Dealership Act).

Richter v. Dairy Queen of Southern Arizona, Inc., 643 P.2d 508 (App.1982).

Rosenberg v. Pillsbury Co., 718 F. Supp. 1146 (S.D.N.Y. 1988).

S. Nevada Shell Dealers Ass'n v. Shell Oil Co., 725 F. Supp. 1104 (D. Nev. 1989).

S.Rep. No. 103-387.

S.Rep. No. 731, 95th Cong., 2d Sess.

S.Rep. No. 95–73 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873.

San Juan Mercantile v. Canadian Transport Co., 108 D.P.R. 211 (1978).

SB 610 Bill Analysis, Assembly Committee On Business, Professions And Consumer Protection, Susan A. Bonilla, Date of Hearing: August 13, 2013.

Schultz v. Onan Corp., 737 F.2d 339 (3d Cir. 1984).

Seegmiller v. Western Men, Inc., 437 P.2d 892 (1968).

Servpro Industries, Inc. v. Schmidt, 905 F. Supp. 475 (N.D. Ill. 1995).

Sheldon v. Munford, Inc., 950 F.2d 403 (7th Cir. 1991).

Shell Oil Co. v. Marinello, 307 A.2d 598 (1973).

Simmons v. Mobil Oil Corporation, 29 F.3d 505 (9th Cir.1994).

Smith v. Chrysler Group LLC, 2014 WL 1577515 (D. Ariz. 2014).

Snelling & Snelling, Inc. v. Watson, 254 S.E.2d 785 (N.C. App. 1979).

Stadium Chrysler Jeep, L.L.C. v. DaimlerChrysler Motors Co., LLC, 324 F. Supp. 2d 587 (D.N.J. 2004).

Stillwell v. RadioShack Corp., 676 F. Supp. 2d 962 (S.D. Cal. 2009).

Super Valu Stores, Inc. v. D–Mart Food Stores, Inc., 431 N.W.2d 721 (App.1988).

Taylor Equip., Inc. v. John Deere Co., 98 F.3d 1028 (8th Cir. 1996).

Tele-Controls, Inc. v. Ford Indus., 388 F.2d 48 (7th Cir.1967).

The Small Business Franchise Act of 1999, H.R. 3308, 106th Cong. (1999).

Thompson v. A. Richfield Co., 649 F. Supp. 969, 971 (W.D. Wash. 1986).

Ticknor v. Choice Hotels, Int'l, Inc., 265 F.3d 931 (9th Cir. 2001).

Town & Country Equip., Inc. v. Deere & Co., 133 F. Supp. 2d 665 (W.D. Tenn. 2000).

Tractor & Farm Supply, Inc. v. Ford New Holland, Inc., 898 F. Supp. 1198 (W.D. Ky. 1995).

Treppel v. Biovail Corp., 2005 WL 427538 (S.D.N.Y. 2005).

Triangle Mining Co., Inc. v. Stauffer Chemical Co., 753 F.2d 734 (9th Cir.1985).

Tymshare, Inc. v. Covell, 727 F.2d 1145 (D.C. Cir. 1984).

Uniform Commercial Code (U.C.C.).

U.S. House of Representatives Committee on Small Business, Franchising in the US Economy: Prospects and Problems (US Government Printing Office, Washington DC, 1990).

United Magazine Co. v. Murdoch Magazines Distribution, Inc., 146 F. Supp. 2d 385 (S.D.N.Y. 2001).

Venta, Inc. v. Frontier Oil & Refining, 827 F. Supp. 1526 (D. Colo. 1993).

12A V.I.C. § 132 (Virgin Island Franchise Act).

Va. Code Ann. § 13.1-564 (Virginia Retail Franchising Act).

Wash. Rev. Code Ann. § 19.100.180 (Washington Franchise Investment Protection Act).

Weight Watchers of Quebec Ltd. v. Weight Watchers Intern., Inc., 398 F. Supp. 1047 (E.D.N.Y. 1975).

Westfield Centre Serv., Inc. v. Cities Serv. Oil Co., 86 N.J. 453 (1981).

Wilson v. Amerada Hess Corp. 773 A.2d 1121 (N.J. 2001).

Wis. Stat. § 135.03 (Wisconsin Fair Dealership Law).

Wright v. Wright, 904 P.2d 403 (Alaska 1995).

Wright-Moore Corp. v. Ricoh Corp., 794 F. Supp. 844 (N.D. Ind. 1991).

Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir.1990).

Zad, LLC v. Bulk Petroleum Corp., 368 S.W.3d 122 (Ky. App. 2012).

Zeidler v. A&W Restaurants, Inc., 2000 WL 122616 (N.D. Ill. 2000).

Ziegler Co., Inc. v. Rexnord, Inc., 433 N.W.2d 8 (Wis. 1988).

Articles, Books, Other Publications – German

Ankele, Jörg, Harmonisiertes Handelsvertreterrecht für die Europäische Gemeinschaft, DB 1987 S. 569-571

Baumbach, Adolf/ Hopt, Klaus J., Handelsgesetzbuch (Kurzkommentar), 32. Auflage, München 2006
Cited as: Baumbach/Hopt/ *Bearbeiter*, § Rdnr.

Bodewig, Theo, Der Ausgleichsanspruch des Franchisenehmers nach Beendigung des Vertragsverhältnisses, BB 1997 S. 637-644

Canaris, Claus-Wilhelm, Handelsrecht, 23. Auflage, München 2000

Ebenroth, Carsten Thomas/ Boujoung, Karlheinz/ Joost, Detlev, Kommentar zum Handelsgesetzbuch, Band 1: §§ 1 - 342, 1. Auflage, München 2001.
Cited as: E/B/J/ *Bearbeiter* § Rdnr.

Eberstein, Hans Hermann, Der Handelsvertretervertrag, Heidelberg 1999

Eckert, Jörn, Die analoge Anwendung des Ausgleichsanspruchs nach § 89b HGB auf Vertragshändler und Franchisenehmer, WM 1991 S. 1237-1248

Glanegger, Peter/ Güroff, Georg/ Kirnberger, Christian u.a.(Hrsg.), Heidelberger Kommentar zum Handelsgesetzbuch, 6. Auflage, Heidelberg 2002
Cited as: *Bearbeiter* in HK-HGB, § Rdnr.

Hagemeister, Roland, Der Handelsvertreter im englischen Recht und seine Ansprüche bei Beendigung des Vertretervertrages, Diss. Münster 2004
Cited as: Hagemeister, Diss., S.

Handelsgesetzbuch (Großkommentar), 1. Band: Einleitung; §§ 1 – 104, 4. Auflage, Berlin 1995
Cited as: *Bearbeiter* in Großkomm. HGB § Rdnr.

Herbert, Manfred, Neues zum Ausgleichsanspruch des Handelsvertreters, BB 1997 S. 1317-1323

Heymann, Ernst (Begr.), Handelsgesetzbuch (Kommentar), Band 1: Erstes Buch (Einleitung, §§ 1 - 104), 1. Auflage, Berlin 1989
Cited as: *Bearbeiter* in Heymann, HGB, § Rdnr.

Hubertus Thum, Der Ausgleichsanspruch des Franchisenehmers: ein europäischer Rechtsvergleich (Wien: Verlag Österreich 2012).

Köhler, Helmuti, Ausgleichsanspruch des Franchisenehmers: Bestehen, Bemessung, Abwälzung, NJW 1990 S. 1689-1696

Küstner, Wolfram, Der Ausgleichsanspruch des Handelsvertreters, Vertragshändlers und Franchisenehmers im Warenverkehr - Teil 1: Anspruchsberechtigung und Anspruchsvoraussetzungen, (Fach 15, S. 463-484), ZAP 2005 S. 659-680

Küstner, Wolfram/ Manteuffel, Kurt von, Die Änderungen des Handelsvertreterrechts aufgrund der EG-Harmonisierungsrichtlinie vom 18.12.1986, BB 1990 S. 291-299

Küstner, Wolfram/ Thume, Karl-Heinz, Handbuch des gesamten Außendienstrechts Band 1: Das Recht des Handelsvertreters, 3. Auflage, Heidelberg 2000
Cited as: Küstner/Thume /Bearbeiter, S. Rdnr.

Band 2: Der Ausgleichsanspruch des Handelsvertreters, 7. Auflage, Heidelberg 2003
Cited as: Küstner/Thume /Bearbeiter, Band II S. Rdnr.

Mansur Pour Rafsendjani, Der Goodwill-Ausgleichsanspruch des Franchisenehmers ein Vergleich des deutschen, französischen und US-amerikanischen Franchiserechts (Frankfurt am Main: Lang 1998).

Martinek, Michael, Vom Handelsvertreterrecht zum Recht der Vertriebssysteme, ZHR (161) 1997 S. 67 - 101

Röhricht, Volker/ Westphalen, Friedrich Graf von, Handelsgesetzbuch, 2. Auflage, München 2001
Cited as: *Bearbeiter* in Röhricht/Graf v. Westphalen, HGB, § Rdnr.

Saenger, Ingo, Das Recht des Handelsvertreters zur ausgleichswahrenden Eigenkündigung, DB 2000 S. 129-134

Saenger, Ingo, Der Ausgleichsanspruch des Handelsvertreters bei Eigenkündigung, Stuttgart u.a. 1997

Saenger, Ingo/ Schulze, Reiner (Hrsg.), Der Ausgleichsanspruch des Handelsvertreters, Beispiel für die Fortentwicklung angeglichenen europäischen Rechts, Baden-Baden 2000
Cited as: *Bearbeiter* in: Saenger/Schulze (Hrsg.), Der Ausgleichsanspruch des Handelsvertreters, S.

Scherer, Inge, Ausschluß von Ausgleichsansprüchen des Handelsvertreters, DB 1996 S. 1709-1713

Schmidt Karsten (Hrsg.), Münchener Kommentar zum Handelsgesetzbuch*,* München 2005
Cited as : MünchKommHGB/ *Bearbeiter*, § Rdnr

Staub, Hermann (Begr.)/ Canaris, Claus-Wilhelm/ Ulmer, Peter (Hrsg.),

Westphal, Bernd, Die Handelsvertreterrichtlinie und deren Umsetzung in den Mitgliedstaaten der Europäischen Union, Diss. Münster 1994
Cited as: Westphal, Diss., S.

Cases, Codes, Statutes, and Other Administrative Materials – Non-U.S.

BGH, I ZR 104/82, BB 1985

BGH, I ZR 122/86, NJW 1989

BGH, I ZR 138/74, NJW 1975

BGH, I ZR 142/89, BB 1991

BGH, I ZR 150/91, WM 1993

BGH, I ZR 173/91, NJW-RR 1993

BGH, I ZR 175/75, BB 1977

BGH, I ZR 2/89, NJW 1990

BGH, I ZR 209/84, NJW-RR 1987

BGH, I ZR 269/88, BB 1991

BGH, I ZR 32/89, NJW-RR 1991

BGH, I ZR 51/85, NJW 1987

BGH, I ZR 78/78, NJW 1989

BGH, II ZR 318/56, BB 528 1957

BGH, II ZR 318/56, BB 528 1957

BGH, VII ZR 123/62, BB 699 1964

BGH, VII ZR 23/70, BB 1971

BGH, VII ZR 240/63, BGHZ 43

BGH, VII ZR 48/67, BGHZ 52

BGH, VII ZR 49/61, BB 1962

BGH, VIII ZR 150/96, NJW 1998

BGH, VIII ZR 211/01, NJW 2003

BGH, VIII ZR 22/96, NJW 1997

BGH, VIII ZR 261/95, NJW 1996

BGH, VIII ZR 58/00, WM 2003

BGH, VIII ZR 61/95, NJW 1996

BGH, VIII ZR 7/95, NJW 1996

BGH, VIII ZR 92/96, NJW 1998

BGH, VIII ZR 95/94, BGHZ 129

BT-Drucks. 11/3077

BVerfG, B. v. 22.8.1995 – 1

BvR 1624/92, NJW 1996

COM(1996) 23.7.1996

COM(2001) 11.7.2001

COM(2003) 12.2.2003

COM(2010) 1.7.2010

Directive 86/653/EEC

Government Explanation for the Draft Bill, BT-Drucks. 1/3856

Graham Page v. Combined Shipping and Trading Co Ltd [1997] 3 All ER 656

Ingmar GB Ltd. v. Eaton Leonard Technologies Inc., Case C-381/98, 2000 E.C.R. I-9305

LG Frankfurt, 3-8 O 28/99, EWIR 2004

LG Freiburg, 12 O 140/98, NJW-RR 2000

Lonsdale v. Howard & Hallam Limited [2007] UKHL 32

OLG Bremen, 2 U 58/64, BB 1966

OLG Celle, 7 U 227/68, BB 1970

OLG Köln, 19 U 206/00, VersR 2001

OLG Nürnberg, 12 U 2405/86

Semen v. Deutsche Tamoil, Case C-348/07