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COMMENT

THE NORTH CAROLINA FARM MACHINERY FRANCHISE ACT: ITS PROVISIONS, CONTEXT AND CONTRIBUTION TO THE LAW OF FRANCHISING

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I. INTRODUCTION

In the 1985 session of the General Assembly, North Carolina became the twenty-eighth state to enact legislation regulating the termination and non-renewal of farm machinery and implement franchises. The Farm Machinery Franchise Act¹ (hereinafter "FMFA" or "Act") provides, in its essential terms, that upon termination of a franchise relationship the franchisor (typically the manufacturer) is obligated to repurchase the inventory of the franchisee (the retail dealer). The Act became effective October 1, 1985.

In comparison to statutes of other states regulating franchise relationships in the marketing of agricultural implements, the FMFA bears many similarities and one significant difference. Similar are the coverage, requirement of notice by the terminating party, repurchase terms, and remedies available for non-compliance. Markedly distinct from virtually every statute regulating implement franchises, and indeed every statute regulating any franchise relationship, is the absence of a requirement of "good cause" prior to lawful termination. The absence of the "good cause" requirement is not a mere oversight but rather is one of the first attempts in several decades by a legislative body to enact an innovative approach to the troublesome area of franchise terminations.

This comment examines the FMFA as it applies to the agricultural implement industry as well as its context in regard to the generic franchise relationship. The provisions of the Act are set forth and discussed. Finally, certain provisions of the Act are critically examined and potential interpretations are offered.

II. BACKGROUND OF THE ACT

A. The Advantages of Franchising

The past several decades have witnessed the growth of the franchise-type business relationship as a distinct method of mar-

¹. N.C. GEN. STAT. §§ 66-180 to -188 (Michie 1985). The Act is entitled "An Act to Provide for Franchise Agreements Between Dealers Engaged in the Business of Retailing Farm, Utility, and Industrial Implements, Equipment, Attachments, or Repair Parts, and Wholesalers, Manufacturers, or Distributors of the Products; To Require Repurchase of Inventory From Dealers Upon Termination of a Contract; To Provide Procedures; To Establish Limitations, Rights, and Civil Liability Relative to Repurchase; To Extend the Right to Require Repurchase Option to the Heirs of Dealers; and To Provide Warranty Obligations."
keting. In 1983, there were 462,000 franchise outlets throughout the United States\textsuperscript{2} producing 460 billion dollars of sales, a three hundred percent increase from 1969 and a one hundred ninety percent increase from 1976.\textsuperscript{3} The franchising system has been described as:

a preferred method of distribution by companies of all sizes, [providing] an easy and efficient distribution system at little cost and with little of the irritations and responsibilities of an integrated system.\textsuperscript{4}

The potential benefits available to both the franchisee and the franchisor make this method of distribution popular. For the franchisee, the license to use a nationally recognized trademark creates instant recognition and goodwill. The franchisor may provide the franchisee with national advertising, marketing, business consultation, and guidance in capital matters. By taking advantage of economies of scale, the franchisee enjoys many advantages over the sole proprietor.\textsuperscript{5}

Similarly, the franchisor benefits financially and practically from the relationship. In financial terms, the franchisor can realize income from a variety of sources beyond the direct income from the distribution of its products. The initial sale of the franchise can be accompanied by a franchise fee, and the franchisee is often charged a royalty for the licensed use of the trademark and business systems. The availability of an assured distribution network increases the franchisor's profits by providing an assured demand and reducing the need for a large inventory. Additional income is realized through the extension of credit for inventory purchases throughout the franchise network. In a practical sense, the franchise system allows the franchisor to forgo the complex administrative hierarchy, salaries, and fringe benefits associated with a vertically integrated business.\textsuperscript{6}

The franchise method of marketing is particularly well-suited

\textsuperscript{2} Whittemore, \textit{The Great Franchise Boom}, \textsc{Nations Business} 20 (Sept. 1984); \textit{See further} Whittemore, \textit{Franchising's Future}, \textsc{Nations Business} 47 (Feb. 1986) (quoting researcher John Naisbitt's prediction that "sales by business format franchises will likely reach $1.3 trillion in the year 2010").

\textsuperscript{3} Whittemore, \textit{supra} note 2, at 20.


\textsuperscript{5} H. Brown, \textit{Franchising: Realities and Remedies} 6-11 (2d ed. 1978).

\textsuperscript{6} Id.
for the agricultural implement industry and is the primary method employed. The John Deere Company began its branch marketing operations soon after the Civil War.\(^\text{7}\) Today, there are approximately 7,600 franchised implement dealers nationwide.\(^\text{8}\) Since agricultural implements are sold primarily to customers living in rural areas removed from most commercial activity, direct distribution of a manufacturer’s products through company stores is economically and administratively impossible. By franchising, however, the manufacturer can access these low density and geographically disparate markets through the licensing of local businesses.

**B. The Pitfalls of Franchising**

In spite of the tremendous popularity of franchising as a method of marketing, inherent in its structure is the potential for conflict between the franchisor and the franchisee. Virtually all problems associated with the franchise relationship can ultimately be attributed to the vast disparity in bargaining power held by the parties to the agreement and the ability of the franchisor to terminate the franchisee.\(^\text{9}\) The franchisor possesses skilled bargaining power, financial strength, professional advisors, access to marketing data, and a minimized exposure to loss. The franchisor drafts the franchise agreement defining the rights and duties of the franchisee.\(^\text{10}\) The franchisee, on the other hand, is typically an inexperienced businessman with little understanding of the rights and liabilities of the franchise relationship who nonetheless invests a

high portion of his savings to obtain a business of his own. In contrast with the franchisor, exposure to loss threatens the franchisee's livelihood, and his future business opportunities may be diminished by a post-termination covenant with the franchisor not to compete.

The disparity in bargaining power alone need not invoke conflict between the franchisor and the franchisee, but the abuse of this disparity certainly may. Indeed, the franchisor is often required under the Lanham Act to exert its greater bargaining position since it cannot compromise the uniformity and quality of its marketing system without potentially losing the right to its trademark. However, the disparity in bargaining power readily lends itself to abuse by the franchisor; the franchisee is at the mercy of the franchisor for its success and existence. Typical abuses include

11. H. Brown, supra note 5, at 5. A 1970 survey of more than 10,000 persons who had recently purchased franchises revealed that 65% previously earned less than $15,000 per year in their prior occupations. Minority groups and retired military personnel comprised a significant proportion of franchisees. Report of the Senate Select Comm. on Small Business on the Impact of Franchising on Small Business, Based on Hearing Before the Subcomm. on Urban and Rural Economic Development, 91st Cong., 2d Sess. at 13 (1970).


14. 15 U.S.C. § 1064(e)(1) (1982) ("A verified petition to cancel a registration of a mark . . . may . . . be filed by any person . . . (e) at any time in the case of a certification mark on the ground that the registrant (1) does not control, or is not able legitimately to exercise control over, the use of such mark."). See further, Smith, Trademarks and Antitrust: The Misuse Defense Under Section 33(b)(7) of the Lanham Act, 4 HARV. J. OF L & PUB. POL. 161 (1981); Comment, A Balancing Approach; State Franchise Law and Federal Trademark Law, 24 BUFFALO L. REV. 463 (1975); Comment, Antitrust Barriers to Franchising, 61 GEO. L.J. 189 (1972); Collison, Trademarks—The Cornerstone of a Franchise System, 24 Sw. L.J. 247 (1970); Comment, Liability of a Franchisor for Acts of the Franchisee, 41 S. CAL. L. REV. 143 (1967) (comparison of Lanham Act obligations to obligations under agency relationship); for a critical discussion of the Lanham Act as a means of justifying abuses of franchisees, see H. Brown, supra note 5, at 123: "It may be appropriate to reexamine the standards supposedly imposed upon franchising by the Lanham Act. In actuality, that statute merely prescribes that a trademark shall be cancelled if the registrant 'does not control, or is not able legitimately to exercise control over, the use of such mark,' a provision quite different from a 'requirement' that the franchisor exercise quality control over its licensee." See further, Ford Motor Co. v. United States, 405 U.S. 562, 576, n.11 (1972) ("The trademark may become a detrimental weapon if it is used to serve a harmful or injurious purpose.").
discriminatory treatment of competing franchises, financial penalties, product tying, and arbitrary or capricious termination and non-renewal.\textsuperscript{15}

In the agricultural implement industry, where franchising is the primary method of marketing, the abuse of franchisees by franchisors has flourished. North Carolina's implement industry, for example, was cited before Congress as a prime example of abuses inherent in the general franchise method of marketing:

It is in [North Carolina] where a farm implement company changed its whole method of distribution. As a result, a third generation of farm implement dealers—and as you are aware, many of the small towns in both the South and the North have their own farm implement dealer in each small town—was told that it was, that the farm implement company was going to a new modus of distribution, of having regional centers in the larger cities and he was through. Obviously, such a distributional change affects more than one isolated dealer. And as I say, here were three generations of a family that had been in the business and all of a sudden, one day, that was the end of it with no ifs, ands or buts [sic].\textsuperscript{16}

Short of sudden termination, abuse may take the form of requiring the purchase of non-inventory items—such as computers for accounting purposes—through the franchisor at a greatly inflated price or product tying where the franchisee is required to stock slow-selling and unpopular implements as a prerequisite to stocking popular models. Accompanying each such requirement is the threat of termination or non-renewal.\textsuperscript{17}

Such abuse is difficult to halt. Judicial relief is often unavailable to the injured franchisee because courts have tended to favor the competitive efficiencies of the franchising marketing method

\textsuperscript{15} H. Brown, supra note 5, at 5; Franchise Termination Practices Reform Act Hearing, supra note 9, at 40 (statement by Rep. Abner J. Mikva).


\textsuperscript{17} These examples were drawn from actual situations in North Carolina and were revealed in confidence by attorneys for implement dealerships. See further, Smith Machinery Corp. v. Hesston, Inc., BUSINESS FRANCHISE GUIDE (CCH) ¶ 8324 (N.M. 1985) (representative-line forcing of new tractors and windrowers); Earley Ford Tractor, Inc. v. Hesston Corp., BUSINESS FRANCHISE GUIDE ¶ 7940 (W.D. Mo. 1983) (full-line forcing of new tractors with right to deal in manufacturer's other farm equipment).
over the interests of a single injured franchisee, or have viewed

18. Providing remedies under antitrust laws for franchise-related abuses has posed a difficult dilemma for the courts. On the one hand, excessive regulation of a franchisor's ability to control its franchises may predictably result in an increase in vertical integration—creating not only greater costs for the supplier, but barriers to entry as well, thereby hampering interbrand competition. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57 n.26 (1977) ("To the extent that a per se rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of the independent businessmen.") On the other hand, providing immunity from antitrust laws to franchisors with regard to their franchisees hampers intrabrand competition by destroying competition within territories and for raw materials. See Siegel v. Chicken Delight, Inc., 311 F.Supp. 847 (N.D. Cal. 1970), aff'd in part, rev'd in part, 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 855 (1972). See generally, Chisum, Policy Issues of Franchising, 14 Sw. U.L. Rev. 156 (1984); Steutermann, Selected Antitrust Aspects of Trademark Franchising, 60 Ky. L.J. 638 (1972); Pollock, Antitrust Problems in Franchising, 15 N.Y. L.F. 106 (1969); Shuman, The Future of Franchising and Trade Regulation, 14 How. L.J. 60 (1968); Comment, Franchising + Antitrust = Confusion: The Unfortunate Formula, 9 SANTA CLARA L. REV. 266 (1968).

Since the 1976 landmark decision of Sylvania, 433 U.S. 36, franchisees have been categorically unsuccessful in pursuing antitrust claims against franchisors. The Sylvania holding differentiates between vertical restraints of trade, such as between a franchisor and a franchisee, and horizontal restraints of trade, such as between competitors marketing the same product. Under Sylvania, restraints of trade among vertical competitors are to be viewed under the "rule of reason," which allows competitive restraints when justified by economic and practical considerations, while horizontal restraints continue to be viewed under the presumption of per se illegality. See Zeidman, The Rule of Reason in Franchisor-Franchisee Relationships, 47 ANTITRUST L.J. 873, 880-81 (1978); Denger, Vertical Restrictions: The Impact of Sylvania, 46 ANTITRUST L.J. 908 (1977) (Denger was the chairman and principal author of the ABA Antitrust Section Sherman Act Comm. Task Force Monograph, Vertical Restrictions Limiting Intrabrand Competition, cited repeatedly in the Sylvania opinion.). The Sylvania ruling has been applied consistently to franchises in alleged instances of illegal tying under § 1 of the Sherman Act: Krehl v. Baskin-Robbins Ice Cream Co., 1978-1 TRADE CAS. (CCH) ¶ 61,870 (C.D. Cal. 1979); aff'd, 664 F.2d 1348 (9th Cir. 1982); Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981); Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); to exclusivity under § 3 of the Clayton Act: Joyce Beverage v. Royal Crown Cola Co., 555 F. Supp. 271 (S.D.N.Y. 1983); to territorial restraints: Donald B. Rice Tire Co. v. Michelin Tire Corp., 483 F. Supp. 750 (D. Md. 1980), aff'd, 638 F.2d 15 (4th Cir.), cert. denied, 454 U.S. 864 (1981); Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 (5th Cir.), cert. denied, 454 U.S. 827 (1981); Cowley v. Braden Industries, Inc., 613 F.2d 751 (9th Cir.), cert. denied, 446 U.S. 965 (1980); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975); and to restraints arising under dual distributions: Shavrnock v. Clark Oil & Refining
the franchise relationship as purely a matter of contract. Administrative agencies charged with policing the marketplace, while proscribing some potential franchise abuse, generally provide no private right of action for the injured franchisee. The overwhelming

Co., BUSINESS FRANCHISE GUIDE (CCH) ¶ 8122 (6th Cir. 1984); O'Byrne v. Cheker Oil Co., BUSINESS FRANCHISE GUIDE, (CCH) ¶ 8127 (7th Cir. 1984). Very few exceptions can be cited: e.g. Eiberger v. Sony Corp. of America, 622 F.2d 1068 (2d Cir. 1980)(finding violation of Sherman Act, stating that less restrictive measures would have accomplished seller's reasonable objectives); In re Coca-Cola Co., 91 F.T.C. 517 (1978), rev'd on other grounds, 642 F.2d 1387 (D.C. Cir. 1981)(dual distribution mere sham for competitive restraints). However, even among parties to a franchise agreement, resale price maintenance remains a per se violation of antitrust law. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).


majority of successful claims against the franchisor by the franchisee have arisen through federal and state legislation such as the FMFA, specifically designed to curb franchise abuse.21

civil penalty); United States v. Royco Automobile Parts, Inc., 46 ANTITRUST & TRADE REG. REP. (BNA) 26 (M.D. Fla. 1983)(freezing assets of corporation).


Similarly, the Securities Exchange Commission may penalize fraudulent sales of franchises, 15 U.S.C. §§ 77a-78ll (1976), but only in the narrow instances where the investment in a franchise can be categorized as a type of interest where management is principally provided by a third party other than the franchisee, or even if the franchisee is active in management, where the control of capital rests with a third party (the "risk capital" test). See, e.g., SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974). For an example of a franchise which met this requirement, see American Gold & Diamond Corp. v. Kirkpatrick, BUSINESS FRANCHISE GUIDE (CCH) ¶ 8155 (Alaska 1984). Most franchises, however, do not. See, e.g., Beefy Trail, Inc. v. Beefy King Int'l, FED. SEC. L. REP. (CCH) ¶ 93,603 (M.D. Fla. 1972); McCoy v. Convenient Food Mart, Inc., TRADE REG. REP. (CCH) ¶ 73,873 (D. Neb. 1972); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635 (9th Cir. 1969).


Also at the federal level, automobile dealership franchises are protected under the Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221 et seq. (1982). In contrast to the PMPA, the Dealer's Day in Court Act, enacted in 1956, is a "bare bones" statute creating a cause of action if the automobile manufacturer fails "to act in good faith in performing . . . [the] provisions of the franchise, or in terminating [the relationship]." Id. at § 1222. As in the case of the PMPA, the Automobile Dealer's Day in Court Act has been the subject of commentary and extensive litigation. See, e.g., Brown, A Bill of Rights for Auto Dealer's, 12 B.C. IND. & COM. L. REV. 758 (1971); McCauley, Changing a Continuing Relationship
A. Legislative History

The FMFA was enacted to accomplish two purposes. First, it was enacted to curb the abuse of agricultural implement dealerships by manufacturers and manufacturers' representatives. Abuse of agricultural implement dealerships is so prevalent that the North Carolina General Assembly, in enacting the FMFA, felt the existence of abuse was a "foregone conclusion." It heard little testimony regarding the extent of the abuse and focused almost exclusively on remedies. Second, in response to the recent decline of the farm economy, the FMFA was enacted to provide for the orderly termination of franchise relationships in the agricultural implement industry.


23. Id. From 1981 to 1985, the number of farms in North Carolina dropped from 90,000 to 76,000, while North Carolina farmers' net income slipped from $1.14 billion in 1984 to approximately $750 million in 1985. For the national agricultural implement industry, the declining farm economy resulted in a loss of approximately $5 billion in the past five years. The loss included a 38% decrease in the sale of tractors, and a 74% decrease in the sale of combines. The national implement market now is suffering from a glut of new and used farm equipment;
North Carolina is not alone in its concern for the agricultural implement franchisee. Twenty-seven other states have statutes directly applicable to the industry. The North Carolina Act closely parallels the South Carolina Act and was in fact proposed in both states by the Carolinas Farm and Power Equipment Dealer’s Association, Inc. The Association sought passage of the acts in North Carolina and South Carolina at the urging of farm implement dealers in counties near the South Carolina-Georgia border, who, after passage of a similar act in Georgia in 1982, recognized the distinct advantages of protection under such legislation. The acts that the Association proposed in the Carolinas were modeled after an Alabama Act passed in 1981.

B. Provisions of the FMFA

The FMFA is composed of seven sections: definitions, notice provisions, buy-back requirements and terms, exceptions to the buy-back provisions, uniform commercial practice, warranty obligations, and remedies for the failure to comply with the terms of the Act. Each of these sections is described below.

estimated at 50% more implements then the market can absorb. In North Carolina, the number of implement dealerships declined 24% from 1984 to 1985. Jeffries, Farm Equipment Dealers Withering, News & Observer, March 18, 1986, at D-1, col. 1.


1. Definitions

a. "Franchise Agreement"

The statutory definition of "franchise agreement" delineates the coverage of the FMFA. "Franchise agreement" is defined as "a written or oral contract or agreement between a dealer and a wholesaler, manufacturer, or distributor by which the dealer is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logo type, or advertising or other commercial symbol." This definition is consistent with the majority of franchise legislation, which holds the trademark license as the primary determination of the franchise relationship. The definition is broad in scope and includes a variety of marketing schemes. Unlike other franchise-related statutes, payment of a li-


31. For example, independent dealers or distributors operating without a formal franchise agreement are nonetheless covered by this definition. From a legal standpoint, there is no difference between these types of dealers and the franchised dealer. G. Glickman, Franchising § 3.04 (1985); J. McCarthy, Trademarks and Unfair Competition § 18:20 (1973); H. Brown, supra note 5, at 13.
censing fee by the franchisee is not a prerequisite to coverage of the Act.\textsuperscript{32} Contrary to the wishes of some franchisors, there are no requirements of assistance in organizing, training, merchandising, or management.\textsuperscript{33}

\textit{b. "Dealer"}

A “dealer” is defined as “a person engaged in the business of selling at retail farm, utility or industrial equipment, implements, machinery, attachments, or repair parts.”\textsuperscript{34} Clearly, the Act only applies to franchise relationships involving \textit{retail} trade. A wholesaler would have no remedy against the manufacturer under this statute.

The use of the word “person” in defining “dealer” is probably not meant to limit the Act to sole proprietorships, although at least one court has used such a construction in applying a similar act.\textsuperscript{35} Under that construction, a corporation or partnership “engaged in the business of selling retail farm . . . equipment” would not be able to avail itself of the benefits of the Act.\textsuperscript{36} There is no rational basis for excluding every business entity other than sole proprietorships from the scope of the Act; the formation of a part-

However, a “franchisor is to be distinguished from a ‘distributor,’ ‘wholesaler,’ ‘jobber,’ or other merchant middleman who is franchised and authorized by a manufacturer, producer, or supplier of goods or commodities to sell chiefly to retailers, other merchants, or industrial, institutional, and commercial users mainly for resale or business use.” C. ROSENFIELD, \textit{THE LAW OF FRANCHISING} § 15 (1970).

\textsuperscript{32.} See, e.g., \textit{WASH. REV. CODE} § 19.100.220 (Supp. 1972)(defining a franchise as “an agreement granting another the use of license . . . in which the franchisee is required to pay a franchise fee.”)

\textsuperscript{33.} The International Franchise Association, a trade association representing the interests of the franchisor, has defined franchising as “a continuing relationship in which the franchisor provides a licensed privilege to do business, plus assistance in organizing, training, merchandising, and management in return for a consideration from the franchisee.” \textit{Franchise Company Data for Equal Opportunity in Business}, United States Department of Commerce (July 1969 p. VIII).

\textsuperscript{34.} N.C. GEN. STAT. § 66-180(2) (1985).


\textsuperscript{36.} Compare, for example, § 66-180(2) with S.C. CODE ANN. § 39-59-10(3) (1984), after which the FMFA was modeled: “‘Retailer’ means any person engaged in the business of selling and retailing farm implements . . . The term also includes any person engaged in such business, his heirs, personal representatives, or his guardian or \textit{the major stockholder of the business}.” (emphasis added).
nership or incorporation does not necessarily demonstrate a level of business sophistication sufficient to remove the franchisee from the need for the Act's protection. Furthermore, it is clear from the "four corners" of the Act that the General Assembly envisioned the Act applying to all retail franchisees, regardless of the legal nature of their business organization. In § 66-182(5), for example, the notice provisions, the words "withdrawal of an individual proprietor, partner, major shareholder, or manager of the dealership, or a substantial reduction in interest of a partner or major shareholder . . ." certainly indicate that the definition of "dealer" is to be broader than sole proprietorships.37

c. "Supplier"

A "supplier" is defined as a "wholesaler, manufacturer, or distributor who enters into a franchise agreement with a dealer."38

d. "Inventory"

The term "inventory" is defined as "farm, utility, or industrial equipment, implements, machinery, attachments, or repair parts. These terms do not include heavy construction equipment."39 This definition must be read in conjunction with § 66-181, which states that "[t]he terms 'utility' and 'industrial', when used to refer to equipment, implements, machinery, attachments, or repair parts, shall have the meaning commonly used and understood among dealers and suppliers of farm equipment as a usage of trade in accordance with G.S. 25-1-205(2)."40

Whereas the definition specifically excludes heavy construction equipment from the scope of the Act, it does not refer to the sale of lawn and garden equipment.41 Though the Act is silent on

37. See also N.C. GEN. STAT. § 66-183(b) (1985) ("... or the majority stockholder of the dealer, if the dealer is a corporation, ... ").
39. Id. at § 66-180(4).
40. N.C. GEN. STAT. § 25-1-205(2) (1985) states:
A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
41. Compare "'Inventory' means farm implements, machinery, ... and yard and garden equipment, attachments or repair parts." S.C. CODE ANN. § 35-59.
this, the legislative history of the Act strongly suggests that the lawn and garden equipment industry is exempt from the Act's coverage. As the Act was making its way through the House Committee on Agriculture, an amendment was offered specifically to include lawn and garden machinery. However, upon strong opposition from major manufacturers and national hardware store chains, the amendment was tabled.

The omission of lawn and garden equipment introduces vagueness as to the exact inventory covered by the Act. Certainly there are dual purpose implements—such as chain saws—that, if sold to a farmer, are farm implements, but if sold to a homeowner, are lawn and garden implements. In rural communities, the farm machinery dealership typically is a source of lawn and garden implements as well. The statute provides no clear method or scheme of allocation for such dual purpose items upon termination.

Evidence as to the character of the implement, whether farm or lawn and garden, may be adduced from the sales tax imposed on the sale of that type implement by the franchisee. Under the North Carolina Retail Sales Tax law, the sale of "machinery to farmers" is subjected to a one percent sales tax as opposed to a three percent tax for general retail items. The retailer has the duty of ascertaining whether the customer is a farmer, and if so, recording the sale separately in the store's books. It is conceivable that upon termination of a business which dealt with dual purpose items, one could determine from the franchisee's books the proportion of such items typically sold to farmers, and thus subject a proportional share of the remaining inventory to the coverage of the Act.


45. Id. at § 105-164.4(5). The statute gives the store owner little guidance in exactly how to determine whether a customer is a farmer or not. The courts have indicated that the taxpayer claiming an exemption has the burden of showing that he comes within that exception. Deep River Farms, Ltd. v. Lynch, 58 N.C. App. 165, 292 S.E.2d 752 (1982).

46. Similarly, another approach might allow a dealer who sold greater than a certain percentage of his inventory for agricultural use to be covered entirely by the Act.
e. "Termination"

"Termination" of a franchise agreement is defined as the "termination, cancellation, nonrenewal, or noncontinuance of the agreement." As specified in § 66-183, the Act applies not only to unilateral terminations of a franchise by the franchisor, but also to terminations "by either party."


In a manner consistent with other North Carolina franchise regulation acts and agricultural implement franchise acts of other states, the FMFA requires notice of termination, cancellation, nonrenewal, or noncontinuance of a franchise agreement. The Act provides that:

Notwithstanding any agreement to the contrary, a supplier who terminates a franchise agreement with a dealer shall notify the dealer of the termination not less than 90 days prior to the effective date of the termination.

The Act further permits the supplier to "immediately terminate" the agreement at any time after the occurrence of one or more enumerated events. Immediate termination may be invoked if:

(1) A petition under bankruptcy or receivership law has been filed against the dealer;

48. In the North Carolina Automobile Dealer’s Act, N.C. Gen. Stat. §§ 20-285 et seq. (1985), the definition of “termination” gave rise to litigation in Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff’d in part, rev’d in part, 296 N.C. 357, 250 S.E.2d 250 (1979). In § 20-305(6) of the Automobile Dealer’s Act, the franchisor was required to supply notice of pending “termination, cancellation or nonrenewal.” In Mazda, the parties mutually agreed to terminate the franchise, and the franchisor did not provide the notice required by the statute. The court of appeals held that the Act plainly required notice even though the termination was mutual. 36 N.C. App. at 14, 243 S.E.2d at 802. The supreme court, however, reversed the court of appeals on this point, holding that to require notice in the case of mutual termination led to absurd results. The supreme court read the statutory language to apply only to unilateral terminations. 296 N.C. at 362, 250 S.E.2d at 253.

The FMFA language differs from that of the Dealer’s Act only with the addition of the word “noncontinuance.” Arguably, a mutual termination is a “noncontinuance,” and reflects a legislative intent to include mutual terminations within the scope of the Act’s notice requirement.

(2) the dealer has made an intentional misrepresentation with the intent to defraud the supplier;
(3) Default by the dealer under a chattel mortgage or other security agreement between the dealer and the supplier;
(4) Close out or sale of a substantial part of the dealer's business related to the handling of goods; the commencement or dissolution or liquidation of the dealer if the dealer is a partnership or corporation; or a change, without the prior written approval of the supplier, in the location of the dealer's principal place of business under the agreement;
(5) Withdrawal of an individual proprietor, partner, major shareholder, or manager of the dealership, or a substantial reduction in interest of a partner or major shareholder, without the prior written consent of the supplier; or
(6) Revocation or discontinuance of any guarantee of the dealer's present or future obligation to the supplier.  

The dealer is required by the Act to notify the supplier of its intent to terminate a franchise agreement "not less than 30 days prior to the effective date of termination." Notice of termination by either party must be "in writing and shall be by certified mail or personally delivered to the recipient." It must contain:

(1) A statement of intention to terminate the franchise,
(2) A statement of the reasons for the termination, and
(3) The date on which the termination takes effect.  

The notice requirements, aside from adopting and codifying common law and the Uniform Commercial Code notice require-
ments,\textsuperscript{53} reflect a legislative view that the Act should protect the legitimate expectations of both the franchisor and the franchisee. The disparity in the times required for notice reflects the relative economic position of the franchisor compared with the franchisee.\textsuperscript{54} The notice provision has the practical effect of allowing a terminated dealer ninety days in which to obtain another supplier or, if necessary, to liquidate assets.

The Act is silent in regard to the consequences of a failure to provide proper notice prior to termination. Based on similar statutes, the typical remedy is to stay the termination until notice is perfected.\textsuperscript{55} At least one court allowed a termination to occur in spite of insufficient notice, but required the franchisor to account for and compensate the franchisee for income earned until the statutory notice period tolled.\textsuperscript{56}

3. \textit{The Repurchase Requirement and its Terms}

The most significant provision of the FMFA is the obligation that it places upon the supplier to repurchase inventory from the dealer at the termination, cancellation, nonrenewal, or noncontinuance of the franchise agreement. The Act requires the following:

Whenever a dealer enters into a franchise agreement in which the dealer agrees to maintain an inventory, and the agreement is terminated by either party, the supplier shall repurchase the dealer's inventory as provided in this Article unless the dealer chooses to keep the inventory.\textsuperscript{57}

\textsuperscript{53} U.C.C. § 2-309(3) provides that "termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable." For cases holding that common law requires notice prior to termination, see Ken-Rad Corp. v. R.C. Bohannan, Inc., 80 F.2d 251 (6th Cir. 1935); Foster-Porter Enterprises, Inc. v. De Mare, 198 Md. 20, 81 A.2d 325 (1951); See generally, Gellhorn, Limitations on Contract Termination Rights—Franchise Cancellations, 1967 DUKE L.J. 465, 479-81.

\textsuperscript{54} See Fern & Klein, Restrictions on Termination and Nonrenewal of Franchises: A Policy Analysis, 36 BUS. LAW. 1041, 1043 (1981).


\textsuperscript{56} Seegmiller v. Western Men, Inc., 20 Utah 2d 352, 537 P.2d 892 (1968).

\textsuperscript{57} N.C. GEN. STAT. § 66-183 (1985). The rationale of the requirement that the dealer agree to maintain an inventory was described in \textit{In re Hausauer Implement Co., BUSINESS FRANCHISE GUIDE (CCH) ¶ 8159 (Bankr. D.N.D. 1983)}. There,
The inventory must be repurchased within ninety days of the termination,\(^{58}\) and payment in full must be made to the dealer within thirty days after receipt of the repurchased inventory.\(^{59}\) If the dealer has outstanding debts to the supplier, then the repurchase amount may be credited to the dealer's account.\(^{60}\)

The supplier's duty to repurchase is also invoked when the "dealer or the majority stockholder of the dealer, if the dealer is a corporation, dies or becomes incompetent."\(^{61}\) In such cases, the duty to repurchase arises at the option of the "heir, personal representative, or guardian of the dealer, or the person who succeeds to the stock of the majority stockholder."\(^{62}\) The option must be exercised within one year of the deemed termination.\(^{63}\)

The terms of the repurchase requirement are set forth as:

1. One hundred percent (100\%) of the net cost of all new, unused, undamaged, and complete farm, utility, and industrial equipment, implements, machinery, and attachments, less a reasonable allowance for deterioration attributable to weather conditions at the dealer's location;

In applying language substantially similar to the FMFA, the court stated that:

The foregoing provision was intended to remedy the problem which arises when a dealer has been required by the terms of the franchise agreement to invest in purchases of equipment in order to maintain a specified level of inventory parts or machinery and thereby using cash assets that would ordinarily be available for operating expenses. In such instances, the manufacturer shares the fault should the situation arise where the dealer is unable to continue in business . . . . This is to be contrasted from the situation where the dealer voluntarily purchases equipment and is under no specific obligation to maintain a certain level of parts or whole machines. In this latter situation, the manufacturer is less at fault should a failure occur in the dealer's business. It is the opinion of this Court that section 51-07-01 of the [North Dakota] Code is not applicable in instances where the written agreement does not specifically require a dealer to maintain a stock of parts or whole machines.

Id. at 14,388.

59. Id. at § 66-184(e).
60. Id.
61. Id. at § 66-184(b). This provision is found in most of the agricultural implement dealership acts of other states (all but California, Colorado, Connecticut, New Mexico, North Dakota, Texas, Washington and Wisconsin, see supra note 24) and in the franchise legislation guidelines established by the Farm and Industrial Equipment Institute, a trade association representing the interests of implement manufacturers.
63. Id.
The percentages set forth by the FMFA for determination of the repurchase price to the supplier are fairly standard in comparison to the implement franchise acts of other states. Some states, however, require repurchase at a "fair and reasonable compensation," CONN. GEN. STAT. § 42-133(f)(b) (1972). See also, Wis. STAT. ANN. § 135.045 (1974). Others differ from the FMFA, which requires the supplier to repurchase at 100% of the "current net cost," by requiring repurchase at 100% of the "current net price." See ALA. CODE § 8-21-3 (1982); 1977 Miss. Laws ch. 419(3); Mo. ANN. STAT. § 407.853(1) (1982). The "current net cost" is defined as the "price the dealer paid the supplier," N.C. GEN. STAT. § 66-180(5) (1985), whereas the "current net price" is defined as the "price listed in the supplier's price list or catalog." Id. at § 66-180(1).

64. Id. at § 66-184(b). The South Carolina Act, S.C. CODE ANN. §§ 39-59-10 et seq. (1984), does not require the supplier to repurchase any inventory sold to the dealer more than 36 months prior to notice of termination. Id. at § 39-59-50(8). The North Carolina General Assembly chose not to include this exemption, but rather opted to allow the supplier to deduct a "reasonable allowance for deterioration attributable to weather conditions at the dealer's location." Telephone interview with Ed Biggs, supra note 27.

The percentages set forth by the FMFA for determination of the repurchase price to the supplier are fairly standard in comparison to the implement franchise acts of other states. Some states, however, require repurchase at a "fair and reasonable compensation," CONN. GEN. STAT. § 42-133(f)(b) (1972). See also, Wis. STAT. ANN. § 135.045 (1974). Others differ from the FMFA, which requires the supplier to repurchase at 100% of the "current net cost," by requiring repurchase at 100% of the "current net price." See ALA. CODE § 8-21-3 (1982); 1977 Miss. Laws ch. 419(3); Mo. ANN. STAT. § 407.853(1) (1982). The "current net cost" is defined as the "price the dealer paid the supplier," N.C. GEN. STAT. § 66-180(5) (1985), whereas the "current net price" is defined as the "price listed in the supplier's price list or catalog." Id. at § 66-180(1).


66. Id. at § 66-183.

67. While no authority exists that denied a dealer coverage of an implement franchise act because of misconduct, Hall GMC, Inc. v. Crane Carrier Co., BUSINESS FRANCHISE GUIDE (CCH) ¶ 7965 (N.D. 1983) considered whether the dealer had removed himself from the coverage of the North Dakota act by fraud, breach of faith, estoppel, or waiver. The court did not find any of these actions, and thus never reached the issue of whether the dealer's rights could be lost. See infra text accompanying notes 68-75.
rier Co., illustrates the potentially harsh result of applying such a provision.

In Hall, a dealer of trucks terminated its franchise relationship with its franchisor. The dealer admitted that it did so primarily because of a downward trend in the economy and a consequential slowing of the heavy equipment industry. The North Dakota Franchise Act provides that the franchisor is required to repurchase a dealer's current model inventory upon discontinuance of the franchise relationship. Immediately prior to providing notice to the franchisor of its intent to terminate, the dealer, upon the advice of its attorney, traded its inventory for current models so as to be certain to fall within the coverage of the Franchise Act.

The North Dakota Supreme Court not only held that the Franchise Act required the franchisor to repurchase the dealer's inventory, but the court refused to find fraud, estoppel or waiver on the part of the dealer. The court simply stated that "[a] general principle of contract law is that existing law at the time of the formation of a contract becomes part of the contract. . . . Consequently, we conclude that the statutory provisions of [the Franchise Act] must be read into the distributor agreement and any contrary contractual provisions must be severed."

4. Exceptions to the Repurchase Requirement

Certain inventory items are exempted from the supplier's duty to repurchase under the FMFA. These items are:

(1) A repair part with a limited storage life or otherwise subject to deterioration, such as gaskets or batteries, except for industrial 'press on' or industrial pneumatic tires;
(2) A single repair part that is priced as a set of two or more items;
(3) A repair part that, because of its condition, is not resalable as a new part without repackaging or reconditioning;
(4) An item of inventory for which the dealer does not have title free of all claims, liens, and encumbrances other than those of the

69. Id. at 13,590.
70. Id.
73. Id. at 13,590-91.
74. Id. at 13,591-92.
75. Id. at 13,593.
(5) Any inventory that the dealer chooses to keep;
(6) Any inventory that was ordered by the dealer after either party's receipt of notice of termination of the franchise agreement; and
(7) Any inventory that was acquired by the dealer from a source other than the supplier. 76

While these exceptions to the supplier's repurchase duty appear to have fair and practical bases, the seventh exception, which relieves the supplier from repurchasing inventory "acquired from a source other than the supplier," has been criticized as creating a potential loophole in the protection envisioned by the Act. 77 For example, a supplier may potentially evade the repurchase requirement by requiring the dealer to purchase inventory only from another approved supplier, such as an independent wholesale distributor of the supplier's products. Under a literal application of the exception, such inventory would be exempt from the repurchase requirement because, although required by the supplier, it was purchased from "a source other than the supplier." 78 A position more consistent with the intent of the repurchase requirement would be to require the supplier to repurchase all inventory that it had required, regardless of its source. 79

76. N.C. GEN. STAT. § 66-185 (1985). While this provision is substantially similar to most implement dealership acts of other states, it differs from some by not exempting the supplier from repurchase of inventory acquired 24 or 36 months prior to notice of termination. California, Connecticut, Florida, Nebraska, New Mexico, North Dakota, South Dakota and Texas join North Carolina in not allowing this exception. Some acts allow for inventory which is "not current" to be exempted from the supplier's repurchase obligation. GA. CODE § 13-8-16(c)(4) (1982); WASH. REV. CODE. ANN. § 19.98.010 (1976). The Farm and Industrial Equipment Institute, a trade association for implement manufacturers, offers proposed legislation that incorporates exceptions both for inventory items acquired 24 month prior to notice of termination and for non-current inventory. Illinois has adopted both of these terms. ILL. ANN. STAT. §§ 5 ¶ 1507(9) and (12) (1983). Cf. supra note 64.


79. See, e.g., CONN. GEN. STAT. § 42-133f(b) (1972) (requires "compensation by the franchisor for the franchisee's inventory . . . purchased by the franchisee from the franchisor or its approved sources.").
5. **Uniform Commercial Practice**

The Act provides that its terms do not "affect a security interest of the supplier in the inventory of the dealer." Moreover, the repurchase of the inventory is not subject to the bulk sales provisions of Article 6 of Chapter 25 of the North Carolina General Statutes.

6. **Warranty Obligations and Product Liability Indemnity**

As well as providing guidance upon the termination of franchise agreements, the FMFA also provides a statutory procedure for settling (1) warranty obligations and (2) indemnity in products liability actions. In providing for the first, warranty obligations, the Act sets forth a specific procedure and timetable for payment by the supplier to the dealer for approved warranty repairs. In providing for the second, indemnity for product liability actions, the Act adopts the position of the *Restatement (Second) of Torts* and the *Restatement (Second) of Agency*.

In regard to warranty obligations, the Act establishes a procedure by which the dealer may seek approval from the supplier prior to performing warranty repairs or replacements. The sup-

80. N.C. Gen. Stat. § 66-186 (1985). The inclusion of this provision minimizes the impact that the repurchase provision has in the normal course of business between the supplier and the dealer by allowing the secured transactions provision of Article 25 (Uniform Commercial Code) of the General Statutes to apply in full force. Similar language is found in many implement dealership acts of other states, namely Alabama, Arkansas, Colorado, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, Oklahoma, Oregon, Tennessee, Texas and Washington. *See supra* note 24.

81. N.C. Gen. Stat. § 66-186 (1985). The purpose of the bulk sales provisions of N.C. Gen. Stat. § 25-60-101 et seq. (1985), as set forth in the Official Comment, is to minimize the opportunity for a merchant to defraud creditors by selling the entire assets of a business, and then abscond with the proceeds. The bulk sales provisions require the transferee to provide creditors with notice of the transfer. *Id.* at § 25-6-105. Under the FMFA, exempting the repurchase transaction from the provisions of the bulk sales act frees the supplier from having to notify all of the dealer's creditors in order to have an effective transaction. Similar language is found in many implement dealership acts of other states, namely Alabama, Arkansas, Colorado, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, Oklahoma, Oregon, Tennessee, Texas and Washington. *See supra* note 24.


83. *Restatement (Second) of Torts* § 402(A) and § 400, comment d (1965).

plier, upon receipt of such a request, must respond within thirty days. If the request is not specifically disapproved in writing within thirty days after its receipt, it is deemed approved. Once a request is approved, the supplier must reimburse the dealer within thirty days for parts and services rendered.85

With regard to product liability indemnification, the Act provides that:

Whenever a supplier and a dealer enter into a franchise agreement, the supplier shall indemnify and hold harmless the dealer against any judgment for damages or any settlement agreed to by the supplier, including court costs and a reasonable attorney's fee, arising out of a complaint, claim, or lawsuit, including negligence, strict liability, misrepresentation, breach of warranty, or rescission of the sale, to the extent the judgment or settlement relates to the manufacture, assembly, or design of inventory, or other conduct of the supplier beyond the dealer's control.86

This provision settles the issue of whether the franchisor or the franchisee is the "seller" for the purposes of product liability.87 The Restatement (Second) of Torts § 402A, entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," states that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability . . . ."88 Comment d of § 400 of the Restatement defines a seller as "one [who] puts out a chattel . . . under his name or affixes to it his trade name or trademark."89 The FMFA recognizes that the franchisor, not the franchisee, should be subject to § 402A, since the franchisor is ultimately responsible for the quality and safety of the product.

Additionally, the Act eases the showing required by the dealer to establish a right of indemnity under the principle of agency law which requires a principal to indemnify an agent when the agent is

86. Id. at § 66-187(b).
88. Restatement (Second) of Torts § 402(A).
89. Id. at § 400, comment d.
held liable for acts the principal required it perform. 90 Without this provision of the Act, the dealer would be required to show (1) that an agency exists, (2) that the franchisor has a duty to indemnify, and (3) that the tortious conduct was not of its own making. 91 The Act alleviates the first and second requirement; agency is established by the existence of a franchise agreement 92 and the supplier has a statutory duty to indemnify under the provisions of the Act. 93 The dealer must, however, show the third element—that the "conduct was beyond the dealer's control." 94

7. Remedies for Failure to Comply with the Provisions of the FMFA.

Under the FMFA, if the supplier fails or refuses to comply with the repurchase requirements of the Act within the prescribed ninety days following termination, 95 it becomes civilly liable for:

one hundred percent (100%) of the current net price of the inventory, any freight charges paid by the dealer, the dealer's reasonable attorney's fees and court costs, and interest on the current net price of the inventory computed at the legal rate of interest from the 91st day after termination of the franchise agreement. 96

Additionally, any person who suffers monetary loss because he refuses to accede to a "proposal for an arrangement that, if consummated, is in violation of this Article" may seek injunctive relief from further violations and monetary damages, and the cost of the suit, including a reasonable attorney's fee. 97 The statute of limitations for violations of the provisions of the Act is four years after the violation is or reasonably should have been discovered. 98

90. Restatement (Second) of Agency § 439.
91. Id. at § 439(a), (b) and (c).
92. N.C. Gen. Stat § 66-187(b) ("Whenever a supplier and a dealer enter into a franchise agreement . . .").
93. Id. (" . . . the supplier shall indemnify and hold harmless the dealer against any judgment for damages . . .").
94. Id.
96. Id. at § 66-188(a).
97. Id. at § 66-188(b).
98. Id. at § 66-188(c).
IV. ANALYSIS OF SELECTED PROVISIONS OF THE ACT

Although the FMFA is the twenty-eighth statute of its type in the United States, very few cases have ever arisen under such an act and very little scholarly commentary exists to date. Thus, analysis of various provisions of the FMFA must, to a great extent, be extrapolated from analogous statutes governing franchises in other industries, and such analysis must necessarily be limited to that which the courts have chosen to comment upon.

A. Retroactive Coverage

Perhaps the issue of greatest concern to farm implement franchisors, and the issue most likely to be litigated, is the possibility that the Act may be retroactive and thus applicable to franchise agreements formed prior to the effective date of the Act, but terminated thereafter. The Act itself is silent as to its retroactive application, merely stating that it shall "become effective October 1, 1985." At issue are first, whether the legislature intended the Act to apply retroactively and second, if such an intent did in fact exist, whether the Act overcomes the constitutional proscription against the impairment of contracts.

The sparse recorded legislative history regarding the Act provides no insight as to its retroactivity. The Act's sponsor indicated verbally that his impression was that the Act would apply retroactively.

In predicting whether the FMFA applies retroactively, one may look to the North Carolina Court of Appeals' analysis in Mazda Motors of America, Inc. v. Southwestern Motors, Inc. of a similar franchise act, the North Carolina Automobile Dealer Act. There, the appellants contested a superior court holding that an amendment to the Automobile Dealer Act requiring notice of termination could not be constitutionally applied to preexisting franchise agreements. The agreement between the parties

100. U.S. CONST. art. I § 10 c. 1.
101. Telephone interview, Representative David Redwine, supra note 22.
103. N.C. GEN. STAT. §§ 20-285 et seq. (1975)(the Act has since been amended).
104. Id. at § 20-305(6).
105. 36 N.C. App. at 6, 243 S.E.2d at 798.
was entered into in May 1971; the amendment to the statute was enacted in 1973; and the termination was attempted in June 1974. The court of appeals reversed the conclusion of the lower court, holding instead that the act’s retroactive application would not constitute a unconstitutional impairment of contracts.

The court of appeals prefaced its holding both by noting that the United States Constitution grants contracting parties a “qualified and not an absolute right” from impairment and by noting that a regulation on economic relations was subjected to a relaxed scrutiny when under constitutional attack. The court then applied a two part analysis to determine (1) whether the act indicated in its terms a legislative intent to apply the act retroactively, and (2) whether the retroactive application of the act would impermissibly disturb “core expectations” of the parties.

The determination that the Automobile Dealer Act was intended by the legislature to apply retroactively was easily settled. The Act specifically stated that “[t]he provisions of this Article shall be applicable to all franchises and contracts existing between dealers and manufacturers, factory branches, and distributors at the time of its ratification, and to all such future franchises and contracts.”

The “core expectation” requirement was treated with equal brevity. “It has long been recognized,” the court stated, “that existing state laws are to be read into contracts in order to fix the obligations of the parties.” Further, the United States Supreme Court has held that:

Not only are existing laws read into contracts in order to fix obligations as between parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government . . . which retains adequate authority to secure the peace and good

106. Id. at 11, 243 S.E.2d at 801.
107. Id. at 13, 243 S.E.2d at 802.
108. Id. at 7, 243 S.E.2d at 798, citing Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115 (1941).
110. 36 N.C. App. at 12, 243 S.E.2d at 801.
112. 36 N.C. App. at 12, 243 S.E.2d at 801.
order of society.\textsuperscript{113}

Without further analysis, the court concluded the requirement of notice of intention to terminate did not strike at the core expectations of the contract to a constitutionally impermissible level.\textsuperscript{114}

In applying this analysis to the FMFA, a similar conclusion cannot be predicted. Under the first prong of the \textit{Mazda} analysis, the FMFA fails to raise the presumption that the legislature intended the Act to apply retroactively. The Act contains no language, beyond its effective date, indicating its application.\textsuperscript{115}

Second, even assuming \textit{arguendo} that the Act did manifest the legislative intent to apply retroactively, it may fail under the second prong of the \textit{Mazda} test as well. The \textit{Mazda} court held that a retroactively applied statute must not strike at the core expectations of the parties\textsuperscript{116} and concluded that a provision which merely required the parties to provide each other notice of an intention to terminate the franchise agreement did not impermissibly alter core expectations.\textsuperscript{117} In contrast, the FMFA, if applied retroactively, would require the supplier, in repurchasing the dealer's inventory, to expend a potentially great sum of money that had not been anticipated at the time the franchise agreement was entered.\textsuperscript{118} Al-

\begin{footnotes}
\footnotetext{113}{Id., citing Blaisdell, 290 U.S. at 435.}
\footnotetext{114}{Id. at 12, 243 S.E.2d at 802.}
\footnotetext{115}{N.C. GEN. STAT. \$ 66-188(2) (1985). Even where a statute is silent as to its retroactive application, some courts have resorted to grammatical analysis to determine legislative intent. See, e.g., McDonnell v. Farmers Insurance Exchange, \textit{Business Franchise Guide} (CCH) \textsuperscript{117} at 14,024 (D.C. Minn. 1983)(finding "clearly prospective language" in that the definition of 'franchise' . . . uses the present and not the past tense of verbs: 'a contract or agreement . . . by which a franchise is granted the right . . . '). Similarly, the FMFA, in defining "franchise agreement," uses the present tense: " . . . by which the dealer is granted the right . . . ", N.C. GEN. STAT. \$ 66-180(3) (1985) (emphasis added), and later: "[w]henever a dealer enters into a franchise agreement . . . ." Id. at \$ 66-183(3)(emphasis added).}
\footnotetext{116}{36 N.C. App. at 12, 243 S.E.2d at 801.}
\footnotetext{117}{Id. at 12, 243 S.E.2d at 802. Indeed, under similar analysis, a number of courts have determined that the common law requires that adequate notice is always implied in a contract, and therefore a notice provision is not an impairment at all. See, e.g., A.R. Dervaes Co., Inc. v. Houdaille, Inc., \textit{Business Franchise Guide} (CCH) \textsuperscript{117} at 13,071 (Del. 1981); Gianelli Distribution Co. v. Beck & Co., \textit{Business Franchise Guide} (CCH) \textsuperscript{117} at 8456 (Cal. App. 1985). \textit{Cf. supra} note 53 and cases cited therein.}
\footnotetext{118}{N.C. GEN. STAT. \$ 66-183 (1985). For example, the supplier in Hall GMC, Inc. v. Crane Carrier Co., \textit{Business Franchise Guide} (CCH) \textsuperscript{117} at 7966 (N.D. 1983), was required to expend $52,223.97 to repurchase inventory under N.D. CENT.}
\end{footnotes}
though the *Mazda* holding does not provide analysis sufficient to
determine whether such an impairment of the supplier's interests
would rise to the level of "striking at a core expectation," 119 the
argument certainly could be made, especially in light of the failure
of the Act to provide a legislative intention of retroactivity. 120

Assuming that the FMFA is not applicable to preexisting con-
tracts, the issue immediately arises as to whether, or under what
conditions, a preexisting obligation can be transformed into an new
obligation created after the effective date of the Act. The issue has
arisen most frequently in regard to renewals of contracts, modifica-
tions of contracts, and the occurrence of events inherently altering
contracts.

Courts have consistently held that renewals of franchise agree-
ments constitute the formation of a new contract, and thus any
renewal occurring after the effective date of the Act is subject to
its provisions. 121 This rule applies to all but the most perfunctory
renewals; 122 any renewal which alters requirements such as increasing
yearly minimum purchase quotas 123 or bearing language such as "this agreements cancels or supersedes any preceding agree-

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119. 36 N.C. App. at 12, 243 S.E.2d at 801.

120. While no court has ruled on the constitutionality of a retroactive buy-
back provision, a number of courts have applied analysis very similar to the
*Mazda* analysis to franchise statutes. These primarily examine the retroactive ef-
fect of notice provisions and "good cause" requirements. See, e.g., Fireside
Guide* (CCH) ¶ 8077 (D.C. Minn. 1983); Wipperfurth v. U-Haul Co. of Western
Wisconsin, Inc., 101 Wis. 2d 586, 304 N.W.2d 767 (1981); McDonald's Corp. v.
Markim, Inc., 209 Neb. 49, 306 N.W.2d 158 (1981); Hein-Werner Corp. v. Jackson
Industries, Inc., 364 Mass. 523, 306 N.E.2d 440 (1974); Shell Oil Co. v. Marinello,
ysis has led an increasing number of courts to deny retroactive coverage of
248 (E.D. Wash. 1981), *aff'd*, 685 F.2d 440 (9th Cir. 1982); Ward v. Chevron
Nebraska, 192 Neb. 328, 220 N.W.2d 544 (1974); Globe Liquor Co. v. Four Roses

1357, 1363 (W.D. Wis. 1982), *aff'd in part & vacated in part*, 761 F.2d 345 (7th
Cir. 1985).

122. See Wipperfurth v. U-Haul Co. of Western Wis., 101 Wis. 2d 586, 304
N.W.2d 767 (1981).

123. See *Kealey Pharmacy*, 539 F. Supp. at 1363.
ment" should be treated as a new contract for the purposes of the FMFA.

Similarly, a modification to a contract may constitute a new agreement, depending upon the character of the modification. Evidence of modified sales quotas or pricing policies have been held substantial enough to constitute a new agreement subject to a franchise act's coverage. However, a modification such as the relinquishment of part of a franchisor's sales territory has been held not of sufficient magnitude so as to constitute a "fresh" agreement.

The occurrence of certain events may, by definition, create a new relationship between franchised parties. For example, the merger of a franchisor with another manufacturing company was held to have de facto established new franchise relationships between the merged company and its franchisees. Thus, even though the Act may not be retroactive, it applies to continuing franchise relationships upon renewal, modification, or de facto renewals.

### B. Good Cause

In a statute purportedly enacted to remedy inequities inherent in the termination of franchises, it seems ironic that the statute unequivocally fails to require "good cause" of the franchisor prior to terminating a franchisee. Initially, it appears that this statute has ignored a substantive right enjoyed by virtually every other franchise protected by state or federal franchise regulations. However, it is this departure from the vast majority of franchise

124. See Reinders Bros., Inc. v. Rain Bird Eastern Sales Corp., 627 F.2d 44, 49-50 (7th Cir. 1980).
125. See Kealey Pharmacy, 539 F. Supp. at 1363.
126. See Bitronics Sales Co. v. Microsemiconductor Corp., BUSINESS FRANCHISE GUIDE (CCH) ¶ 8101 at 14,142 (D.C. Minn. 1983); Kealey Pharmacy, 539 F. Supp. at 1363.
129. See, e.g., Fern & Klein, Restrictions on Termination and Nonrenewal of Franchises: A Policy Analysis, 36 Bus. Law. 1041, 1046-47 (1981) ("In at least two states . . . the relevant statutes set forth no provision requiring 'good cause' prior to termination or nonrenewal . . . . It is apparent that the protection afforded franchisees in these states may be minimal.").
acts—and indeed, the other North Carolina franchise related acts—\textsuperscript{130}—that places this Act on the leading edge in the rapidly evolving body of franchise law.

The "good cause" requirement, while intuitively popular for the appearance of protection that it offers, has become meaningless as a deterrent to unfair terminations.\textsuperscript{131} The repurchase requirement, on the other hand, provides a substantial economic disincentive to arbitrary or capricious terminations. The Act is apparently premised upon the presumption that the realities of market forces will appropriately deal with a franchisor who abuses its superior bargaining position.

Through judicial interpretation and statutory limitations, the "good cause" genre franchise statute has failed to provide franchisees adequate statutory leverage from which to attack the practices of franchisors. For example, the numerous judicial rulings surrounding the federal Petroleum Marketing Practices Act—an early "good cause" statute—have repeatedly demonstrated the statute's failure to remedy a historically abusive industry.\textsuperscript{133} The PMPA is one of the most comprehensive "good cause" statutes; Congress provided an intricate and specific listing of events constituting good cause for termination, and an extensive list of events that did not.\textsuperscript{134} For the most part, courts have been unresponsive to

\textsuperscript{130} The North Carolina Wine Distribution Act requires "good cause," which includes "failure of the wholesaler to comply substantially . . . with any reasonable and material requirement imposed upon him by the winery." N.C. GEN. STAT. § 18B-1204 (1985). The North Carolina Automobile Dealer Franchise Act similarly requires "good cause" and "good faith" in termination of a franchisee. Id at § 20-305(6) (1985).

\textsuperscript{131} A graphic example of the failure of "good cause" statutes may be found in New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 110 n.14 (1978), where it was noted that of the forty-two protests under the California Automobile Dealers' Act, only one had been granted a remedy under the Act. Thus, in only one of forty-two cases was good cause found. See further, Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc., 409 F. Supp. 497 (E.D. Va. 1976); General Motors Corp. v. Blevins, 144 F. Supp. 381, 395 (D. Colo. 1956); United States Brewers' Ass'n, Inc. v. Nebraska, 192 Neb. 328, 220 N.W.2d 544 (1974). See generally, Comment, Adjusting the Equities in Franchising Termination: A Sui Generis Approach, 30 CLEVELAND ST. L. REV. 523 (1981).


\textsuperscript{133} "It is generally conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising." Brown, supra note 9, at 657.

either expansion or contraction of the Act's literal requirements. Petroleum franchisors have rapidly discovered methods of terminating franchisees under the PMPA good cause requirements, which, aside from an increased level of covertness, are as arbitrary and capricious as before the statute. But now, as far as the courts are concerned, these terminations have the express blessing of Congress.

The FMFA dispenses with the fiction of "good cause" in franchise terminations. Rather, in a strictly pragmatic fashion, it requires a franchisor to confront the decision to terminate a franchise as a pure business decision. Presumably, if a termination is based upon arbitrary grounds, it will be contrary to the franchisor's economic interests. On the other hand, if the termination is based upon a rational business purpose such as stagnant profits or trademark violations by the franchisee, then the franchisor's legitimate exercise of its right to terminate will be unh hampered by the fictional "good cause" requirement.

In any case, the franchisee remains protected by the FMFA. Although the franchisee is denied a statutory ground for questioning the cause of its termination, it is guaranteed that it will be

135. Fern & Kline, supra note 129, at 142.


137. In justifying a 200-300% rent increase as good cause for termination, the court held:

[T]he legislative history suggests that courts have been directed to look to the franchisor's intent rather than to the effect of its actions. If it is only using proposed changes to the lease to disguise an illegal attempt to discriminate against the franchisee and thereby drive him from business, the court is empowered to interfere. If, on the other hand, a good faith application of a rental formula operates unreasonably in a particular case, the dictates of the marketplace alone will govern the transaction. This interpretation is completely in accord with the perceived abuse which Congress sought to rectify. Munno, 488 F. Supp. at 1119.

138. Of course, the franchisee is not precluded from pursuing remedies
financially returned to a position near *status quo ante*. The Act creates a mandatory market for a substantial portion of the franchisee's tangible assets.139

V. Conclusion

In enacting the FMFA, the North Carolina General Assembly sought to provide a deterrent to the abuse that is prevalent in the termination of agricultural implement franchises. The FMFA provides a number of specific remedies and procedures that must be followed by the parties to a franchise agreement and requires the supplier to repurchase inventory of the dealer upon termination. The Act builds upon the experience of the past several decades of franchise legislation—the heretofore popular "good cause" requirement for termination is replaced by a more pragmatic inventory repurchase requirement. In this regard, the Act is on the forefront of current franchise law. In this period of a rapidly declining farm economy, it is predictable that the practical aspects of the Act will soon be implemented, and the theoretical bases upon which it is founded will be put to test.

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139. A number of commentators have suggested that a terminated franchisee be compensated for its goodwill value as well as its tangible assets. Such a remedy would draw the franchisee nearer to *status quo ante*. See Brown, *supra* note 9, at 655; Comment, *Adjusting the Equities in Franchising Termination: A Sui Generis Approach*, 30 Cleveland St. L. Rev. 523, 567-68 (1981). The FMFA makes no such allowance.