



Case Western Reserve Law Review

Volume 43 | Issue 3

1993

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Recommended Citation

Anne L. Austin, *When Does a Franchisor become a Fiduciary: Crim Truck & Tractor Co. v. Navistar International Transportation Corporation*, 43 Case W. Res. L. Rev. 1151 (1993)

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COMMENTS

WHEN DOES A FRANCHISOR BECOME A FIDUCIARY?: *CRIM TRUCK & TRACTOR CO. v. NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION*

For forty-two years franchisee Crim Truck & Tractor ("Crim") distributed the products of franchisor Navistar.¹ When Crim decided not to implement a new dealer network proposed by Navistar, Navistar terminated the franchise. Crim sued, alleging among other claims breach of fiduciary duty.² The Texas Supreme Court refused to impose a fiduciary duty on Navistar, finding that the franchisee had not provided sufficient evidence that a confidential relationship giving rise to a fiduciary duty existed between it and the franchisor.

In a franchising relationship, the franchisor grants the franchisee a license to operate an independent business according to the franchisor's direction.³ Most courts have deemed franchising to be a business relationship, governed by contract, and as such have refused to impose per se fiduciary obligations on the franchisor.⁴ However, many jurisdictions recognize that fiduciary obligations may arise in business relationships due to the nature of the interac-

1. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 593 (Tex. 1992) [hereinafter *Crim*]. For a full description of the facts see *infra* section II.A.

2. See *infra* notes 90-102 and accompanying text.

3. ROBERT JUSTIS & RICHARD JUDD, *FRANCHISING*, 6 (1989).

4. See *infra* notes 61-89 and accompanying text.

tion between the parties. If the parties provide sufficient evidence, courts are willing to find that a confidential relationship exists as a matter of fact and will therefore impose a fiduciary duty as a matter of law.⁵ *Crim Truck & Tractor Co. v. Navistar Int'l. Transp. Corp.* marks the intersection between the law of franchising and the law of confidential relationships. Like most jurisdictions, Texas jurisprudence allows a court to impose heightened duties in a contractual relationship where the evidence is persuasive that the interaction between the parties has induced a higher level of trust and confidence than that characterizing an arms-length contractual transaction.⁶ In *Crim*, the Texas Supreme Court rejected the franchisee's argument that it was owed any heightened duty. While there is no bright line test under Texas law for determining whether the plaintiff's evidentiary burden has been met, the facts of *Crim Truck & Tractor* were open to the interpretation that a confidential relationship existed, such that the court could have imposed fiduciary duties on the franchisor.

This Comment reviews the Texas Supreme Court's decision in *Crim Truck & Tractor*. First, fiduciary obligations are examined both generally and in the context of franchising. In addition, the nature of fiduciary obligations in formal and informal relationships is defined. Further, the factors courts consider to determine whether to impose heightened duties in a commercial, contract-based relationship are reviewed.

Second, case law regarding the imposition of heightened duties in franchisor-franchisee relationships and the circumstances under which courts have been willing to find a fiduciary duty are discussed. Finally, the decision reached by the Texas Supreme Court in *Crim Truck & Tractor* is reviewed. Specifically, the majority held that no confidential relationship existed, and thus the franchisor owed no fiduciary duty to the franchisee. The dissent vehemently disagreed.

The majority of state and federal courts have held that the franchise agreement alone does not create a fiduciary obligation on the part of the franchisor. The holding of the Texas Supreme Court in *Crim Truck & Tractor* conforms with this national precedent in rejecting the existence of a *per se* fiduciary duty in the context of a franchise relationship. However, this Comment argues the court's

5. See *infra* notes 25-33 and accompanying text.

6. See *infra* notes 25-54 and accompanying text.

decision was incorrect on the facts of the case. The outcome is the result of the court's incorrect application of Texas law regarding confidential relationships to the facts of *Crim Truck & Tractor*. Had the Court correctly applied Texas law, it would have held that the facts supported the existence of confidential relationship, thereby supporting the imposition of a fiduciary duty.

I. HISTORY

A. Fiduciary Obligations

The concept of a fiduciary is difficult to define with precision, and no one definition is sufficiently flexible to cover all relationships.⁷ Fiduciary obligations may arise in either formal or informal relationships. In a formal fiduciary relationship, the fiduciary owes heightened duties to another as a consequence of his or her status or role. In an informal fiduciary relationship, the court may determine that the circumstances surrounding the interaction between the parties support the imposition of a heightened duty.

1. Formal Relationships

The term "fiduciary" derives from Roman law.⁸ As the highest duty imposed by law, a fiduciary owes a duty to act with good faith, trust and confidence towards another.⁹ Formal fiduciary relationships include those of trustee and beneficiary, agent and principal, guardian and ward, and attorney and client.¹⁰ Corporate officers and directors as well as receivers, executors, and administrators are also fiduciaries.¹¹ In each of these relationships, the fidu-

7. *Crim Truck & Tractor*, 823 S.W.2d at 593 n.3.

8. BLACK'S LAW DICTIONARY 625 (6th ed. 1990).

9. *Id.*

10. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959); RESTATEMENT OF RESTITUTION § 190 cmt. a (1937).

11. RESTATEMENT OF RESTITUTION § 190 cmt. a (1937). See generally FRANK H. EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW 90-108 (1991) (discussion of fiduciary obligations of corporate directors and officers). Courts have analyzed the relationship of director and corporation by analogizing either to trusts or to agency. *DePinto v. Landge*, 411 F.2d 297, 300 (9th Cir. 1969). See also RESTATEMENT (SECOND) OF AGENCY § 14F cmts. a-c (1958) (distinguishing fiduciaries appointed by the court to manage the affairs of others from the fiduciary status of an agent which derives from the principal-agent relationship). Fiduciary status may also be legislatively mandated. For example, the conduct of those administering employee benefit plans is regulated by the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § 1104 (West 1985 & Supp. 1992) (establishing fiduciary's obligations and standard of care).

ciary duty arises from the individual's status as trustee, agent, or guardian. Thus the entire class of individuals having the status of trustee, etc. owes a fiduciary duty to the class of individuals having the status of beneficiaries, etc. The fiduciary must act for the benefit of the other party in matters within the scope of the relationship.¹² This includes subordinating his or her own interest to that of the other party.¹³ Failure to do so is a breach of the fiduciary's duty. However, "[t]he scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations."¹⁴

2. Informal Relationships

Even absent a formal fiduciary relationship, i.e., in cases where the parties lack the requisite status, the court may nevertheless impose additional duties on the parties where the relationship involves a high level of trust and confidence between the parties.¹⁵ Such informal relationships, including those governed by contract, may be designated as "confidential" relationships.¹⁶ The

12. RESTATEMENT (SECOND) OF AGENCY § 13 (1958).

13. BLACK'S LAW DICTIONARY 625 (6th ed. 1990). A trustee owes a duty of loyalty "to administer the trust *solely* in the interest of the beneficiary." RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959) (emphasis added). Comment a adds that the principle is applicable not only to trustees but to other fiduciaries. ERISA utilizes similar language: the fiduciary must "discharge his duty . . . *solely* in the interest of the participants and beneficiaries." 29 U.S.C.A. § 1104(a)(1) (Supp. 1992) (emphasis added).

14. RESTATEMENT (SECOND) OF TRUSTS § 2(b).

15. See, e.g., *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512-513 (Tex. 1942). The Restatement (Second) of Torts also recognizes that "liability [for breach of a fiduciary duty] is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation." RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1974).

16. *Crim Truck & Tractor*, 823 S.W.2d 591, 594 (Tex. 1992). A second type of informal fiduciary relationship is the "special" relationship. Unlike formal fiduciary relationships and confidential relationship, no fiduciary obligation attaches. Special relationships impose only a duty a good faith and fair dealing on the parties. *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983) (Spears, J., concurring). As in formal fiduciary relationships, special relationships exist as a matter of law, so a party's status serves as proof of the relationship. Gregory B. Westfall, Comment, "*But I Know It When I See It*": A Practical Framework For Analysis and Argument Of Informal Fiduciary Relationships, 23 TEX. TECH L. REV. 835, 841 (1992). Once the court recognizes a special relationship, the duty of good faith and fair dealing is imposed on the class of individuals having that status. *Id.* This broad effect has meant that only a limited number of relationships have been recognized as special by the Texas courts. These include insurer/insured, *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987); worker's compensation carrier/worker, *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210, 212 (Tex. 1988); and bank/depositor, *Plaza Nat'l Bank v. Walker*, 767 S.W.2d 276, 278 (Tex. Ct. App.

definitions of confidential relationships utilized by the courts all involve the elements of trust and confidence. For example, one court stated, "[a] confidential relationship 'may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.'"¹⁷ Courts have also recognized that the relationship need not be a legal one, such as that giving rise to a formal fiduciary duty, but may be "moral, social, domestic, or merely personal."¹⁸ Thus, the relation:

arises by reason of kinship between the parties, or professional, business, or social relations that would reasonably lead an ordinarily prudent person in the management of his business affairs to repose that degree of confidence in the defendant which largely results in the substitution of the will of [one party] for that of the [fiduciary] in the material matters involved in the transaction.¹⁹

Thus, the scope of the term confidential relationship is necessarily broad, referring to any relation where "influence has been acquired and abused, [where] confidence has been reposed and betrayed."²⁰

Establishing a confidential relationship can be extremely difficult. It is an issue of fact whether the party asserting a confidential relationship has established that the requisite level of trust and reliance exists between the parties.²¹ The two key concepts are

1989). Unequal bargaining power between the parties or a special element of reliance must be present before the court will hold the relationship is special. *Arnold*, 725 S.W.2d at 167. The Texas courts have refused to impose heightened duties on new classes of relationships such as employer/employee, *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 819-20 (Tex. Ct. App. 1988), and franchisor/franchisee, *Crim Truck & Tractor*, 823 S.W.2d at 594.

Although confidential and special relationships are conceptually similar, the duties owed as a consequence of either relationship may be distinguished:

Although a fiduciary duty encompasses at the very minimum a duty of good faith and fair dealing, the converse is not true. The duty of good faith and fair dealing merely requires the parties to "deal fairly" with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty.

Id.

17. *Main v. Merrill Lynch*, 136 Cal. Rptr. 378, 385 (Cal. Ct. App. 1977).

18. *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261 (Tex. 1951); *Prudential Ins. Co. v. Eslick*, 586 F. Supp. 763, 766 (S.D. Ohio 1984) (applying Ohio law).

19. *Sellers v. Sellers*, 428 P.2d 230, 236 (Okla. 1967) (citation omitted).

20. *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980); *Sellers*, 428 P.2d at 236.

21. *MacDonald v. Follett*, 180 S.W.2d 334, 337 (Tex. 1944).

"justifiable trust" and "relationship before."²² The plaintiff must first show he was "justified in trusting the other party as a fiduciary."²³ Trust may be justified if prior to and separate from the transaction in question there existed a "relationship before" which exhibited trust and confidence.²⁴ Obviously, this test imposes a heavy and uncertain evidentiary burden on the party asserting the existence of the relationship, for it is not at all clear precisely what facts must be plead.

The existence of a confidential relationship may turn on such factors²⁵ as the duration of the parties' relationship,²⁶ their relative bargaining power,²⁷ and representations made to induce trust or confidence.²⁸ For example, although joint ownership of an oil lease alone was not enough to establish a fiduciary duty, in *MacDonald v. Follett*,²⁹ the Texas Supreme Court stated that a relation of trust and confidence, giving rise to a fiduciary duty, would be established if it could be proved as alleged that the parties had an ongoing, six year relationship, had negotiated several leases and royalty arrangements, and had agreed to work together to protect each other's interests.³⁰ When the plaintiff in *MacDonald* agreed to renew the lease for the benefit of himself and the defendant, but renewed it only for his own benefit, he breached the fiduciary duty owed to the defendant as a result of the confidential relationship that existed between them.³¹ Similarly, in *Fitz-Gerald v. Hull*,³² the court, relying on *MacDonald*,

22. See Westfall, *supra* note 15, at 844-45.

23. *Id.* at 844.

24. *Id.* at 845.

25. One court has identified seven general factors: prior business dealings; transfer of confidential information; presence of close, personal friendship; presence of family relationship; customary guidance by one party; superior knowledge or known reliance; domination by one party. *Id.* at 850 (quoting *Dominguez v. Brackey Enter., Inc.*, 756 S.W.2d 788, 791-92 (Tex. Ct. App. 1988)).

26. *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 337 (Tex. 1966).

27. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962).

28. *Fitz-Gerald*, 237 S.W.2d at 264; *MacDonald*, 180 S.W.2d at 337.

29. 180 S.W.2d 334 (Tex. 1944).

30. *Id.* at 337.

31. *Id.* Usually it is the plaintiff asserting the confidential relationship. Here, Follett brought suit against MacDonald on the theory of a constructive trust to recover royalties from mineral leases. A directed verdict was entered in favor of Follett, and both Follett and MacDonald filed writs of error, such that MacDonald is the plaintiff and Follett the defendant. *Id.* at 335-36.

32. 237 S.W.2d 256, 264-65 (Tex. 1951).

found that a fiduciary relationship was established where one party took title to a jointly owned oil and gas lease in his own name and sought to appropriate all the profits from the lease to himself.³³

Likewise, in a suit brought by an administrator/bank for an accounting and to recover property for the estate, the court held in *Texas Bank and Trust Co. v. Moore*³⁴ that the nephew's relation with his deceased aunt was a fiduciary relationship.³⁵ The existence of a familial relationship combined with the bestowing of a benefit, however, were not enough to establish a fiduciary duty.³⁶ Rather, the court stated that where trust is reposed and substantial benefit obtained, the beneficiary in such a transaction is a fiduciary.³⁷ The court also noted that the profiting fiduciary in a confidential relationship has a burden to show the fairness of the transaction.³⁸ Since testimony established that the aunt had signed transfers of funds at her nephew's request, was confused, and relied on and trusted the nephew, the nephew had to testify as to the fairness of the transfers to overcome the presumption that he had breached the fiduciary duty he owed to his aunt.³⁹ Because the nephew did not overcome the presumption of unfairness, the administrator's allegation that the nephew breached his fiduciary duty prevailed.⁴⁰

The Texas courts seem willing to find a confidential relationship where the relation between the parties is similar to that of the traditional trustee-beneficiary.⁴¹ Where the underlying relationship is similar to an arms-length transaction, the Texas courts conversely appear unwilling to find the existence of a confidential relationship.⁴² For example, in *Thigpen v. Locke*,⁴³ the court ruled that

33. *Id.* at 264. The court noted that the facts supported the existence of a fiduciary relationship, but since petitioners had not pled this issue, the court was able to find the existence of only a joint venture. *Id.*

34. 595 S.W.2d 502 (Tex. 1980).

35. *Id.* at 507.

36. *Id.* at 508.

37. *Id.* at 508-09.

38. *Id.* at 509.

39. *Id.*

40. *Id.*

41. A trust is defined as a relationship of fiduciary nature with a designated property as its subject matter. The trustee manages the property for the beneficiaries; i.e., the trustee has a fiduciary obligation not to profit at the expense of the beneficiary and to put the beneficiaries' interest ahead of his own. *See, e.g.,* 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* §§ 2.4-2.5 (4th ed. 1987). *See also* PAUL G. HASKELL, *PREFACE TO THE LAW OF TRUSTS* 13 (1975).

42. *See* Westfall, *supra* note 15, at 851 (noting unwillingness to find confidential rela-

no fiduciary duty was established where, over a four year period, a bank officer had assisted plaintiffs in obtaining loans, supervised their business, kept the books, and served as a personal friend as well as business advisor.⁴⁴ Without reading the instruments, the plaintiffs signed over property to the bank officer in what they believed was a lease. In a suit to set aside the deeds, the plaintiffs argued that the bank officer had breached his fiduciary duty to them by not fully revealing what they were signing.⁴⁵ The court held there was no confidential relationship, and that the plaintiffs were not relieved of their duty to read the instruments. The court noted that:

mere subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship Businessmen generally do trust one another, and their dealings are frequently characterized by cordiality of the kind testified to here.⁴⁶

The court again in *Consolidated Gas & Equipment Co. v. Thompson*⁴⁷ found only that the defendant had breached a contract to convey an oil and gas lease, and had not breached any fiduciary duty.⁴⁸ Although the plaintiff testified he had trusted the president of the defendant corporation and relied on his representation that he would assign royalties to the plaintiff, the court found that the existence of a confidential relationship had not been established.⁴⁹ The fiduciary relationship had to arise "before, and apart from" the contract that formed the basis of the suit.⁵⁰ Evidence that "one businessman trusts another, and relies upon his promise to carry out a contract" was insufficient to show that one businessman owed the other a fiduciary duty.⁵¹

Additionally, the *Consolidated Gas* court recognized, as had the *Thigpen* court, that a fiduciary relationship might arise when the

tionship only on evidence of prior business dealings).

43. 363 S.W.2d 247 (Tex. 1963).

44. *Id.* at 253.

45. *Id.* at 251-52.

46. *Id.* at 253. The court limited its holding to the facts because the Lockes' testimony relied solely on their subjective feelings of trust. *Id.*

47. 405 S.W.2d 333 (Tex. 1966).

48. *Id.* at 336-37.

49. *Id.* at 337.

50. *Id.* at 336.

51. *Id.*

parties had worked together over a long period of time towards a common goal.⁵² Subsequently, courts have interpreted this statement to mean that in order to establish the fiduciary relationship, "the dealings between the parties [must] have continued for such a period of time that one party is justified in relying on the other to act in his best interest."⁵³ Courts have ruled that relationships continuing for only a few months or a year or two are of insufficient duration.⁵⁴

Thus, it appears that although Texas courts are willing to impose fiduciary duties on the parties to a confidential relationship, it is not easy to establish the requisite level of trust and confidence where the underlying transaction is an arms-length contract.⁵⁵ The parties must have worked toward a common goal for a sufficient period of time to establish that the trust and confidence reposed by one party in the other were justified. Mere subjective trust is insufficient. Recognition of confidential relationships, however, appears to be limited to those relationships bearing some resemblance to the trustee-beneficiary relation. Texas courts seem reluctant to recognize confidential relationships in cases characterized by a commercial contract.

B. What Duty Does A Franchisor Owe?

A court can approach the franchisor-franchisee relationship from several perspectives. The simplest is to consider franchising a straight-forward commercial arrangement between businesspeople, and therefore apply contract principles to any disputes that arise between the parties. The parties would then owe each other only those duties that have been contractually specified. A more complex perspective acknowledges the commercial nature of the relationship, but looks additionally at the balance of power that directs the interaction between the parties. This latter approach permits the application of tort-based breach of duty principles to franchising disputes. In either case, the nature of the franchisor-franchisee relationship must be understood before any decision can be reached

52. *Id.* at 337.

53. *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d 557, 563 (Tex. Ct. App. 1983).

54. *See, e.g.*, *O'Shea*, 656 S.W.2d at 559 (2 years); *Gonzalez v. City of Mission*, 620 S.W.2d 918, 922 (Tex. Ct. App. 1981) (1 year); *Thomson v. Norton*, 604 S.W.2d 473, 474 (Tex. Ct. App. 1980) (few months).

55. *Consolidated Bearing and Supply Co. v. First Nat'l Bank*, 720 S.W.2d 647, 649 (Tex. Ct. App. 1986) (courts are strict, "emphasizing the distinction between factual proof of a confidential relationship and mere subjective assertions by one party.").

as to the standard of care governing the parties' actions.

1. The Nature of the Franchise Relationship

A franchise relationship is a mutually beneficial business arrangement between the franchisor and the franchisee; a "form of commercial venture [in which] both parties have a common interest and profit from the activities of the other."⁵⁶ The franchisor grants the franchisee the right to do business in a prescribed manner, for which the franchisee pays an initial fee and ongoing licensing and royalty fees.⁵⁷ The relationship is governed by a detailed contract that often specifies everything from the color of the employees' uniforms to the amount of ketchup put on a hamburger.⁵⁸ The franchisor often responds to contract breaches by termination or non-renewal of the franchise. The franchisee frequently alleges wrongful termination, and litigation ensues.⁵⁹ Although the gravamen of the franchisee's complaint is wrongful termination, the cause of action may sound in either contract or tort. Because contract remedies are potentially less satisfactory than tort remedies, the franchisee may claim it was owed a fiduciary duty by the franchisor.⁶⁰ The court's response to these pleadings will vary

56. *Arnott v. American Oil Co.*, 609 F.2d 873, 881 (8th Cir. 1979), cert. denied 446 U.S. 918 (1980). A marriage metaphor is also used to describe the relationship. See Anthony G. Covatta, *Aspects of Systemwide Discontent: Learning to Live Together, Avoiding Divorce*, 12 *FRANCHISE L. J.* 33, 55 (1992).

57. See *JUSTIS & JUDD*, *supra* note 2, at 6. See also GLADYS GLICKMAN, *FRANCHISING*, § 2.02[2] at 2-11 (1992).

58. Judith M. Bailey, *A Form Unit Franchise Agreement*, 1980 *ARIZ. ST. L.J.* 585, 593; Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 *STAN. L. REV.* 927, 937 (1990) (discussing relation of length between contract and length of franchise arrangement). *But see Arnott*, 609 F.2d at 881 and n.6 (defining the nature of a franchise relationship as something beyond an arms-length contractual arrangement).

59. Hadfield, *supra* note 57, at 970; Covatta, *supra* note 51, at 33.

60. The franchisee may also claim it was owed the duty of good faith and fair dealing by the franchisor. The duty arises either from the franchise contract or because of the special relationship between the franchisor and franchisee. Jurisdictions that recognize a contractual duty of good faith and fair dealing have been willing to allow a cause of action for a franchisor's breach of such duty. See *Devery Implement Co. v. J.I. Case Co.*, [1990-92 *Transfer Binder*] *Bus. Franchise Guide* (CCH) ¶ 9889 at 22,577 (10th Cir. 1991); *Bain v. Champlin Petroleum Co.*, 692 F.2d 43, 47-48 (8th Cir. 1982); *Dunfee v. Baskin-Robbins, Inc.*, 720 P.2d 1148, 1154 (Mont. 1986). Arbitrary termination of the franchise by the franchisor is recognized as a breach of the franchisor's implied duty of good faith and fair dealing that is "inherent in every business relationship." *Bain*, 692 F.2d at 48. Additionally, some courts impose a duty of good faith and fair dealing where the plaintiff can demonstrate the relationship between the franchisor and franchisee is special. *Amos v. Union Oil Co. of Calif.*, 663 F. Supp. 1027, 1029 (D.Or. 1987) (fran-

based on the facts of the particular case and its perspective of the franchise relationship.

2. Fiduciary Duty

Some commentators have argued that franchise relationships should involve fiduciary duties.⁶¹ One commentator observes that over time courts have determined that fiduciary duties arise in complex transactions of long duration, where the relationship is characterized by disparity of power and opportunities for abuse, especially through "clandestine self-preference."⁶² Franchise relationships fit this established pattern because they are characterized by the franchisor's "pervasive power of control."⁶³

Following this reasoning, the court in *Arnott v. American Oil*⁶⁴ argued along similar lines to reach the proposition that "[i]nherent in a franchise relationship is a fiduciary duty."⁶⁵ In *Arnott*, the Eighth Circuit found that the district court had not erred in instructing that a fiduciary relationship existed between the franchisor/oil company and franchisee/service station as a matter of law.⁶⁶ The court based its holding on an examination of franchise relationships, franchise jurisprudence, and the facts of the case, finding that the franchisor breached its "'fiduciary' duty of good faith and fair dealing" when it terminated the franchise lease without good cause.⁶⁷

Other commentators⁶⁸ and the majority of jurisdictions have

chisee must show special relationship existed). *But see* Little Oil Co., Inc. v. Atlantic Richfield Co., 852 F.2d 441, 446 (9th Cir. 1988) (as matter of law, special relationship does not exist between franchisor and franchisee).

61. Harold Brown, *Franchising — A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971). *But cf.* *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 355 n.6 (7th Cir. 1982) (court notes that Brown does not cite a firm precedential basis for finding fiduciary duty, but merely "argues for a desirable prospective judicial policy") with *Mister Donut of America, Inc. v. Harris*, 723 P.2d 670, 673 (Ariz. 1986) (citing Brown with approval and holding franchisor-franchisee relationship "special" as a matter of law).

62. Brown, *supra* note 60, at 665. Brown implies the franchisor will act in his own self interest, and conceal this from the franchisee. However, it is equally possible the franchisee will be the one to act with "clandestine self-preference." See Anne L. Austin & Frank L. Winfrey, *Reciprocal Agency in Franchise Channels of Distribution*, 4 SOC'Y OF FRANCHISING PROC. 8 (1990).

63. Brown, *supra* note 60, at 664.

64. 609 F.2d 873 (8th Cir. 1979), *cert. denied* 446 U.S. 918 (1980).

65. *Id.* at 881.

66. *Id.* at 884.

67. *Id.*

68. Brown, *supra* note 60, appears to be the only commentator who has advocated that franchisors owe a *per se* fiduciary duty to their franchisees. At the other end of the spec-

rejected the automatic imposition of *per se* fiduciary duty in a franchise relationship.⁶⁹ The Ninth Circuit Court of Appeals stated that when a manufacturer is free to make pricing and distribution decisions for its own benefit, as a franchisor does, the franchisor-franchisee relation is "not that of a fiduciary to a beneficiary;" the franchisor is far from being a "traditional trustee."⁷⁰ Subsequent to *Arnott*, the Eighth Circuit distinguished the case on its facts:

What [*Arnott*] actually decided . . . was simply that [the franchisor's] *arbitrary termination* of [the franchisee's] lease constituted a breach of [the franchisor's] implied duty of "good faith and fair dealing." Inasmuch as the duty of "good faith and fair dealing" is inherent in every business relationship, it was unnecessary to the decision to label that duty as "fiduciary." In any event, *Arnott* does not stand for the proposition that the grant of a franchise of itself in all instances imposes on the franchisor *all* of the duties and responsibilities which traditionally pertain to a true fiduciary.⁷¹

trum, some argue that no additional duties beyond those contractually specified should be imposed on franchisors. See, e.g., Lee A. Rau, *Implied Obligations in Franchising: Beyond Terminations*, 47 BUS. LAW. 1053 (1992).

69. Carter Equip. Co. v. John Deere Indus. Equip., 681 F.2d 386, 390 n.6 (5th Cir. 1982) (declining to adopt *Arnott* because existence of fiduciary relationship is question of fact). See also O'Neal v. Burger Chef Sys., Inc., 860 F.2d 1341, 1349 (6th Cir. 1988) ("franchise agreements do not give rise to fiduciary or confidential relationships"); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 711 (7th Cir. 1984) (Wisconsin common law does not make franchisor fiduciary of his franchisees); Murphy v. White Hen Pantry, 691 F.2d 350, 354-55 (7th Cir. 1982) (noting that courts refuse to impose general fiduciary duty); Layton v. Aamco Transmissions, Inc., 717 F. Supp. 368, 371 (D. Md. 1989) (franchisor/franchisee relationship not fiduciary or confidential in nature); General Bus. Machines v. Nat'l Semiconductor Datachecker, 664 F. Supp. 1422, 1426 (D. Utah 1987) (existence of fiduciary relationship is question for jury); Power Motive Corp. v. Mannesmann Demag Corp., 617 F. Supp. 1048, 1051 (D.C. Colo. 1985) (under Ohio law, franchise relationship does not give rise to fiduciary duties); RJM Sales & Marketing v. Banfi Products Corp., 546 F. Supp. 1368, 1377-78 (D. Minn. 1982) (franchise relationship not automatically fiduciary); Weight Watchers of Quebec, Ltd. v. Weight Watchers Int'l, Inc., 398 F. Supp. 1047, 1053 (E.D.N.Y. 1975) (license without more does not create fiduciary relationship).

70. Boat & Motor Mart v. Sea Ray Boats, Inc., 825 F.2d 1285, 1292 (9th Cir. 1987).

71. Bain v. Champlin Petroleum Co., 692 F.2d 43, 48 (8th Cir. 1982) (emphasis in original). See also Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 171 (8th Cir. 1987) (following *Bain* in rejecting *Arnott* because a "franchise or other ordinary business relationship does not alone create fiduciary duties"); Domed Stadium Hotel, Inc. v. Holiday Inns Inc., 732 F.2d 480, 485 (5th Cir. 1984) (following *Bain's* argument that the *Arnott* court only applied basic contract principles).

Nonetheless, even jurisdictions that reject a *per se* fiduciary duty recognize that a fiduciary duty may arise independent of the contractual arrangement because of the nature of the relationship between the parties.⁷² In *Carter Equipment Co. v. John Deere Indus. Equip.*,⁷³ the court suggests that in determining the existence of a fiduciary duty in a contractually-based relationship the fact finder should look to the parties' mutual or shared purposes, the requisite need for trust and confidence, and the relative power, authority and bargaining positions of the parties.⁷⁴

The Fifth Circuit Court of Appeals⁷⁵ applied these factors in two subsequent cases: *Walker v. U-Haul Co. of Miss.*⁷⁶ and *Phillips v. Chevron U.S.A., Inc.*⁷⁷ The *Walker* court found that the plaintiff had sufficient evidence to submit his fiduciary duty claim to a jury.⁷⁸ The plaintiff argued that his business relationship with the defendant was of 14 years duration,⁷⁹ and their contract contained language stating the relationship must be "mutually beneficial" and was one of "trust."⁸⁰ The court further noted that the franchisor's power over the franchisee was "obvious and undisputed."⁸¹ Based on this evidence, the *Walker* court determined that the district court had erred in granting summary judgment for the defendant on the issue of fiduciary duty. On the other hand, in *Phillips*, the evidence did not support a finding that the franchisor breached a fiduciary duty owed to its franchisee.⁸² The franchisee was unable to present any evidence that promises made by the

72. *Carter Equip.*, 681 F.2d at 390 (error was not in finding cause of action but in improperly instructing jury as to what constituted breach of fiduciary duty). See also *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1075 (5th Cir. 1984) (existence of fiduciary relationship depends on facts); *Eaton, Yale and Towne, Inc. v. Sherman Indus. Equip. Co.*, 316 F. Supp. 435, 445 (E.D. Mo. 1970) (record showed no special circumstance to impose fiduciary duty where none normally exists).

73. 681 F.2d 386 (5th Cir. 1982).

74. *Carter Equip.*, 681 F.2d at 391. Utah law holds that the relationship is created where the trusting party is induced to relax his ordinary care and vigilance. The evidence must necessarily show "the placement of trust and reliance." *General Bus. Machines*, 664 F. Supp. at 1425.

75. The Tenth Circuit has also utilized the *Carter Equip.* analysis. *Devery Implement Co. v. J.I. Case Co.*, [1990-92 Transfer Binder] *Bus. Franchise Guide* (CCH) ¶ 9889 at 22,579 (10th Cir. 1991).

76. 734 F.2d 1068 (5th Cir. 1984).

77. 792 F.2d 521 (5th Cir. 1986).

78. *Walker*, 734 F.2d at 1076.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Phillips*, 792 F.2d at 525.

franchisor's agent were intended to deceive him.⁸³ Because the *Carter* test requires at a minimum proof of bad faith, absent fraud or bad faith it follows that there was no breach of fiduciary duty.⁸⁴ It is important to note that the Fifth Circuit's test resolves the issue on factual grounds — the fiduciary obligation does not arise *per se*, but will only arise under certain factual circumstances.

Courts also look to the jurisdiction's statutory scheme to determine whether a fiduciary relationship has evolved out of the franchise arrangement.⁸⁵ The *Arnott* court based its holding in part on South Dakota's comprehensive franchise legislation, as well as the "surge" of general franchise legislation, finding such legislation to be indicative of the fiduciary nature of the relationship.⁸⁶ Conversely, after analyzing Virginia's franchising statute, one court stated that since the statute required franchisors to deal fairly there was no need to elevate this to a fiduciary duty and create an additional cause of action for its breach.⁸⁷

Other than in instances where the facts reveal abuse by the franchisor in terminating the franchise, the prevailing approach to franchisor-franchisee relations appears to be that stated in *Picture Lake Campground Inc. v. Holiday Inns, Inc.*⁸⁸: "the franchise relationship is inherently a business relationship, not a fiduciary relationship."⁸⁹

83. *Id.* at 526.

84. *Id.*

85. Brown's commentary is based partly on an absence of statutory protection at the time. Brown, *supra* note 60, at 651. The policy goal of statutes such as the Automobile Dealers Day in Court Act was to equalize the power of franchisor and franchisee. See *Woodard v. General Motors Corp.*, 298 F.2d 121, 127 (5th Cir.), *cert. denied* 369 U.S. 887 (1962). Prospective franchising legislation in Iowa has a similar goal. See Covatta, *supra* note 55, at 60-61.

86. *Arnott v. American Oil Co.*, 609 F.2d 873, 883 (8th Cir. 1979). The dissent argues the statute merely enjoined unfair or inequitable practices. *Id.* at 890 (Bright, J., concurring and dissenting). The *Bain* court also rejected *Arnott* on the grounds that Missouri's statute was not comparably comprehensive, and contained no language to indicate the franchise relationship should be considered a fiduciary one. *Bain v. Champlin Petroleum Co.*, 692 F.2d 43, 48 (8th Cir. 1982).

87. *Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F. Supp. 858, 869 (E.D. Va. 1980).

88. 497 F. Supp. 858 (E.D. Va. 1980).

89. *Id.* See also *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1155 (S.D.N.Y. 1989) (franchisor-franchisee relationship is "an arms-length, commercial one, with the parties' relations governed by the terms of the offering circular and franchise agreement"); *Bonfield v. Aamco Transmissions, Inc.*, 708 F. Supp. 867, 883 (N.D. Ill. 1989) ("business relationships do not of themselves create fiduciary obligations"); *Weight Watchers of Quebec Ltd. v. Weight Watchers Int'l, Inc.*, 398 F. Supp. 1047, 1053 (parties' rights and duties deter-

II. CRIM TRUCK & TRACTOR CO. V. NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION

From the preceding review, it may be seen that most courts characterize the franchisor-franchisee relation as a business relationship, not as a fiduciary relationship. To prove the franchisor owes a duty beyond that specified by the contract, the franchisee must establish the existence of a confidential relationship. Absent such a relationship, the franchisor does not owe a fiduciary duty to the franchisee. This section examines how one court reviewed the facts of a relationship to deny that any heightened duty was owed to the franchisee.

A. Background

The facts of *Crim Truck & Tractor* reflect a common problem faced by franchisors who wish to alter their dealership arrangements to meet competitive market situations.⁹⁰ Since 1943,⁹¹ Crim Truck & Tractor had acted as a distributor of Navistar's products.⁹² Under its most recent distribution agreement,⁹³ Navistar could terminate a dealer only if the dealer had breached any of eleven contractual provisions.⁹⁴ As a competitive measure,

mined by their underlying contract).

90. The situation was particularly acute for Navistar, given its brush with bankruptcy and its continuing problems with reestablishing itself. See generally Chet Borucki and Carole K. Barnett, *Restructuring for Survival — The Navistar Case*, 4 THE EXECUTIVE 36 (1990) (exploring the *Navistar* case and raising implications for the effective management of organizational decline and renewal). See also *Groseth Int'l Inc. v. Tenneco, Inc.*, 410 N.W.2d 159 (S.D. 1987) (wrongful termination case arising from the purchase of division by J.I. Case/Tenneco from International Harvester/Navistar and resulting reformation of dealer network).

91. The relationship was formalized in 1958. *Crim Truck & Tractor*, 823 S.W.2d 591, 593 (Tex. 1992).

92. The relationship began with International Harvester, Navistar's predecessor. *Id.*

93. The agreement was dated 1979. *Id.*

94. *Id.* Additionally, the dealer had a reasonable opportunity to cure any claimed breach. The specific nature of the provisions is not stated. The dissent specifies certain features of the contract that illustrate the imbalance of power such as: Navistar could change truck models without liability; Navistar had unilateral control over what orders it would accept from dealers; dealers could cancel orders only in limited circumstances; after an order is placed, Navistar could retroactively modify price and terms; dealers had to pay all shipping and handling; dealers paid advertising costs and advertising content and quality was controlled by Navistar; Navistar could compete directly with its dealers; dealers could not relocate without approval; dealers had to provide a service center and had to service all products; and dealers had to hire and train all personnel. *Id.* at 599-600 (Mauzy, J., dissenting). However, such provisions are common in franchise agreements. See generally Bailey, *supra* note 57 (setting forth form franchise agreement).

Navistar developed a nationwide communications network designed to facilitate communication between Navistar and its dealers so that customers could be provided better warranty and repair services.⁹⁵ Crim Truck & Tractor did not send a representative to the meeting called by Navistar to introduce the network to all of its dealers.⁹⁶ The dealers were asked to purchase the computer equipment necessary to implement the network.⁹⁷

Although Navistar considered participation in the network mandatory,⁹⁸ Crim Truck & Tractor elected not to sign the sales and service agreement regarding the equipment purchase.⁹⁹ When Crim Truck & Tractor did not comply with repeated requests to sign and return the sales and service agreement, Navistar terminated the franchise in April of 1985.¹⁰⁰ Crim Truck & Tractor brought suit against Navistar for breach of fiduciary duty.¹⁰¹ Crim argued that the evidence supported the conclusion that a confidential relationship existed.¹⁰²

B. The Majority Opinion

At issue before the Texas Supreme Court was whether there was evidence of a confidential relationship giving rise to a fiduciary duty between the parties to a franchise agreement.¹⁰³ Plain-

95. *Crim Truck & Tractor*, 823 S.W.2d at 593.

96. *Id.*

97. *Id.*

98. *Id.* At trial, a Navistar representative testified that the computer system was functional in only half the dealerships; the rest were still using the old written forms and had not been terminated. *Crim Truck & Tractor Co. v. Navistar Int'l*, 791 S.W.2d 241, 244 (Tex. Ct. App. 1990), *aff'd*, 823 S.W.2d 591 (Tex. 1992).

99. *Crim Truck & Tractor*, 823 S.W.2d at 593.

100. *Id.*

101. *Crim Truck & Tractor*, 791 S.W.2d at 242. Crim also sued for breach of contract and conspiracy to convert assets. The jury found in favor of Crim Truck & Tractor on all three questions and fixed actual damages of \$1.6 million and exemplary damages of \$1.75 million. Navistar appealed, and the appellate court reversed on the tort claims and remanded the contract claims. *Id.* at 242, 245.

102. *Crim Truck & Tractor*, 823 S.W.2d at 594.

103. *Id.* at 592. The Texas Supreme Court affirmed the appellate court's decision to reverse the tort judgment and remand the contract claim. *Id.* at 592-93. In addition, the Texas Supreme Court rejected the plaintiff's argument to impose "a common law fiduciary duty on franchisors in the termination of franchise agreements." *Id.* at 596. The amici curiae argued the franchisor/franchisee relationship should be deemed a special relationship, an argument the Supreme Court also rejected because it felt the level of control exerted by the franchisor over the franchisee did not reach that of the insurer over the insured. Furthermore, the franchisee was protected from abuse by statute. *Id.* at 596 n.8. The dissent disagreed with these rulings as well. *Id.* at 601-02 (Mauzy, J., dissenting).

tiff Crim Truck & Tractor relied on two circumstances to support its allegation of a confidential relationship. First, Crim testified that he believed the relationship with Navistar was one of mutual trust and confidence.¹⁰⁴ Second, as further evidence of a confidential relationship, Crim pointed to a "General Provisions" section of the contract containing language that stated the contract involved "mutual confidence and trust" and was thus unassignable.¹⁰⁵

The court rejected Crim's testimony as insufficient to create a confidential relationship.¹⁰⁶ Relying on *Thigpen v. Locke*¹⁰⁷ and *Consolidated Gas v. Thompson*,¹⁰⁸ where the courts held no confidential relationships arose in business relationships despite their duration and trust and reliance, the *Crim Truck & Tractor* court held that a long, cordial relationship is not evidence of a confidential relationship.¹⁰⁹

In response to Crim's contract language evidence, the court noted that all contracts include a degree of trust and confidence that parties will fulfill their contractual obligations.¹¹⁰ In rejecting Crim's reliance on the contract language, the court found that contract language plaintiff considered evidence of a confidential relationship to be mere "boilerplate", "designed to give the parties some degree of control over with whom they do business and nothing more."¹¹¹

C. The Dissent

The dissent vehemently disagreed with the majority's interpretation of Texas law and its application to the facts of *Crim Truck & Tractor*. In a carefully reasoned argument, the dissent points to several deficiencies in the majority's opinion.

The dissenting opinion is premised upon the majority's complete failure "to give due recognition to imbalances of power in business relationships."¹¹² The dissent pointed to "the wealth of evidence" presented by the plaintiff that indicated the relationship

104. *Id.* at 595.

105. *Id.* at 595 n.7.

106. *Id.* at 595-96.

107. *See supra* text accompanying notes 43-46.

108. *See supra* text accompanying notes 47-51.

109. *Crim Truck & Tractor*, 823 S.W.2d at 595.

110. *Id.*

111. *Id.* at 596.

112. *Id.* at 602 (Mauzy, J., dissenting).

was a confidential one.¹¹³ This wealth of evidence included these facts: Crim had worked for Navistar for fifteen years with no contract; Crim testified that he relied on a provision in the franchise agreement specifying that the agreement involved “mutual confidence and trust,” and absent such provision, would not have signed; and Crim had never breached the agreement. The dissent would have upheld the jury’s determination, based on the total evidence, that a fiduciary relationship existed between Navistar and Crim.¹¹⁴

Criticizing the majority for failing to give due consideration to the jury’s decision, the dissent accused the majority of selecting certain facts and “assigning weight to those according to its own inclination.”¹¹⁵ The dissent found the majority’s reliance on *Thigpen v. Locke*¹¹⁶ for the proposition that a confidential relationship must be of long duration before it gives rise to a fiduciary duty to be misplaced, noting that the parties in *Thigpen* had known each other for less than four years, whereas Crim had worked with Navistar for over forty years.¹¹⁷ Although the dissent agreed with the majority that a non-assignability clause might not be conclusive evidence of a confidential relationship, nevertheless, the dissent felt it was “some evidence of trust and confidence.”¹¹⁸ Thus, the dissent argued, the majority had explained away some of the contract’s most important language. The dissent was willing to give credence to the plaintiff’s argument — if the contract was not intended to induce trust and reliance, why include the language and non-assignability clause as Navistar did? Pointing to numerous provisions in the franchise agreement, the dissent found “ample” evidence of Navistar’s “overwhelming bargaining power and exclusive control.”¹¹⁹

The dissent criticized the majority’s reliance on the franchising cases it cited as persuasive authority for rejecting the imposition of fiduciary duties in a contract-based relationship.¹²⁰ The dissent noted that in the context of franchise termination, many of those courts had recognized that a franchise relationship may give rise to

113. *Id.* at 598.

114. *Id.* at 599.

115. *Id.*

116. 363 S.W.2d 247 (Tex. 1962).

117. *Id.* at 597.

118. *Id.* at 598.

119. *Id.* at 599. See *supra* note 93 for a discussion of the contract provisions.

120. *Id.* at 601.

fiduciary duties as a matter of fact.¹²¹ Because the Navistar-Crim Truck & Tractor relationship was factually similar to those cases, the dissent found the majority's decision "fundamentally at odds" with the franchising cases it cited.¹²² The dissent would have utilized such precedent as support for Crim's arguments that a fiduciary relationship had been established. Based on these criticisms and arguments, the dissent would have upheld the jury's determination that the Navistar-Crim Truck & Tractor relationship was a confidential one giving rise to a fiduciary duty.

III. ANALYSIS

The Texas Supreme Court held that Navistar owed no fiduciary duty to Crim Truck & Tractor because the franchisee had not established the existence of a confidential relationship between the parties. Given the fundamentally commercial nature of the franchise relationship, it seems logical that the franchisor should not owe a *per se* fiduciary duty to the franchisee. The holding of *Crim Truck & Tractor* thereby aligns Texas law with other jurisdictions that have refused a *per se* imposition of fiduciary obligations. For franchisors attempting to operate a nationwide business, this holding is welcome. One competitive advantage of franchising is the ability to reduce costs and meet consumer expectations through standardized products and service quality levels.¹²³ Standardization is eroded when courts in each jurisdiction apply different standards of care to the franchisors' treatment of the franchisee. Because Texas now officially follows national precedent, the decision reduces the franchisors' uncertainty about how they will be treated in that jurisdiction.

However, under Texas law, the facts of the case are open to the interpretation that a confidential relationship existed between Navistar and Crim Truck & Tractor. The existence of a confidential relationship is a question of fact, and the jury at the trial level found that the relationship did exist.¹²⁴ The Texas Supreme Court failed to give proper deference to the jury verdict; even on a *de novo* review, the Court should have found a confidential relation-

121. *Id.*

122. *Id.*

123. Richard E. Caves & William F. Murphy II, *Franchising: Firms, Markets, and Intangible Assets*, 42 SO. ECON. J. 572, 584 (1976).

124. *Crim Truck & Tractor Co. v. Navistar Int'l*, 791 S.W.2d 241, 242 (Tex. Ct. App. 1990), *aff'd*, 823 S.W.2d 591 (Tex. 1992).

ship. Thus, it can be argued that regardless of how welcome the decision was to franchisors, the Texas Supreme Court's holding was wrong on the facts of the case.

To establish the existence of a confidential relationship, Texas law requires facts that demonstrate certain characteristics: a relation of trust and confidence; a relation of long duration; control by the dominant party over the affairs of the trusting party; and reliance by the trusting party that the dominant party's actions are done for his benefit.¹²⁵ The fact pattern of *Crim Truck & Tractor* exhibits these characteristics. Crim testified that he signed the last contract revision in reliance on its language that the relation was one of trust and confidence, and that absent such language, he would not have signed. The parties had a long relationship — forty-three years overall, and six from the latest contract revision to termination. Like most franchise agreements, the contract gave Navistar tremendous control over the management of Crim Truck & Tractor's business. The franchisee relied on Navistar to act for its benefit.

Despite these facts, the court rejected the evidence as insufficient to establish a confidential relationship. To do this, the court relied heavily on *Thigpen v. Locke*¹²⁶ and *Consolidated Gas & Equipment Co. v. Thompson*.¹²⁷ The court cites to *Thigpen* for the proposition that a commercial relationship is not a confidential one because a commercial contract always involves trust and confidence; businessmen expect performance, not breach. However, a close reading of *Thigpen* shows that the *Thigpen* court did not reject the existence of a confidential relationship because the contract was between businesspeople; rather the existence of a confidential relationship was rejected because the plaintiff's only evidence of its existence was his own subjective feeling of trust. Such evidence was simply insufficient to establish the relationship.¹²⁸ Crim relied on far more than a mere feeling of subjective trust to establish the relationship. As a demonstration of his objective trust, Crim cited to the contract language he had relied on. The Texas Supreme Court's reliance on *Thigpen* to reject Crim's evidence was inapposite.

Equally flawed was the *Crim Truck & Tractor* court's reliance

125. See *supra* notes 14-27 and accompanying text.

126. 363 S.W.2d 247 (Tex. 1963).

127. 405 S.W.2d 333 (Tex. 1966). See *supra* notes 106-09 and accompanying text.

128. See *supra* notes 43-46 and accompanying text.

on *Consolidated Gas*. The court cited *Consolidated Gas* for the proposition that a confidential relationship must be of long duration. The relationship in *Consolidated Gas* lasted a few years. Other cases citing *Consolidated Gas* involve relationships of a few months or a few years duration.¹²⁹ Yet in *Crim Truck & Tractor* the parties had worked under the most recent contract revision for six years, and had done business together for forty-three. By any standard, the Navistar-Crim Truck & Tractor relationship was one of long duration, such that Crim was justified in relying on Navistar. The Texas Supreme Court's reliance on *Consolidated Gas* was also misplaced.

Rather than rely on *Thigpen* and *Consolidated Gas*, the Texas Supreme Court could have considered those cases where the evidence was sufficient to establish a confidential relationship. In both *MacDonald v. Follett*¹³⁰ and *Fitz-Gerald v. Hull*,¹³¹ the parties were joint owners of oil and gas leases, and one party sought to divert all the royalties to himself.¹³² In these cases, the parties worked together for mutual benefit as did Navistar and Crim Truck & Tractor. Additionally, the trusting party in both cases did so because the actions of the other party had induced such trust. Crim Truck & Tractor reposed trust in Navistar because of the actions Crim testified to. The critical elements of these two cases are sufficiently on point such that the *Crim Truck & Tractor* court could have utilized them as authority had it wanted to find a confidential relationship was established between Navistar and Crim Truck & Tractor.

The Texas Supreme Court could also have turned to case law from other jurisdictions finding the existence of a confidential relationship or imposing fiduciary duties in the context of franchising. While these cases are only persuasive authority, they would have provided guidance to the Texas court on how to account for the nature of a relationship based on a franchise contract. The line of cases from the Fifth Circuit imposing fiduciary duties are particularly pertinent.¹³³ These decisions are based on Mississippi law regarding confidential relationships which is similar to Texas law. Mississippi law recognizes that fiduciary relationships are not re-

129. See *supra* notes 52-53 and accompanying text.

130. 180 S.W.2d 334 (Tex. 1944).

131. 237 S.W.2d 256 (Tex. 1951).

132. See *supra* notes 29-33 and accompanying text.

133. See *supra* notes 74-83 and accompanying text.

stricted to the traditional relationships of trustee and beneficiary, partners, etc.¹³⁴ Where a party occupies a position out of which fiduciary obligations ought to arise "in equity and good conscience," the Mississippi courts will impose the duty even if the relationship is contractual.¹³⁵

Texas law also recognizes fiduciary obligations as arising in informal relationships characterized by trust and confidence even if the relationship is governed by contract. Furthermore, the facts of the *Mississippi* cases discussed above are similar to those of *Crim Truck & Tractor*. All three cases involve long relationships: twelve years for Carter and John Deere,¹³⁶ fourteen years for Walker and U-Haul,¹³⁷ and over forty years for Crim Truck & Tractor and Navistar.¹³⁸ Walker relied on the contract language regarding trust and confidence¹³⁹ as did Crim Truck & Tractor.¹⁴⁰ In building new facilities, Carter relied on Deere's representations that it would broaden its product line.¹⁴¹ Similarly, Crim Truck & Tractor had relied on Navistar's growth to formulate its business strategies.¹⁴² Because of the close similarity in law and facts, the Texas Supreme Court could have used these Fifth Circuit cases as a model to find a confidential relationship in *Crim Truck & Tractor*.

It seems clear that had the Texas court wished to find a confidential relationship it could have done so with no great legal or logical difficulty. The *Crim Truck & Tractor* decision merely reflects the court's hesitancy to find a confidential relationship where the parties' relationship can be more easily be characterized as a contractual business relationship. Although the decision is favorable to franchisors and aligns Texas with national precedent in franchising law, the decision is an unfortunate one because it further muddies the waters in which confidential relationships are fast sinking.

IV. CONCLUSION

One commentator concluded that "[c]onfidential relationships

134. Carter Equip. v. John Deere Indus. Equip., 681 F.2d 386, 390 (5th Cir. 1982).

135. *Id.*

136. *Id.* at 388-89.

137. See *supra* notes 77-80 and accompanying text.

138. See *supra* notes 1, 16 and accompanying text.

139. See *supra* note 79 and accompanying text.

140. See *supra* note 103 and accompanying text.

141. *Crim Truck & Tractor*, 681 F.2d at 388-89.

142. *Crim Truck & Tractor Co. v. Navistar Int'l*, 791 S.W.2d 241, 243 (Tex. Ct. App. 1990), *aff'd*, 823 S.W.2d 591 (Tex. 1992).

will be determined to exist upon the facts in each case combined with supporting or countervailing principles of law, equity, and public policy."¹⁴³ *Crim Truck & Tractor* illustrates that the analysis is by no means so simple. The only aspect of confidential relationships that seems obvious is that the party wishing to establish one bears a heavy and uncertain evidentiary burden. In rhetorical frustration the dissent exclaimed, "What sort of evidence, then, might tend to establish a confidential relationship?"¹⁴⁴ The majority rejected evidence of trust and reliance, evidence of a cordial, long-enduring relationship, and even express contractual language that mutual confidence and trust characterized the relationship.¹⁴⁵ By rejecting these obvious elements as insufficient, the Texas Supreme Court leaves future plaintiffs and fact finders in an awkward position since they cannot point to any bright-line test that declares what sort and what amount of evidence will prove the existence of a confidential relationship. A judicial standard of "I know it when I see it"¹⁴⁶ does not make for good law.

While the business nature of a franchise relationship makes it logical that franchisors should not unilaterally be held to duties beyond those contractually specified, where the facts demonstrate that the franchisor has acted to induce trust and confidence, the imposition of additional duties may be warranted. To find the existence of a confidential relationship in a contract-based relationship such as franchising, the courts must balance the appropriate deference to the parties' freedom to contract with any facts demonstrating egregious conduct. Only then may the court correctly separate an ordinary breach of contract from the breach of a more onerous duty. The facts of *Crim Truck & Tractor* are persuasive that the franchisor owed additional duties to its franchisee. Because the court did not impose any higher duty than that imposed under the contract, *Crim Truck & Tractor* is a poor decision. Texas law and franchising law would have supported a ruling that a confidential relationship had been established between the franchisor and franchisee. Under these extraordinary circumstances, the franchisor and the franchisee had developed such a level of trust and confidence

143. See Westfall, *supra* note 15, at 869.

144. *Crim Truck & Tractor*, 823 S.W.2d at 597.

145. *Id.*

146. See Westfall, *supra* note 11, at title (quoting Justice Stewart's comments concerning pornography).

that the imposition of a fiduciary duty would have been justified, even though under ordinary circumstances the franchise relationship is a business relationship, governed by contract, and nothing more.

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