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# Misbranding and the Opportunity to Cure Under the Petroleum Marketing Practices Act

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## I. Introduction

During the eight years since enactment of Title I of the Petroleum Marketing Practices Act ("PMPA" or "the Act") in 1978,[1] federal courts have had a number of opportunities to rule on the legality of termination and nonrenewal of retail gasoline dealer franchises under the PMPA.[2] The Act limits the grounds on which an oil franchisor may base termination or refusal to renew a retail dealer's franchise,[3] generally prohibiting termination or nonrenewal except for good cause.[4] In this respect, the PMPA is closely aligned with earlier federal legislation regulating automobile dealer franchising.[5]

When a terminating event does occur, the question arises whether the dealer-franchisee must first be afforded an opportunity to cure its failure to adhere to the provisions of the franchise agreement before the franchise may be terminated. This article examines the question of termination for misbranding and opportunity for cure under the PMPA. Its special focus is on two recent conflicting opinions of the

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[1] Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 (1982). The Petroleum Marketing Practices Act ("PMPA") has three titles. Title II, 15 U.S.C. §§ 2821-2824 (1982), deals with octane ratings. Title III, 15 U.S.C. § 2841 (1982), deals with motor fuel subsidization. These two Titles are beyond the scope of this article.

[2] *See, e.g.*, Sun Refining & Marketing Co. v. Rago, 741 F.2d 670 (3d Cir. 1984); Roberts v. Amoco Oil Co., 740 F.2d 602 (8th Cir. 1984); Moody v. Amoco Oil Co., 734 F.2d 1200 (7th Cir. 1984); Lewis v. Exxon Corp., U.S.A., 716 F.2d 1398 (D.C. Cir. 1983); Humboldt Oil, Inc. v. Exxon Co., U.S.A., 695 F.2d 386 (9th Cir. 1982); Palmieri v. Mobil Oil Corp., 682 F.2d 295 (2d Cir. 1982); Thompson v. Kerr-McGee Refining Corp., 660 F.2d 1380 (10th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982).

[3] 15 U.S.C. § 2802 (1982).

[4] *Id. See* Kostantas v. Exxon Co., U.S.A., 663 F.2d 605 (5th Cir. 1981) (the PMPA does not create a permanent estate of inheritance in the franchise).

[5] *See* Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1982). *See generally* Macauley, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers and the Legal System*, 1965 Wis. L. Rev. 740; Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 Yale L.J. 1135 (1957).

Seventh and Second Circuit Courts of Appeals which address this question.[6]

## II. Background of the Petroleum Marketing Practices Act

In June 1978, Congress passed the Petroleum Marketing Practices Act,[7] creating minimum substantive and procedural standards for the termination and nonrenewal of retail gasoline dealer franchises. Out of a perceived need to protect franchisees from arbitrary and discriminatory termination and nonrenewal of their franchises,[8] Congress prohibited franchisors from terminating a franchise during the term of the franchise agreement[9] and from failing to renew a franchise upon its expiration.[10] If, however, the termination or nonrenewal is based upon one of the grounds specified in the Act[11] and is executed in accordance with the Act's notice requirements,[12] the termination is valid. The statutory grounds for franchise termination are: (1) a failure by the franchisee to comply with any reasonable and material provision of the franchise;[13] (2) a failure by the franchisee to exert

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[6] Lippo v. Mobil Oil Corp., 776 F.2d 706 (7th Cir. 1985); Wisser Co. v. Mobil Oil Corp., 730 F.2d 54 (2d Cir. 1984).

[7] PMPA, *supra* note 1. For an excellent discussion of Title I of the PMPA, *see* Comment, *Retail Gasoline Franchise Terminations and Nonrenewals Under Title I of the Petroleum Marketing Practices Act*, 1980 Duke L.J. 522 [hereinafter cited as *Retail Gasoline Franchise Terminations*]; Note, *Petroleum Marketing Practices Act: Equalizing the Bargaining Power in the Franchise Relationship*, 25 S.D.L. Rev. 69 (1980). *See also* O'Brien, *Federal Laws Affecting the Right of a Franchisor to Terminate or Not Renew a Franchise: Petroleum Marketing Practices Act*, 49 Antitrust L.J. 1371 (1980); Finch, *Judicial Interpretation of the Petroleum Marketing Practices Act: Strict Construction of Remedial Legislation*, 37 Bus. Law. 141 (1981); Jordan, *Unconscionability at the Gas Station*, 62 Minn. L. Rev. 813 (1978); Comment, *Adjusting the Equities in Franchise Termination: A Sui Generis Approach*, 30 Cleve. St. L. Rev. 523, 548-54 (1981). *See generally* Gellhorn, *Limitations on Contract Termination Rights — Franchise Cancellations*, 1967 Duke L.J. 465; Hewitt, *Good Faith or Unconscionability — Franchisee Remedies for Termination*, 29 Bus. Law. 227 (1973).

[8] *See* S. Rep. No. 731, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 873, 874 [hereinafter cited as S. Rep. No. 731].

[9] 15 U.S.C. § 2802(a)(1).

[10] *Id.* § 2802(a)(2).

[11] *Id.* § 2802(b)(2).

[12] *Id.* § 2804.

[13] *Id.* § 2802(b)(2)(A). This section provides:

> (2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:
>
> (A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure —
>
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 U.S.C. § 2804(a)]; or

good faith efforts to carry out the provisions of the franchise after prior warning by the franchisor of such failure;[14] (3) the occurrence of an event which is relevant to the franchise relationship and which makes franchise termination reasonable;[15] (4) a written agreement to

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(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 U.S.C. § 2804(b)(1)].

[14] 15 U.S.C. § 2802(b)(2)(B). This section provides that a franchise may be terminated or not renewed for:

> [a] failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if —
>
> (i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and
>
> (ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 104 [15 U.S.C. § 2804].

[15] 15 U.S.C. § 2802(b)(2)(C). This section permits franchise termination upon:

> [t]he occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence —
>
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 U.S.C. § 2804(a)]; or
>
> (ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 U.S.C. § 2804(b)(1)].

15 U.S.C. § 2802(c) provides an illustrative list of twelve events which are considered relevant to the franchise relationship and as a result of which franchise termination or nonrenewal is deemed reasonable:

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;
(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;
(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;
(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease . . .;
(5) condemnation or other taking . . . of the marketing premises pursuant to the power of eminent domain;
(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise . . .;
(7) destruction . . . of . . . the marketing premises;
(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;
(9) failure by the franchisee to operate the marketing premises for —
(A) 7 consecutive days, or
(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;
(10) willful adulteration, mislabeling or misbranding of motor fuels or other trade-

terminate the franchise;[16] and (5) a good faith determination by the franchisor to withdraw its business from the geographic area.[17] The grounds for franchise nonrenewal include all of the grounds for franchise termination,[18] plus (1) the failure to agree to franchise changes or additional provisions proposed by the franchisor in good faith and in the normal course of business;[19] (2) numerous customer complaints of which the franchisee is promptly apprised and, if they relate to the condition of the premises or employee conduct, which the franchisee does not promptly cure;[20] (3) a failure to operate the premises in a clean, safe, and healthful manner on two or more previous occasions of which the franchisee was notified by the franchisor;[21] and (4) a good faith determination by the franchisor to sell, materially alter, or convert the premises to a use other than the sale of motor fuel.[22] Time limitations are imposed to preclude a franchisor from basing termination or nonrenewal on "old and long forgotten events."[23] According to the Senate Committee on Energy and Natural Resources, "[t]hese provisions strike a balance between the at times conflicting interests of the parties to the relationship."[24]

In the past, franchisors were able to exact highly preferential franchise termination provisions.[25] The PMPA was thus born out of a concern that retail gasoline dealers suffered a disparity of bargaining power,[26] resulting in franchise agreements which were little better than contracts of adhesion.[27] At the same time, however, Congress recognized that franchisors too have a legitimate need to be able to

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mark violations by the franchisee;

(11) knowing failure of the franchisee to comply with federal, state, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

[16] 15 U.S.C. § 2802(b)(2)(D).

[17] *Id.* § 2802(b)(2)(E).

[18] *Id.* § 2802(b)(2)(A)-(E).

[19] *Id.* § 2802(b)(3)(A).

[20] *Id.* § 2802(b)(3)(B).

[21] *Id.* § 2802(b)(3)(C).

[22] *Id.* § 2802(b)(3)(D).

[23] S. Rep. No. 731, *supra* note 8, at 892. As noted in the Senate report, "the time limitations are not intended to stop a franchisor from exercising termination or non-renewal rights based upon a future event which constitutes a ground for termination or non-renewal, even if such future event is a repeat occurrence of an event with respect to which the previous exercise of termination or non-renewal rights was waived." *Id.* at 892.

[24] *Id.* at 874.

[25] *Id.* at 876-77.

[26] *Id.* at 875-76. *See also Retail Gasoline Franchise Terminations*, *supra* note 7, at 524-31.

[27] S. Rep. No. 731, *supra* note 8, at 875-76.

terminate or not renew a franchise relationship;[28] this is especially true where the franchisee has committed an egregious breach of the franchise agreement[29] or where circumstances have appreciably changed.[30] As noted, the PMPA establishes a general prohibition against termination of any motor fuel franchise,[31] but it does permit termination under certain circumstances.[32] The extent to which the Act affords a franchisee the opportunity to cure defaults under the franchise agreement is the focus of the following section.

## III. The Opportunity to Cure Under the PMPA

Three of the five enumerated grounds for franchise termination contained in the PMPA[33] contemplate that, prior to actual termination, the franchisor and franchisee first attempt to work out a mutually satisfactory solution to the situation which triggered the notice of termination.[34] These three grounds are: the failure of the franchisee to comply with a franchise provision which is both reasonable and of material significance to the franchise relationship;[35] the failure of the franchisee to exert good faith efforts to carry out the provisions of the franchise;[36] and the occurrence of an event relevant to the franchise as a result of which termination is reasonable.[37] Specific notice[38] and time limitations[39] are imposed on a franchisor's termination under each of these three grounds. According to the Senate:

> The time limitations are designed to provide adequate opportunity for a franchisor to evaluate the potential grounds for franchise termination . . . prior to making a determination whether to terminate the franchise . . . . Flexibility is provided so that a franchisor may work with a franchisee in an effort to correct the situation and avoid termination of the franchise . . . .[40]

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[28] *Id.* at 876.

[29] *Id.* at 877.

[30] *Id.*

[31] 15 U.S.C. § 2802(a); S. Rep. No. 731, *supra* note 8, at 892.

[32] 15 U.S.C. § 2802(b).

[33] *See supra* notes 13-17 and accompanying text.

[34] By their nature, neither the parties' mutual agreement to terminate the franchise under 15 U.S.C. § 2802(b)(2)(D), nor the franchisor's good faith decision to withdraw its business from the geographic area under 15 U.S.C. § 2802(b)(2)(E), contemplates an opportunity on the part of the franchisee to cure.

[35] 15 U.S.C. § 2802(b)(2)(A).

[36] *Id.* § 2802(b)(2)(B).

[37] *Id.* § 2802(b)(2)(C).

[38] *Id.* § 2804.

[39] *Id.* §§ 2802(b)(2)(A), (B), & (C).

[40] S. Rep. No. 731, *supra* note 8, at 892-93.

In light of this legislative history, the question arises whether a franchisor must afford a franchisee the opportunity to cure in the three instances of franchise termination permitted under 15 U.S.C. §§ 2802(b)(2)(A), (B), and (C). As the following discussion shows, the structure of the PMPA indicates that the answer is "no" in the case of terminations under sections 2802(b)(2)(A) and 2802(b)(2)(C), but that such an opportunity must be provided if franchise termination is based on section 2802(b)(2)(B).

First, a franchise may be terminated under section 2802(b)(2)(A) for a failure by the franchisee to comply with any provision of the franchise agreement (upon giving timely notice of such termination), so long as the franchise provision is reasonable and of material significance to the franchise relationship.[41] In addition, termination on such a ground cannot be based on a franchisee's noncompliance when the franchisor had actual or constructive knowledge more than 120 days prior to the date on which notification of termination is given.[42] Nothing in the Act expressly grants the franchisee the opportunity to cure a default.

Second, in connection with section 2802(b)(2)(C), a franchisee may have its franchise terminated based upon "[t]he occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise . . . is reasonable . . . ."[43] Franchise termination under this subsection is subject to the same notice and time limitation restrictions as those contained in section 2802(b)(2)(A).[44] Events which are deemed relevant to the franchise relationship and which make termination permissible are defined in section 2802(c).[45] They include criminal conduct by the franchisee relating to the operation of the franchise[46] or involving moral turpitude;[47] a declaration of bankruptcy by the franchisee;[48] and willful adulteration, mislabeling or misbranding of motor fuels or other

[41] 15 U.S.C. § 2802(b)(2)(A). *See supra* note 13.

[42] *Id.* § 2802(b)(2)(A)(i). This provision is designed to prevent a franchisor from resurrecting stale events as a ground for termination. *See* S. Rep. No. 731, *supra* note 8, at 892. This 120-day limitation period is shortened to 60 days if less than 90-days notification of termination is given the franchisee pursuant to 15 U.S.C. § 2804(b)(1). Ordinarily, 90-days notice of termination is required under 15 U.S.C. § 2804(a)(2). However, such advance notice may be shortened "[i]n circumstances in which it would not be reasonable for the franchisor to furnish notification." 15 U.S.C. § 2804(b)(1).

[43] 15 U.S.C. § 2802(b)(2)(C). *See supra* note 15.

[44] *Id. Compare supra* note 13 with note 15.

[45] *See supra* note 15.

[46] 15 U.S.C. § 2802(c)(1).

[47] *Id.* § 2802(c)(12).

[48] *Id.* § 2802(c)(2).

trademark violations by the franchisee.[49] As is the case with section 2802(b)(2)(A) terminations, section 2802(b)(2)(C) on its face does not permit the franchisee an opportunity to cure the defect in the event of franchise termination.

By contrast, section 2802(b)(2)(B) contemplates that a franchisee will be afforded an opportunity to cure. That section provides that a franchise may be terminated for "[a] failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if . . . the franchisee was apprised by the franchisor in writing of such failure *and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions*. . . ."[50] In addition, termination on this ground cannot be based on any purported failure to exert good faith efforts which is more than 180 days old.[51] On its face then, section 2802(b)(2)(B) envisions an opportunity to cure by the franchisee. Whether sections 2802(b)(2)(A) or 2802(b)(2)(C) likewise extend the same opportunity to the franchisee has been the subject of recent litigation.

In one of the first cases to consider the PMPA, *Gilderhus v. Amoco Oil Co.*,[52] the district court read into the Act a policy of providing franchisees with " 'meaningful protection from arbitrary or discriminatory terminations.' "[53] Given this congressional policy, the court found relevant the allegation by the franchisee that Amoco had given its other franchisees the opportunity "to correct their transgressions before they are terminated."[54] Gilderhus purportedly had not been given this opportunity. At issue was the plaintiff's purchase and sale of small amounts of petroleum products not originating from Amoco in breach of the franchise agreement.[55] This was a terminating event under section 2802(b)(2)(C) and (c)(10).[56] In granting Gilderhus' motion for a preliminary injunction, the district court stated that "[i]f plaintiff's assertions [of discriminatory termination] . . . can be proven at trial, it is likely that the termination would be found invalid, since it would be contrary to the very purpose and policies of the Petroleum Marketing Practices Act . . . ."[57] The court thus read into section 2802(b)(2)(C) a requirement that a franchisee be given an op-

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[49] *Id.* § 2802(c)(10).
[50] *Id.* § 2802(b)(2)(B) (emphasis added).
[51] *Id.* § 2802(b)(2)(B)(ii); S. REP. No. 731, *supra* note 8, at 892.
[52] Guilderhus v. Amoco Oil Co., 470 F. Supp. 1302 (D. Minn. 1979).
[53] *Id.* at 1305 (quoting S. REP. No. 731, *supra* note 8, at 876).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

portunity to cure an event which is cause for termination under that section if the franchisor has afforded such an opportunity to its other franchisees.[58]

More recently, the Second and Seventh Circuit Courts of Appeals have considered the question of cure under sections 2802(b)(2)(A) and 2802(b)(2)(C).[59] In *Wisser Co. v. Mobil Oil Corp.*,[60] the Second Circuit held that neither section 2802(b)(2)(A) nor section 2802(b)(2)(C) require that a franchisee be afforded an opportunity to cure.[61] In that case the plaintiff-franchisee had its franchise terminated for selling non-Mobil gasoline as a Mobil product.[62] The question presented was whether either the parties' franchise agreement or the PMPA required notice of default and an opportunity to cure.[63] The court concluded that although the parties' contract generally required notice and an opportunity to cure, a rider permitted immediate termination in the event of misbranding.[64] As for the franchisee's rights under the PMPA, the Second Circuit first noted that "misbranding is a ground for termination under 15 U.S.C. §§ 2802(b)(2)(A), 2802(b)(2)(C), 2802(c)(10) and 2802(c)(11) . . . ."[65] Writing for the court, Chief Judge Feinberg noted that "[n]othing in these provisions . . . requires an opportunity to cure."[66] He continued:

> In contrast, § 2802(b)(2)(B), a parallel provision permitting termination for 'failure . . . to exert good faith efforts to carry out the provisions of the franchise,' requires the franchisor to apprise the franchisee 'in writing of such failure' and to afford 'a reasonable opportunity to exert good faith efforts to carry out such provisions,' and allows termination only if the franchisee continues its failure to exercise good faith efforts . . . . Similarly, in connection with nonrenewal based on receipt of numerous customer complaints related to the condition of the premises . . . , the PMPA confers on the fran-

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[58] *Compare* Crown Cent. Petroleum Corp. v. Waldman, 515 F. Supp. 477, 485 (M.D. Pa. 1981) (no evidence of discriminatory termination under section 2802(b)(2)(A)).

[59] Wisser Co. v. Mobil Oil Corp., 730 F.2d 54 (2d Cir. 1984); Lippo v. Mobil Oil Corp., 776 F.2d 706 (7th Cir. 1985). Excluded from this discussion are those cases involving "any failure beyond the reasonable control of the franchisee," a statutorily excluded type of "failure" under 15 U.S.C. § 2801(13). *See, e.g.*, Sun Refining & Marketing Co. v. Rago, 741 F.2d 670, 672-74 (3d Cir. 1984). *See also infra* notes 103-105 and accompanying text.

[60] *Wisser Co.*, 730 F.2d 54 (2d Cir. 1984).

[61] *Id.* at 59.

[62] *Id.* at 56-57.

[63] *Id.* at 57.

[64] *Id.* at 58.

[65] *Id.*

[66] *Id.*

> chisee a right to notice and an opportunity to cure or correct. 15 U.S.C. §§ 2802(b)(3)(B) and 2802(b)(3)(C).
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> It is clear from the structure of the statute that Congress meant to give franchisees the right to cure for some kinds of conduct or conditions that if continued would warrant termination or nonrenewal, but did not intend to require a second chance for other kinds of conduct or conditions . . . . While the legislative history does contemplate "[f]lexibility . . . so that the franchisor may work with a franchisee in an effort to correct the situation and avoid termination . . . , it also recognizes that '[s]ome contractual violations, although not readily reducible to a dollar value, may be so serious as to undermine the entire relationship, . . .'
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> The misbranding alleged in this case falls into the latter category.[67]

The Second Circuit thus held that no opportunity to cure was required in connection with franchise terminations for misbranding under sections 2802(b)(2)(A) and 2802(b)(2)(C).[68]

The Seventh Circuit was presented with a similar issue in *Lippo v. Mobil Oil Corp.*[69] Lippo had purchased non-Mobil gasoline and in turn sold it as a Mobil product.[70] Mobil gave Lippo notice of termination pursuant to 15 U.S.C. §§ 2802(b)(2)(A) and 2802(b)(2)(C),[71] to which Lippo responded that he had a right to cure.[72] In addressing Lippo's contention, the court began by distinguishing the Second Circuit's decision in *Wisser Co.* While the court conceded that the contract provisions in both cases were "virtually identical,"[73] the Seventh Circuit did not find *Wisser* dispositive.[74] On the contrary, the court distinguished *Wisser* principally on the basis of its own reading of the controlling contract provisions.[75] The court, speaking through

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[67] *Id.* at 58-59 (citations omitted).

[68] *Id.* at 59. For additional cases where an opportunity to cure was not given in connection with franchise terminations under 15 U.S.C. §§ 2802(b)(2)(A) and 2802(b)(2)(C), *see* JFC Investors Ltd. v. Gulf Products Div. of BP Oil, 608 F. Supp. 1136, 1141-43 (W.D.N.C. 1985) (misbranding); Amoco Oil Co. v. D.Z. Enterprises Inc., 607 F. Supp. 595, 600-01 (E.D.N.Y. 1985); H.R.H. Service Station, Inc. v. Exxon Co., U.S.A., 591 F. Supp. 25, 26 (S.D.N.Y. 1983); Itin Oil Co. v. Mobil Oil Corp., 527 F. Supp. 898, 900-01 (E.D. Mich. 1981); Haynes v. Exxon Co., U.S.A., 512 F. Supp. 543, 544 (E.D. Tenn. 1981) (termination for misbranding).

[69] Lippo v. Mobil Oil Corp., 776 F.2d 706 (7th Cir. 1985).

[70] *Id.* at 708.

[71] *Id.* at 709, 721.

[72] *Id.* at 709.

[73] *Id.* at 711.

[74] *Id.* at 712-13.

[75] *Id.* at 712-16. The court also noted that contract provisions of franchise agreements governed by the PMPA are to be interpreted according to state contract law. Thus, unless relevant Illinois contract law and New York contract law were identical, the *Wisser* decision would not

Judge Cudahy, read the parties' franchise agreement as allowing termination without notice for certain violations of the franchise, such as misbranding.[76] However, according to the court, a "violation" as defined under the Lippo-Mobil franchise agreement was an "uncorrected default."[77] Thus, Lippo had the contractual right to cure his default.[78] Since, in the court's view, he had cured his default by covering over Mobil signs, it never became a contractual "violation;" and Mobil had no right to terminate the franchise.[79]

In a vigorous dissent,[80] Judge Posner framed the underlying issue as "whether a rational franchisor would, and whether this rational franchisor did, empower his dealers to defraud him by attaching his trademark to another supplier's product."[81] In Judge Posner's view, since every commercial contract imposes a duty of good faith and fair dealing in its performance, the contractual right of cure was conditional upon Lippo's having acted in good faith in defaulting on his contractual obligations.[82] Considering that Lippo "committed a palpable and potentially very harmful fraud against Mobil by deliberately selling another supplier's gas under Mobil's name,"[83] Lippo breached his duty of good faith performance, according to Judge Posner. In addition, Judge Posner noted the near impossibility of curing the type of default committed by Lippo, given that Mobil gas would be mixed with another supplier's gas in the storage tank.[84] "If this was not misbranding, which it probably was, it was adulteration — which is forbidden along with misbranding," Judge Posner observed.[85]

Finally, Judge Posner found the majority's interpretation of the franchise agreement to be inconsistent with the Second Circuit's decision in *Wisser*.[86] What was of particular interest in this connection was the Second Circuit's conclusion in *Wisser* that the PMPA did not give a franchisee an opportunity to cure misbranding. In Judge

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be dispositive, according to the court. *Id.* at 712.

[76] *Id.* at 713-14.

[77] *Id.* at 714.

[78] *Id.*

[79] *Id.* The court reached this conclusion by applying the principle of *contra proferentum. Id.* at 714-15.

[80] Lippo v. Mobil Oil Corp., 776 F.2d 706, 722 (7th Cir. 1985) (Posner, J., dissenting).

[81] *Id.* at 726.

[82] *Id.* at 723.

[83] *Id.* at 722.

[84] *Id.* at 724.

[85] *Id.* at 724-25. As noted by Judge Posner, "The adulteration was not cured within ten days; it may never be cured, though it will decay exponentially . . . ." *Id.* at 725.

[86] *Id.* at 725.

Posner's opinion, "it is possible in theory that the Act [which is designed to protect only the franchisee] would give a franchisee fewer rights than the franchise contract; it just is completely unrealistic."[87]

The Posner dissent in *Lippo* hits the mark on at least two counts. First, regarding Lippo's good faith, the law in Illinois is clear: "Every contract implies good faith and fair dealing between the parties to it, and where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted."[88] The majority's interpretation of the Lippo-Mobil franchise agreement permits Lippo to act in apparent bad faith and yet evade termination of his franchise with Mobil. In light of Lippo's apparent bad faith conduct, basic Illinois contract law, on which the majority placed great reliance,[89] strongly suggests that the franchise-agreement's termination provisions in this instance should have been interpreted in Mobil's favor.[90]

Second, and more importantly, Judge Posner's criticism of the majority's failure to interpret the Lippo-Mobil franchise in light of the PMPA[91] is well taken. In Illinois the law is well settled "that, in the absence of language to the contrary, laws and statutes in existence at the time a contract is executed are considered a part of the contract as though they were expressly incorporated therein."[92] Considering the protective purpose of the PMPA, the Act "may confer greater rights on a franchisee than are granted in a particular franchise agreement."[93] The converse, however, seems improbable, particularly considering that franchise agreements are, by and large, contracts of adhesion drafted by franchisors.[94] Had the majority in *Lippo* interpreted the Lippo-Mobil franchise agreement in light of the PMPA, it

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[87] *Id.* at 726. Judge Posner summed up his dissent by observing that "twisting a contract to help the little man who is dishonest hurts the little man who is honest . . . . [The majority's opinion] will confirm the widespread view in the business community . . . that contemporary American law is unintelligible and unjust, and, not least, will set back the cause of purposive and realistic contract interpretation." *Id.* at 726-27.

[88] Martindell v. Lake Shore Nat'l Bank, 15 Ill. 2d 272, 154 N.E.2d 683 (1958).

[89] *Lippo*, 776 F.2d at 712-15.

[90] *See id.* at 708 n.2.

[91] *Lippo*, 776 F.2d at 726 (Posner, J., dissenting).

[92] S&D Service, Inc. v. 915-925 W. Schubert Condominium Ass'n, 132 Ill. App. 3d 1019, 478 N.E.2d 478, 483 (1985). *See* Rehart v. Clark, 448 F.2d 170, 173 (9th Cir. 1971) ("It is well settled that existing laws are read into contracts in order to fix the rights and obligations of the parties"). *See also* Hatcho Corp. v. Della Pietra, 195 Conn. 18, 485 A.2d 1285, 1288 (1985); Winter v. Liles, 354 N.W.2d 70, 73 (Minn. Ct. App. 1984); Cary v. Cary, 675 S.W.2d 491 (Tenn. Ct. App. 1984).

[93] *Wisser*, 730 F.2d at 58.

[94] *See* S. REP. No. 731, *supra* note 8, at 864-66.

seems highly unlikely that they would have concluded that Lippo had a right to cure his misbranding.

## IV. CONCLUSION

In the absence of discriminatory treatment by a franchisor of a franchisee, vis-a-vis the franchisor's other franchisees,[95] the PMPA does not require that franchisees be given a formal opportunity to cure before a franchise is terminated pursuant to 15 U.S.C. § 2802(b)(2)(A) or 2802(b)(2)(C). The structure of the Act shows that Congress intended to give franchisees the right to cure for some types of conduct that if continued would warrant termination, but not for other more serious kinds of conduct.[96] Terminations under these two sections are for serious franchise violations, not minor or mere technical violations, but the kind of violations which "undermine the entire relationship."[97] As the Second Circuit concluded in *Wisser*, misbranding of gasoline falls into the latter category.[98]

Regarding an alleged contractual right to cure serious breaches or defaults such as fuel misbranding, the Seventh Circuit's decision in *Lippo* falls wide of the mark. The franchise agreement in *Lippo* was virtually identical with the agreement in the *Wisser* decision,[99] which the Second Circuit concluded conferred no right on the franchisee to cure misbranding.[100] In addition, the majority in *Lippo* also neglected to interpret the franchise agreement in light of the PMPA.[101] The Act, even though highly protective of vulnerable franchisees, does not confer a right to cure misbranding.[102] Given this consideration, it seems improbable that Mobil, the party which drafted the franchise agreement, intended to give its franchisees greater rights under contract than they enjoyed under statute.

In the final analysis, it may be possible to harmonize the Seventh Circuit's decision in *Lippo* with the *Wisser* decision and the PMPA if Lippo's admitted misbranding is characterized as a failure "for a cause beyond the reasonable control of the franchisee."[103] As such, it

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[95] *See supra* notes 52-58 and accompanying text.

[96] S. REP. No. 731, *supra* note 8, at 891-97. *See Wisser*, 730 F.2d at 59.

[97] S. REP. No. 731, *supra* note 8, at 876. *See* 15 U.S.C. § 2801(13), which excludes technical or unimportant failures from the definition of franchisee failures.

[98] *Wisser*, 730 F.2d at 59.

[99] *See supra* note 73 and accompanying text.

[100] *See supra* note 64 and accompanying text.

[101] *See supra* notes 86-87 and 91-94 and accompanying text.

[102] *See supra* cases cited at note 68.

[103] 15 U.S.C. § 2801(13).

would not be a statutory failure under the PMPA.[104] As noted by the *Lippo* majority, "Lippo's one-time use of non-Mobil gasoline occurred during a period of gasoline shortage when Lippo apparently feared he would have no gas to sell to his customers."[105] While this explanation arguably qualifies as a cause for purchasing non-Mobil gasoline beyond Lippo's reasonable control, it does not explain or excuse Lippo's sale for one day of non-Mobil gasoline as a Mobil product.[106] Although the majority did not expressly so state, it seems fairly evident from the tenor of their opinion that they viewed this particular instance of misbranding as merely a technical failure, and thus excluded as a statutory "failure" under 15 U.S.C. § 2801(13)(A).

Regardless of the majority's rationale in *Lippo*, "linguistic subtlety is in any event out of place in interpreting this contract. It is not a contract between lexicographers; it was not drawn to provide hermeneutical exercises for judges."[107] In short, the majority's reading of the franchise agreement in *Lippo* is strained and at odds with the clear guidance furnished by Congress on this score. The scope of the *Lippo* opinion should be closely circumscribed.

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[104] *See supra* note 59.

[105] *Lippo*, 776 F.2d at 708 n.4.

[106] *See id.* at 708. Lippo covered the Mobil signs and pumps only after being so directed by a Mobil representative. *Id.*

[107] *Id.* at 725 (Posner, J., dissenting).