

Louisiana Law Review

Volume 42 | Number 1
Fall 1981

"At Will" Franchise Terminations and the Abuse of Rights Doctrine

Pannal Alan Sanders

Repository Citation

Pannal Alan Sanders, *"At Will" Franchise Terminations and the Abuse of Rights Doctrine*, 42 La. L. Rev. (1981)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol42/iss1/9>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

"AT WILL" FRANCHISE TERMINATIONS AND THE ABUSE OF RIGHTS DOCTRINE: THE MATURATION OF LOUISIANA LAW

Primitive systems of law are often characterized by their formality and rigidity. If the right form is used, a contract may be enforced despite unfair terms or even vices of consent. This kind of contractual security is at the cost of permitting injustice. . . . The movement in Roman law from rigid contracts to consensual contracts and the development of a doctrine of good faith and judicial inquiry into both the fact of agreement and the fairness of terms is properly considered a sign of the maturation of Roman law.*

Hypothetical: A franchisor grants to a franchisee an exclusive dealership for the distribution and sale of certain household appliances in a specified area of a state. Termination may be by either party at any time, for any reason, ten days after written notice thereof to the non-terminating party. Eight years later sales of the appliances in the area covered by the franchise have increased over 1000 percent, an average annual increase of 143 percent, and the franchisor's products comprise almost 26 percent of the franchisee's sales, up from 6 percent at the beginning of the contractual relationship. One day the franchisor gives the required notice of termination, and transfers the franchise to a rival dealer of the now ex-franchisee, because animosity developed between the franchisor's president and the president of the parent corporation of the franchisee. The franchisee loses its good will in the area with respect to the product line, and is forced to lay off some of its employees. Although this situation might seem unlikely, particularly in view of the "rational man" assumption at the foundation of modern economic theory, such "hypotheticals" fill the case reporters.¹

This article proposes a legal analysis for determining the effect of at will termination clauses in franchise contracts.² After a brief

* Sachse, *Unconscionable Contracts*, in *ESSAYS ON THE CIVIL LAW OF OBLIGATIONS* 274 (J. Dainow ed. 1969).

1. See, e.g., *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129 (5th Cir.), cert. denied, 444 U.S. 938 (1979), discussed in the text at p. 220. *infra*.

2. A typical at will termination clause allows termination on specified notice, by either party "at any time, for any reason." Most franchise contracts provide for termination should the franchisee violate any or all of specified obligations in the contract, with forbearance by the franchisor not constituting waiver of the franchisor's right to terminate for subsequent breaches. Because many of the clauses "linked" to the termination clause provide for the alteration of the standards or duties imposed therein by the franchisor (who may thereby impose impracticable demands upon the franchisee) such clauses will be treated as if they give the franchisor the ability to terminate the contract "at will."

survey of the federal treatment of the issue of franchise terminations,³ and a more extensive survey of the Louisiana experience, the article concludes that the civilian doctrine of abuse of rights provides a necessary framework within which to resolve individual cases.

The volume of business done by firms pursuant to franchise agreements⁴ has increased rapidly during the past decade; this increase is due primarily to the attractiveness of the franchise form of industrial organization to relatively small investors. Usually, only a small amount of start-up capital is needed; the franchisor⁵ typically finances or arranges financing for the franchisee.⁶ Marketing techniques developed by expert managers are utilized, as are sophisticated uniform accounting procedures. Dealers are taught entrepreneurial skills at special training centers, and receive regular

3. Analogous problems arise in several areas of contract law. Although the Louisiana treatment of them will be scrutinized separately, some mention should be made here of their general treatment. For instance, employment contracts often allow for termination of the employment relationship for unsatisfactory performance. In grappling with the problem of regulating such contracts, the courts have imposed requirements of reasonability, good faith, or subjective taste according to the nature of the employment; thus menial or clerical positions have been held to the reasonable or good faith standard, whereas firings of executive personnel have been based upon more subjective standards. *Cf. J. R. Watkins Co. v. Rich*, 254 Mich. 82, 235 N.W. 845 (1931) (In dictum, the court stated that a "provision in a contract for termination at the option of a party is valid. But where the relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, the option may be exercised only in good faith." 254 Mich. at 84-85, 235 N.W. at 846). See generally *Blades, Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 87 COLUM. L. REV. 1404 (1967); Note, *Employment at Will—Limitations on Employers' Freedom to Terminate*, 35 LA. L. REV. 710 (1975) (discussing *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), in which an employee fired in bad faith or with malice recovered damages based upon a breach of the employment contract. The court noted that such dismissals "were not in the best interest of the economic system or the public good." 35 LA. L. REV. at 712 (footnote omitted)). See also Annot., 92 A.L.R.3d 690 (1979); Annot., 62 A.L.R.3d 271 (1975); Annot., 61 A.L.R.3d 244 (1975); Annot., 6 A.L.R. 1497 (1920).

Contracts to sell immovables are often contingent upon (1) the buyer's satisfaction with the vendor's title; Annot., 16 A.L.R.3d 1424 (1967); Annot., 47 A.L.R.2d 455 (1956); Annot., 44 A.L.R.2d 1114 (1955); Annot., 8 Am. Jur. P.O.F.2d 717-44 (1976); (2) the buyer's obtaining suitable financing for the purchase; Annot., 78 A.L.R.3d 880 (1977); or (3) approval by a third party; Annot., 7 A.L.R.3d 555 (1966); Annot., 167 A.L.R. 411 (1947). Movables are sold sometimes on a "sale or return" basis; Annot., 93 A.L.R.2d 342 (1964); Annot., 86 A.L.R.2d 200 (1962). The standards of behavior imposed reflect the courts' attempts to balance the forces of equity, freedom of contract, and certainty of contractual relations.

4. The terms franchise, dealership, and distributorship contracts or agreements are used synonymously herein.

5. Franchisor and manufacturer are used synonymously herein.

6. Franchisee, dealer, and distributor are used synonymously herein.

evaluations of their performance from franchisors in the form of written reports and personal contact with area representatives and district managers. Because of managerial, advertising, and production economies, an increase in sales may result in increased profits for the dealer, and increased royalty revenues for the franchisor.⁷

Franchising is attractive also from the manufacturer's viewpoint. Through franchising the manufacturer may avoid high capital outlay costs, as well as large inventories for high turnover products. The manufacturer also acquires an assured distribution network without many of the tax complexities inherent in vertical integration. National advertising campaigns, made possible through cooperative advertising schemes, may increase the national demand for the product. Finally, the franchisor benefits directly from the franchisee's strong profit motives and enhanced entrepreneurial abilities.⁸

Though desirable in many aspects, the franchise relationship is not without its drawbacks.⁹ Abuses abound and have been the object of congressional investigation.¹⁰ The primary source of abuse lies in

7. See Brown & Cohen, *Franchising: Constitutional Considerations for "Good Cause" State Legislation*, 16 HOUS. L. REV. 21, 28-29 (1978) [hereinafter cited as Brown & Cohen]. See also Comment, *Fairness in Franchising: The Need for a Good Cause Termination Requirement in California*, 13 U. CAL. D. L. REV. 780 (1980).

8. See Brown & Cohen, *supra* note 7, at 29-33. Cf. *Noble v. McClatchy Newspapers*, 533 F.2d 1081 (9th Cir. 1975), cert. granted, judgment vacated and remanded, 433 U.S. 904 (1977), wherein the court noted that manufacturers "have a significant incentive to distribute their products through independent contractors rather than through employees, agents or consignees. Use of independent distributors avoids the substantial investment, expense and risk incident to alternate methods of distribution." 533 F.2d at 1088-89.

9. H. BROWN, *FRANCHISING: REALITIES AND REMEDIES* (2d ed. 1978); H. BROWN, *FRANCHISING: TRAP FOR THE TRUSTING* (1969); PRACTISING LAW INSTITUTE, *REPRESENTING THE FRANCHISOR AND FRANCHISEE* (1979); C. ROSENFELD, *THE LAW OF FRANCHISING* (1970); see Brown & Cohen, *supra* note 7; Gelhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465; Hewitt, *Good Faith or Unconscionability—Franchise Remedies for Termination*, 29 BUS. LAW. 227 (1973); Hewitt, *Termination of Dealer Franchises and the Code—Mixing Classified and Coordinated Uncertainty with Conflict*, 22 BUS. LAW. 1075 (1967); Rudnick & Young, *Franchise Symposium: Recent Developments in the Law Affecting Franchise Organizations—A Primer on the Regulation of Franchise Sales*, 1980 ARIZ. ST. L.J. 453; Comment, *supra* note 7; Note, *Constitutional Obstacles to State "Good Cause" Restrictions on Franchise Terminations*, 74 COLUM. L. REV. 1487 (1974).

10. Cf. *Proposed Franchising Termination Reform Act: Hearings on H.R. 5016 and H.R. 9144, Before the Subcomm. on Interstate and Foreign Commerce, 95th Cong., 1st Session 6080* (1977).

the gross inequality in bargaining power which usually exists between the franchisee and the more powerful franchisor.¹¹ As the number of dealers of a given product increases, the relative importance of any one of them to the franchisor decreases. To the extent that sufficient numbers of alternative investors are available, few constraints exist on the franchisor's behavior, with respect to any one franchisee, other than the franchise agreement itself.

That constraint usually is illusory. The contract is one typically referred to as an "adhesion" contract.¹² The agreement consists of a long, multiple-page form document offered on a take-it-or-leave-it basis, replete with numerous disciplinary devices in favor of the franchisor.¹³ Dealers must follow the standards set down in operation manuals, which may be revised by the franchisor at its discretion. Sales volume criteria often require the dealer to have sales equal to or exceeding the average over a specified area and time. Unless all sales per dealer are equal, almost one-half of the dealers as a matter of probability and mathematics will have sales below the average. Thus, many franchisees are in constant peril of technical breaches of the contract. Dealers must file voluminous, expensive, and frequent reports, and attend conferences at which their vulnerability to the franchisor is both emphasized and apparent.

11. See Brown & Cohen, *supra* note 7, at 26; Comment, *supra* note 7, at 781.

12. See generally G. GILMORE, *THE DEATH OF CONTRACT* (1974); R. UNGER, *LAW IN MODERN SOCIETY* (1976); Brown & Cohen, *supra* note 7, at 27; Dawson, *Economic Duress and the Fair Exchange in French and German Law (Part II)*, 12 TUL. L. REV. 42 (1937); Dawson, *Economic Duress and the Fair Exchange in French and German Law (Part I)*, 11 TUL. L. REV. 345 (1937); Duncan, *Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code*, 34 LA. L. REV. 1081 (1974); Gelhorn, *supra* note 9, at 486 n.81; Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Holmes, *Is There Life After Gilmore's Death of Contract?—Inductions From a Study of Commerical Good Faith in First-Party Insurance Contracts*, 65 CORNELL L. REV. 330, 335 (1980); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contracts*, 43 COLUM. L. REV. 629 (1943); Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1962); Lenhoff, *The Scope of Compulsory Contracts Proper*, 43 COLUM. L. REV. 586 (1943); Litvinoff, *Offer and Acceptance in Louisiana Law: A Comparative Analysis: Part II—Acceptance*, 28 LA. L. REV. 153, 205-10 (1968); Radin, *Contract Obligation and the Human Will*, 43 COLUM. L. REV. 575 (1943); Wigmore, *The Scope of the Contract—Concept*, 43 COLUM. L. REV. 569 (1943); Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INTL & COMP. L.Q. 172 (1965); Comment, *Nullity of Contracts for Limited Mental Capacity and Business Experience of a Party: The Molaison Case*, 23 TUL. L. REV. 250, 255 (1948); Note, *Obligations—Doctrine of Economic Duress*, 32 TUL. L. REV. 512 (1958). Patterson introduced the term "contract of adhesion" to the common law. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

13. See Brown & Cohen, *supra* note 7, at 24, 34; Comment, *supra* note 7, at 785.

Furthermore, the franchisor has an array of reward and punishment techniques with which to control franchisees, including preferred treatment to obedient dealers, awards and fee penalties, and most significantly, termination or non-renewal of the franchise, or threats thereof. Termination and non-renewal threats are effective because dealers fear the loss of their capital investment and the good will which they have created.¹⁴ One commentator states that the "contractual right of franchisors to terminate without cause and without payment to franchisees for the good will value of the franchised business is the single most serious problem in the franchising relationship."¹⁵

Although the judicial response to claims arising from such agreements has been far from uniform, the majority of the courts seem to enforce franchise contracts strictly according to the terms therein. Adhering to the classical doctrine of freedom of contracts and the will theory of contract formation, the decisions indicate that courts do not have the duty of relieving a contractual party from a consensual bad bargain.¹⁶ When the contracting parties are of approximately equal economic status—with skilled, experienced representatives bargaining for concessions—the classical contract model probably provides appropriate solutions in a sufficient number of cases so as to make the approach a "proper" one. Because equal bargaining power seldom exists, however, between the parties to franchise contracts, application of traditional contractual analysis usually leads to harsh results.

As a result of persistent reports of abuses of the franchise relationships, the Federal Trade Commission (FTC) studied the problem, then implemented a set of disclosure requirements applicable to the sale or transfer of franchise rights.¹⁷ The FTC Rule and its com-

14. See Comment, *supra* note 7, at 784.

15. *Id.* at 784 n.17 (citation omitted).

16. See, e.g., *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952); *Howard v. Mercury Record Corp.*, 178 F.2d 449 (5th Cir. 1949); *Wilson v. Cost Plus of Vivian, Inc.*, 375 So. 2d 683 (La. App. 2d Cir. 1979). The cases collected under L.S.A.—C.C. art. 1901 (West) are legion. See also Comment, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193, 208 (1967).

17. See 16 C.F.R. §§ 436 *et seq.* (1979) [hereinafter cited as the FTC Rule]. See also the final interpretive guidelines to the FTC Rule, at 44 Fed. Reg. 49966 (1979) [hereinafter cited as the FTC Guidelines]. The FTC Rule and Guidelines have been subjected to considerable comment and controversy. See, e.g., Black, 35 BUS. LAW. 409 (1980); Comment, *The Federal Trade Commission Franchise Disclosure Rule*, 13 JOHN MARSHALL L. REV. 637 (1980); Comment, *supra* note 7, at 789-93; Comment, *Federal Franchise Regulation: A Definitional Dilemma*, 13 U. CAL. D.L. REV. 813 (1980).

plementary Guidelines require disclosure of material matters contained within the franchise transaction. The Rule is aimed primarily at preventing abuses or surprises in the contractual formation stage, rather than in the termination stage. Moreover, the Rule does not purport to govern the substantive relationships between the contracting parties, but instead mandates disclosure of certain aspects of the relationships. The implementation of the Rule and Guidelines indicates increasing governmental concern about the franchise form of industrial organization.

That this concern is not entirely of recent vintage is obvious from an examination of the Automobile Dealers' Day in Court Act.¹⁸ Franchise abuses have been particularly prevalent in the automobile industry, and strong political pressure from dealers resulted in passage of Act. One section of the Act is particularly relevant to the present inquiry.¹⁹ That section proscribes franchise terminations by an automobile manufacturer acting without good faith. A franchisor acts without good faith when he fails to weigh the equities involved in reaching his decision to terminate the franchise. Because a termination without good faith is proscribed only if it is accompanied by coercive behavior by the manufacturer, dealer recovery under the Act is difficult.²⁰

18. 15 U.S.C. §§ 1221 *et seq.* (1976).

19. 15 U.S.C. § 1222 (1976).

20. An early Second Circuit decision hastened passage of the Act. *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940). *Bushwick* involved an at will termination clause in a car manufacturer's dealership contract. The court upheld the right of Ford to terminate the contract at any time regardless of the presence or lack of good faith. In a not-too subtle call for legislative action, the court refused to "rewrite" the contract:

With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take But, generally speaking, the situation arises from the strong bargaining position which economic factors give the great automobile manufacturing companies: the dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact one-sided. To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy.

Id. at 677.

Because of the stringent two-prong requirement of a showing of bad faith and coercion (which is vaguely defined in the Act at 15 U.S.C. § 1221(e), and excludes persuasion, pleadings, cajoling, etc.) a burdensome evidentiary task is placed upon claimants under the Act. The United States Fifth Circuit Court of Appeals has had numerous cases under the Act; most claimants failed to recover. See *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir. 1967); *Victory Motors of Savannah, Inc. v. Chrysler Motors Corp.*, 357 F.2d 429 (5th Cir. 1966);

The United States Supreme Court has not been a leader in the development of this aspect of substantive commercial law, and has encountered the issue of franchise terminations only indirectly. The Court has faced the problem of franchise terminations most often in the antitrust field.²¹ In *Emich Motors v. General Motors Corp.*,²² a civil case involving the admissibility of a prior criminal conviction in an antitrust suit, the Court set out the standards by which to determine what violations the jury had found in reaching a general verdict to a multiple count indictment. One count alleged that the defendant, General Motors Corporation, had unlawfully used the termination and threats of termination of short-term franchise contracts to secure dealer favoritism towards the defendant's subsidiary, General Motors Acceptance Corporation. Although the issue was not squarely before it, the Court hinted that such actions might create a private antitrust cause of action.²³

A similar oblique opportunity for the Court to deal with franchise terminations arose in *Partmar Corp. v. Paramount Corp.*²⁴ In

Abbott-Stansell Motors Co. v. Chrysler Motors Corp., 339 F.2d 322 (5th Cir. 1964); *Woodard v. General Motors Corp.*, 298 F.2d 121 (5th Cir. 1962).

In a recent case, however, recovery was granted. *H.C. Blackwell Co., Inc. v. Kenworth Truck Co.*, 620 F.2d 104 (5th Cir. 1980). Although the court adhered to the two-pronged test in *Blackwell*, 620 F.2d at 106, it found no error in the jury's award to the plaintiff dealer of \$90,000 damages based upon Chrysler's failure to renew the franchise despite the dealer's expenditures of the amount recovered as damages in a diligent effort to comply with Chrysler's renewal demands. The dealer was given only ninety days in which to comply with the demands, even though the manufacturer's representative testified that it would have taken the dealer at least one year to meet those demands. See generally Note, *The Elusive Measure of Damages for Wrongful Termination of Automobile Dealership Franchises*, 74 YALE L.J. 354 (1964); Annot., 50 A.L.R. Fed. 245 (1980); Annot., 54 A.L.R.3d 324 (1973). Louisiana has a statute similar to the federal government's. LA. R.S. 32:1251-1256.1 (1950 & Supp. 1976 & 1980). See *Benton-Volvo-Metairie, Inc. v. Volvo S.W., Inc.*, 479 F.2d 135 (5th Cir. 1973); *Best Motor & Implement Co., Inc. v. International Harvester Co.*, 252 F.2d 278 (5th Cir. 1958); See also *Davis v. General Motors Corp.*, 414 F.2d 270 (5th Cir. 1969) (decided under Michigan law). Comparable statutes govern gasoline franchises. See, e.g., *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979), discussed in Note, *Antitrust and Franchise Considerations at the Gasoline Service Station*, 13 CREIGHTON L. REV. 1160 (1980). See also *Jordon, Unconscionability at the Gas Station*, 62 MINN. L. REV. 813 (1978).

21. But see *National Muffler Dealers' Ass'n, Inc. v. United States*, 440 U.S. 472 (1979) (held: a trade organization for muffler dealers with membership limited to franchisees of Midas Int'l Corp. (Midas) and formed for the purpose of negotiating unitedly with the management of Midas (almost 80 percent of all Midas dealers were Ass'n members) was not a business league for the purpose of a federal income tax exemption).

22. 340 U.S. 558 (1951).

23. *Id.* at 570 n.7.

24. 347 U.S. 89 (1954). This case was companion litigation to *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), reversing 70 F. Supp. 53 (1946). Para-

an alternative argument favoring its right to cancel certain leases, the lessor, Paramount, contended that its lease provided for termination "for any reason." The Supreme Court found that the trial court concluded properly that this clause meant for any legal or substantial reason, not for any capricious or arbitrary reason.²⁵ Antitrust implications arising from the franchise relationship may be more subtle than the coercive use of the termination power.²⁶ For instance, in assessing the antitrust impact of the Brown Shoe-Kinney Shoe merger,²⁷ the trial court found, as did the Supreme Court, that the relevant geographic market was every city and its environs with a population exceeding 10,000 in which Brown and Kinney sold shoes at retail through stores they either owned or controlled. Stores participating in the Brown Franchise or Wohl Plan were considered to be "controlled" by Brown because of the extensive interrelationship between the franchisor Brown and the franchisee retailers.²⁸

Finally, in a case involving the termination of aid to welfare recipients,²⁹ the Court recognized the importance of "wealth in this country [which] takes the form of rights that do not fall within traditional common-law concepts of property," and also noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise . . . [which is an] aid [to] security and independence."³⁰ Whether the Court merely was being philosophical or was signalling a policy shift regarding the juridical nature of property interests remains uncertain.

mount was attempting to evict Partmar from a theatre leased in conjunction with a franchise, on the grounds that because the franchise was declared illegal by the trial court, the lease also fell. For Paramount to prevail it was in the "anomalous position of attempting to prove that its agreements with Partmar violated the antitrust laws." 347 U.S. at 95. The Court held that collateral estoppel barred re litigation of the issue.

25. 347 U.S. at 96 (quoting *Paramount Pictures Theatres Corp. v. Partmar Corp.*, 97 F. Supp. 552 (S.D. Cal. 1951)).

26. Cf. *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (use of GMC's power to ensure compliance with a Chevrolet dealer conspiracy not to deal with "discounters," "bootleggers," or "bird dogs").

27. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). The antitrust laws, 15 U.S.C. §§ 1 *et seq.* (1976), prohibit certain combinations between persons when the effect is or may be substantially to restrain interstate commerce. Corporations are "persons" under the statute; however, ascertaining the legal entity appropriate for analyzing problems arising under the antitrust laws may be difficult in cases involving complex organizational structures. Essentially, the Court had to determine "what" Brown Shoe Company "was," to determine the legality of "its" merger with the Kinney Shoe Company.

28. 370 U.S. at 337 n.66.

29. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

30. *Id.* at 262 n.8 (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)). See also Reich, *The New Property*, 73 YALE L.J. 733 (1964).

The federal circuit courts³¹ have dealt more frequently with franchise terminations and other effects arising from the franchise relationship. The Fifth Circuit has yet to adopt a clear or uniform analytical approach to problems involving franchise terminations and in fact has avoided the issue whenever possible. An early 1950's case³² involved the franchisee's action for damages arising from the tortious termination of an appliance franchise contract. The court upheld the franchisor's exception of no cause of action by stating that the termination was in conformance with an "at will" termination clause in the contract. Twenty years later, when the tortious breach of contract doctrine was developed more fully, the Fifth Circuit found that under applicable Florida law, the defendant master franchisor had interfered with the plaintiff franchisee's contract with a previously authorized subfranchisee, thereby tortiously breaching the master franchise agreement.³³

The posture in which the franchise relationship has appeared before the court is as interesting as it is varied. Budweiser escaped a claim for violation of an alleged oral franchise contract when the court applied the parol evidence rule to prevent the alleged franchisee from introducing evidence to prove the true nature of the parties' relationship.³⁴ Invoking the rule permitted the court to avoid the issue presented by the plaintiff, who asserted that the defendant brewer's threat not to sell the plaintiff beer for failure to set up a sales record card system was a breach of the franchise agreement.³⁵ Minimum contacts satisfying due process criteria for obtaining personal jurisdiction over non-resident defendants may be the result of the franchise relationship,³⁶ but a referee in bankruptcy has no more

31. The federal appellate court treatment will emphasize the Fifth Circuit Court of Appeals decisions.

32. *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952). See also *Howard v. Mercury Record Corp.*, 178 F.2d 449 (5th Cir. 1949).

33. *House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64 (5th Cir. 1972). See generally *Frost, The Tort of Bad Faith*, 9 COLO. LAW. 1173 (1980); Symposium, *Sixth Annual Survey of Developments in Alabama Law; 1978-79; Torts—Tort of Bad Faith*, 31 ALA. L. REV. 858 (1980); Note, *First Party Insurer Bad Faith Arrives in Arizona*, 22 ARIZ. L. REV. 274 (1980). See also LA. R.S. 22:657 & 658 (1950).

34. *Anheuser-Busch, Inc. v. Jefferson Distrib. Co.*, 353 F.2d 956 (5th Cir. 1965).

35. Although the nature of the parties' relationship probably was in fact that of franchisor-franchisee, an "established" rule of law was invoked without an express analysis of its purposes or its suitability for the instant case.

36. See *Atwood Hatcheries v. Heisdorf & Nelson Farms*, 357 F.2d 847 (5th Cir. 1966) (a franchisor of pure breed male Leghorn chickens, known as "Nick Chicks," was subject to personal jurisdiction of the Texas courts by operation of the state's long-arm statute, because of the franchisor's extensive and systematic contacts with Texas arising out of the franchise contractual relationship with its Texas franchisees).

power than does the bankrupt to prevent the termination of a franchise by a franchisor due to the nonpayment of royalties.³⁷ Adherence to classical contract theory and a hostility towards an analysis based in part upon the relative economic status of the parties is evidenced in *Sonnleitner v. Commissioner of Internal Revenue*.³⁸ A taxpayer sought to avoid the assessment of ordinary income taxes on money received in the sale of an exclusive franchise and attributable to a covenant not to compete. The defendant claimed that economic duress vitiated his consent to the franchise contract, but the court, laying down a heavy burden, rejected his claim. Three essential elements were required to make out a prima facie case of economic duress: "(1) wrongful acts or threats; (2) financial distress caused by the wrongful acts or threats; and (3) the absence of any reasonable alternative to the terms presented by the wrongdoer."³⁹

The Fifth Circuit recently sidestepped the problem by focusing upon the plaintiff's lack of damages arising from an alleged breach of a franchise contract.⁴⁰ Plaintiff Bel-Mar alleged injury due to the breach by the defendant, Woods & Copeland (W&C), of an alleged exclusive dealership to sell Cleveland Tractors in certain areas of Mississippi. Acting in the absence of a contractual termination date, W&C entered into a new franchise agreement with one Taylor on June 15, 1976, and terminated its relationship with Bel-Mar on September 1, 1976. The court held that since Bel-Mar made no sales during the period between the agreement with Taylor and the termination of the franchise, no damage resulted from the alleged breach. The plaintiff also failed to recover specially incurred demonstration expenditures of \$24,000 because, in the absence of a franchise clause covering the situation, the plaintiff supposedly took "the risk that W&C might terminate the franchise."⁴¹

On still another occasion, the court avoided grappling directly with the problem. In *Avis Rent-A-Car*,⁴² the issue was whether the defendant Avis had acted rightfully in terminating summarily the license of plaintiff Gulf Shores, Avis' franchisee.⁴³ Avis granted franchise rights to SALCO respecting the Avis rental car business in

37. See *Schokbeton Ind., Inc. v. Schokbeton Prod. Corp.* (*Un re Schokbeton Ind., Inc.*), 446 F.2d 171 (5th Cir. 1972); *Acrete v. Schokbeton Prod. Corp.* (*Un re Schokbeton Ind., Inc.*), 449 F.2d 321 (5th Cir. 1971).

38. 598 F.2d 464 (5th Cir. 1979).

39. *Id.* at 468.

40. *Bel-Mar Ford Tractor v. Wood & Copeland Mfg., Inc.*, 602 F.2d 1199 (1979).

41. *Id.* at 1200.

42. *Gulf Shores Leasing Corp. v. Avis Rent-A-Car Sys., Inc.*, 441 F.2d 1385 (5th Cir. 1971).

43. *Id.* at 1387.

three Louisiana cities: Lake Charles, Lafayette and Baton Rouge. These rights were assigned to Gulf Shores in a three-party agreement.⁴⁴ Construing the assignments and franchises under Louisiana law, the court held that the applicable termination clause dated from the execution of the assignment; thus Avis benefited from the agreement's termination without cause provision. Gulf Shore's claim that such a clause was unconscionable, raised for the first time on appeal, was argued too late.⁴⁵

The somewhat startling case of *Corenswet, Inc. v. Amana Refrigeration, Inc.*⁴⁶ reveals the extent to which the Fifth Circuit is reluctant to question classical contract theory. Corenswet, an independent wholesale distributor based in New Orleans, had held exclusive distributorship rights in southern Louisiana for certain Amana products since 1969. Amana attempted to terminate Corenswet's franchise in 1976 through an "at will" termination clause.⁴⁷ Corenswet sought injunctive relief from the attempted termination and claimed Amana's action was arbitrary and capricious. The district court⁴⁸ agreed, finding that Amana was attempting to breach the franchise agreement and, furthermore, was violating the Uniform Commercial Code's general principle requiring good faith dealings.⁴⁹ The appellate court found the district court's opinion not clearly erroneous, and Amana appealed the preliminary injunction prohibiting termination of the franchise. Pending that appeal, Amana drafted a new one-year distributorship agreement. When Corenswet refused to execute the new contract, Amana sued in the

44. *Id.*

45. *Id.* at 1391-92.

46. 594 F.2d 129 (5th Cir.), *cert. denied*, 444 U.S. 938 (1979).

47. 594 F.2d at 131.

48. Honorable Alvin B. Rubin, for the United States Eastern District Court of Louisiana, presiding.

49. The U.C.C. defines an agreement as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts. . . ." U.C.C. § 1-201(3). A contract means "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." U.C.C. § 1-201(11). Good faith means "honesty in fact in the conduct or transaction concerned," U.C.C. § 1-201(19), and in the case of sales by a merchant, includes "the observance of reasonable commercial standards of fair dealing in the trade," U.C.C. § 2-103(1). The phrase "good faith" appears over fifty times in the U.C.C. See generally Eisenberg, *Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem*, 1971 *COM. L.J.* 296; Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 *U. CHI. L. REV.* 666 (1963).

same district court, claiming that the refusal to sign the agreement was a just cause to terminate the franchise relationship. Although the district court agreed with Amana in the second suit, it ruled that if Corenswet did enter into the contract, Amana could not refuse to renew the agreement at the end of any one-year term "without good reason," a ruling which Amana appealed.

The issue before the Fifth Circuit then became whether a franchisor, under a distributorship agreement of indefinite duration and terminable by either party at any time for any reason, may arbitrarily terminate the agreement under both the terms of the contract and under the U.C.C. (as adopted by Iowa).⁵⁰ A brief history of the parties' past dealings with one another is instructive. Corenswet, in developing an important new market for Amana products, had invested over \$1.6 million in south Louisiana for that purpose; as a result of Corenswet's efforts, annual Amana sales in the area increased from a mere \$200,000 in 1969 to \$2.5 million in 1976. Sales attributable to Amana products constituted 26 percent of Corenswet's sales in 1976, up from 6 percent in 1969; obviously, the parties had significant financial interdependence. But personal animosity between the president of Amana and the president of Corenswet's parent corporation, Select Brands, Inc., caused friction. Desiring to transfer the franchise to George H. Lehleitner & Co. (another distributor in New Orleans), Amana first attempted to provoke Corenswet into terminating the agreement by repeatedly increasing its demand for inventory security, but Corenswet met each demand. Amana, abandoning its attempt to coerce Corenswet into withdrawing from the contract, then declared its intent to terminate the franchise, thus precipitating the instant litigation.⁵¹

The Fifth Circuit construed the contract to allow termination for any cause deemed sufficient by the party electing to terminate the agreement, thus not prohibiting bad faith termination. Following a dubious analysis of the effect of Iowa's adoption of the U.C.C.⁵² and of decisions cited favorably by each litigant,⁵³ the court stated its

50. 594 F.2d at 131.

51. *Id.* at 132.

52. "Although most distributorship agreements, like franchise agreements, are more than sales contracts, the courts have not hesitated to apply the Uniform Commercial Code to cases involving such agreements." *Id.* at 134.

53. The court distinguished an early Tennessee case cited by the plaintiffs, *Dubois v. Gentry*, 182 Tenn. 103, 184 S.W.2d 369 (1945) (construing "for any reason" in a lease termination clause to mean "any good reason or just reason," 182 Tenn. at 108, 184 S.W.2d at 371), by asserting that the Tennessee court was ruling on a question of law, whereas the instant case involved a question of fact, under Iowa law, because the

uncertainty as to the proper resolution of the issue and, after noting the varied approaches of decisions and scholars, concluded that while public policy may not frown on the enforcement of any and all contract clauses permitting termination without cause, public policy "does abhor economic overreaching—the use of superior bargaining power to secure grossly unfair advantage."⁵⁴ Thus, the court indicated that the proper analysis lay in the doctrine of unconscionability, and not that of good faith, for "[i]n an area such as this, where considerations of *stare decisis* are of importance, we should hesitate to depart from established case authority absent fair assurance that the state's courts would interpret the Uniform Commercial Code to forbid 'bad faith' or 'arbitrary' terminations of distributorship contracts."⁵⁵ The district court judgment in favor of Corenswet was reversed.⁵⁶

Judge Rubin again dealt with the doctrine of good faith performance of obligations in *Makofsky v. Cunningham*.⁵⁷ A purchaser of immovable property entered into a contract to sell conditioned upon the ability of the seller to deliver a marketable title. To frustrate the seller's fulfillment of this condition, the buyer induced one Goff, the holder of an earlier recorded purchase option, to execute and record an affidavit that a recorded purported cancellation by Goff of the previous option was fraudulent, thus clouding the seller's title. The court held that the buyer's actions breached his implied obligation under Louisiana law to perform the contract in good faith.⁵⁸

district court looked to extrinsic evidence in interpreting the contract. 594 F.2d at 134, 135 n.4. Instead, the court embraced dictum in the Iowa decision of *Harper v. Cedar Rapids Television Co., Inc.*, 244 N.W.2d 782 (Iowa 1976) ("The contract being terminable at will plaintiff could have been discharged for virtually any reason," 244 N.W.2d at 791). 594 F.2d at 135 n.4. *Harper*, however, involved the termination of the employment contract of a TV news anchor-man who had engaged in repeated acts of misconduct with his co-employees, and who had been discharged for good cause. Additionally, the nature of the relationship lent itself more readily to a purely subjective standard, rather than requiring reasonable grounds, for termination. See note 3, *supra*.

54. 594 F.2d at 139.

55. *Id.* at 138.

56. Although the court approvingly cited Gelhorn, *supra* note 9, it failed to note the following statement by him: "The manufacturer's right to terminate should *not* be subject to the possibility that some *personal animosity* may exist between a dealer and the manufacturer's agents. Rather the relevant facts are whether the termination was commercially justifiable [and permitted by the contract] and whether the relative *burdens* resulting from it [the termination] are so disproportionate as to be unfair." Gelhorn, *supra* note 9, at 521 (footnotes omitted) (emphasis added).

57. 576 F.2d 1223 (5th Cir. 1978).

58. *Id.* at 1234. See LA. CIV. CODE art. 1901. The court also resorted to Civil Code article 2040, because the conditional obligor had prevented the fulfillment of the condition. See the discussion of this article at p. 228, *infra*.

A synthesis of the federal approach to problems arising from the formation, existence, and termination of the franchise relationship is not possible presently, for no unified doctrine is apparent under the statutes or jurisprudence. To the extent that Louisiana legislation and jurisprudence tend to follow federal counterparts, however, such comparative analysis lends some aid in developing a cogent legal theory. Although the nucleus of the appropriate doctrine is present in Louisiana, albeit in the formative stage, an exposition of some fundamental aspects of civilian contract theory is necessary to place in proper perspective the theory of abuse of rights as it relates to the franchise relationship. The perspective will be developed by references to codal, doctrinal, and judicial authorities.

Because of the variety of situations and endeavors which typify human activities, no legislature could possibly regulate a priori all aspects of interpersonal relationships. General rules of public order may be and have been prescribed, however, as a means of guiding the courts in the resolution of particular cases or controversies. These rules reflect a tension between several social policies which sometimes conflict with one another. Security of transactions, freedom of contract, supremacy of the will, and fundamental fairness are names sometimes given to the policies.⁵⁹ In large part, the industrial revolution was made possible by the development of contract law and the contemporaneous attempt to attach certain, or at least predictable, consequences to the combination of words, actions, and thoughts called a contract. As the uncertainty of the consequences of an action increases, so does the risk of undesirable results; economic theory reveals that risk-taking entails costs, which must ultimately be borne by consumers. Therefore, the policy of stability of transactions is well-suited to a free enterprise system with the goal of minimum-cost production of a variety of goods.⁶⁰

Together with the policy of security of transactions, the goals of freedom of contract and supremacy of the will also serve important roles in a capitalistic economic system. Individuals acting to achieve "selfish" profit maximization might be characterized as the invisible hand regulating the economy; the ability to contract in a manner to effectuate that will is an important channel for the guiding of funds into optimum uses. Traditional analysis predicates the utility of these paradigms upon the notion that economic actors function in atomistic markets lacking significant concentrations of economic

59. See Gelhorn, *supra* note 9, at 475.

60. For an excellent, and more eloquent, discussion of these concepts, see generally Kessler, *supra* note 12, at 629-33.

power. The validity of this assumption has come under forceful attack in recent years.⁶¹ Various legal tools have been developed in order to compensate for the imbalanced economic forces often encountered in a particular class of transactions. Restorative forces not only serve the practical goal of easing economic ills, but also reflect the value western society traditionally places upon fundamental fairness in dealings, both personal and commercial. An understanding of these principles and of their clash is crucial to a coherent analysis of problems arising from the franchise relationship.

Assuming that any one policy or value set will receive a non-conclusive, positive weight in a judicial system, every system must determine the proper "mix," or emphasis, of the value sets.⁶² The common law has proceeded to establish the mix on a case basis; the civil law, Louisiana in particular, has embedded that mix in a comprehensive legislative scheme. An examination of the Louisiana Civil Code discloses that a pervasive notion of good faith and subjective right-dealing intertwines with and complements the classical theory of contract.

Agreements not *contra bonos mores* or not contrary to public order, legally entered into,⁶³ bind the parties thereto and create obligations,⁶⁴ some of which are enforceable in the courts.⁶⁵ Obliga-

61. See the authorities cited in note 12, *supra*. It has been noted, for instance, that in addition to the disintegration of traditional contractual damage rules, a "change in societal values and expectations has also undercut most of . . . [the] formal external rules governing contract formation, construction, and breach." Holmes, *supra* note 12, at 331. Instead of one body of contract law, analysis has shifted to three distinct aspects within the field: the formational process, the status and relationships of the contracting parties, and the nature of the underlying transaction. These aspects are approached by asking how the contract was formed, who the parties are, and what kind of contract it is. *Id.* at 343-44. *But cf.* Note, *Obligations—Doctrine of Economic Duress*, 32 TUL. L. REV. 512, 516 (1958). The writer submits that a fourth inquiry is necessary: In light of the several interests of society and of the parties, how should the contract be *performed* and enforced? This query is in keeping with civilian tradition, which "conceives contractual obligations as a duty to maintain a certain *conduct*, while the common law conceives a contractual obligation as a guarantee of a certain *result*." Gorla, *The Theory of Object of Contract in Civil Law: A Critical Analysis by Means of the Comparative Method*, 28 TUL. L. REV. 442, 456 (1954) (emphasis added).

62. "The key question is how far can the law go in protecting the reasonable expectations of franchisees without endangering the economic viability of franchising as a dynamic and expanding system of distribution? The answer in the long run should be shaped in accordance with the economic [and political, in the broad sense] goals and priorities of a free society." Hewitt, *supra* note 9, 29 BUS. LAW. at 236.

63. See LA. CIV. CODE arts. 11, 1764, 1779(4), 1895 & 1901.

64. See LA. CIV. CODE arts. 1756-1760.

65. See LA. CIV. CODE arts. 1756-1760 & 1779.

tions of contracts include obligations implied by law;⁶⁶ one obligation implied by law is the duty to perform contracts in good faith.⁶⁷ Other obligations, considered to be incidental⁶⁸ to any particular contract, arise from custom or equity and supply terms of the agreement about which the parties reasonably may be presumed to have been silent because they contemplated that the law imposed those terms in the absence of express contractual provisions.⁶⁹ Equity demands that persons treat one another as they would have themselves treated, and that persons not enrich themselves (unjustly) at the expense of another.⁷⁰ Indeed, the codal articles on the interpretation of agreements prohibit giving literal effect to express clauses when to do so would lead to unreasonable or absurd consequences.⁷¹

66. See LA. CIV. CODE art. 1903.

67. See LA. CIV. CODE art. 1901. Common law commentators are beginning to appreciate fully the notion of an implied obligation of good faith performance, although the expressions of the principle's content vary. An "internalized" view (see text discussion at p. 231, *infra*) is that a party is prohibited from doing anything that will injure the right of the other party from receiving the benefit of his bargain, see Holmes, *supra* note 10, at 332-34, thus "a party [is required] to strike an equitable balance when a conflict of interest appears." *Id.* at 377 (footnote omitted). One scholar has stated succinctly that to "act in good faith is to exercise one's *formal entitlements* in the spirit of solidarity. The good faith standard requires one to find in each case the mean between the principle that one party may disregard the interest of the other in the exercise of his own rights and the counterprinciple that he must treat those interests *exactly as if they were his own.*" Unger, *supra* note 12, at 210 (emphasis added). Compare the italicized portion of Unger's statement with the definition of equity given in Civil Code article 1965, and note the connexity between good faith and equity. The abuse of rights doctrine embraces both of these notions. See the text beginning at p. 231, *infra*. See also RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tent. Draft No. 5, 1970), and authorities cited in note 12, *supra*.

68. See LA. CIV. CODE art. 1764(3).

69. See LA. CIV. CODE arts. 1903, 1963 & 1967.

70. See LA. CIV. CODE art. 1965. See generally Stone, *The So-Called Unprovided-For Case*, 53 TUL. L. REV. 93, 95-97 (1978); Tate, *The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process (Part II)*, 51 TUL. L. REV. 446 (1977); Tate, *The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process (Part I)*, 50 TUL. L. REV. 883 (1976); Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law (Part II)*, 37 TUL. L. REV. 49 (1962); Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law (Part I)*, 36 TUL. L. REV. 605 (1962); Comment, *Actio De In Rem Verso in Louisiana: Minyard v. Curtis Products, Inc.*, 43 TUL. L. REV. 263 (1969); Note, *Conditions for the Application of Actio De In Rem Verso*, 36 LA. L. REV. 312 (1975), (discussing *Edmonston v. A-Second Mfg. Co.*, 289 So. 2d 116 (La. 1974)).

71. See LA. CIV. CODE arts. 1945-1962, 1963-1967; *National Safe Corp. v. Benedict & Myrick, Inc.*, 371 So. 2d 792, 795 (La. 1979); *Martin-Parry Corp. v. New Orleans Fire Detection Serv.*, 221 La. 667, 681, 60 So. 2d 83, 84 (1952); *Dixie Campers, Inc. v. Vesely Co.*, 389 So. 2d 889, 891-92 (La. App. 4th Cir. 1980), *writ granted*, 395 So. 2d 812 (La. 1980), *rev'd*, 398 So. 2d 1087 (La. 1981); *Lanneau v. Capital Transp. Corp.*, 292 So. 2d 810, 816 (La. App. 1st Cir. 1974); *Crow v. Monsell*, 200 So. 2d 700 (La. App. 2d Cir. 1967).

To understand the Code is to realize that it has adopted only in a limited fashion the strict classical doctrine of contract, which emphasizes the principles of security of transactions, sanctity of the will, and freedom of contract almost to the exclusion of fairness to the individual and of a sense of social justice. The Code has wrapped numerous protections around the individual, such as vices of consent,⁷² the failure of cause doctrine,⁷³ requirements related to capacity,⁷⁴ and lesion.⁷⁵

Thus, when confronted with a franchise termination clause, the court's function is to determine not only what protection applies but when it is to be applied.⁷⁶ A franchisor's continuing⁷⁷ obligation under an "at will" termination clause is dependent upon an express resolutive⁷⁸ potestative⁷⁹ condition.⁸⁰ Although the state jurisprudence and doctrine concerning conditional obligations have been at times inconsistent or not articulated fully, a summary herein proves useful.⁸¹ The early jurisprudence failed to distinguish between purely potestative conditions,⁸² solely dependent upon the whim, caprice,

72. See LA. CIV. CODE arts. 1819-1859, 1881 & 1882.

73. See LA. CIV. CODE arts. 1893-1900.

74. See LA. CIV. CODE arts. 1780-1796.

75. See LA. CIV. CODE arts. 1860-1880, 2665 & 2666.

76. The analysis begins, of course, with an examination of the Civil Code. Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727 (1962); Tate, *Civilian Methodology in Louisiana*, 44 TUL. L. REV. 673 (1970).

77. See LA. CIV. CODE art. 1899.

78. See LA. CIV. CODE arts. 2026 & 2045.

79. See LA. CIV. CODE arts. 2024, 2034 & 2036.

80. See LA. CIV. CODE arts. 2020-2047.

81. See generally Brown, *The Potestative Condition in Louisiana*, 6 TUL. L. REV. 23 (1931); Brown, *Potestative Conditions and Illusory Promises*, 5 TUL. L. REV. 396 (1931); Palmer & Plauché, Jr., *A Review of the Louisiana Law on Potestative Conditions*, 47 TUL. L. REV. 284 (1973).

82. See LA. CIV. CODE art. 2035. For example, A promises to B that A will buy from B a thing, if A decides to buy it. A's promise is illusory. Compare this example with that given by Brown, *supra* note 81, 6 TUL. L. REV. at 25: A promises to sell to B if B wishes to buy. Note that in conditional commutative contracts, each party is both an obligee and an obligor, and his status as either one may be conditional. In Brown's example, B is an unconditional obligee with respect to A's promise to sell, and is an obligor subject to a purely potestative suspensive condition with respect to B's obligation to pay the price, which arises upon the exercise of the option. The Louisiana courts seemingly forget the civilian doctrine of unilateral contracts, which is the result of Brown's example, since A is still bound unconditionally. Thus the courts often invalidate an entire contract, instead of the obligation therein subject to a purely potestative suspensive condition. See LA. CIV. CODE arts. 2024, 2034-2036; Palmer & Plauché, Jr., *supra* note 81, at 289. See also *Martin-Parry Corp. v. New Orleans Fire Detection Serv.*, 221 La. 677, 682-83, 60 So. 2d 83, 85 (1962) (dictum).

or will of the obligor, and simply potestative conditions in which the exercise of the obligor's will is constrained by substantial adverse consequences attached to the exercise of will.⁸³ Failing to make this distinction, courts construed seemingly potestative conditions as mixed conditions in order to prevent what they perceived to be illusory promises from nullifying agreements. Many contracts to sell real estate, for example, are conditioned upon one or several of the following: (1) the buyer's obtaining suitable financing; (2) the buyer's ability to sell his present home; and (3) the seller's ability to deliver a title satisfactory to the buyer. In each instance, the purchaser may prevent or delay consummation of the sale by not seeking financing, by not placing his present home on the market, or by declaring unsatisfactory his vendor's title. Cases dealing with these problems generally took two approaches. First, a court might interpret the conditions so as to reflect the "reasonable" intent of the parties, thus imposing an objective standard of reasonable behavior under the circumstances upon the conditional obligor.⁸⁴ Second, by misreading

83. See LA. CIV. CODE art. 2035; *King v. King*, 185 So. 2d 893, 895 (La. App. 3d Cir. 1966).

84. Since 1931 the Louisiana courts have had continued success in deciding cases containing allegedly purely potestative conditions by resorting to a "reasonable man" objective test. Under this test, the courts inquire into the intention behind a contract clause that on its face gives one party an arbitrary option to perform. Often they are able to determine that the obligation is actually not conditioned on the arbitrary will of one of the parties.

Palmer & Plauché, Jr., *supra* note 81, at 299. See also *Brown*, *supra* note 81, 6 TUL. L. REV. at 37 (1931). In many cases the objective standard was phrased in terms of a requirement of good faith performance.

On appeal of the trial court's sustaining an exception of no cause of action, the Louisiana Supreme Court held that the plaintiff lessor had stated a cause of action for the cancellation of and damages for the breach of an automotive dealership, garage, and filling station lease. *Huber v. Taussig*, 224 La. 453, 69 So. 2d 919 (1953), *discussed in* Smith, *The Work of the Louisiana Supreme Court for the 1953-1954 Term—Conventional Obligations*, 15 LA. L. REV. 282, 283-84 (1955). The lease, tied to an exclusive-purchase requirements contract, gave the defendant lessee the option to terminate the requirements contract if a change of the lessor's jobber was not "satisfactory" to the lessee. The court held that the lessee was under a duty to determine by a *bona fide* exercise of judgment whether the substituted goods were satisfactory according to an objective standard and could not act arbitrarily and without justification. *But see* *Jackson v. New Orleans Bd. of Trade, Ltd.*, 207 La. 571, 21 So. 2d 731 (1945), *discussed in* Pascal, *Work of the Louisiana Supreme Court for the 1944-1945 Term—Obligations, Contracts and Mandate*, 6 LA. L. REV. 587 (1946), in which the court in dictum stated that an attorney's fee arrangement with the defendant Board, whereby the Board was to determine the fee, would have involved a purely potestative condition.

The second circuit in *Franks v. Louisiana Health Services and Indem. Co.*, 382 So. 2d 1064 (La. App. 2d Cir. 1980), a case involving a group health policy excluding coverage of hospital admissions not medically necessary in the judgment of the com-

Civil Code article 2040 to mean that the condition is fulfilled "against" the party preventing fulfillment of the condition, regardless of whether the obstructing party was the conditional obligor, a court might find fulfillment of the condition when the purchaser has made insubstantial efforts to comply with the condition.⁸⁵ Both approaches err in that if such conditions are construed to be purely potestative, then the capricious exercise of the purchaser's will can be nothing other than fulfillment of the condition. Similar problem areas have involved employment contract terminations⁸⁶ and brokerage contracts.⁸⁷

pany, held that the insurance company was obligated to make an honest, sincere effort to determine the medical necessity of an admission. *Cf. Lopez v. Blue Cross of La.*, 397 So. 2d 1343 (La. 1981) (construing LA. R.S. 22:657(A) (1950) to require health and accident insurers to pay properly presented claims within 90 days, "unless just and reasonable grounds such as would put a reasonable and prudent businessman on his guard that the claim is unjust, exist." 397 So. 2d at 1345). The second circuit gave a similar interpretation to a contract between a sewerage company and a real estate developer to furnish sewerage service to a subdivision, up to fifty connections. *D'Arbonne Sewerage, Inc. v. Sanders*, 259 So. 2d 417 (La. App. 2d Cir. 1972). *Accord*, *Crow v. Monsell*, 200 So. 2d 700 (La. App. 2d Cir. 1967) (seller's refusal to tender title according to a contract to sell real estate); *Brewater v. Yockey*, 153 So. 2d 489 (La. App. 4th Cir. 1963) (a contract to sell real estate conditioned upon the purchaser's securing a specified loan imposed on the buyer the duty to make *bona fide* efforts to obtain the loan; under the facts, one attempt was insufficient). *But see Motors Sec. Co., Inc. v. Tullos*, 178 So. 634 (La. App. 1st Cir. 1938), *discussed in Note, Chattel Mortgage-Security Clause as a Potestative Condition*, 2 LA. L. REV. 548 (1940).

85. *See, e.g., Waseco Chem. & Supply Co. v. Bayou State Oil Corp.*, 371 So. 2d 305 (La. App. 2d Cir. 1979) (an oil and gas lessee's failure to use the fire flooding oil recovery technique, the only one available for the disputed field, was a failure to develop diligently the premises); *Lopez v. Broussard*, 308 So. 2d 837 (La. App. 3d Cir. 1975) (involving a contract of sale conditioned on the purchaser's ability to sell her mobile home [itself a condition to her ability to obtain suitable financing for the purchase sued upon]; under the facts her single attempt to sell the mobile home was a good faith effort to fulfill the condition). *Accord*, *Freedman v. Faid*, 176 So. 2d 213 (La. App. 4th Cir. 1965); *Slack v. Munson*, 61 So. 2d 618 (La. App. 1st Cir. 1952). *See also Morrison v. Mioton*, 163 La. 1065, 113 So. 456 (1927); *Boudreaux v. Elite Homes, Inc.*, 259 So. 2d 669 (La. App. 4th Cir. 1972).

86. *See Long v. Foster & Assocs., Inc.*, 242 La. 295, 136 So. 2d 48 (1961); *Martin-Parry Corp. v. New Orleans Fire Detection Serv.*, 221 La. 677, 60 So. 2d 83 (1952). The court in each case upheld the validity of at will termination clauses in employment contracts on the basis that either party, as opposed to only one, could terminate the employment relationship. For a criticism of the court's approach see *Palmer & Plauché, Jr.*, *supra* note 81, at 293.

87. In a recent case a plaintiff broker stated a cause of action where the defendant seller allegedly attempted to circumvent his obligation to pay broker's fees by requiring the buyer—procured through the broker's efforts and ready, willing, and able to complete the transaction—to represent contrary to the facts that the broker had not procured his participation in the transaction. *Associated Executive Control v. Bankers Union Life Ins. Co.*, 367 So. 2d 811 (La. 1979). *Cf. Stephen L. Guice & Co., Inc.*

After some time of confusion and scholarly criticism,⁸⁸ the Louisiana bench recognized not only the differences between the various types of conditions, but also the different consequences arising from their nature as resolutive or suspensive.⁸⁹ That a series of successive or continuing obligations may be made subject to a resolutive purely potestative condition is apparent from a reading of Civil Code articles 2036 and 1899; article 2040 is not applicable. Despite the courts' confusion about the codal scheme governing conditional obligations, a unifying rationale linking the cases emerges. The courts are extremely reluctant to sanction behavior substantially deviating from the parties' probable intention at the time of contract formation. By a circuitous route, the courts have rendered results consistent with the principle succinctly summarized by article 2037, that "[e]very condition must be performed in the manner that it is probable that the parties wished and intended that it should be."

The doctrine of abuse of rights is an appropriate constraint upon the exercise of the right of an "at will" franchise termination clause. The doctrine, used in conjunction with a preliminary analysis of the exercise of the right as a function of the parties' expectations at the time of the formation of the contract, is an appropriate legal model for the judicial control of franchise relationships. The doctrine is applied within the framework of the principles of basic contract law, the codal provisions governing conditional obligations, and the implied obligation to perform agreements in good faith.⁹⁰

v. *Perkowaski*, 12 So. 2d 692 (La. App. Orl. Cir. 1943), discussed in Note, *Contracts—Simple Potestative Conditions—Duty of Obligor*, 18 TUL. L. REV. 160 (1943) (a broker was allowed to recover fees from a purchaser who breached a contract to sell real estate, conditioned upon his ability to secure a loan from any New Orleans homestead association on their regular terms and conditions, by refusing to accept a loan arranged for him by the plaintiff broker as per the contract to sell). The court called the contingency a mixed condition, since it was contingent upon homestead actions as well as those of the purchaser. See generally Comment, *Real Estate Brokerage in Louisiana*, 17 LA. L. REV. 820 (1957), in which the good faith standard is discussed at 828. See also Comment, *The Law of Real Estate Brokerage Contracts: The Broker's Commission*, 41 LA. L. REV. 857 (1981).

88. See authorities cited in note 81, *supra*.

89. See *Professional Billing Agency, Inc. v. Tarantino*, 350 So. 2d 258, 261 (La. App. 4th Cir. 1977); *King v. King*, 185 So. 2d 893, 895 (La. App. 3d Cir. 1966).

90. The courts increasingly are relying upon the Code's central theme of good faith and fair dealing. Although Louisiana has not adopted the theory of tortious breach of contract, it provides near-equivalent sanctions for subjectively "bad" behavior by application of contractual remedies. For instance, in *Roussel Pump & Elec. Co. v. Sanderson*, 216 So. 2d 650 (La. App. 4th Cir. 1968), a franchisor and employees of a franchisee allegedly conspired to end the franchise contract (which was subject to cancellation without cause on the anniversary date) and to establish the employees as replacement franchisees after they left their employment at the current

An important threshold question must be answered in the negative before the abuse of rights doctrine should be involved: Was the condition performed in the manner probably intended by the

franchisee's business. The franchisee sued on both tortious breach of contract and breach of contract grounds. The appellate court held that the appropriate remedy lay *ex contractu*, and not *ex delicto* under Civil Code article 2324.

The supreme court advanced this theme in *National Safe Corp. v. Benedict & Myrick, Inc.*, 371 So. 2d 792 (La. 1979). The franchisor, National, sued the ex-franchisee, B&M, to collect an allegedly past due account. B&M resisted the claim and reconvened for damages on the basis that National had breached the franchise contract by soliciting an employee of B&M, one Sibley, and by seeking to establish Sibley as the exclusive Louisiana dealer for National safe security systems. B&M had built up steadily the Louisiana market for National products when National altered the termination clause of the franchise contract (which was otherwise identical to the original agreement) to allow termination "at any time by either party." The new agreement (executed by B&M, which was unaware of the change) was made because National was contemplating giving the dealership to a partnership formed by a former National vice-president and Sibley. *Id.* at 793. The court declined the opportunity to allow tort damages for tortious inducement of the breach of the employment relationship. It did, however, allow an action in contract respecting the franchise agreement, despite the contention of National that the franchise contained no clause prohibiting this action by it. Citing Civil Code articles 1901, 1903, 1964, and 1965, the court concluded that "good faith performance of the contract would reprobate National's actions." *Id.* at 795. Applying the test of equity, it noted: "We are certain that if the roles of the contracting parties were reversed National would not expect to be treated as it treated Benedict & Myrick." *Id.* at 795.

A case involving the interpretation of an exclusive dealership for the sale of certain camping supplies arose soon after in *Dixie Campers, Inc. v. Vesely Co.*, 389 So. 2d 889 (La. App. 4th Cir. 1980), *writ granted*, 395 So. 2d 812 (La. 1980). Dixie was defendant's authorized "Apache dealer for the sale and distribution of Apache camping trailers and parts and accessories marketed by Vesely . . ." *Id.* at 890 (emphasis by the court in quoting a portion of the dealership agreement). The controversy surrounded the word "and" in the clause quoted above. Vesely agreed not to sell "any Apache products" to other dealers in a specified five-parish area. Vesely claimed that its contract with Dixie covered only camping trailers and *their* parts and accessories, and not other types of Apache products, such as travel trailers, motor homes, and mini homes, and that its establishment of dealerships pertaining to those products within the five-parish area was neither a breach of the express contract, nor of its implied good faith obligations. The court agreed with this construction of the contract, and distinguished *National Safe* on the basis that this was a proper, reasonable and equitable understanding of the parties' intentions. *Id.* at 893. As to the interpretation of the ambiguous clause, see Allen, *Some Uses of Symbolic Logic in Law Practice*, ABA SPECIAL COMMITTEE ON ELECTRONIC DATA RETRIEVAL, MODERN USES OF LOGIC IN LAW 119 (June 1962). Shortly before publication of this article the Louisiana Supreme Court reversed the fourth circuit and denied of the defendant's motion for a summary judgment. *Dixie Campers, Inc. v. Vesely Co.*, 398 So. 2d 1087 (La. 1981). The court held that, "taken as a whole, the . . . [franchise contract was] ambiguous as to whether it relates to a class of trailers including travel and mini-home trailers or refers to one type of trailer within a group." *Id.* at 1088. See also *Wilson v. Cost Plus of Vivian, Inc.* 375 So. 2d 683 (La. App. 2d Cir. 1979).

parties? If so, the non-terminating party has no grounds for complaint, because he has obtained the very thing for which he bargained. One scholar, in an attempt to resolve the problem of uncertain performance within an economic expectations and cost theory under traditional contract law, has proposed an objective test for answering this question.⁹¹ Burton theorizes that the parties discount the future value of uncertain future performance, and that their bargaining behavior reflects this cost element. Under Burton's analysis, bad faith performance is more than merely a case of diminishing the expected benefits of the promisee; it is also a case in which the "discretion-exercising party refuses to pay the expected cost of performance."⁹² Good faith performance occurs "when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering into the contract, interpreted objectively."⁹³ Thus, two questions must be asked to aid in answering the initial question: What was the purpose of the terminating party? Was that purpose within the reasonable contemplation of the parties?⁹⁴ If the discretion-exercising party has attempted to capture opportunities not bargained and paid for, then the abuse of rights doctrine is unnecessary to protect the non-breaching party. Parties to franchise agreements seldom calculate the costs of uncertainty arising from "bad faith" terminations based upon non-market factors such as personal animosities existing between high-level personnel. Even if the terminating party has acted within his contractual rights under this time of formation analysis, he still may be constrained by the rules prohibiting the abuse of rights.

The doctrine of abuse of rights, like its cousin doctrine of unjust enrichment, has received little doctrinal or jurisprudential scrutiny in Louisiana until recent years.⁹⁵ Although Planiol criticized the

91. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

92. *Id.* at 373 (footnote omitted).

93. *Id.* (footnote omitted).

94. *Id.* at 386.

95. See generally Bolgar, *Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1017 (1975); Cueto-Rua, *Abuse of Rights*, 35 LA. L. REV. 965 (1975); Sono & Fijoka, *The Role of the Abuse of Right Doctrine in Japan*, 35 LA. L. REV. 1037 (1975). See also *Housing Authority of Lake Charles v. Minor*, 355 So. 2d 271 (La. App. 3d Cir. 1977) ("[The Louisiana] courts, on the basis of equity, are vested with the discretion under some circumstances to decline to grant a lessor cancellation of a lease although such right appears to be otherwise available to him." *Id.* at 273.).

abuse of rights theory on semantic grounds,⁹⁶ it remains nevertheless a viable and extremely useful civilian tool. In an analysis adopted in large part by the courts,⁹⁷ Professor Cueto-Rua states that rights may be abused when certain "acts . . . are performed by persons whom the legal order entitles . . . to request performance of duties and obligations which other parties owe them."⁹⁸ Although persons normally have broad discretion in exercising their rights, a civilian court should not aid the exercise thereof when to do so would violate a principle of fundamental fairness or would not contribute to or would harm public order. Judicial experience has resulted in the articulation of the following criteria for ascertaining the abusive exercise of a right. Was the right sought to be exercised:

- (1) for the sole purpose of harming another; or
- (2) for the predominant purpose of harming another; or
- (3) with no substantial and legitimate benefit to the holder of the right and a substantial detriment to the person against whom the right is sought to be enforced; or
- (4) against good faith, good customs, or positive morality; or
- (5) in pursuit of an end contrary to the end on account of which the right was conferred?⁹⁹

Except in the third criterion, the tests formulated above are in large part the questions asked in the threshold question. The difference is that the abuse of rights doctrine seeks the answers from a viewpoint external to the contract on the basis of a scheme of order independent from that created by the contract; the threshold question analyzes the attempted behavior from an economically internalized intra-contract perspective. Because the doctrine has been so seldom used in Louisiana, a thorough understanding of the principal cases relying upon it is necessary to judge its suitability for an increasingly prominent role in a complex and litigious society.

The genesis of Louisiana's abuse of rights doctrine occurs in the famous *Higgins Oil*¹⁰⁰ case. Higgins Oil had drilled a producing oil

96. Planiol did so on the basis that a right is inherently limited to proper use, and the wrongful act is not, therefore, abuse of a right but is an act not based upon any right. Indeed, one is led to the conclusion that the abuse of rights doctrine is the segregation from delictual fault that fault denominated "abuse of right," which causes damage to another who is entitled to redress. See Bolgar, *supra* note 95, at 1023.

97. Cueto-Rua, *supra* note 95 *passim*.

98. *Id.* at 983.

99. *Id.*

100. *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206 (1919).

well on its property. Guaranty Oil drilled a nearby oil well on adjacent property, which failed to produce oil. On abandoning the dry hole Guaranty Oil failed to plug the well. By means of an underground communication between the well shafts, air entered the Higgins Oil well from the unplugged Guaranty Oil well, thus reducing significantly the former well's production. Higgins Oil sued when Guaranty Oil failed to comply with an amicable demand to replace the plug. Justice Provosty resorted to an analysis of the codal provisions governing neighborhood, ownership, and delictual fault. Still unable to draw a clear conclusion, he consulted civilian doctrine. After holding that the plaintiff had stated a cause of action for damages, Provosty explained the primary factors influencing the court's decision to grant the plaintiff recovery: Replacing the plug was of small expense and little inconvenience to the defendant; no serious and legitimate interest was being served by Guaranty Oil's refusal to act; no showing was made that leaving the well uncapped was necessary or sufficient to prevent oil from being drawn from under the defendant's property. On the contrary, substantial evidence established that the reduced output of the Higgins Oil well resulted in the impoverishment of the tract by other wells piercing the underlying common reservoir. The court expressly applied the third criterion for discovering an abuse of right situation.

The supreme court implicitly used the fourth criterion of good faith in allowing a broker to recover fees for services rendered in *Onorato v. Maestri*.¹⁰¹ Plaintiff Onorato, a real estate broker, was hired by the defendant Maestri to procure a suitable lessee for certain property owned by Maestri. The broker performed as anticipated; by agreement with his principal, the broker's fees were deferred six months after the execution of the lease so that the defendant lessor might use the lessee's pre-payment of six months' rent to prepare the premises for occupancy. Thereafter, the rent was to be applied directly to the broker's fees until paid. Shortly after the execution of the lease, the lessee was placed into receivership. A clause in the lease gave the lessor the option to call the entire rental due immediately or to terminate the lease upon the insolvency of the lessee. The lessor opted for the latter course and obtained a judicial dissolution of the lease. Securing this judgment, he entered into a new lease with the receiver with the same rental as in the original lease. Because the rents were attributable to this new lease, claimed the lessor, his obligation to pay the deferred

101. 173 La. 375, 137 So. 67 (1931).

broker fees was extinguished, since no rents were payable from the first lease from which the parties agreed to satisfy the broker's claim. The supreme court agreed with the plaintiff broker that the lessor had acted in a manner not consistent with the good faith performance of his obligation arising from the brokerage contract.¹⁰² Although the court applied the Civil Code articles on vices of consent concerning the use of the forms of law as a type of violence,¹⁰³ clearly the court was applying principles of good faith.

No further development of the abuse of rights doctrine occurred for forty-nine years until *Morse v. J. Ray McDermott & Co., Inc.*¹⁰⁴ The plaintiff, a former employee of the defendant, was fired through no fault of his own during an economic downturn. Morse had participated in certain deferred compensation plans—namely a Supplemental Compensation Plan, which was a bonus-incentive plan, and a Retirement Plan. Clauses in the plans purportedly caused the “forfeiture” or “non-vesting” of the portions of the plaintiff's interest, if any, in the plans upon the termination of his employment. When Morse sued to recover the allegedly lost benefits, the trial court upheld the validity of the clauses and the appellate court affirmed.¹⁰⁵

On original hearing the supreme court reversed in favor of the plaintiff Morse. The court characterized the issue as follows:

Even if under the terms of a plan no interest of the employee has “vested” so as to become payable, are there ever circumstances where nevertheless the employee may recover such deferred compensation (or its value of benefits based thereupon) despite contractual clauses which require forfeiture or prevent vesting should the employment terminate prior to a vesting date?¹⁰⁶

Citing numerous Code articles,¹⁰⁷ the court concluded that the clauses at issue were “manifestly unjust, contrary to public order and public policy. . . .”¹⁰⁸

On rehearing the defendant argued that Civil Code article 2040 does not contemplate the situation in which the “debtor” prevents

102. 173 La. at 381, 137 So. at 69.

103. LA. CIV. CODE arts. 1856 & 1857.

104. 344 So. 2d 1353 (La. 1977).

105. *Morse v. J. Ray McDermott & Co., Inc.*, 330 So. 2d 411 (La. App. 4th Cir. 1976).

106. 344 So. 2d at 1357.

107. LA. CIV. CODE arts. 11, 12, 19, 1764, 1892, 1895, 1901, 1986, 2031 & 2040.

108. 344 So. 2d at 1358 (footnote omitted).

the fulfillment of the condition merely by exercising a legal right, namely, laying off an employee due to an economic decline in the industry. Assuming *arguendo* the correctness of the argument, the court countered it by invoking the abuse of rights doctrine. The court applied the third criterion enumerated by Professor Cueto-Rua, because

[the] company's interest in not waiving the requirements . . . is so insignificant in comparison with our strong public policy against wage forfeiture as to constitute neither a legitimate nor serious interest. The exercise of a right (here, to discharge an employee while opting not to waive the nontermination requirement) without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of right which courts should not countenance.¹⁰⁹

For reasons not entirely clear, the court reversed itself as to the Retirement Plan. Finding the "exercise of a legal right" exception to article 2040 applicable, as well as an absence of an abuse of that right, Morse was said to have had his expectations under the Retirement Plan subject to the clear and unequivocal terms and conditions of the plan.¹¹⁰ Although the distinctions between the two plans were probably differences without meaning in the context of the case, *McDermott* is nonetheless instructive, if not entirely persuasive, in its abuse of rights analysis.

The *McDermott* court gave several reasons for concluding that the company was not exercising its right in furtherance of any serious and legitimate interest. Two classes benefitted from the company's decision not to waive the Plan requirements. Although the company alone contributed to the Supplemental Compensation Plan fund, money which remained in the fund was not returned to the company nor included in its current income. Co-employees benefitted from the increased amount of funds, and the company had at its disposal, without an increased cost to itself, more funds with which to increase the incentive for managerial employees to improve their performance.¹¹¹ Although the court correctly stated the effects of the company's decision, it improperly characterized those effects

109. *Id.* at 1369.

110. *Id.* The court left open the question of whether the same result as to the SCP would obtain in the absence of a waiver clause; if the company could avoid the "strong" public interest asserted by the court merely by deleting the clause, the strength of that public interest must be questioned.

111. *Id.*

as insubstantial. In an economic decline in an industry, the economy is signalling that too many resources are being put into the industry in proportion to the demand for its products. As market forces seek to restore equilibrium, a company will reduce its costs in an attempt to restore prior profit levels. Labor, a variable cost of usually low productivity compared to capital, is often the first area of cost-cutting. That lay-offs may result in increased opportunities for the firm and its employees to become more efficient is a serious and legitimate interest to the firm and to society. The court's decision unduly and unnecessarily restricted a firm's flexibility in adjusting to changing market conditions. Thus an incorrect result was reached after a potentially fruitful inquiry. Indeed, the court must have perceived the adverse impact of its original decision since it recharacterized the Retirement Plan on rehearing.

Another opportunity to delineate the doctrine arose shortly after *McDermott* in the *International Harvester* case.¹¹² Defendant lessee, International Harvester (Harvester), had occupied the leased premises since 1936 under a twenty-five year lease, which was renewed in 1960 and was to expire in 1986. In 1971 the Louisiana Superdome was built across the street from the leased premises, precipitating rapid acceleration of property values in the vicinity of the arena. Having moved off the premises to a new location in 1974, the defendant contemplated subleasing the vacated building to a parking garage concern. A lease provision prohibited the subletting of the property by the lessee without the prior written consent of the plaintiff lessor, Illinois Central Gulf Railroad (Gulf), which Gulf withheld. After disposing of Harvester's contention that Gulf had impliedly consented to a modification of the lease terms to allow the subletting of the premises for parking garage purposes, the court faced the argument that Gulf was abusing its right to withhold permission under the sublease clause.¹¹³

Noting that the lease called for exclusive use of the property as a truck sales and service facility, Justice Dennis characterized the lessee's demand as a request to sublet and as an attempt to change the nature of the use of the property. The court's analysis of the abuse of rights doctrine relied almost entirely upon Professor Cueto-Rua's article.¹¹⁴ The opinion concluded that "judicial enforcement of . . . [the lessor's] right to withhold permission for *the sublease and*

112. *Illinois Central Gulf R.R. Co. v. International Harvester Co.*, 368 So. 2d 1009 (La. 1979).

113. *Id.* at 1010.

114. See Cueto-Rua, *supra* note 95.

change of use by Harvester would not sanction an abuse of right," under any of the five criteria for ascertaining abusive acts.¹¹⁵ Several factors influenced the decision. Gulf refused to sublet as a part of its effort to terminate the lease or to renegotiate it in order to capture the greatly enhanced real estate value. Endeavoring to end its "inequitable" rental receipts was said to be an action taken with a serious and legitimate motive. Furthermore, the refusal was not adamant or irrevocable (although the relevance of this factor is questionable). Behavior by the lessee also prejudiced its case, for the lessee did not press vigorously its demand for consent, either amicably or by seeking judicial intervention. As negotiations for the lease cancellation began, Harvester sublet the premises despite Gulf's prior lack of consent and without its knowledge. Without discussion, the court held that Gulf's actions plainly were not in violation of good faith, moral rules, or elementary fairness, for Gulf candidly had disclosed to the lessee its motives, and had made significant concessions during the course of the lease cancellation negotiations.¹¹⁶ The case is important in two principal respects: First, it indicates a judicial willingness to embrace the civilian doctrine in its fullest form; second, the decision further refines the doctrine to require that the party invoking it have "clean hands." This second aspect is an appropriate addition to the five criteria for the doctrine is invocable as a special remedy only, and should not be available to a plaintiff who has violated its precepts.

Although the *McDermott* and *International Harvester* cases are too recent for the appellate courts to have put a significant gloss on the doctrine in practice, one recent decision merits attention. In *Housing Authority of Abbeville v. Herbert*,¹¹⁷ the defendant tenant of a public housing project appealed an adverse city court judgment favoring the Authority's demand for eviction. Although a lease provision prohibited tenants from keeping pets in the apartments, the Authority had not enforced the clause for over twenty years. In an apparent "crackdown" on pets in the apartments, the project tenants were given thirty days' prior written notice of the Authority's intent to enforce the letter of the contract. The eviction suit was filed when the tenant failed to remove his pets from the premises. The third circuit affirmed, holding that the Authority could enforce the lease provision. Merely listing the criteria for discovering an abuse of rights, as proposed by Professor Cueto-Rua and adopted by the

115. 368 So. 2d at 1014 (emphasis added).

116. *Id.*

117. 387 So. 2d 693 (La. App. 3d Cir. 1980).

supreme court in *International Harvester*, the court stated without explanation that it found no occasion to invoke the doctrine.¹¹⁸

Perhaps a methodology for analyzing franchise terminations under the abuse of rights doctrine may best be illustrated by returning to the *Corenswet* "hypothetical."¹¹⁹ The first step would require that the termination have been exercised in a manner probably intended by the parties. Of course, one indicator of this intention is the wording of the contractual termination clause; another is the trade custom in the industry at the time of the contract. In any event, the words should not be interpreted so as to lead to absurd consequences. By contractually circumscribing the parties' opportunities, a standard exists by which to judge their subsequent actions. If a party acts without the contractually defined boundary, he is breaching the contract. If his actions fall within the boundary, the abuse of rights doctrine becomes relevant. Hence an answer to the threshold question requires a thorough understanding of the contract and its commercial setting.

Given the assumption that the franchisee and franchisor did not intend to be bound permanently, the determinants of that finite time period must be ascertained. Although a listing of all factors is neither possible nor necessary, a few important factors might include the efforts and success of the franchisee in promoting the franchised products, confidence in the other party's solvency, skills and adaptability to the market, and the presence of alternative uses of firm resources yielding higher economic profits. The termination date probably was not intended to be solely a function of character clashes between high level personnel.

Interfirm compatibility is an important factor in a continuing commercial relationship; however, if the rivalry between the presidents reached a level which marginally affected everyday operations, the five criteria for analyzing an abuse of rights situation would be used in light of the facts. Due consideration of the civilian principles of contract law, and of the competing forces shaping its solutions, will result in a proper solution to the case, for the analysis focuses upon the private and societal interests involved, rather than blindly adhering to traditional, and sometimes inappropriate, contract law.

Pannal Alan Sanders

118. *Id.* at 697.

119. See text at 210, *supra*.