P U B L I C H E A R I N G

before

ASSEMBLY JUDICIARY COMMITTEE

on

ASSEMBLY BILL NO. 2063
(Franchise Practices Act)

Held:
March 29, 1971
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Peter W. Thomas (Chairman)
Assemblyman James Cafiero
Assemblyman John F. Fay, Jr.
Assemblyman Paul Policastro
Assemblyman Albert S. Smith
Assemblyman James M. Turner
Assemblyman Austin N. Volk

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ASSEMBLYMAN PETER W. THOMAS (Chairman): I'd like to call this hearing to order.

This is a public hearing on Assembly 2063 - the Franchise Bill. Just a few minutes ago I met with a representative of those who are proposing the passage of this bill and a representative of those who are opposing passage and we agreed on ground rules. We are going to have to close promptly at 1:00 P.M. today. We have divided the time up, between then and now, into four equal segments. We tossed a coin as to who would go first, and who would go second. The opponents of the bill lost. They will go first and third and the proponents of the bill will go second and fourth.

Let the record show that Chairman Thomas, Assemblyman Policastro and Assemblyman Fay are present.

May I also say this, Mr. Nasmith represented the opposing side and any person who wishes to present his testimony should see him. Mr. Joseph Katz represented the proponents and anybody wishing to speak on that side should see him so that he can decide in what order and how much time you will be allotted.

P E T E R D O R N: Assemblyman Thomas, Assemblyman Policastro and Assemblyman Fay, my name is Peter Dorn and I am Secretary of the New Jersey State Chamber of Commerce and I appear before you today to present the views of the State Chamber with respect to Assembly bill #2063, which is proposing a broad and sweeping regulation of the business of franchising.

The State Chamber is aware that there have been abuses in the franchising business which developed mostly in the late 1960's in the so-called "franchise boom." The speculative mood of the country, and the high pressure advertising of many franchisor companies during this period, with inflated claims of prospective earnings, and the claim that no experience was necessary, resulted in many misleading and deceptive sales of business franchises. This "franchise boom" reached its height when celebrities in the sports and entertainment fields were induced to head up franchise operations which were designed solely for the purpose of selling franchises

and not for the long term operation of a business.

However, it should be kept in mind that franchising has been with us a long time and embraces many types of relationships and distribution techniques, involving all kinds of products and services. It is an established business procedure to broaden the market for dispensing products and services to the ultimate consumer. There are two basic types of franchise agreements, each of which has its own business needs and legal problems.

One is the manufacturing or product franchise, which usually takes the form of an exclusive distributorship whereby a manufacturer encourages a dealer to purchase, sell and service his trademarked product. The other type of arrangement is franchising of an entire business system, and is usually associated with the licensing of service mark or trademark, with the franchisor not manufacturing the product or rendering the service, but licensing others to do so, and making available to them its merchandising background and know-how. In this type of franchising the franchisor is vitally interested in maintaining the quality and uniformity of his product or service in order to maintain the value of his trademark, and consequently imposes standards of operating procedures, specifications of product quality, etc. In some types of franchises, the franchisor gets a franchise fee from the sale or use of the franchise, but in others, they obtain their revenue from a royalty on percentage of sales or by the sale of merchandise inventory, or sale of equipment to the franchisee.

The attempt to resolve and correct all of the abuses in as diverse and complicated a form of business organization as franchising, through the broad sweeping language used in Assembly Bill 2063, is not the answer to the complex problems which beset the franchise field.

The definition of franchise, in Section 3(a) of the bill includes every arrangement, written or oral, for a definite or indefinite period of time, in which one person grants to another the right to use a trade name or trademark, in the marketing of goods or services at wholesale or retail. The definition is all-inclusive, and would embrace every business arrangement where a trademark or trade name is used.

Section 5 prohibits any franchisor from terminating or refusing to renew any franchise without at least 180 days written notice giving the reasons, which reasons can only be that the franchisee has failed to comply substantially with provisions of the agreement which the franchisor must establish are "essential, reasonable, and non-discriminatory." This section, in effect, grants the franchisee the right to use some one else's trademark or trade name indefinitely unless the owner can establish that the terms of the agreement meet the test of being essential, reasonable and non-discriminatory. The burden of proof is on the franchisor and not on the franchisee. If the franchisor should be wrong in assessing that the contract requirements meet such test, he is subject to treble damages.

This bill delegates to the courts the power to decide, on a case-by-case basis, whether a person has a right to use some one else's

trade name or trademark as long as he so chooses. Is a quota in a franchise agreement a reasonable and essential provision? If reasonable at the time of the agreement, would it be unreasonable at a later time because of lessened efficiency on the part of the franchisee or a change in economic conditions? Is a system to insure conformity in the quality of a product reasonable? Is a restriction against the sale of a competitor's product to prevent confusion with the franchisor's product reasonable? Must the validity of these, and many similar provisions, which are common to present day franchising agreements, be tested in the courts before there can be any certainty that they will not bestow a franchise for as long as the franchisee chooses to retain it, or subject the franchisor to treble damages?

The current trend in the law in extending and expanding the liability of manufacturers for product failure or deficiencies is resulting in closer supervision and control over franchisees to insure that the product is properly represented and serviced. The necessity for closer controls over franchise operations poses a further problem under Section 5 of the bill.

Rather than run the risk inherent in court review of the essentiality and reasonableness of franchise contract provisions and the threat of treble damage suits, franchisors with adequate capital and resources could very well give up the franchise approach as a distribution technique and integrate vertically by establishing and owning their own distribution

outlets. The smaller franchisor, without sufficient capital and resources to do so, probably could not elect this option, resulting in the big getting bigger, and the small getting smaller, contrary to present day anti-trust enforcement policies.

The basic problem in franchise abuses seems to be deceptive and misleading representations made to sell a franchise operation for a fee to people of limited resources, with the expectation of handsome profits. The way to remedy this problem would be by requiring the franchisor to to make a full disclosure of all the facts, similar to the disclosure required under the Securities Act. In fact, such a bill has already been introduced in the Congress and in a few other states. And on Thursday of last week, two such bills were introduced in the New Jersey Legislature -- A-2293 and S-2158.

Assembly Bill 2063, on the other hand, does not attack this basic problem, but rather weds the franchisee to the franchisor until the franchisor chooses to terminate or refuses to renew the franchise, or the franchisor violates other provisions of the bill, none of which have anything to do with deceptive or misleading representations in the initial sale of the franchise.

The New Jersey State Chamber of Commerce strongly opposes Assembly Bill No. 2063. It would do more harm than good, and would forestall, if not eliminate, any significant growth in the franchise business in New Jersey.

We feel it is unfortunate, moreover, that the changed date of this hearing has precluded an in-depth study of A-2063 by many of the corporations, both in manufacturing (or product) franchising and in business system franchising. As a result, we feel that many corporations which will be seriously affected by what this bill proposes were simply unable to prepare presentations which might have been extremely helpful to the Judiciary Committee today in its consideration of this bill.

Thank you, Mr. Chairman.

ASSEMBLYMAN THOMAS: Mr. Dorn, who are the principal people who are interested in the passage of this bill?

MR. DORN: The principal people who are interested in the passage of this bill? Well, I understand it is the New Jersey Automobile Dealer's Association and the New Jersey Gasoline Retail Dealer's Association.

ASSEMBLYMAN THOMAS: As you understand it, what is their reason for being in favor of the passage of this legislation?

MR. DORN: Well, I don't know whether I can answer that question. I think perhaps that best be asked of the opponents of the bill.

ASSEMBLYMAN THOMAS: Is A2293 Kaltenbacher's bill?

MR. DORN: Yes.

ASSEMBLYMAN THOMAS: And that is a disclosure bill, isn't it?

MR. DORN: I believe so. It was just introduced Thursday. We haven't had an opportunity to read it yet but I understand it is a financial disclosure bill.

ASSEMBLYMAN THOMAS: Do you know whether or not

it is similar to the California disclosure act?

MR. DORN: The story I hear, it is, and also the bill Senator Miller, from Camden County, introduced in the Senate is, I believe, the same bill or very similar type of legislation.

ASSEMBLYMAN POLICASTRO: Mr. Dorn, isn't it true that most gasoline dealers and most gasoline stations are in favor of this bill?

MR. DORN: I couldn't answer that question.

ASSEMBLYMAN THOMAS: O.K. Thank you.

MR. DORN: Thank you.

C H A R L E S B U R R O W: Mr. Chairman, my name is Charles Burrow and I am an attorney with Holiday Inns, Inc. in Memphis, Tennessee. I guess you are all aware that we do franchise Holiday Inns throughout the world.

We are one of those corporations, I suppose, Mr. Dorn referred to as not having had an opportunity to properly prepare for this. We do have an interest in all of the states. They are vital interests. We think we contribute vitally to the economy of every state and at the same time we certainly reap benefits from doing business in the states.

We have had a very short time to review this particular legislation and I will address my remarks to a very limited portion of the bill.

Basically we agree with Mr. Dorn, in that misleading and deceptive type of franchising must be eliminated and we do favor legislation of some sort. The type we favor goes along with the disclosure type - such as the California bill. I think Senator Williams, from your State, has introduced the type of bill that we favor as well, on the national level. In essence, we desire to avoid conflict among the states which would almost eliminate our doing business in some states.

There is some confusion with reference to termination requirements - which we think in this case would be excessive. One hundred eighty days would just about put us out of business with the type of franchising that we do - which, as you know, is not product. We are not concerned with product franchising in any form or fashion.

In the service industry we have got to maintain certain standards for every franchisee. Incidentally, the franchisees - we have found through our association of franchisees - favor the fact that we should maintain very strict standards over them to assure each of them that their counterpart franchisee, down the road, is maintaining the same standards and in the event he is not, that franchisee himself prefers that we eliminate that problem by termination. We have not been faced with termination of this nature over the years that we have been in business more than a half-dozen times, strange as it seems in light of the numerous franchises we have issued. But in those cases where substandard conditions exist, we must look after not only our own trademark and service mark but we must look after the other franchisees. We are bound to do this by the license itself, and as such, we have adopted a 30 day notice of default, in which time they have to cure the fault. If reasonable, extensions are granted by us. But if it is such a substandard condition it will reflect upon other franchisees,we feel it is our obligation to rid the system of franchisees of that one problem. So that we think the 180 day notice requirement in bill 2063 is certainly unreasonable as it relates to the legitimate franchisor-franchisee relationship, particularly in the service industry.

ASSEMBLYMAN THOMAS: Mr. Burrow, let me stop you for just one moment.

There is something you don't know. There have been amendments offered to this bill, one of which affect the 180 day cancellation - changing it from 180 days to 150 days. Another amendment eliminates the word "essential." In several places where they are talking about - well, for instance, on page 2 of the bill - section 5, line 13, the word "essential" is removed. In section 6, line 12 "essential" is again removed from the definition that is used in determining when there can be a termination of contract. Also, on page 3, section 6, line 6, "essential" is again removed and two new paragraphs have been offered. They don't really affect the type of thing that you are talking about now. One gives them the right,

gives the franchisor the right to terminate if there is a conviction by the franchisee of something that has to do with the franchise operation itself.

MR. BURROW: Well, along those lines, whether it be 180 or 150 or less, the assumption seems to be, under the bill, that the franchisor, let's say, might not have the right and thereby subjects himself to treble damages, if he is not right in termination.

ASSEMBLYMAN THOMAS: This treble damages section has been eliminated too.

MR. BURROW: Well, again, we obviously are not prepared to talk to those issues - we were not aware of that.

ASSEMBLYMAN THOMAS: You should not be at all embarrassed by this because these amendments have not even been printed as yet. They were offered to the committee during the past week.

MR. BURROW: I thank you for the information.

After eliminating the treble damage feature, the period of time for termination, I think, would vary with the industry. In this case - in the service industry - let's assume that the franchisor ultimately has the right to terminate and he has had to wait for a period of 150 or more days to do so. This, in our mind, means that we have been forced unduly to allow the use of our service mark and trademark for that period of time when, in fact, we had the right, under a shorter period of time, to eliminate that problem.

ASSEMBLYMAN THOMAS: Let me ask you, since you are an attorney, under this bill, what would happen with respect to the 150 day termination period if a franchisee went bankrupt - would you, the franchisor, have to wait 150 days before you could terminate that franchise and get somebody else in there?

MR. BURROW: That is one feature that we are not too clear on.

ASSEMBLYMAN THOMAS: Well, I'm not clear on it either; that's why I asked you and I am going to ask the

other side.

MR. BURROW: Well, I think, the way it is worded, that this would certainly be the construction by a court of law. Now we contend - or we would contend - that, certainly, bankruptcy was not contemplated when this legislation was written. Currently, we operate on the basis that if bankruptcy or insolvency does occur, we have the right to immediately terminate the franchise.

ASSEMBLYMAN THOMAS: Do you see that right in this bill?

MR. BURROW: I do not see that right in this bill, no, sir, I do not.

ASSEMBLYMAN THOMAS: Do you have contracts that you make with each of your franchisees?

MR. BURROW: Yes, sir, we do.

ASSEMBLYMAN THOMAS: And do you have a typical time period for which the contract will run?

MR. BURROW: Yes, we have a basic 20-year term.

ASSEMBLYMAN THOMAS: 20-year term?

MR. BURROW: 20 years, yes sir.

ASSEMBLYMAN THOMAS: And is there a right of renewal after that 20-year term, in your typical contract?

MR. BURROW: Up until January 15th of this year they had an automatic right of renewal on a year-to-year basis after the basic 20-year term. Now we do have a set 20-year term with no mention of renewal but with an implied renewal option - obviously.

ASSEMBLYMAN THOMAS: Do you have spelled out in your contract the grounds upon which you, as a franchisor, could step in on 30-days notice and terminate the franchise agreement?

MR. BURROW: Yes, it is spelled out specifically.

ASSEMBLYMAN THOMAS: Do you have a copy of a typical contract?

MR. BURROW: We do have a copy, I don't know if--

ASSEMBLYMAN THOMAS: Do you have one with you?

MR. BURROW: I don't know if we would like to make it

of record, however.

ASSEMBLYMAN THOMAS: All right. Can you give me some examples of what reasons are spelled out in your contract for termination?

MR. BURROW: Basically we only have two that, I think, would concern themselves with this hearing. We have what we call our "inspection standards" - rules of operation for a Holiday Inn. This relates, primarily, to cleanliness and maintenance and the good-will and attitude of the particular Inn that is doing business. Here we have quarterly inspections of every franchise operation in the country by unknown inspectors, whom we send out across the country to make sure that minimum standards are being met by each franchised Inn. Failure to meet these standards - we have passing grades, average grades, excellent grades - failure to pass means they receive a 30 day notice of default and that they will be re-inspected within 30 days. Failure to pass that inspection will mean that the matter goes before our executive committee for consideration of termination. We never terminate after 30 days as a matter of fact, we never have. But we could grant extensions of 30 days or 60 days, depending on the nature of the substandard condition. If it is a matter of cleanliness we think that a little elbow grease could straighten most of any of those problems out in 30 days and we would be pretty firm in that regard. If it is worn furniture, mattresses, etc., then ordering, shipping, receiving, does take time and we sometimes give as much as 180 days to cure that type of default.

Another type of default is certainly that of delinquent fees and accounts - royalties under the franchise itself. And there again, we give them 30 days to bring current their accounts. However, we do not put them on a default status until they are 60 days in arrears. So, in effect, we are dealing with 90 days anyway.

ASSEMBLYMAN THOMAS: These are accounts to you, as a franchise owner - royalties to you?

MR. BURROW: Yes, as it relates to us.

ASSEMBLYMAN THOMAS: Does the franchisee pay a fee to obtain his franchise in your operation?

MR. BURROW: Yes, an application fee is charged.

ASSEMBLYMAN THOMAS: And who owns the property and the facilities of the hotel or motel? Do you own it or do they own it?

MR. BURROW: The franchisee himself. If there are questions about our particular operation, I will be happy to answer them. I don't think I am prepared to offer any more testimony as to the bill itself.

ASSEMBLYMAN THOMAS: Let me ask one more question: Would this bill affect your existing contracts?

MR. BURROW: The existing contracts, no - as I read it - unless we amend it or come up with renewal of some of the contracts. But in our particular industry there is, after six or seven years of a franchise operation, considerable turnover - that is change of ownership - and, certainly, in every instance this bill would affect that change of ownership.

ASSEMBLYMAN THOMAS: Do you reserve the right, in your contract with a franchisee, to pass on a prospective ownership change?

MR. BURROW: Yes, we do.

ASSEMBLYMAN THOMAS: As I read this bill, you would have that right if they were not a corporation - although if they were a corporation, they could transfer their interest in the corporation to somebody without a franchise or having any say about it. Do you interpret it the same way?

MR. BURROW: I'm not sure if I could interpret it that way. It, to me, is somewhat vague in that area.

ASSEMBLYMAN THOMAS: Well, there seem to be two sections that are in conflict on this question of transfer of ownership. You won't have time now, but after this hearing, you might take a look at it and advise us as to what your legal opinion is.

I am talking about section 6 and section 8 (d). They seem to be in conflict and I would be interested in your views on that.

Does anybody have any questions?

ASSEMBLYMAN FAY: Mr. Burrow, would you tell us how many franchises have been terminated in New Jersey?

MR. BURROW: In New Jersey?

ASSEMBLYMAN FAY: Yes.

MR. BURROW: To my knowledge none. Presently the Trenton Holiday Inn is in receivership.

ASSEMBLYMAN FARY: How many?

MR. BURROW: No, I say in Trenton the Holiday Inn here is in receivership now. It is still a Holiday Inn, however, and we are working with the receiver, hoping to salvage something. But we have not terminated a franchise, to my knowledge, in the State of New Jersey.

ASSEMBLYMAN FAY: How many do you average nationally? Are some states more obvious than others as far as terminating of contracts?

MR. BURROW: No. Actually I will call it terminating for cause. We have many voluntarily surrendered or submitted to us for change of ownership which, in effect, means a new franchise - one thrown by the wayside and another coming in. But as far as termination, as you refer to it - or cancellation - over the 15 or some odd years that we have been in business, there have only been about six cancellations for cause.

We did run into a problem with I.T. & T. where they acquired about 16 Holiday Inns, many of them around this area. They did voluntarily surrender those licenses and convert them into Sheratons. So, in one sense, they might have been cancelled and terminated had they not surrendered them in that case.

ASSEMBLYMAN THOMAS: Are you familiar with the California Act, which is a disclosure Act?

MR. BURROW: Which Act?

ASSEMBLYMAN THOMAS: California's Disclosure Act.

MR. BURROW: Yes, I am basically familiar with that.

ASSEMBLYMAN THOMAS: That is not similar to this present proposal, is it?

MR. BURROW: No.

ASSEMBLYMAN THOMAS: Would your company favor the passage of an act comparable to the California Disclosure Act?

MR. BURROW: Yes, we would - definitely.

ASSEMBLYMAN THOMAS: Anything else?

I guess that is it, Mr. Burrow.

MR. BURROW: I have an associate from Holiday Inns with me. He is in the franchise field itself, he sells franchises, and did for many years in the New York-New England area, and he could possibly answer some questions, as they relate to our doing business in the states, if you care to hear from him - Mr Acker.

ASSEMBLYMAN THOMAS: If he has something he would like to contribute, why don't we hear from him.

MR. BURROW: Do you have some figures that you would like to present?

I think, basically, we want to show our interest in the legislation, although we are not fully prepared.

R O B E R T A C K E R: My name is Robert Acker; I am Director of Franchise Sales for the eastern United States for Holiday Inns, Inc., based in Memphis, Tennessee.

Just some statistics on Holiday Inns, nationwide or systemwide we have about 1,300 facilities open and operating, which represent about 190,000 rooms. In the State of New Jersey you presently have 28 franchised Holiday Inns open - three under construction and ten in the planning stage. The open facilities represent 3,800 rooms, the under-construction facilities represent 476 rooms and the planned facilites represent 1,500 rooms. We have one parent company facility in the State of New Jersey. Of course, basically, the 180 day - or 150 day - cancellation clause is what we are concerned with because we feel this could severely hinder the additional development of franchise facilities in the State of New Jersey - primarily because we are interested in protecting the Holiday Inn name which is, we feel, widely accepted by the traveling public. It is looked at as a standard of quality in the motel-hotel field.

Also, there is the fact that one bad facility reflects on the system as a whole and not maintaining our minimum standards, of course, would also reflect on the system in general. Basically I think that is it. If you have any questions--

ASSEMBLYMAN THOMAS: Do you have any figures on cancellation in any state?

MR. ACKER: No, I don't have any figures in front of me on cancellation but I concur with the figures that Mr. Burrow mentioned.

ASSEMBLYMAN THOMAS: Do you find that the ability to cancel on 30 days notice for either one of the two reasons mentioned by Mr. Burrow is sufficient to maintain the standards of your franchise operation?

MR. ACKER: I think it is. Of course, we do have inns failing these inspections from time to time, and we notify them and they are expected to bring the facility up to at least a minimum passing score. All of the facilities are able to attain this type of score with a minimum amount of effort on their part.

ASSEMBLYMAN THOMAS: I guess that is all. Thank you.

P A U L K R E B S: First I would like to thank the Committee for the opportunity of appearing. My name is Paul Krebs. I appear as a member of the Board of Directors of the Comsumers League of New Jersey, as a consultant on consumer affairs, and as the Former Director of the Office of Consumer Protection for the State of New Jersey and a member of the Bateman Commission that had its origin, I believe, in the need for codification and order in the whole question of the consumer's relationship to business, be it big or small.

I would like to say parenthetically here that as I came into this chamber this morning, I was accused of being an ally of big business because I was testifying against this bill. I think this is wrong and I think people ought to be allowed to come into a chamber and testify at a public hearing without attempted intimidation or with categorizing

because of position. I find it totally consistent with my interest in the consumers, for whom I happen to have spent my entire life working, to be opposed to this bill and not necessarily be an ally of big business.

I further submit for the record, my testimony before the Federal Trade Commission in Washington, D. C., in January of 1969, in opposition to the practices of big business and, namely, the automobile industry in their warranty and guarantee policy. I think that my record speaks for itself and I would like to then proceed with the testimony of Mrs. Zwemer who is unable to be here today, who is the President of the Consumers League of New Jersey.

(Reading)

The Consumers League of New Jersey is opposed to A 2063. It attempts to do the same things to which we objected in the self-regulatory board peoposals last year - namely to divide up the territory and seek almost absolute authority on the part of car dealers to manage the car dealer industry without interference.

During the past year, we have handled a number of complaints against car dealers and have had, in some cases, to refer the complaint to the car manufacturers who are now setting up active departments to handle these complaints. We also send complaints to Mrs. Virginia H. Knauer, Director of the Office of Consumer Affairs in the Executive Office of the White House, and I should say parenthetically also to the New Jersey Department of Consumer Protection, and we know that her office and their office contacts the manufacturers directly. Thus, the present system gives consumers two chances - one directly to the car dealer and then if that fails to the manufacturer.

We also consider any state legislation at this time as premature. The Congress is presently investigating the abuses in the operation of franchises as the basis of legislation for regulation on the federal level. And since you are dealing with a nationwide industry, it is our feeling that the only effective method of assuring the consumer equity in

the market place is for Federal regulation.

That is the statement that we want to make. Again, in closing, I want to thank the Committee for the opportunity of appearing here this morning and presenting not only the views of the Consumers League and of Mrs. Zwemer, its President, but my own views as a member of the consuming public who has had some considerable experience in this field. Thank you, gentlemen.

ASSEMBLYMAN THOMAS: Congressman, are you familiar with the California Disclosure Act?

MR. KREBS: No, sir, I am not.

ASSEMBLYMAN THOMAS: Are you by any chance - and this is kind of an unfair question - familiar with the bill which was just introduced last week by Assemblyman Katenbacher, A 2293?

MR. KREBS: No. I have read several times 2063, but I haven't seen Assemblyman Kaltenbacher's bill. I want to say that I know Assemblyman Kaltenbacher and worked with him considerably when I was Director of the Consumer Protection Department.

ASSEMBLYMAN THOMAS: He has introduced a bill that I understand is very similar to the California Disclosure Act and what it does really is provide information for a prospective franchisee, a full disclosure of what the relative situation is with respect to his proposed operation vis-a-vis the Franchise Law, so he can make an intelligent appraisal of what his chances of success or failure are going to be. Would the Consumer League favor that type of legislation?

MR. KREBS: I would say this - and again I have to speak as a person and as a member of the Board of Directors of the Consumers League - in the Office of Consumer Protection, we had several occasions to investigate shady franchise operations and I would say for the record there is adequate room for improvement in that field. But I say this bill has one purpose and that is to achieve the defeated purposes of S 581 that came before the Legislature and that in fact gave birth to the Bateman Study Commission that just gave

its report and the bill starting the legislation suggested in that study was signed by Governor Cahill on Tuesday.

ASSEMBLYMAN THOMAS: Give us a little bit of this history. What was the prior attempt? Did you say 251?

MR. KREBS: S 581. S 581 was known by several numbers because with each successive attempt to pass it, it was watered down. But initially S 581 was a bill designed by the automobile dealers to set up an Automobile Dealers' Licensing Board that would have taken out of the control of the Attorney General, and any other existing legislation on the statute books, control of that industry and put it originally in the hands of a board of nine people appointed by the Governor, six of whom, significantly, would have had to have been automobile dealers, licensed automobile dealers.

This Board would have had the right to issue franchises, deny the issuance of franchises, to revoke franchises, to penalize people, to collect the fines and spend the fines they collected in the name of the State as they saw fit, and use the services of the Attorney General to boot.

This was the reason largely for the establishment of the Study Commission that recently issued its report.

ASSEMBLYMAN THOMAS: Well, this particular bill doesn't set up the same type of regulatory board.

MR. KREBS: No, except that you have the added value here of controlling nationally an industry that needs control - let me say that - except that you do it on an overall basis. You don't do it piecemeal. Actually what happens here, we have just as many problems with automobile dealers who refuse to do repair work under warranties because they don't get as much money per hour for their workmen, for their mechanics, from the manufacturer under the terms of the warranty that they get from customers off the street. And you go to any consumer agency in the State and you will find their files replete with cases of complaints regarding people who can't get service that they have warranteed and graranteed under the terms of the purchase of a car.

ASSEMBLYMAN THOMAS: How would this bill prevent a new car purchaser from getting satisfaction?

MR. KREBS: It would take ultimately from the manufacturer the right to give people the service they are entitled to. Actually the local dealer, although he is a big business person himself in most cases, doesn't have the threat of losing goodwill that the corporation which is a national body does by the adverse publicity gotten from mishandling the warranties and the guarantees and the type of workmanship in the product.

ASSEMBLYMAN THOMAS: In other words, the insulation from cancellation which this bill creates is what takes away the protection from the public.

MR. KREBS: Yes, sir.

ASSEMBLYMAN POLICASTRO: Mr. Krebs, you are talking about the automobile dealers. What about the other people, the gasoline dealers, the gasoline stations? While you were head of the Consumers League, did you get a lot of complaints from them?

MR. KREBS: Not only against the gasoline dealers, the automobile dealers, but applicance dealers, franchisors in the sale of franchises dealing in detergents, in cosmetics, in any field you name. There were abuses galore and there is a need for protection, but I think it has to come from the national level. It is not a State, piecemeal problem.

ASSEMBLYMAN POLICASTRO: I won't argue that point. They are probably going across state lines. But we are talking about franchisors in this State.

MR. KREBS: Well, it is hard in the case of the automobile industry to consider this an intrastate industry.

ASSEMBLYMAN POLICASTRO: But not when they are dealing here and there and selling goods in this State. We have the right to do something about it.

MR. KREBS: I am sure you have the right. I am talking about the effectiveness. I don't challenge the committee's or the Legislature's right to enact legislation.

ASSEMBLYMAN POLICASTRO: If we wait for the Federal government, we will probably wait 20 or 30 years before we get a uniform law to do something about anything.

Thanks, Mr. Congressman.

ASSEMBLYMAN FAY: Mr. Krebs, do you have any records on these complaints? Say, a consumer was involved and you went to Washington and you went to the New Jersey department. Were there any effects on the local dealer or on the franchisor?

MR. KREBS: The Federal Trade Commission, I understand, is in the process now of evaluating its whole posture on warranties and guarantees and it is very likely that in the near future a more salutary policy will be enacted in terms of the needs of the consumers and the protection of consumers.

But you asked a question. Let me give you an answer to the first part of that. In the State of New Jersey - and this is pretty universal - the automobile industry comprises the second largest area of complaint on the part of consumers. First is home improvements. Second is the automobile industry. And this pertains not just to the State of New Jersey; it is nationwide.

ASSEMBLYMAN FAY: But after your complaints, do you have many results to show for the documentation of legitimate complaints about the franchisee or the franchisor?

MR. KREBS: Well, I would say the results of our efforts are the best evidence available and that is the number of times we have had to go to the corporation to get redress of the grievances of the offended consumers.

ASSEMBLYMAN THOMAS: Thank you, sir.

MR. KREBS: Thank you.

J O H N R. S E E G E R: My name is John R. Seeger and I am employed by Outboard Marine Corporation. I want to thank the committee for the opportunity to appear.

Outboard Marine Corporation is the manufacturer of Johnson and Evinrude outboard motors, as well as other products that are sold by a franchise method. We sell our outboard

motors, together with service parts and accessories, to retail dealers in the State of New Jersey and elsewhere. The relationship between Outboard Marine and the dealer is evidenced by a "Dealer Agreement" which is expressly stated to be of one year's duration. The currently existing Dealer Agreements expire annually on September 30, 1971, which is the end of Outboard Marine's fiscal year.

The retail dealer does not pay Outboard Marine for the privilege of becoming a dealer. The Agreement provides the terms and conditions upon which Outboard Marine will sell and the retailer will purchase Johnson and Evinrude motors, parts and accessories. It requires the dealer to maintain an adequate inventory and adequate service facilities in order that members of the public who purchase the motors may have proper repair service. It further requires the dealer to display on his place of business identification as a Johnson or Evinrude dealer, to do advertising at the local level, and to use his best efforts to promote the sale of outboard motors. The Agreement does not grant exclusive territory to the dealer, but simply indicates the area, such as "City of Newark", in which the dealer's place of business is located and states the address of the dealer's retail location.

There is no such thing as a retailer dealing solely in outboard motors, thereby we distinguish from gasoline and automobile in most respects. A so-called marine dealer will typically carry, along with his outboard motors, lines of boats, boat trailers, boat hardware and accessories and related products such as safety equipment. However, many outboard motor dealers are not typical marine dealers in this sense, in that they may also be engaged in the sale of collateral products such as motorcycles, bicycles, general hardware, sporting goods, etc. In general, small marine business is one of the last refuges of small and modest-size independent businessmen. The chain store and branch store concept has eliminated or tended to eliminate this type of man in many fields, but not in our marine business.

I describe in detail the nature of an outboard motor dealer to emphasize the fact that if a company such as ours were deprived of flexibility in changing its dealer organization, when it appears necessary - to achieve necessary market penetration and necessary service to the consumer - small independent dealers might well fall by the wayside. The potential exposure to liability, the treble damage provision of this bill - although I understand this has now been deleted - but such things could make it inadvisable to continue marketing to independent dealers and we might have to market through company operated outlets. We understand that the United States Department of Justice has criticized similar litigation on that basis - that it has a tendency to defeat its own purpose of protecting the small independent businessman. We do not make this statement in any spirit of threat. You may be assured we would like to continue to deal as we are dealing with our products, and permanently maintain independent dealerships.

We are well aware of the great increase in the franchise business in recent years and we would concede that some abuses may have arisen in certain types of franchising relationships. This might be particularly true where the franchisee is required to make a substantial payment just for the privilege of obtaining the franchise or to make large expenditures just to get into the business. He thereby becomes pretty much dependent on the good or ill will of the franchisor.

On the other hand, in our business and in many, many, businesses that we are involved in - such as the franchising of lawn mowers and chain saws, etc.- it is not typically required that the franchise be paid for or that the initial investment be substantial. For instance, in outboard motors, there are a number of outboard motors offered in the United States which would enable a competent merchant to replace one brand with another in case he were terminated by a manufacturer. No manufacturer likes to terminate dealers;there is a cost in money and manpower

in doing so and if the dealer is performing in a competent and reasonable fashion, there is no reason for him to be terminated. In our history of 60 years we have had mostly satisfied dealers who have maintained our franchises and we have been most satisfied with them.

Apart from these generalities, I would like to make a few comments on this particular bill. The test of percentage of gross sales - the 20% test - in our judgment is inadvisable. If this test were in terms of substantially all of the franchisee's gross sales it would be more meaningful. However, we feel that this provision would stimulate a manufacturer to deal only with large retailers who carried a wide variety of products. It may be a bit hard to conceive of automobiles, for instance, being put through other channels than their present dealerships but if you talk about appliances, outboard motors or other merchandise, there would be a tendency to go through the big chain stores, through discount houses, through mass marketers, rather than through independent dealers.

In the same connection, we feel that the phrase "or intended to be" in this section is wholly inappropriate since actualities of a situation should govern rather than intent of the franchisee.

In Section 5 there is a burden of proof apparently on the manufacturer to show good cause to the franchisee's failure to substantially comply with these requirements and the requirements must be "essentially reasonable and non-discriminatory." This language sounds inherently fair; on the other hand it is somewhat vague and I notice that in the statement in support of the bill there is a different approach. They speak of "clear and non-discriminatory standards." I might mention on this discriminatory thing, we have, for instance, dealers that vary in size from selling only a few outboard motors a year to selling hundreds. We require certain repair facilities but it would be inappropriate to require the same sophistication of repair facilities for all sizes of these dealers. So

we feel there has to be some flexibility left to the manufacturer in determining these requirements.

Section 7, which specifies "geographical area" is, in our opinion, contrary to, certainly, the spirit of competition. The previous person who testified, I thought, stated that position very well and I won't go into great detail but it seems to us that it is contrary to Federal Anti-Trust Law and to any anti-competitive spirit to require that a franchisee be given an exclusive territory regardless of his standard of performance, etc. We never have believed in adding too many dealers in a given area but we do feel that it is in the public interest to be able to vary the concentration of dealership as required by circumstances.

I will skip my comment on the treble damages.

In summary I would like to say that we believe that this bill is unclear and somewhat oppressive in its form. We are not totally opposed to reasonable legislation to govern this area but we feel that this particular bill is probably not - and we certainly do not think it is the proper vehicle for that purpose. Thank you.

ASSEMBLYMAN THOMAS: Mr. Seeger, do you have in your franchise contracts a right of renewal written into the contract.

MR. SEEGER: It is not automatic. They do expire each year. They are almost all renewed. We have a small percentage, of course, by attrition and also for non-performance reasons, that are not renewed. More frequently than not they are not renewed because the man is going out of business or has changed his brand. We are cancelled occasionally.

ASSEMBLYMAN THOMAS: Do you have in your contracts the right of termination before the end of the year period?

MR. SEEGER: Yes, we do - for non-performance. We also have a 30 day termination clause.

ASSEMBLYMAN THOMAS: Well, do you spell out what constitutes non-performance in your contract?

MR. SEEGER: It is non-performance of the specific provisions in the contract. We do have many specific performance provisions, such as maintaining good service in handling warranty, etc.

ASSEMBLYMAN THOMAS: Do you have minimum sales levels that must be attained?

MR. SEEGER: No, we do not, though, largely, because of the broad variations of circumstances. Small dealers on small lakes in resort areas can not possibly perform in the same manner as dealers in large cities. We have a broad spectrum of problems there.

ASSEMBLYMAN THOMAS: As you view this bill, would this give a franchisee a perpetual right to maintain his franchise?

MR. SEEGER: No. I would say non-performance could terminate that right. On the other hand I have a little trouble visualizing how a fair and workable standard of non-performance could be established.

ASSEMBLYMAN THOMAS: Does this bill establish a standard of non-performance?

MR. SEEGER: No, it does not specifically. However, it-- I would find it, in my situation of having to draft franchise agreements, hard to know whether I was complying with the bill in drafting those standards.

ASSEMBLYMAN THOMAS: Are you familiar with the California disclosure?

MR. SEEGER: No, I am not. I know of that type of bill but I have not read the California bill.

ASSEMBLYMAN THOMAS: Would your company favor that type of legislation - disclosure legislation?

MR. SEEGER: We certainly would not oppose it in general principle.

ASSEMBLYMAN POLICASTRO: Mr. Seeger, you don't know what the California bill is?

MR. SEEGER: No, I have not read the bill.

ASSEMBLYMAN POLICASTRO: You have no idea what it contains?

MR. SEEGER: No, I have heard things about it but I just do not have specific knowledge of it.

ASSEMBLYMAN THOMAS: Are there any other questions?

All right, we will switch now to those who are proponents of the bill.

J A C O B P E T U S K A: My name is Jacob Petuska; I represent the New Jersey Gasoline Retailers. I am the President of that Association. I reside at 35 Richard Street, Tenafly, New Jersey. However, I make my living by pumping gas; I am a gasoline dealer.

I speak in support of A 2063, principally because of the actions of the major oil companies. They are cancelling dealers, and have been throughout the years, through whims and for no definite reasons. Our dealers are never supplied with reasons for cancellation. They are sent a cold letter, sometimes with a 10 day cancellation clause, sometimes with a 30 day cancellation clause. Many times the dealer is kept waiting up until the final day before he knows what is going to happen to his belongings at that service station.

In many cases the dealer has put his last dollar into that station. He has mortgaged his home and, in some cases, the oil companies take that mortgage back as a second mortgage and we have had cases of threatened foreclosure of the man's home. Verbally reasons are given - sloppy service station and various other reasons - but the main reason seems to be that the company wants that location for, perhaps, a friend or a friend of the salesman or, perhaps, the dealer did not do their bidding in the line of pricing as we are having today.

If you gentlemen ride the highways you will notice time after time "under new management" in our service stations. The question was asked before of, I believe, Holiday Inn, how many cancellations have you had. I would like you gentlemen to ask that of any company official that may come along later on. I many cases, as I have said, the man has moved his family to the location, he is ready to do a job, he has

been doing a job and then suddenly he is cancelled.

As I say, the number of cancellations - I would say- at the moment are in the vicinity of 33 to 40%. And, gentlemen, I would like to tell you that our people are never in bankruptcy proceedings becuase they just lose their five or six or ten thousand dollars, fold up their tents and leave. There is no bankruptcy or anything else. I say to you that this law, this legislation, is good legislation and should become law in the State of New Jersey - to protect the small businessman, particularly the gasoline retailer.

Gentlemen, we have no where to turn when our leases are cancelled. The courts have - in recent days - the courts have been listening to us but not greatly. In the past we have had nowhere to turn. This bill will give us our day in court and that's all we ask, for our dealers to present their case in court and air why they are being put out of their livelihoods. And, gentlemen, if a dealer is fortunate enough to stay in his service station until his twilight days, so to speak, there is no good-will when he leaves that station. The oil company finds a new operator. He is asked to leave or if he is leaving of his own good-will, there is no good-will. He is paid for the merchandise that is in that location and, God forbid, if there is merchandise other than the company's, then you have to pack that into your garage or basement, etc.; they will not purchase the merchandise other than their products. Many times our dealers are forced to take a few thousand dollars worth of merchandise, fan belts, and the like, and store them somewhere or perhaps sell them to another dealer, if we are fortunate enough to find another dealer.

There have been flagrant cases, gentlemen, of what is happening to the gasoline dealer in the State of New Jersey and we feel that A 2063 is a good bill and should be passed.

I will answer any questions, gentlemen, if I can.

ASSEMBLYMAN THOMAS: Mr. Petuska, does the average

retail gasoline dealer have to pay for his franchise?

MR. PETUSKA: Well, there are several deals, sir. In my case - I deal with Sun Oil Company - we are asked to put up about-- anywhere from $2,500 to $5,000 in escrow. This is to make sure that you pay your bill. And for this, gentlemen, the Sun Oil Company pays 3%, in this day and age, on the $5,000 that they are holding of yours. In other companies they make you pay for the product as it goes into the ground and if by chance you should give a bad check - and this happens because we are working on marginal profit - you are then put on C.O.D. and no gas is put into the ground unless you have the currency there.

Another fallacy in our business, gentlemen-- this brings to mind the 24 hour clause where the companies, in many cases, will ask the dealer to be open 24 hours, despite the holdups, despite the killings, despite everything that goes on, they will ask the dealer to stay open 24 hours - and, gentlemen, this is a losing proposition in 90% of the cases.

ASSEMBLYMAN THOMAS: Do you enter into a contract with your franchisor?

MR. PETUSKA: Yes, sir.

ASSEMBLYMAN THOMAS: And does that contract call for the operation of your station for a stated period of time?

MR. PETUSKA: In some cases it does and in some cases it does not. Some companies stipulate hours and some do not.

ASSEMBLYMAN THOMAS: No, I am not talking about hours or operation. I am talking about how long your agreement with the company will run.

MR. PETUSKA: Length of contract is usually one year.

ASSEMBLYMAN THOMAS: And is there an option to renew contained in the typical contract?

MR. PETUSKA: No. Each year you have to decide the merits of the case, so to speak, and they have the right

of 30 days cancellation. In some cases, as I said earler, it is ten days.

ASSEMBLYMAN THOMAS: Well, is this something that the dealer and the company negotiate between themselves?

MR. PETUSKA: Well, gentlemen, let me say this: Nine times out of ten our dealers-- They should take these contracts - these franchise contracts - to their lawyers, etc., but the pressure is put on them to sign these things in a hurry and often they do sign them with clauses in them that should not be there.

ASSEMBLYMAN THOMAS: You say that there is, in a typical contract, a thirty-day right-of-termination. Are there any standards set forth in these contracts as to when termination can--

MR. PETUSKA: Well, it is usually on the anniversary date - 30 days before the anniversary.

ASSEMBLYMAN THOMAS: Before the year period is up, is there any right-of-cancellation?

MR. PETUSKA: Before the year period is up?

ASSEMBLYMAN THOMAS: Yes. Can they terminate before the year period?

MR. PETUSKA: They can - in many cases they can terminate before the year is up.

ASSEMBLYMAN THOMAS: Are the grounds expressed in the contract stating when they can terminate a contract?

MR. PETUSKA: No. No grounds whatsoever are set forth in the contract.

ASSEMBLYMAN THOMAS: Now, you mention leases and you also mention ownership of stations. Are both situations existent in your trade? In other words, do some retailers own their stations whereas others lease them from the company?

MR. PETUSKA: I would say, gentlemen, that about five percent of our dealers own their own stations. I happen to be one of them. Years ago I entered into a franchise with Sun Oil Company and realized that this was not anything I could live with so I bought my own property. This was twenty years ago and I am one of the few so called private

businessmen - independent businessmen.

ASSEMBLYMAN THOMAS: Well then, what is the - on the 95% that don't own their own business - what is the investment they must make? What would be the typical investment that a man going into your business must make?

MR. PETUSKA: I would say, today, between $10,000 and $15,000.

ASSEMBLYMAN THOMAS: What would that be for?

MR. PETUSKA: That would be to stock the station, tools, equipment, burglar alarms, dogs, what have you today for protection. Tools would be a big item in the service station business today.

ASSEMBLYMAN THOMAS: So it would be tools and the stock in trade?

MR. PETUSKA: Right.

ASSEMBLYMAN THOMAS: You said that there is a cancellation rate - and I don't know if you were referring to New Jersey or not - of 33% to 40%.

MR. PETUSKA: Yes, I am referring to New Jersey, sir.

ASSEMBLYMAN THOMAS: So between one-third to 40% of the retail gasoline station arrangements are cancelled each year by the company?

MR. PETUSKA: By the major oil companies, yes, sir.

ASSEMBLYMAN THOMAS: What is the typical reason for this cancellation?

MR. PETUSKA: Well, they give no reason, gentlemen. In their letters they merely state that they are the property owners and they would like their property vacated on such and such a date. In the letter of cancellation there is never a reason given.

ASSEMBLYMAN THOMAS: Mr. Petuska, how long have you been in business.

MR. PETUSKA: I have been a service station dealer for 40 years, sir.

ASSEMBLYMAN THOMAS: Can you tell me why you have managed to survive whereas there is this big turnover

in the rest of the industry?

MR. PETUSKA: Well, as I said before, I own my own property and there is no cancellation clause in my case.

ASSEMBLYMAN THOMAS: Well, can't they cancel? You sell Sunoco, is that right? Can't Sunoco cancel you insofar as selling their gasoline product?

MR. PETUSKA: Yes, they can but when you are selling a great quantity of gasoline there seems to be no ill-will and they are only too happy to stay with you, when you are the so-called boss of the station.

ASSEMBLYMAN THOMAS: Well, is then the lack of adequate performance the principal reason why there is a cancellation of these contracts?

MR. PETUSKA: No, sir, not by the dealer.

ASSEMBLYMAN THOMAS: Well what is? Do you mean to say that the only reason is that he wants to give it to his brother-in-law?

MR. PETUSKA: No, I stated several reasons, sir. At the moment one of the biggest reasons for cancellation of our dealers is the price. If you ride up and down the highways, you will see signs, "save 4¢, save 5¢, save 7¢."

ASSEMBLYMAN THOMAS: I don't see that very often, where I buy my gas.

MR. PETUSKA: Well, you ride the highways and you will see them.

Gentlemen, this is forced on the dealer by the major oil companies. In the papers they will tell you they are giving concessions and rebates to help the dealer. Sure, they help the dealer after he is bogged down through their doings. At the moment they are asking the dealer to go down anywhere from 4¢ to 6¢ and they are footing the bill for about 2¢ of it. This is at the moment. And if you ride through the streets of Trenton, gentlemen, you will see a very sad situation in the gasoline industry.

ASSEMBLYMAN FAY: I just want to reiterate a few points. Are there any other leases beyond one year?

Does the oil company insist upon the one year contract?

MR. PETUSKA: In the main they are one year leases.

ASSEMBLYMAN FAY: You made one statement that they could cancel in as short a period as 10 days.

MR. PETUSKA: Yes, there are 10-day cancellation clauses.

ASSEMBLYMAN FAY: And that is in the contract and therefore they can, and they do do this?

MR. PETUSKA: Yes.

ASSEMBLYMAN FAY: Now, when you as a group - when the dealers as a group -- Is there one company more abusive than the other or is this an industry problem.

MR. PETUSKA: This is industry-wide.

ASSEMBLYMAN FAY: I see. There are no good guys or bad guys?

MR. PETUSKA: No.

ASSEMBLYMAN FAY: And how do you feel that this bill in particular - the major thrust of this bill - will alleviate many of these abuses?

MR. PETUSKA: Well, gentlemen, number one - as I understand the bill, and I am not a lawyer - they will have to give us 150 days' notice. A man can get his house in order somewhere along that line instead of 10 or 30 days. And then we will have our day in court, gentlemen, and that's all we ask, that we will be able to go to someone who will listen to our side of the story. That's all we ask in this bill and we are happy to see a bill such as this that is simple and it is asking for our day in court - someone to listen to our side of the story which we have never had in the State of New Jersey before.

ASSEMBLYMAN THOMAS: Do you have a lawyer that is going to testify sometime during this proceeding?

MR. PETUSKA: I believe so, yes.

Gentlemen, I'd just like to say before I leave that the major oil companies have polluted our waters in this country, they have polluted our air and they are trying

to pollute our minds. Gentlemen, I think we should bring this to a halt. Thank you very much.

R O B E R T M. B U R D: Chairman Thomas and Members of the Assembly Judiciary Committee. I wish to thank you for this opportunity to appear before you and testify in behalf of Assembly Bill 2063.

My name is Robert M. Burd, and I am President of the New Jersey Automobile Dealers Association, President of Warren Volkswagen, Inc., and a resident of Washington, New Jersey, Warren County. With me is Mr. Walter W. Stillman, New Jersey's Director of the National Automobile Dealers Association, a Past President of our State Association, and a Buick-Opel dealer in Englewood. Mr. Stillman resides in Tenafly.

We are here to answer any questions you may have following the testimony I present on behalf of our Association, which strongly supports the passage of A-2063, the "Franchise Practices Act."

It is a privilege to speak on behalf of over 800 local New Jersey businessmen who are members of our Association and many of whom are in your audience today. We urgently request your help in lending a measure of stability and security to the conditions under which approximately 30,000 employees of new car dealerships in this state earn their livelihood.

Not only does this bill affect our industry, but if passed, it will be of immeasurable help to thousands of other New Jersey businessmen and their employees who operate other franchised enterprises. Franchising is big business in the United States and in New Jersey. By and large, franchisors are large national corporations - many are industrial giants. Franchisees, on the other hand, are relatively small local businessmen. The franchisor-franchisee system has been an ideal compromise between big business merchandising and independent "little guy" control of his own destiny.

Products merchandised range from beer, soft drinks, bicycles, mufflers, transmissions, pianos, automobiles, gasoline products, motel and restaurant services, to such items as hamburgers, doughnuts, and chicken.

As of 1968, we understand nationally there were approximately 700 franchisors and more than 500,000 franchisees who accounted for more than 80 Billion Dollars in annual sales, or approximately 10 per cent of the Gross National Product and more than 20 per cent of all retail sales. Since then, the figures have grown, and few will argue that the franchise system of merchandising has become the fastest growing industry in the United States.

Opponents of this measure may argue that to even moderately define the present franchisor-franchisee relationship -- as does this bill -- is a disruption of the free enterprise system, or the "Great American Dream". Gentlemen, it is precisely these very ideals we are trying to preserve. We believe that the New Jersey Legislature has an opportunity to step to the forefront among the states with this bill. It does no more than to provide a small measure of balance in a present one-sided relationship. It sets forth standards of performance for each party where none now exist.

ASSEMBLYMAN THOMAS: Mr. Burd, could I stop you for just one minute?

MR. BURD: Yes, sir.

ASSEMBLYMAN THOMAS: Will you tell me where it sets forth standards? You just mentioned that this bill sets forth standards of performance.

MR. BURD: We are asking in this bill, Mr. Chairman, for the manufacturer to set forth standards of performance.

ASSEMBLYMAN THOMAS: Will you point to me where in the bill it does that? Would this be better left to your

lawyer who is going to testify? You may not be that familiar with the sections of the bill, I don't want to--

MR. BURD: Well, we will answer that later or if you would like, right now, sir. Our attorney, I assume, will testify later. Will that be alright?

ASSEMBLYMAN THOMAS: Yes.

MR. BURD: A-2063, if enacted, will see New Jersey moving to protect the legitimate interest of its small businessmen in coping with this unique imbalance that is generally present in the franchisor-franchisee relationship. This imbalance results from a small businessman being completely dependent on a franchise issued by a national corporation with its vastly greater economic power.

At the core of the franchise relationship is unilateral control exercised by the franchisor over every aspect of the franchisee's business. The franchisor controls the business location, purchases from other vendors, methods of business operations, labor practices, quality control, merchandising, and even record keeping. There is a marked intentional and constantly emphasized disparity in the position of the parties -- the franchisors combining the roles of father, teacher, and drill sergeant, with the franchisee relegated to the roles of son, pupil, and buck private, respectively.

If you had such control, would you voluntarily give it up?

The franchise agreement in many cases is not a matter of mutual consent but actually a contract of adhesion -- either take it or leave it. While all franchisors prefer their franchisees to succeed, the franchisor's success is not tied to that of any individual franchisee.

It is the purpose of this bill to set forth standards of performance, guidelines, and responsibilities, which both parties must follow. We ask that, rather than one party making all the rules to satisfy his own needs, both parties meet responsibilities to each other, and with the court system of New Jersey acting as an arbitrator. We feel this subject so vitally affects the general economy of this state and its public interest and welfare that it is necessary to define the relationships and responsibilities of franchisors and franchisees.

I am sure that you will hear from representatives of a number of other franchised industries, so the balance of my testimony will be limited to the impact of A-2063 on the automobile industry, one of the earliest forms of franchising.

The very existence of a new car dealership depends on its franchise. Each franchise specifies a product to be merchandised. Thus, a Chevrolet dealer cannot readily shift to Ford, or even to another General Motors product. A Chrysler dealer, should he lose his franchise, cannot begin selling Buicks on his premises. New car dealers have a heavy personal investment in one-purpose facilities. When these facilities cannot operate for that purpose, they have little worth for anything else.

Today, the automobile manufacturer has a wide latitude in applying to his dealers different standards of performance -- often unreasonable standards -- which are enforced at the whim of zone and regional personnel far removed from top management.

This law, if enacted, would require all concerned to pause carefully and consider their actions. For example:

A-2063 gives no one an outright guarantee that he can retain his franchise no matter how he does business. Instead, it guarantees his franchise as long as he continues to meet standards imposed by his franchisor on all other franchisees in comparable situations. If the bottom line on his profit and loss statement is written in red, he will go out of business whether or not his franchisor acts to expedite that result.

Indeed, we must expect a continued reduction in the number of dealerships. Today there are some 26,000 retail automobile dealers in the nation. This number has dropped by about 1,000 dealers per year. In New Jersey, there are now less than 1,000 dealers; in 1950 there were 1,579 franchised dealers in this state. Normal economic pressures will continue to force marginal operations out of business. This bill does nothing to inhibit such normal play of economic forces.

The greatest threat under which any franchisee must operate is the threat of cancellation, termination, or failure to renew a franchise. This bill requires a franchisor to notify a franchisee of his intent to act, and the reasons for such action; and the reasons must be for good cause.

This requirement would not be unique in New Jersey. In regard to the automobile industry, 14 other states have laws guaranteeing that a franchisor cannot arbitrarily cancel, terminate, or fail to renew. The states are Arizona, Florida, Hawaii, Iowa, Massachusetts, Mississippi, Nebraska, Nevada, South Dakota, North Carolina, Tennessee, Wisconsin, and our neighbors, New York and Delaware.

Under A-2063, a franchisee is given security against the arbitrary introduction of a similar franchise in a geographical area -- only if such an area is assigned to him by his franchisor. Furthermore, this protection would prevail only if the existing franchisee is not doing the job the franchisor requires of other franchisees who are similarly situated. Should the franchise be located in a rapidly expanding area which can no longer be served by the existing franchise, the franchisor is perfectly free to authorize additional franchises.

Do not be misled by opponents' claims on this subject. The standard is clear, and as it applies to our industry, there are presently five states which have this requirement as a matter of law -- Arizona, Florida, Iowa, Massachusetts, and Wisconsin.

An important feature of this bill is its requirement of adequate notice of change by both the franchisor and franchisee. Today, an automobile manufacturer can almost close a dealership overnight, basing his action only on standards he applies to that dealer alone.

The bill requires the dealer to give the manufacturer adequate notice of his intention to sell his franchise to another. He must provide full information concerning the character, financial ability and business experience of a purchaser. If these qualifications are not adequate, the franchisor retains the right to disapprove the sale. Is this not fair?

Within the past six months alone, Massachusetts and Mississippi have enacted laws clarifying the right of a dealer to transfer or sell his dealership without arbitrary interference by the manufacturer.

Many automobile dealers who have devoted a lifetime to the development of their business would like, as they grow older, to lighten some of their responsibilities of ownership and management. They may want to sell a part of the business, most likely in the form of stock, to their executives. They may want to capitalize a portion of the value of their dealership through the sale of stock to the public. This bill would give a New Jersey automobile dealer the same right to sell an equity interest in his business that is possessed by most other businesses -- indeed, by such companies as General Motors, Ford, Chrysler, and American Motors. Such a transaction would in no way diminish the franchisor's right to establish and maintain reasonable and non-discriminatory standards of business performance by the franchisee. This right is also new statutory language in Iowa and Massachusetts - again within the last six months.

Perhaps the most important aspect of this bill is the fact that government would NOT interfere in the manufacturer-dealer relationship. A-2063 would utilize our own State courts -- the traditional forum for resolving disputes between businessmen -- as the arbitrator of any dispute that may arise in the franchise relationship. The bill, however, would define clear limits and standards of proof under which the courts would make their judgment. Today in New Jersey, a franchisee has no automatic right to obtain an injunction against a capricious cancellation. Without adequate notice or injunctive relief -- both of which are provided in A-2063 -- a dealer could be put out of business immediately.

Yes, a dealer can take his cause of action to court today, and he can go through the expensive process of retaining legal counsel to fight an action against the powerful manufacturer, who is supplied with the best in legal talent. If he is

really well heeled, he can attempt to fight the dispute through the Federal courts under the 15-year old "Dealer Day In Court Act", but few dealers are able to finance such an action. By the time a dealer obtains a court ruling, his place of business could long since have been closed. Even if he wins in court, he would most likely find it almost impossible to renew operations. A-2063 would give the small businessman adequate time to begin a court action to preserve his business. The bill's specification of injunctive relief "where appropriate" would be an important guideline for the courts.

I understand that the Committee has under consideration a number of amendments, including changes in notice requirements, voluntary abandonment of franchises, defining a "Place of Business", covering conviction of franchisees on indictable offenses, reducing the criteria to "reasonable and non-discriminatory", further defining the court defense for a franchisor, and eliminating treble damages.

We concur with these proposed amendments as <u>fair to all concerned</u>.

With these amendments, we feel you as a legislator will be voting on a bill that is even handed and which restores a balance to the ever growing field of franchise operations. We feel this will work not only to the benefit of the franchisees but also the franchisors, and above all the public of New Jersey which is served by franchise operations.

If A-2063 becomes law I would venture the prediction that automobile dealers will very seldom have to go to court in order to apply its protections. Today, much of the pressure on dealers -- to sell to a particular buyer of the

business, to elevate or not elevate a certain person to a managerial position, or to take any of a score of other actions that a dealer might not do on his own -- is applied verbally by zealous representatives of the manufacturers operating at the lower executive levels. This bill would force the franchisors to put these demands in writing. If they have to do that, I am sure they will pause and deeply consider their actions and that they won't be making unreasonable demands.

On behalf of our members, I want to express particular thanks to the members of this committee who voted to move this hearing date up from the originally scheduled date of April 16. That late date would have denied us the opportunity to seek a vote on this vitally important measure from both houses of the Legislature. We are most hopeful that this committee will act promptly on A-2063 so that the full membership of the House can decide whether we are to have this minimal security in the conduct of businesses upon which the livelihoods of so many New Jersey families depend. Thank you for your interest.

ASSEMBLYMAN THOMAS: Mr. Katz, are you going to have a lawyer testify?

MR. KATZ: Yes, sir.

ASSEMBLYMAN THOMAS: Is he going to be next?

MR. KATZ: He is going to wind up.

ASSEMBLYMAN THOMAS: I have some questions that I want to ask of your lawyer rather than of one of these witnesses because I think it would be more appropriate and I don't want to run out of time.

MR. ALAN DAVIS: Sir, I would be glad to answer your questions now. I thought we could compile all the problems on both sides of the fence and deal with them at the very end. If you prefer - I have been making notes of the various problems as they have come up during the testimony of both proponents and opponents.

ASSEMBLYMAN THOMAS: For instance, a lot of statements have been made during the course of this testimony and I don't really know whether it would be fair to ask this witness the questions.

MR. ALAN DAVIS: I would prefer, if they are of a very legal nature as to the operation of the bill in the courts or otherwise, that you address those questions to me because I think I will be able to deal with them in the context of legal procedures and things of that sort.

ASSEMBLYMAN THOMAS: Mr. Burd, you are a Volkswagen dealer, is that right?

MR. BURD: Yes. I am a former Chevrolet dealer, I am a second generation in the business and I left the Chevrolet dealership to-- I was the dealer principal in the Chevrolet dealership.

ASSEMBLYMAN THOMAS: As a prospective dealer, did you enter into and negotiate a contract with the manufacturer of Volkswagens?

MR. BURD: Yes, sir.

ASSEMBLYMAN THOMAS: And does your contract call for the existence of the contract for a certain period of time?

MR. BURD: Yes, sir.

ASSEMBLYMAN THOMAS: How long does that run?

MR. BURD: Well, this varies according to the standards that they apply in Volkswagen and,if you reach the standards that they require,you are given a two-year contract. If not,you are given a one-year contract.

ASSEMBLYMAN THOMAS: Well, how long is your contract?

MR. BURD: It is a two-year contract, sir.

ASSEMBLYMAN THOMAS: And is there an option to renew at the end of the two year period?

MR. BURD: I would prefer that be answered legally. I don't think I am qualified to answer that.

ASSEMBLYMAN THOMAS: Well, who negotiates this contract on your behalf?

MR. BURD: I do.

ASSEMBLYMAN THOMAS: Well, can't you tell me whether you have a right to renew your own contract? I'm not talking about generally--

MR. BURD: Well, I can renew it under certain circumstances.

ASSEMBLYMAN THOMAS: Well, that's what I am trying to find out. What is your situation?

MR. BURD: What is my situation? Well, it is very good, sir.

ASSEMBLYMAN THOMAS: No-- Under what circumstances can you renew your contract with Volkswagen?

MR. BURD: Well, that depends on what they are at the particular contracting time.

ASSEMBLYMAN THOMAS: Well, what are they now?

MR. BURD: Well, I have a contract now. I am working under contract.

ASSEMBLYMAN THOMAS: All right.

MR. BURD: Do you mean what were they the last time? This would be wasting your time, sir, I think they would go on in any number or they could be very small.

ASSEMBLYMAN THOMAS: Well, don't you have certain circumstances under which the contract determines whether or not you have the right to continue for another two year period?

MR. BURD: Well, again, this I--

ASSEMBLYMAN THOMAS: You don't know.

MR. BURD: Well, I wouldn't say I don't know but it is debatable - the language of the contract.

ASSEMBLYMAN THOMAS: Well, a contract, if it is a contract, isn't debatable.

Do they have the right to terminate your contract before the end of a two-year period?

MR. BURD: Yes.

ASSEMBLYMAN THOMAS: Under what circumstances?

MR. BURD: By not complying with the regulations that they apply.

ASSEMBLYMAN THOMAS: Are these regulations that they set forth unreasonable regulations?

MR. BURD: Not as far as Volkswagen is concerned, no, sir.

ASSEMBLYMAN THOMAS: And this is something that you and the manufacturer work out between yourselves?

MR. BURD: Well, a group of people. I would like to go on record although - and you are forcing me to do this, Mr. Chairman - as a whole I don't --

ASSEMBLYMAN THOMAS: I'm not forcing you to do anything.

MR. BURD: Well, I'd like to make a statement then because I have a very uneasy feeling.

On the whole, I don't think Volkswagen dealers have a gripe with the manufacturer or the contracting people because they have always had an ideal relationship because they set forth standards of practice that are equal to everyone within their industry. So I think it is a known fact that they have never had a problem, that I know of, in our immediate area. So I think we are wasting the committee's time by pursuing what Volkswagen's contracting arrangements are.

ASSEMBLYMAN THOMAS: Well, what do you know about Chevrolet?

MR. BURD: I would like to allude to Mr. Stillman who has--

ASSEMBLYMAN THOMAS: Don't worry about wasting our time; let us be the judge of that.

MR. BURD: Well, I wish you would ask these questions of Mr. Stillman and I think he could give you better answers to your questions, sir, than I could at this time.

ASSEMBLYMAN THOMAS: Well, I just want to find out what the dealers relationship is with the manufacturer. You are a dealer and that is why I was asking you those questions.

MR. BURD: Our relationship, as far as Volkswagen dealers are concerned, is excellent.

ASSEMBLYMAN THOMAS: Then you have no complaints at the present time?

MR. BURD: Yes, sir. I have a financial interest in a Chevrolet-Oldsmobile dealership.

ASSEMBLYMAN THOMAS: In addition to your Volkswagen dealership?

MR. BURD: Right.

ASSEMBLYMAN THOMAS: I should be so unlucky. Tell me what your complaints are in that area.

MR. BURD: Well now, again, I can go back - I was born in the business and we have been a successful business but my complaints have been that we have to live under a constant threat. If this is taken up with higher up people in the corporation, they know nothing about this.

ASSEMBLYMAN THOMAS: Do you mean the threat of termination?

MR. BURD: The threat of termination - through their zone and regional personnel.

ASSEMBLYMAN THOMAS: Well, I take it then you have a contract with General Motors in the other dealership that you have an interest in.

MR. BURD: Right.

ASSEMBLYMAN THOMAS: How long does that contract run?

MR. BURD: Again, I would like Mr. Stillman to answer these questions. He is a General Motors dealer and he has recently signed a contract, where I haven't.

ASSEMBLYMAN THOMAS: Well, you seem to indicate some dissatisfaction with your arrangement with General Motors. I wondered what that was. Express that as opposed

to your arrangement with Volkswagen.

MR. BURD: Would you repeat that question, please?

ASSEMBLYMAN THOMAS: You seem to express some dissatisfaction with your arrangement with General Motors; I wondered what it was.

MR. BURD: Yes, it is a one-sided arrangement, whereas the Volkswagen arrangement isn't; it is a two-sided arrangement.

ASSEMBLYMAN THOMAS: In other words it was a bargaining process that went between you and Volkswagen when you entered into your agreement?

MR. BURD: Well, in some cases we could say there was a bargaining process, yes.

ASSEMBLYMAN THOMAS: Doesn't that bargaining process exist when you negotiate - or aren't you able to negotiate with General Motors?

MR. BURD: We are not able to negotiate a contract.

ASSEMBLYMAN THOMAS: You mean you take a contract on their terms or you don't take it?

MR. BURD: Right.

ASSEMBLYMAN THOMAS: Are you losing money on your other dealership?

MR. BURD: Well, I think that is a personal question, sir. We have lost money, yes. I don't see where that has anything to do with it.

ASSEMBLYMAN THOMAS: Well, isn't that a part of this whole hearing and this whole bill - we are doing something to protect the dealer, aren't we?

MR. BURD: Yes, sir.

ASSEMBLYMAN THOMAS: We are trying to find out where you have to be protected.

MR. BURD: Our rights need to be protected.

ASSEMBLYMAN POLICASTRO: Excuse me, he said that it is a one-sided deal. He already answered the question.

ASSEMBLYMAN FAY: Mr. Burd, were you listening when the gasoline retailers went on record that it is just one series of abuses - that no one company is more guilty

than the other of abusing the gas dealer? Now, the same question is being posed here and from what I can gather, Volkswagen isn't as guilty as, say, General Motors in dealing with the franchisee.

Before we had no qualifications - there was abuse right down the line. Now we seem to have a qualification that one company is dealing differently with the franchisee than the other. Is that fair?

MR. BURD: Yes, you put it very well, Mr. Fay; that's exactly correct. I can go a little further to say that when I did deal with General Motors I had many satisfactory dealings with them - many satisfactory dealings. Believe me, we are not here on a witch hunt, as an association or as a group of dealers, to take on the manufacturer or to get an unfair position on them. We are a little bit like the man with the gasoline dealers who stated, we merely want a buffer between them and us - and that would be the courts of New Jersey. I don't see what's unfair about that.

When a major manufacturer cannot be held responsible for what their so-called junior or minor executives are saying within your place of business, then we have a problem.

ASSEMBLYMAN THOMAS: Could you tell me some of the so-called abuses that exist, or have been demonstrated against the dealers by the manufacturers in cancelling dealerships?

MR. BURD: Anything that might be to their benefit at that particular time. It could be as far as car distribution is concerned, if they had an overproduced market. It could be on an advertising campaign. It could be on any kind of campaign whatsoever to promote their product that you might not be in favor of but you would have to buy. I can go on and on, Mr. Chairman.

ASSEMBLYMAN THOMAS: Well, what I am after is, do you know of any instances - specific instances - where a manufacturer has arbitrarily cancelled a dealership, without good cause?

MR. BURD: No, sir, I don't but I think I know

the reason why they don't. They have many other ways; all they have to do is start slowing up his product. They can start shipping his parts in error to somebody else. They can go on and on and harass him to a point where he is not financially able to stay in business.

Again, as I stated earlier, we have a one-purpose building and today it doesn't take a very big dealership to eat up one million dollars to get into that one-purpose building. So they have quite a hammer over your head right from the beginning.

ASSEMBLYMAN THOMAS: How does this bill prevent that kind of harassment?

MR. BURD: I beg your pardon?

ASSEMBLYMAN THOMAS: How does this bill prevent the kind of harassment you just gave us as an example?

MR. BURD: It would stop them from coming in and making these threats because we would have the court to decide whether we live up to the proper standards of performance that they set.

ASSEMBLYMAN THOMAS: I don't think you understood me, Mr. Burd. You indicated that the company could harass you by slowing up the sending of automobiles, the misdirecting of parts, not sending parts that you order, etc. How would this bill prevent that kind of harassment?

MR. BURD: Because they wouldn't be living up to their standards if they didn't send you the proper amount of cars that you were allocated or agreed to receive. It seems simple to me. You would need parts to service the cars that were out there, if you want to use that as an example.

ASSEMBLYMAN THOMAS: I am very interested in the standards and I am not asking this question of you but I am directing it to counsel who is going to testify because this is one area that I am particularly interested in hearing something about.

MR. BURD: Again, I would like Mr. Stillman to answer that because he is a very learned person.

ASSEMBLYMAN TURNER: Mr. Chairman, can I ask a series of questions?

Mr. Burd, I'd like to ask you a series of questions, as president of the New Jersey Automobile Dealers Association, from your knowledge in that capacity as well as a dealer. Are you saying that there are certain automobile manufacturers, that you have direct or indirect knowledge of, that suggest to the automobile dealer what lines he would move? In other words, the Electra rather than the Special - being one of the examples? Are you saying that the corporation uses its authority in having a contract to force a dealer to move one type of product versus the other?

MR. BURD: Under the threat.

ASSEMBLYMAN TURNER: Inference?

MR. BURD: Yes, sir.

ASSEMBLYMAN TURNER: Are you saying that there are instances where an automobile dealer cannot get bumper-faced bars or quarter panels or some other parts he needs as a result of some home office pressure?

MR. BURD: Yes, sir.

ASSEMBLYMAN TURNER: : And is there anyone, to your knowledge, who is prepared to testify - either today or to be available to testify to that?

MR. BURD: I think he would be a fool if he did, sir. Under the present laws we have, I think he would be a fool. But there are other people who are listed to testify that maybe would--

ASSEMBLYMAN TURNER: Yes, sir, but you are the president of the Association. There is--

MR. BURD: Not to my knowledge.

ASSEMBLYMAN TURNER: All right. Additionally, are there certain instances where a franchise dealer, in a certain area, has another dealer move in close-by in the same adjacent area which is owned by the corporation?

MR. BURD: Yes, sir. This is known as a factory store.

ASSEMBLYMAN TURNER: And how does that affect your industry?

MR. BURD: Well, it affects it in many ways. It severely hampers the position that the dealer - the individual dealer - is in on a trading position, at that point, as far as the cost of his products and many favors that could be done to the so-called factory store.

ASSEMBLYMAN TURNER: Particularly when the industry is slow, when the industry wants to move its product, is that when it is more important?

MR. BURD: Well, I would say that could be one factor as far as they are concerned but it could also be used for other reasons.

ASSEMBLYMAN TURNER: In other words it could be a way of affecting the franchise?

MR. BURD: Yes, sir.

ASSEMBLYMAN TURNER: Do you know of many instances of that in New Jersey?

MR. BURD: Well, I know of many so-called factory stores but, again, only by hearsay and not by absolute proof.

ASSEMBLYMAN TURNER: Are you aware of any of the litigations that arose as a result of that?

MR. BURD: Not where I could discuss it.

ASSEMBLYMAN TURNER: That's all.

ASSEMBLYMAN THOMAS: Just a couple of questions, Mr. Burd. Do you pay anything for your franchise?

MR. BURD: Not directly, no, sir.

ASSEMBLYMAN THOMAS: Now does the typical dealer own the facility that he uses - for instance the land, the garage, the salesroom, etc.?

MR. BURD: The usual - how did you state that, sir?

ASSEMBLYMAN THOMAS: The typical dealer.

MR. BURD: Right. The typical dealer does, yes.

ASSEMBLYMAN THOMAS: Unlike the gasoline retailer?

MR. BURD: Right.

ASSEMBLYMAN THOMAS: So you own your land, you put up your own building, you put up your own showroom, you

invest in all of the necessary tools and mechanical devices you need to maintain your repair shop, etc., is that right?

MR. BURD: Yes, sir.

ASSEMBLYMAN THOMAS: What type of investment are we talking about, if you start from scratch? The usual?

MR. BURD: That would be impossible to answer because they could start a dealership, I would say, from a minimum of 50 to 75 cars up to 1,500 a year.

ASSEMBLYMAN TURNER: Can you give me some idea of what we are taling about? Is it $5,000 to start, or $100,000 to start, or $500,000 to start?

MR. BURD: Well, I would say a typical 300 car dealer - that would be to sell 300 new cars, and possibly maybe another 300 used cars, and the amount of parts that would be required to go along and substantiate a service business and the tools and the lifts, etc. - working capital would cost about one-quarter of a million dollars, today.

ASSEMBLYMAN TURNER: Sir, you said you don't pay anything for your franchise; is that what you said?

MR. BURD: Right, sir.

ASSEMBLYMAN TURNER: How long have you been in the automobile business?

MR. BURD: I was born in it.

ASSEMBLYMAN TURNER: You were born in it - do you expect to die in it?

MR. BURD: Boy, I hope not.

ASSEMBLYMAN TURNER: Why I asked that question in that manner is that, you know, the question of franchise as being dollars and cents - it sounds like you put something in it besides money.

MR. BURD: Yes, I have put-- My father has put a lifetime of work in it and I am involved, I have a brother who is involved, I have a set of twin sons out of college now involved and I have a grandson and I hope he gets involved.

ASSEMBLYMAN TURNER: Wouldn't you say that is an investment?

MR. BURD: That's a much bigger investment than

dollars, yes, sir.

ASSEMBLYMAN TURNER: Let me ask you a question. Isn't it a fact that many automobile dealers have to rely on a floor plan.

MR. BURN: I beg your pardon.

ASSEMBLYMAN TURNER: A floor plan.

MR. BURD: Yes, sir.

ASSEMBLYMAN TURNER: Do you know any that don't have to rely on a floor plan?

MR. BURN: Yes, sir.

ASSEMBLYMAN TURNER: Most of them do, however, have to rely on a floor plan.

MR. BURD: Yes, sir.

ASSEMBLYMAN THOMAS: What is a floor plan?

ASSEMBLYMAN TURNER: Well, that is something that might be interesting here. A floor plan is where somebody else -- where you are financing the automobiles. Is that not true? Maybe you should explain.

MR. BURD: Yes. A floor plan -- when a manufacturer contracts with you, you are obligated to have a line of credit. Now there are several manufacturers who have their own finance company. The three major manufacturers have their own finance companies. Usually the floor plan arrangement is made with these companies.

So, again, if it were a company store that were opposing you, you could see one of the biggest favors that could be played, or a competitive edge put on someone.

ASSEMBLYMAN TURNER: Particularly when you were forced to buy so many of each category of product; isn't that true?

MR. BURD: Right.

ASSEMBLYMAN TURNER: And particularly when you have to pay financing on these cars every month and you couldn't sell them; isn't that true?

MR. BURD: Right. Very much so.

ASSEMBLYMAN TURNER: Thank you.

MR. BURD: Thank you, sir.

W A L T E R W. S T I L L M A N: My mane is Walter W. Stillman. We have been a Buick agent since 1908 and I have been personally involved in the business for 50 years.

This bill really only imposes on the franchisor the obligation that they safeguard their interest through the application of fair and reasonable and non-discriminatory standards and that they apply the rule of reasonableness and non-discrimination in their implementation of those standards and their judgment of and their action toward their franchisees in regard to the same.

This bill also defines the rights of each group in the matters vital to their economic existence. One has to believe that the franchisor, in opposing such a reasonable bill, must do so with the thought that at some time they may wish to act unreasonably and/or discriminatorily toward their franchisee and they wish to keep the door open to permit them to do just that.

Now,gentlemen, we are talking about a tremendous big business and you have to look at the situation the way it is, not the way it is meant to be. The manufacturers have very, very, few standards of performance and those that they have are subject to a great deal of interpretation and this is where the rub comes. They want to interpret them one way and the dealers want to interpret them the other, and somebody has to arbitrate this. There is no arbitration in the business today, with the exception that the Ford Motor Company and General Motors have both set-up processes of arbitration and in General Motors they have hired an ex-Federal Judge to act as arbitrator. In the last 20 cases that have come before the judge, only one of them has been - the decision - has been rendered in favor of the dealer. We don't feel that anything short of the decision of a disinterested party is acceptable to the automobile dealers.

You have asked some very interesting questions about standards of performance. There was a very interesting case in Pittsburgh here a while back, where Chrysler cancelled a dealer and when it got into court - this dealer was

cancelled, incidentally, and out of business for two years when it finally did come to court, so it was sort of an academic situation - but when it did come to court the judge asked Chrysler why they were cancelling and they said because he had not maintained the national average of penetration. The judge looked at him and said, well,that is very fine, we will permit you to cancel this dealer - you have already done it - but if you want to take this attitude, every year you are going to have to cancel 50% of your dealers.

You see, the manufacturers have a great way of using their ability to cancel you and non-renew and force situations upon you as a threat of cancellation - situations that are completely discriminatory at times. All we are asking for in this bill - and what this bill will do - is to force the manufacturer to set certain standards of performance and then it will force him to live up to those standards of performance or defend those standards of performance or defend his action under those standards of performance before a court of competent jurisdiction.

There are so many, many cases where situations go on that are really, in my opinion, not situations that would be tolerated by, let's say, the president or the chairman of the board or the executive committee of General Motors or the Ford Motor Company. But the action taken down the line by zone managers, district managers, regional managers - the pressure from these, gentlemen, is so great they force dealers to do many, many things that they otherwise wouldn't do voluntarily. Many of them are against their own best interest. It is this kind of pressure situation that standards of performance will prevent because these gentlemen at the lower echelons certainly wouldn't take some of the actions that they do if they knew they had to face a court situation.

Today, if I wanted to sue the manufacturer on a vital issue, such as cancellation, it would cost me somewhere between one-quarter and one-half million dollars. And today I could very likely be out of business two or three

years before the situation came to a hearing.

This bill-- one of the greatest things in this bill, as the gasoline dealer testified to, is that it gives us a day in court. It gives us virtually an automatic injunction if our cause for going into court is reasonable. Today this is very difficult to get. When you try to pit a dealer-- even the largest dealer is a small economic entity as compared to General Motors or Ford or the Chrysler Motor Car Company.

Let's get into the area of the consumer. Somebody talked here a while ago, I think it was Mr. Krebs, about the fact that this bill takes the control away from the manufacturer. It does just the reverse. If it will set standards of performance, it will give the control to the manufacturer. Many of the problems that the consumer has are the result of the actions of some dealers and the manufacturer might do something about this if he had better standards of performance.

ASSEMBLYMAN TURNER: May I ask you a couple of questions, sir?

MR. STILLMAN: Yes.

ASSEMBLYMAN TURNER: You say you have been in this business since 1908?

MR. STILLMAN: Yes.

ASSEMBLYMAN TURNER: I'd like to talk about the standards in the industry, if I may. I think your experience allows you to cause some observation in that regard. Do you find that the product that you get today is of the same standard of workmanship that it was in the past?

MR. STILLMAN: I'd say it is the finest product that's ever been produced.

ASSEMBLYMAN TURNER: Today?

MR. STILLMAN: Yes, sir. I might also add that the reason that many people say, well, the cars 20 years ago were much better, was that it was a completely different

animal and they operated under completely different conditions. This is a very, very, sophisticated machine and is run down the road at 70, 80 and 90 miles an hour - and stays there. You couldn't do that with an automobile 20 years ago. The whole situation has changed. But these, by far, are the finest automobiles that have ever been made - any make.

ASSEMBLYMAN TURNER: Any make?

MR. STILLMAN: I would say there is not a bad make of automobile manufactured today - they vary a little, of course.

ASSEMBLYMAN TURNER: Are you also saying that the standard, as it comes from the factory, does not give the dealer any difficulty?

MR. STILLMAN: I would say this is not true. We many times, have to remake that automobile before we can deliver it to a customer. But on the other hand, General Motors has just set up a method of paying us to do this. So I would say, in that respect, they are reasonable. But if you want to consider it, if you want to buy a perfect car, you had better buy a Rolls Royce at $25,000 or $30,000.

ASSEMBLYMAN TURNER: Didn't they go out of business?

MR. STILLMAN: No, the airplane engine deal did. You know, Harlow Curtiss, who was president of General Motors, once told me a very interesting thing. He said, "Walter, an automobile is like an oil painting; it is built to look good from about 30 feet away." He said, "if you want to get up close to it and look at it, you will find a lot of imperfections in it. But if people want to buy automobiles at a price at which they can be manufactured and sold in volume, they are going to have to take the automobile as it comes down the production line, with all of the problems of the people that put that automobile together on that production line and which are reflected in that one particular automobile as it comes off the line."

Now an automobile is made two ways - the component parts are made in the machine shop, largely by automatic

equipment. They are put together by human beings. The components are assembled on an assembly line by human beings. There are only two places of failure. If an automatic machine goes out of wack, for some reason or other, and starts to make a component part maybe fifty thousandths of an inch off, you have trouble and I have seen it many times. The second problem is the human element in putting that automobile together.and we take apart many a door panel that has a rattle in it and find a coca-cola bottle in it or something. So, you see what you are up against.

ASSEMBLYMAN TURNER: So you are saying that each automobile is an individual piece of art.

MR. STILLMAN: They are a beautiful thing and they run beautifully.

ASSEMBLYMAN TURNER: Are you having any trouble with the corporation that manufactures it in reaching an agreement as to any readjustments that you make?

MR. STILLMAN: I just recently sued them for a whole lot of money they owed me on warranty claims and, believe me, I got action. I did this. They owed me $2,500 in back warranty claims. I couldn't get any action so I got my lawyer to sue and if you don't think I got action - I got action and damn fast. There are still four of them that we are haggling over.

ASSEMBLYMAN TURNER: Well, then, you are saying that under the present law you are able to work out your problems.

MR. STILLMAN: No, I'm not saying this because this is in a little different area. This is civil suit. This is the type of thing that they just don't want to get involved in. But if they are going to cancel me, then I'm looking at one-half million to one-quarter of a million dollars worth of money. I'm also looking at the fact that I may be out of business before I can do anything about it.

ASSEMBLYMAN TURNER: Did you think about suing them for that $2,500 - did you think about your franchise; were you concerned about your franchise?

MR. STILLMAN: No. I think that is a way to get a little action at the lower level. I don't think they know about this in Flint, don't you see? They know about it where the pressure really had to go. They were just fouling this thing up in the local office.

ASSEMBLYMAN TURNER: Well, I've heard about these people somewhere between Flint and your dealership that apparently are the ones that are creating the policy that causes concern. Is that what you said?

MR. STILLMAN: Well, I think this is many times the case but I also think that many times the people at the top hide behind this as an excuse. It is a convenient excuse.

ASSEMBLYMAN TURNER: Too many Edsels, we have to move them, is that right?

MR. STILLMAN: Yes. Now I have had some personal experiences over 50 years. They forced us three times over that period to expand our facilites to the point way beyond reason. They had me with four showrooms and three service stations at one time - covering an area that I now cover out of one showroom and one service station and I cover a damn site better today than I did then. This is an economic disaster everytime they force you to build these buildings, or rent these buildings - and I see this going on every day. I see them putting automobile dealers right in next to another one in order to force the first one out of business because somebody doesn't like him. I see the manufacturers building great facilities in the middle of a number of dealers and then subsidizing that facility to the point where it dries out the surrounding dealers of that make because they want to get him out of business for some nefarious reason. I see all sorts of things going on that wouldn't happen under this bill, that are adverse to the dealers and adverse to the public interest. Because if there is anything that is adverse to the public interest it is a dealer that can't financially - is not financially able to-give that customer the service he is entitled to. Nobody

can sit here like Mr. Krebs or the gentleman from the Chamber of Commerce and tell me anything about the automobile business because those gentlemen don't know anything about. And I am intrigued, incidentally, by the fact that the Chamber of Commerce even testified. We are members of the Chamber of Commerce. Now, in effect, they are being discriminatory towards the financial interest that really supports them. Because the big manufacturers of the state support the Chamber of Commerce and the few puny dues that they get from the merchants of the state, they just don't consider that. But we are there in numbers and we are the guys that vote - let me remind you, gentlemen.

ASSEMBLYMAN TURNER: Are you saying that the Chamber took a position and testified to something that doesn't agree with you?

MR. STILLMAN: I think it was completely discriminatory when they testified at all. They had no business to testify in an area of this kind. This is a situation that involves basically the franchisor and the franchisee and why should the Chamber of Commerce involve themselves in that? They didn't testify as to the public interest at all.

ASSEMBLYMAN TURNER: Can I interrupt you then, sir. It is a fact that they took a stand without informing their members or passing a resolution or any democratic process.

MR. STILLMAN: We had nothing to say about it.

ASSEMBLYMAN TURNER: Nor knowledge thereof?

MR. STILLMAN: We knew they were going to testify the way they did - you know the grapevine works pretty well. But I just think they were out of--

While I'm setting the record straight, I might just as well say that in the previous bill that Mr. Krebs talked about - S-581 - he said that the majority of the members of the Commission were to be automobile dealers. This was not so. It was a board of eleven men of which five were to be representative of the automobile industry and

it didn't specify that anyone of those five should be an automobile dealer, necessarily. You see, it is easy to turn these things around.

ASSEMBLYMAN TURNER: I'd like to thank you for your testimony, sir.

ASSEMBLYMAN THOMAS: Mr. Stillman, do you negotiate - I take it that you are a General Motors dealer?

MR. STILLMAN: Yes, sir.

ASSEMBLYMAN THOMAS: With which one of their automobiles.

MR. STILLMAN: Buick-Opel, sir.

ASSEMBLYMAN THOMAS: Now, do you negotiate a contract with them for your dealership?

MR. STILLMAN: No, sir, I have a five-year contract that they can renew or not renew at the end of any five-year period. They write me a letter about six months beforehand and say that they will either renew that contract or will not renew it. And if I get a letter that says that they will not renew that contract, I am a dead pigeon - there is no question about it. I have no defense because it is a contract and they can--

ASSEMBLYMAN THOMAS: During the interim - when the five-year contract is in existence - do they have the right to terminate this contract?

MR. STILLMAN: Oh, yes, they list some causes why they can terminate it and I have no quarrel with this.

ASSEMBLYMAN THOMAS: And do they have to give you notice about that?

MR. STILLMAN: I believe they do. I could look it up because I have my contract with me.

ASSEMBLYMAN THOMAS: So I take it, at the end of the five-year period, there is no right-of-renewal. You have no right-of-renewal?

MR. STILLMAN: I have no right-of-renewal, it is their choice.

ASSEMBLYMAN THOMAS: You are at their mercy

insofar as a renewal is concerned.

MR. STILLMAN: 100% and I have no right of negotiation of the contract they offer me, if they choose to renew it and I choose to accept it - I take it the way it is.

ASSEMBLYMAN THOMAS: Now in that contract do you have a geographical area that you represent that cannot be invaded by another franchise of the same type?

MR. STILLMAN: It is a geographical area in which there are five Buick dealers and to that extent it is closed to those five dealers, except under certain circumstances. They have to give us some notification and we have the right to present some arguments against this.

ASSEMBLYMAN THOMAS: Do you feel that they could not terminate your contract before the end of the five-year period without just cause?

MR. STILLMAN: Well, just cause is a debatable point, don't you see. This is where the--

ASSEMBLYMAN How about good cause?

MR. STILLMAN: What?

ASSEMBLYMAN THOMAS: How about good cause?

MR. STILLMAN: This, again, is a question of "good", don't you see. This is the very point of this bill; you put your thumb right on it, Assemblyman - right smack on it. The question is, what is "good" and what is this right? I am perfectly willing to argue the point in any court of jurisdiction but don't put me out of business while I am arguing it. This is the only thing we are asking for. The greatest thing in this bill is this right of injunction and the right to take it to court and get it there fast.

ASSEMBLYMAN TURNER: Can I ask you one question, sir?

MR. STILLMAN: Yes, sir.

ASSEMBLYMAN TURNER: You look me in the eye and I look you in the eye - if you decide to sell me your business this morning and I decide to buy it, and we agree, could you do that?

MR. STILLMAN: I can sell you all the assets but not the franchise.

ASSEMBLYMAN TURNER: You couldn't move it out?

MR. STILLMAN: I cannot.

ASSEMBLYMAN TURNER: Why not?

MR. STILLMAN: Because the manufacturer owns the franchise and he has given it to me under contract and I can sell my assets but not the franchise because if I sold my assets under the contract, I would be out of business.

Now the manufacturer does not allow me, today-- Suppose I have one-million dollars in my business and I worked in that business for fifty years and I decide, well, I'll hang up the gloves and I'll let my son or somebody else run it but I need one-half million bucks to live on - I can't get that money out because it is locked in there under the franchise. But I might turn around, under this bill, and sell one-half of that business to somebody - some of the financial interests - and get myself out and get myself something to live on.

Now there is a very interesting thing here because it has been brought up. This comes into the phraseology of the bill as between section 8 (d) and section 6; under section 6 I cannot sell my franchise - and I have no quarrel with this - under section 6 (d) I have the right to sell an equity in my franchise. Now anybody who buys an equity in my franchise has to know that if the business isn't continued to be run under the conditions that are satisfactory to the manufacturer, the manufacturer can cancel the franchise. So that there is a-- In effect you might say, if you sold all of the stock in your business, wouldn't that control the franchise. No, it wouldn't. It is conceivable that I could sell all of the equity in my business and the franchise still remain there and I, as the holder of the franchise, operate the business satisfactorily. It is well worded - this bill - in this respect.

ASSEMBLYMAN TURNER: Have you seen a lot of

franchises change hands?

MR. STILLMAN: Oh, yes, a tremendous number.

ASSEMBLYMAN THOMAS: And wouldn't you say that most of those automobile-dealerships, franchises, that change hands change hands under someone who has the corporate hand on his shoulder and they say, he is a nice fellow?

MR. STILLMAN: Well, let me put it this way. I've seen so many, many dealers who have wished to get out of the business for one reason or another and have lined up a buyer of their business, who was a perfectly able individual and knowledgeable in the business, and had the finances, and when it came to the showdown with the manufacturer, the manufacturer handed the franchise to one of his employees - one that he wanted to put on retirement or something.

ASSEMBLYMAN TURNER: Somebody from the home office?

MR. STILLMAN: Somebody from the home office. That is common knowledge. Even you know it, and you are not in the business.

ASSEMBLYMAN TURNER: Of course I know it and that's why I am interested in this bill. But I just wanted to hear your experiences.

MR. STILLMAN: Thousands and thousands of cases of this - thousands of cases.

ASSEMBLYMAN TURNER: I want it on the record too, sir. Thank you.

ASSEMBLYMAN POLICASTRO: Mr. Stillman, in a lighter vein, let's forget that you are serious.

You know, you solved one problem for me today. Yesterday I was working a crossword puzzle and there was a four letter word and the second letter was a "P"; now I find out it is Opel. So you solved that problem for me.

MR. STILLMAN: It's a damn good little car, and I'd me sell you one.

ASSEMBLYMAN THOMAS: Thank you very much, Mr. Stillman.

ASSEMBLYMAN SMITH: May I ask Mr. Stillman

a question?

Getting here late and listening to the end of your conversation makes me feel as though your industry now is a throttled industry. I'm frightened, in my locality, where some of my dealers were told to go out and build new quarters because they were in a section of their town that was more or less hemmed in and off the beaten track - which 20 years ago they were not. They have no protection, according to you, but to have that cancelled by the home office at any time at the conclusion of their contract. Is that correct?

MR. STILLMAN: You are 100% correct, sir.

ASSEMBLYMAN SMITH: In other words, they would, more or less, scare you to death by saying, now look you can't have this contract or this franchise by staying in the quarters you are in now, you have to go somewhere else, where the traffic is heavier, and establish new quarters.

MR. STILLMAN: This is correct. I might give you an instance. I have been in the business a long time and I've seen a lot of things happen. When I built a new dealership some years ago, I built three buildings - all multiple-purpose buildings - because I knew that if the manufacturer-- If I built a single purpose building, as so many of them are, and the manufacturer chose not to renew my contract or to cancel me for some reason, my real estate investment would be seriously jeopardized. So I built three buildings. I can do something with those buildings anytime I want to or anytime they choose to throw me out - and this is exactly what you are driving at.

ASSEMBLYMAN SMITH: Thank you.

ASSEMBLYMAN THOMAS: Thank you. We will take a five-minute recess and then start with the other side again.

(recess)

ASSEMBLYMAN THOMAS: I'd like to hear from Mr. Moran and then we will get to those who are against the bill.

J O H N P. M O R A N:

My name is John P. Moran and I am vice president of the New Jersey Restaurant Association, the voice of one of the basic service industries in our State. I operate my own restaurant in Middlesex County. I come here to express the support of our Association for Assembly Bill 2063, the Franchise Practices Act.

While most of the members of the NJRA's Board of Directors do not operate franchised establishments, the Board nevertheless voted unanimously to support this important and long needed bill. We do this in recognition of the fact that increasing numbers of New Jersey businessmen -- particularly in the food service and hospitality field -- have come to rely on a franchise as a cornerstone of their business. We know that if one sector of our industry is rendered weak by pressures growing out of the franchise relationship, the entire industry could be in trouble. Thus, we think franchisees are entitled to the minimal safeguards of A-2063. We realize also that a franchisor, to preserve the value of his business, must depend on good performance by the franchisee.

We think that A-2063 admirably balances these two interests. It permits a franchisor to terminate or refuse to renew a franchised operation that is not meeting uniform standards. Yet, it prohibits such action when the franchisee is living up to the requirements set for all others in comparable situations.

Another important element in this bill is the fact that it permits a franchised businessman to receive full value for his investment in his business if he sells to a qualified buyer. No franchisor could interpose an artificial roadblock that would prevent the sale, for the best possible return, of a franchised operation to a qualified buyer. Furthermore, this bill would give a franchisee the same option enjoyed by other businesses to sell stock or other equity interest in his business to the public or to his employees.

I also think that this bill is commendable in that it permits disputes that may arise in the franchisor-franchisee relationship to be settled in the courts. This is the traditional arena for such adjudication and thus removes the possibility of unneeded governmental intervention in this field of private business activity.

Franchising promises to become an ever more important factor in the business life of our State. It is most encouraging to see this Legislature moving toward the establishment of a good balance of economic interest in this field. On behalf of the members of the New Jersey Restaurant Association, I hope that this Committee will soon vote favorably on A-2063 and that the full membership of the Assembly and Senate will follow with their approval.

Thank you for this opportunity to present the views of our Association.

ASSEMBLYMAN THOMAS: Thank you, Mr. Moran.

MR. MORAN: Thank you.

D A V I D S I E G E L: Mr. Chairman, my name is David Seigel; I am an attorney and Vice-President of the Blimpie Corporation of America, a New Jersey Corporation which is a rather small franchisor in relation to most of the representatives we have here. Our field is the restaurant industry and it is quite appropriate that I speak after the gentleman who just spoke.

As an attorney I am going to refer to specific, pragmatic things in relation to this act. But before I begin, I have been listening to all the testimony and there seems to be a paradox in relation to this law. That is, that the people who are for it are solely and specifically from one industry - the automotive industry. Yet, the act is all encompassing and relates to all other industries, including restaurants, goods, etc. The point is this; if the automotive industry-- if protection is needed in that industry - then a bill should be passed specifically to provide that protection. But I don't think that

an all-encompassing bill that would affect other franchisors is necessary.

ASSEMBLYMAN POLICASTRO: May I interrupt you for a minute, Mr. Siegel. We had automobile dealers here, we had gasoline dealers here and we had restaurant owners here.

MR. SIEGEL: Pardon me?

ASSEMBLYMAN POLICASTRO: Restaurant Associations here.

MR. SIEGEL: But they are not franchisors.

ASSEMBLYMAN POLICASTRO: All diversified people, not just one segment of the industry.

MR. SIEGEL: Well, the prior gentleman that just spoke stated that his association - the Restaurant Association - does not franchise; they are just restaurant owners. I am from a restaurant franchisor.

I'd like to direct your attention to paragraph 3 (b). My opinion is that this act is very badly drafted. It is vague in application, it is misconceived and the result is going to be very serious legal problems and a raft of law suits which will ultimately really injure the franchisee and the franchisor.

I just ask you one question and that is - after I conclude - what is an entity? I won't go any further than that. Try reading it and if you can make some sense out of it, I'd certainly like to be enlightened.

The second aspect - look at paragraph 4 in relation to the jurisdiction of this act and as it relates to where the gross sales of products shall exceed $35,000. Well, this act does not take into consideration the practical aspect of franchising. It only concerns itself with the license. Now most business people, and specifically in the restaurant industry, have a corporation which sells licenses and they have a lease-holding company which holds leases and they have - if they are a producer - a distributing company that sells meat or whatever the condiments are. This act does not cover that. Now I ask you one question: If the act is passed and people begin litigating it, are the courts going to pierce the corporate veil?- and that is a technical term.

Let's assume we conform with this act. That is, that the franchisor is a corporation that just sells licenses, o.k.? And it licenses a franchisee. The franchisor also owns subsidiaries, he owns a meat company, or real estate company, and then he sub-lets or sells produce, or whatever it may be, to the franchisee. Now does that franchise relationship come within the confines of this act? If you read it technically the answer is, no. If you read within the intent of the act the answer is, yes. Now that puts a powerful burden upon the franchisor. What is he going to do? May I ask you that?

Next - am I correct in that the word "essential" has been deleted?

ASSEMBLYMAN THOMAS: Yes.

MR. SIEGEL: All right. I'd like to refer now directly to paragraph 5 - "non discriminatory." Now in the franchise business - and the franchisor has many stores and we don't have near as many as most of the franchisors here, we have about 60 - we have many business relationships with the franchisees - and that's contracts. As we try to make business decisions about our chain, sometimes we conclude that it is not wise to enforce provisions of contracts with certain franchisees.

Let me give you an example: "X", a good operator, fails to sell the correct product line as we determine in our operations manual. He sells, let's put in the ridiculous, he sells "Drake's Cake" instead of "X" cake. Now we might say to ourselves that "X" is a very good operator, he is a fine addition to our chain and we will not enforce our contract with him for whatever the reason. Now "Y", for example, might be a bad operator and he might also not sell the correct product line, but we have the option at that time to make our business decision and that would be to enforce our contract provisions.

Now the effect of this act would mean that we must-- It takes the opportunity to make business decisions out of our realm. That is, we have to specifically enforce

every provision of our contract equally and that is unfair to us.

ASSEMBLYMAN THOMAS: Now, while you are on section five, do you know what "good cause" is? Is good cause defined anyplace in this bill?

MR. SIEGEL: No, it is not mentioned. It is a very vague bill and the end result of it is going to be a lot of litigation.

ASSEMBLYMAN THOMAS: Am I right? The way I read it, it says you can't terminate-- you cannot fail to renew a contract.

MR. SIEGEL: I'd like to get to renewals; I'm going to get to that now.

ASSEMBLYMAN THOMAS: All right, go ahead.

MR. SIEGEL: Well, first of all, the act does not consider-- it is made specifically for the automotive industry where they have short licenses. It does not consider - and you have brought out this point before - long licenses. For example, we give a 20 year right to operate our franchise.

Now, when a man comes to us, he come to us with an attorney and we sit down and we tell him, "this is your license, you can have 20 years to operate this store." Or, in this particular instance, a restaurant. Now, at the end of 20 years we may at our own choice like to renew it if, in fact, it is a good business decision. But this act effectively - and I think it has constitutional ramifications - is taking away our right and our freedom to contract. This might be a contract of adhesion yet, at the same time, people come in and spend a lot of money and they have legal counsel and they don't have to buy franchises. They are buying franchises for their own self-interest. They want to make money.

For example, there may be one hundred food franchisors - at least one hundred - why do they buy our franchise? Because they think they can make money on it and everything is specifically stated, it is in black and white and

they don't have to accept it. It is not analogist to, perhaps, landlord-tenant relationships which you might try to analogize it to.

ASSEMBLYMAN THOMAS: What you are telling us is that there is a market for franchising whereas there may not be a market for getting an apartment, is that what you are saying? So that you've got an opportunity to bargain.

MR. SIEGEL: Absolutely. Ultimately, when it comes down, we sell a system, certain contracts, a certain technique in doing business, and no one coerces anyone to buy our franchise; they buy it because they think they can make money.

ASSEMBLYMAN THOMAS: Well, as I read this bill, you would not be entitled to terminate, or fail to renew, your 20-year contract unless you had good cause which was reasonable and non-discriminatory.

MR. SIEGEL: That's what the bill says.

ASSEMBLYMAN THOMAS: Is there anything that indicates what "reasonable and non-discriminatory" is in the bill?

MR. SEIGEL: It does not mention it. It does not answer the question at the end of the 20 years, "what if the franchisor, himself, wants to keep the premises or the lease or whatever it is that they are selling; what if he wants to close it; what if he wants to open up a different outlet elsewhere? It doesn't answer those questions. It is going to leave it up to litigation and that is going to pose a real problem.

ASSEMBLYMAN THOMAS: What would happen in the event of bankruptcy? Would the franchisor have to give the franchisee 150 days notice that he was going to terminate because--

MR. SIEGEL: That would create a-- According to the bill it would and it would create an intolerable problem, especially in the restaurant industry where it is not such

a large financial setup such as a car distributor where one million dollars is being spent. It is small; you have to act fast in order to get your money; generally you are secured in one form or another - I am going to get to securities in a little while.

Now, I believe in paragraph 6--

ASSEMBLYMAN THOMAS: Six deals with transferring.

MR. SEIGEL: Yes, it relates to transferal. Now the problem is that it is incomplete. If you want to give a franchisee the complete right to transfer his property, fine. What about the franchisor who must go in and retrain the new staff? It just does not consider that.

For example, now let me apply it to our contract. We give a franchisee a right to transfer his business. Of course, he must give us a right of first refusal to purchase it at a bona fide offer and if, in fact, he does transfer it to another franchisee, then he must pay us 5% of his sale price. Now the reason we determine it to be 5% of the sale price is because we have looked at our expenses and what it costs us to put a new franchisee into business. We sell a system and a type of business and, when a new man comes in, he has to be retrained, he is going to make mistakes, it is going to be a large expenditure of money and this act in no way enables us to put such a clause in our contract. The ultimate will be that it will affect us monetarily and detrimentally so.

I'd like to refer to the geographical area in 7. It has been my impression that when a franchisee comes in and purchases a franchise, he is either given an exclusive territory whereby the franchisor covenants that he will not put in any more outlets within this exclusive territory or he is not given an exclusive territory. Now, if, in fact, he is given an exclusive territory, then this act is mere surplusage. It is unnessary because once there is a grant, then a franchisee can go to court and get a restraining order quite easily. I mean it is unnecessary drafting and

it will raise problems - other problems. In other words, if it is covered by the law right now, what is going to happen when something not covered comes up?

If you read 21 (f) - and that is to provide any term or condition in any lease or other agreement which term or condition can directly or indirectly violate this act - if you read that with 8 - and that is restrictions on prohibitation and sale of franchises - when you look at the intent of the clause, this will create a tremendous problem both in the law of real property and security interests. The reason is as follows: The intent of the act is to allow a franchisee to transfer his business any time he wants and in 21 you say that you can't prevent him from doing that. Well, what about lease arrangements, where there is no right to sublet or assign; what about security interests where people lend money and give credit and prevent transfers? This act would seem to create a real problem between the Uniform Commercial Code and our Standard Real Property Law.

Is treble damages--

ASSEMBLYMAN THOMAS: Treble damages is out.

MR. SEIGEL: I know but I'd like to direct myself just to treble damages for a moment. This shows the intent of this whole bill. Treble damages, in this particular industry, franchising, came up in the anti-trust laws and it was deemed to be a penalty because people broke anti-trust laws. However, this bill relates to reasonableness and non-discrimination and a whole context of law where there are very, very narrow issues. Now to include something like treble damages, is a penalty and it should not be and you obviously have taken care of it but it connotes the intent of the act. If you look at the preface, it is supposed to help both franchisors and franchisees; yet it doesn't.

If you look at 9 in relation to renewal of a franchise, I believe this is unconstitutional because it applies to contracts which have been entered into in the past - a business relationship that has been entered into by two people and they have entered into a valid contract. Now if

you are going to apply this law to renewals, you are taking someone's contractual right that he has made years ago and it would seem to me to be a taking of property without due process.

ASSEMBLYMAN THOMAS: Under the present law, if you attempted to close down or revoke a franchise that you had given to a particular individual, is injunctive relief available to them now so that they could continue in business while the question of whether or not you could take away their franchise was being adjudicated?

MR. SEIGEL: Well, I specifically have not had that problem but I feel sure that it is. I find it hard to believe that any court would allow a franchisor to just destroy a man's business without any sort of hearing on it.

They can go to court, they can get injunctions and temporary restraining orders, until a case is brought, and then they will get a stay.

ASSEMBLYMAN THOMAS: Do you find-- In section 8 (e) it says that the franchisor is not to impose unreasonable standards of performance upon a franchisee. Is there any definition of what would constitute unreasonable standards of performance?

MR. SEIGEL: I'm glad you brought that up; I sort of forgot it myself.

It is so subjective and vague-- I'll give you an example - let me give you a very good example. What do you do in this problem? You sell a franchise to "X" and "X" is operating his business. The franchise concerns itself with the sale of chickens - solely chickens. Now, the store is open and he is not doing business - he is losing money. The franchisee wants to put in hamburgers. Is that unreasonable? I ask you. It is certainly not unreasonable from the standards of the franchisee but it is certainly unreasonable to the standards of the franchisor. How do you determine such a thing?

This act would seem to indicate that an individual's trademark, a franchisor's trademark, could easily be destroyed by any sort of construction of that clause.

ASSEMBLYMAN THOMAS: Well, for instance, many franchisors require that the franchisee use a certain type of accounting system. Would that be an imposition of an unreasonable standard of performance in the contract?

MR. SEIGEL: In my opinion it is not, but who knows? I don't know that a judge is going to say. The point is that it is so subjective that all these things will be litigated or will be subject to litigation and rather than creating protection for people, you will wind up having more litigation and having more court action.

ASSEMBLYMAN THOMAS: Do you have an option to renew in your contract?

MR. SEIGEL: Semi. It runs for 20 years and it is renewable yearly, subject to the will of either party. If either party does not want to renew it, they can terminate it.

ASSEMBLYMAN THOMAS: Suppose the franchisee wanted to renew and you didn't, could he take you to court now and say, "look, I've got a good business; there is no reason for terminating me. He is being arbitrary and he wants to put his brother-in-law in here instead of me"?

MR. SEIGEL: No, he couldn't go to court now.

I have to beg the question because he can go--anyone can go to court.

ASSEMBLYMAN THOMAS: I understand. I don't mean "can he" but do you think he has a right of action, a cause of action, is what I meant to say.

MR. SEIGEL: Yes, I think he does and it would be based, as in the geographical protection area, on the fiduciary relationship between franchisor and franchisee. I don't think he should win, but that is my personal feeling.

ASSEMBLYMAN THOMAS: Mr. Seigel, thank you very much.

C H A R L E S B. N E E L Y: Mr. Chairman and gentlemen of the Committee, my name is Charles B. Neely and I am employed by the General Motors Corporation on the Marketing Staff in in Detroit, Michigan. I very much appreciate this opportunity to tell you why the General Motors Corporation is opposed to

Assembly Bill #2063.

First of all, we feel this bill is unwise and unnecessary because it is not designed as a consumer protection bill but as special interest legislation which would advance the interests of the present dealers at the expense of the public by restricting the rights of the manufacturers. Specifically, this bill is designed to provide the dealers with a practically non-cancellable franchise, to protect them from competition by obstructing the addition of new dealers, and to enable them to sell the franchise agreement generally to whoever will pay the highest price regardless of whether the manufacturer approves of such person as a dealer.

In essence, the purpose of this bill is to create and perpetuate a monopoly for each of the present dealers which could ultimately be sold to the highest bidder.

At the outset, it should be explained that General Motors, unlike franchisors in some other product and service industries, does not sell or make any charge for its franchises. Moreover, in the regular course of operations, General Motors provides, and has for many years provided, extensive sales, service, business management and employee training services to its dealers without charge.

In return for the opportunity to sell products which have been

developed and manufactured by General Motors, the license to display its trademarks, and the various forms of assistance provided by General Motors, a franchisee agrees in advance to operate his business in accordance with certain prescribed standards. We believe the contractual obligations of an automobile dealer to conduct business in accordance with the requirements set out in the Dealer Selling Agreement are of material benefit to the consumer -- the retail purchaser of an automobile -- and result in his obtaining better service from the dealer than if General Motors could not enforce these standards. Enactment of A-2063 would substantially limit the ability to do so. And despite what the President of the New Jersey Automobile Dealers Association says about the standards of performance, this contract here between General Motors and the dealer - and I believe this is also true of the other automobile manufacturers - states that the standards of performance will be for both the manufacturer and the dealer, and I am going to leave this with your clerk, sir, for you and the committee to study.

One might ask -- "Should not a dealer be permitted to sell the franchise agreement?". And in my opinion that is the sum and substance and the real nub of this bill.

The answer is "No," because an automobile franchise agreement is a personal service contract. Because such a contract is entered into by one party in reliance on the personal qualifications of the other party, it is not freely transferable.

The GM selling agreements all specifically provide that they are personal service contracts which General Motors enters into in reliance upon and in consideration of the personal qualifications of the persons who will substantially and actively participate in the ownership and operation of the dealership. It is imperative to the preservation ot the reputation and goodwill which GM has established over the course of many years, and I think that in the State of New Jersey we have been doing business for over 60 years, that it be able to continue to pass upon the personal qualifications of every GM dealer.

This bill would force GM to do business with virtually anyone a present dealer which might choose and to grant such person the privilege of displaying GM trademarks. It could refuse to do so only when it could establish, with the burden of proof, that such person would be substantially detrimental to the distribution of its products in that community. This meager reservation of right would not provide any real protection to General Motors.

It is understandable that a dealer might wish to provide for someone working with him in the business, such as his son, to take over the business if he becomes physically incapacitated or in the event of his death. The GM Dealer Selling Agreement, therefore, currently enables a dealer to

nominate a qualified person who will be offered a selling agreement should either eventuality occur. Also, the dealer can make arrangements so that in the event of either occurence his wife or widow, as the case may be, can retain or secure a financial interest in the successor dealership.

This bill will unquestionably increase the investment required to become an automobile dealer because the present dealers would be able to sell their franchise agreement and charge a substantial price for the manufacturer's goodwill. Since each of the present GM dealers executed his selling agreement without having to pay one penny for it, this provision is nothing more than an effort to obtain a huge windfall profit.

Suppose, for example, a criminal syndicate were to buy a Chevrolet dealership in any given locality. He could reduce the price of the cars that he is selling to the consumer until he drove a competitive dealer to the wall when he could then buy the competitive dealership at 10¢ on the dollar. He could continue this until he virtually had a monopoly on every car franchise in a city.

If this provision is enacted into law, the investment required to go into the automobile business in New Jersey will increase substantially. Economic principles would eventually cause the price of new cars and the cost of service to similarly increase in order to produce a reasonable rate of return on the invested capital. Considering this ultimate effect, is this

public interest legislation or special interest legislation at the expense of the public?

For your information, Gentlemen, Federal Law also protects the franchise agreement most adequately. The Automobile Dealers Franchise Act (15 U.S.C.A. 1221 et seq.), which is frequently referred to as the "Dealer Day in Court Act" or the "Good Faith Law," provides protection regarding coercion and termination. If a manufacturer fails "to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer," a dealer may sue the manufacturer in Federal Court under this Act. This was passed in 1956 and, again, with your permission I will leave a copy of this with you.

In addition, preliminary injunctions have been sought and obtained on behalf of the dealers in some of these lawsuits. And they have been saying they could not get injunctions. For example, Swartz Motors, a Dodge dealer in Dover, New Jersey, and Semmes Motors, Inc., a Ford dealer in Scarsdale, New York, obtained, recently, preliminary injunctions - I say recently, it was within the last several years, the last three years - against termination pending trial of their cases.

Some dealers, nevertheless, claim this Act does not provide sufficient protection against termination because not many dealers have

won lawsuits. The proper measure for determining the effect of the Act, however, is not the number of lawsuits won but the number of dealerships terminated.

General Motors has 364 dealers in the state of New Jersey, 30.4% of whom have been our franchised dealers for over 25 years! In the past five years, not one New Jersey dealer has been involuntarily terminated by General Motors. (Mr. Chairman, I would like to leave copies of this analysis with the Clerk for you gentlemen to study at your convenience.)

If a dealer disagrees with General Motors, the dealer has a number of options available. First, he can settle the matter with the local GM sales representatives. If he is not satisfied, he can present the matter to one of the dealer councils which have been established to protect his interests.

For each GM automotive division, there are Dealer Zone Councils, Dealer Regional Councils, and a Dealer National Council. All such council members are elected by other dealers. Also, there is a President's Dealer Advisory Council selected by the President of General Motors from large, medium and small dealers for all GM automotive divisions from all geographic areas, both metropolitan and rural.

Most differences between General Motors and its dealers are resolved locally or through the action of these councils in meetings with GM executives.

If differences can't be resolved through these methods, a dealer can appeal any management decision to an impartial umpire if he feels that the decision will cause him unfair treatment. Former Justice of the United States Supreme Court, Justice Charles E. Whittaker, is that umpire. He is on the payroll of the General Motors Corporation but we would be delighted to have the New Jersey Automobile Dealers Association share the cost. His decision is of no consequence because his decision is binding on General Motors but it isn't binding on the dealer. Notably, the dealer does not waive any rights he may have, under either the Automobile Dealer Franchise Act or under common law principles of contract, fraud or misrepresentation, by appealing to the umpire.

It should be emphasized that GM is not in the retail automobile business in New Jersey. We do not have a single car dealer in the State of New Jersey. The only way we can sell our product is through our established dealers. GM depends on its dealers to sell automobiles to the public. Naturally, it has a great interest in seeing that its dealers are successful, that they sell and service its products in a quality manner and encourage more people to buy GM products. That is just good business sense.

In conclusion, let me say that we ask nothing more than that we of General Motors be allowed to work out our problems

with our dealers, as we have for the last 50 years, in the true sense of "free enterprise." We feel that these problems do not need, nor require, legislative intervention and it is hoped for this reason, gentlemen, that you will oppose A-2063.

Now I will be delighted to answer any questions that you might have.

ASSEMBLYMAN THOMAS: There is one thing that disturbs me. Is it Mr. Lee, did you say?

MR. NEELY: Neely, Charles Neely.

ASSEMBLYMAN THOMAS: Mr. Neely, it seems that you have a standard contract of five years duration, is that right?

MR. NEELY: Yes, sir.

ASSEMBLYMAN THOMAS: There is not any right of renewal in that contract?

MR. NEELY: No, sir.

ASSEMBLYMAN THOMAS: While a dealer may not pay anything for the franchise itself, he does have a very substantial investment in what he has had to put together in order to open a dealership - he has had to buy land and he has had to put up a building and all the rest of it. Under those circumstances, it seems to me that he might be in an unequal bargaining position when it comes to the end of that five-year period and you say to him, "unless you do such and such, we are not going to renew your contract." Now he is not in an equal bargaining position because he has as much as $250 or $500 thousand dollars invested in this thing which is going to go down the drain unless he renews his contract with you. How do we get around that problem? How do you get around that problem? Do you impose unreasonable new conditions when you renew a contract?

MR. NEELY: No, sir, of course we do not, as witness the fact - I think the record speaks for itself - that 30% of our dealers have been with us over 25 years.

Actually the dealer is, at the present time, covered by that Federal law which also says that we will not cancel a dealer nor fail to renew his contract unless we have just cause.

ASSEMBLYMAN THOMAS: Does the Federal law say that because I'm not familiar with it?

MR. NEELY: Yes, sir. It says that the dealer may then sue us in any Federal Court.

ASSEMBLYMAN THOMAS: I have a copy of the law that you handed out. You say that the Federal law would protect against arbitrarily refusing to renew a contract unless there were good grounds for not renewing it?

MR. NEELY: Precisely. The fact is we have not involuntarily terminated any dealer, for example, in the last five years - I just took it that far back. As these gentlemen just testified this morning, we have never treated them unfairly. The fact that the President of the New Jersey Automobile Dealers Association says that he was born into the business, that his father had founded it, that his sons were in college but they were coming into it, and that he hoped his grandson would come into it, indicates that it is a pretty good business.

ASSEMBLYMAN THOMAS: There was some testimony to the effect that unreasonable pressures were exerted on dealers to maintain certain standards of performance, to open up - well, one gentleman said he was forced to open up three additional showrooms. Do you have any comment about this?

MR. NEELY: That's a very interesting commentary. I, of course, am not prepared to discuss it because I am not aware of that.

First of all, let me say that we don't force anybody to do anything. I know that you were telling a witness here this morning that you weren't forcing to do anything and that is exactly so with the General Motors Corporation; we do not force anybody to do anything whatsoever. We urge them to do what is good business for them and the consumer in order that they may succeed, make money, and then we will also.

ASSEMBLYMAN THOMAS: This is one complaint that I have heard from people whom I know are good businessmen and good dealers and I buy cars from them, and they say that the manufacturer makes unreasonable demands

upon them for expansion to the extent of jeopardizing their financial structure. Because, of course, they have to finance this. The average guy cannot go out and pay for an addition. It is true that they do not have to do this, nobody has to do anything, but they are in an economic situation where you would seem to have all the high cards. Now could you comment on that?

For instance, if I have a dealership and it is the last year of my five-year contract, I've got a nice little going concern, I've got a geographic area that I am entitled to operate in and you say, "all right, now, unless you double the size of your dealership when the contract comes up, we are not going to renew or we will cut your geographic district in half," now where do I have any bargaining leverage in this kind of situation? I don't have to agree to the terms but if I don't, I'm in bad shape.

MR. NEELY: I don't know of any situation where this would actually occur, first of all.

ASSEMBLYMAN THOMAS: The dealers tell me it does.

MR. NEELY: Is that a fact? General Motors dealers?

ASSEMBLYMAN THOMAS: Yes, sir.

(laughter)

Mr. Neely, I'm not trying to embarrass you but they have told me this.

MR. NEELY: No, I understand that. I'm not--

ASSEMBLYMAN THOMAS: They have been calling me in the last month and telling me this too.

MR. NEELY: Well, I can understand where they might, perhaps, tell you that. I would like to have them come up and testify to that effect and then if that be so, I'd like to check into it and find out why it is so.

I can't, under any circumstances, imagine a General Motors representative going into a dealership and saying, "your facilities are thus and so; now you must double them."

ASSEMBLYMAN THOMAS: Well, let me ask you something. Is there something in the arrangement - in the financial arrangement - between the dealer and you fellows, sitting up at corporate management level, whereby the in-between guys

get paid on the basis of the performance of the dealer?

MR. NEELY: No.

ASSEMBLYMAN THOMAS: Are they on straight salary or do they get--

MR. NEELY: Straight salary.

ASSEMBLYMAN THOMAS: So it doesn't make any difference how good their area happens to be producing, how well their dealers are producing, they're paid the same amount.

MR. NEELY: Well, I heard someone say - from the audience - that that is not so. Again, I am on record here. I think, perhaps, he is referring to the fact of bonus arrangement.

ASSEMBLYMAN POLICASTRO: Well, you do give a bonus on the amount of business.

MR. NEELY: No, sir. It is on the job that is done not-- If I do a good job as a representative of the General Motors Corporation then I will share in any profits that we might make, yes, that is true. But not at the level of the district manager, the man that is contacting the dealer.

ASSEMBLYMAN SMITH: Mr. Neely, I understand that in your statement you mentioned the fact that the dealers could appeal to the corporate company and the Honorable ex-Justice Whittaker would hear the case and that the Honorable gentleman was on the payroll of General Motors. I assume there are not many cases that he passes in favor of the dealers - I would assume that?

MR. NEELY: The assumption is correct.

ASSEMBLYMAN SMITH: So actually the appeals there would be almost useless to the dealer; he'd be better off taking it into court immediately if he wants any action. So there really isn't any appeal as far as General Motors is concerned because they appoint their own arbitor in the case between dealer and company; am I correct in assuming that?

MR. NEELY: Not exactly, Mr. Smith.

MR. SMITH: Where am I wrong?

MR. NEELY: In that before a case gets to the umpire it must be reviewed by the zone manager of the General Motors

Division, by the Regional Manager, by the Assistant General Sales Manager; it must be reviewed and approved by the General Sales Manager of that Division. Now, if there is any inequity on the part of the divisional personnel, it will have been picked up at this point. When that case goes to the referee, it pretty generally means that the grounds are very firm for the corporation and that is why it results in this disproportionate number.

MR. SMITH: Isn't that inclined to make it worse, Mr. Neely?

MR. NEELY: I beg your pardon?

MR. SMITH: Wouldn't that be an inclination to make the dealer's case worse, if it has to go through all those officials of the company?

MR. NEELY: Well, not exactly, Mr. Smith. The reason they go through all of this is a safeguard for the dealer. In no sense do we-- Keep in mind that we have no other way to merchandise our products or to market our products in the State of New Jersey except through these dealers. We want to do everything we possibly can to build these dealers up so they will sell more cars. As I said, this is just plain common business sense.

Keep in mind that the decision of the umpire is not binding on the dealer; it is binding on the General Motors Corporation. It is a method by which he may air his problems if he so sees fit - it is not binding on him at all.

MR. SMITH: A favorable decision wouldn't be hard to bind then, would it?

MR. NEELY: I beg your pardon?

MR. SMITH: A favorable decision by him wouldn't be hard to bind the General Motors Company.

MR. NEELY: A favorable decision would bind General Motors?

MR. SMITH: It wouldn't be hard to bind General Motors?

MR. NEELY: Well, we are delighted, of course, if we are right.

MR. SMITH: Of course, that's what I thought.

MR. NEELY: Naturally.

ASSEMBLYMAN THOMAS: Are there any more questions?

ASSEMBLYMAN FAY: I have one question. Mr. Neely, are there any major differences for distinction between the fourteen states that do have laws guaranteeing that the franchisor has to give reason or cause. Mr. Burd made this point, that New Jersey would not be breaking new ground and would not be the first state that this bill was passed in. Is there any major problems between the fourteen states that do have this protection clause in their contract between General Motors and the dealer?

MR. NEELY: Yes. The law that governs those fourteen states is a different law altogether from this. Mr. Burd, I think, made it abundantly clear that Massachusetts and Iowa are the only two that have laws of this type.

You mentioned earlier the California Disclosure Act which is not at all like this law, whatsoever. The California law, in its definition says a franchise is one that is sold; a franchisor is one who sells a franchise; a franchisee is one who buys a franchise. That, of course, eliminates all of the people in the automobile industry.

ASSEMBLYMAN POLICASTRO: Mr. Neely, is this a regular contract throughout the United States?

MR. NEELY: Yes, sir. That one happens to be. It just happened I picked up one that--

ASSEMBLYMAN POLICASTRO: Is this one that is standard with every dealer in the United States?

MR. NEELY: If he was a Cadillac dealer, it would say Cadillac, if it is a Chevrolet-- yes, sir.

ASSEMBLYMAN POLICASTRO: Cadillac or Chevrolet?

MR. NEELY: Yes, sir. Other than that, it would be the same.

ASSEMBLYMAN POLICASTRO: What about Massachusetts? Now they have a law, you say, similar to the one we are about-- We intend to take up. Have you changed your contract in any

way to conform with the Massachusetts law?

MR. NEELY: No, sir. That contract--

ASSEMBLYMAN POLICASTRO: In any state at all?

MR. NEELY: No, sir.

ASSEMBLYMAN POLICASTRO: So it stands as it is?

MR. NEELY: Precisely. I think we would be guilty of violating the Robinson-Patman Act if we did that. You have to make one contract for everybody.

ASSEMBLYMAN THOMAS: Thank you, Mr. Neely.

MR. NEELY: Thank you, very much, Mr. Chairman. Gentlemen, I appreciate the opportunity.

ASSEMBLYMAN THOMAS: Mr. Nasmith, do you have somebody from the oil manufacturers who wishes to talk? I think you'd better put him on.

We are not going to have time to get to all of your witnesses but if there is somebody here from the oil industry, I think we should hear from him. I don't want to tell you how to put your witnesses on but I think, in light of what has been said earlier, that in fairness to them they should have a chance to say something.

We will give you about 15 more minutes and then one-half hour to the other side.

J A M E S M C L O U G H L I N: Mr. Chairman, my name is James McLoughlin, I reside in Hopewell Township, I am an attorney practicing at 28 West State Street in Trenton, New Jersey and I represent the New Jersey Petroleum Council.

We have submitted a memorandum which I believe you gentlemen have. This is submitted on behalf of the New Jersey Petroleum Council, an organization composed of petroleum companies doing business within the State of New Jersey.

Although petroleum suppliers have never considered themselves "franchisors", as that term is commonly used, it is clear that the proposed legislation would have a significant impact on their business activities within the State. Bills have been proposed in a number of legislatures and in the Congress of the United States, which in some form or other purport to regulate the franchising industry.

To our knowledge the only franchise bill of general application that has been enacted anywhere is a law passed in the State of California which requires anyone engaged in the sale of franchises for a fee to make available to potential investors sufficient information so that an intelligent and reasoned investment decision can be made. Disclosure legislation of this type is aimed at insuring that parties to an agreement are aware of all the details which are pertinent to their transaction. This we believe is progressive and realistic governmental action which inevitably will obviate rather than encourage litigation between parties to commercial transactions. That legislation is so structured as not to be unduly burdensome or unrealistic in terms of the data required to be filed.

The other type of franchise legislation which has been proposed purports to regulate the nature and detail of the relationship between "franchisors" and "franchisees" as they are defined in the legislation. In this regard the former Chairman of the Federal Trade Commission stated in testimony before the United States Senate,

> "The many varieties of franchise systems differ among themselves so widely that any attempt to state rules applicable to all such systems must either be so broad as to approach the meaningless or tailored with numerous qualifications in order to fit all varieties of franchises. It would be foolhardy for one to issue

flat pronouncements declaring the state of the law as it pertains to franchise agreements."

The principal defect which permeates the total bill A-2063 is the loose, vague, legally imprecise language it contains. This vagueness and indefiniteness raises very serious questions as to the constitutionality of the bill, will put an impossible burden on the already overworked State Judicial System, and will force arms-length commercial transactions to be conducted between parties unable to go forward with any degree of certainty as to the meaning or enforceability of the terms and conditions upon which they have agreed.

When similar legislation was introduced in the United States Senate, extensive hearings were held. The views and opinions of a wide range of parties were sought, received and considered. On both occasions the Senate Judiciary Committee had the advantage of lengthy public hearings and detailed written analyses from a number of sources. They sought, for example, the views of the American Bar Association, the Department of Commerce, and the Department of Justice. These objective commentators, whose prime concern is the broad public interest, recommended against enactment. They saw implicit in the bill a potential detriment to the economy because of its anticompetitive nature which far outweighed any of the claimed benefits. Further, to the extent that any of the abuses the sponsors alleged were present in the franchise

system were anticompetitive, they concluded that the existing body of antitrust laws provided adequate remedies. These antitrust laws are acknowledged to be the mechanism by which our free enterprise system is able to operate effectively, absent artificial restraints.

When considering the probable impact on the economy, it is readily apparent that termination of an arrangement statutorily defined as a franchise is impractical if not impossible. The notice provision and the burdens placed on the franchisor dictate that any such termination would be done at considerable risk, and the propriety of his action would be determined after the fact and would be measured in context of the imprecise language referred to above. For example, after termination the Courts would have to determine whether there was "good cause," and this determination would be made in the context of "substantial compliance" with "essential and reasonable" contract terms. This condition will insulate and protect the inefficient operator and because of the restraints in paragraph 7, franchisors may be unable to establish a competitive franchise in the same "geographical area" as the inefficient operator. The inevitable result will be a reduction in interbrand competition, as fewer franchises are formed, and an elimination of intra-brand competition as each existing franchisee may be given a de facto geographical monopoly.

There is a serious question whether this bill will result in substantial harm to consumer interests by perpetuating the inefficient, the incompetent and the unworthy.

We must ask ourselves whether the unreasonable risks, burdens and attendant uncertainties will foster the growth of the franchise method of doing business in our State. It has been recognized that franchising has enabled many individuals to take advantage of the perquisites of entrepreneurship which would otherwise be difficult to obtain. This bill, whose stated purpose is to protect "franchisees," might well have the anomalous effect of discouraging suppliers from franchising and reducing, perhaps substantially in the future, opportunities for small independent businessmen.

Legislation should have the purpose and effect, particularly in the commercial field, of reducing or obviating litigation between parties. This bill will have the opposite effect and will result in making potential adversaries out of every customer and supplier covered by the bill. Further, it will put an unnecessary, unprecedented and unwanted burden upon our Courts.

The Courts will be involved in all disputes between the parties and will have to rule whether all terms and conditions are "essential," "reasonable," and "non-discriminatory" despite the intention of the parties, their relative sophistication, or

any other pertinent factor. This bill would also make any different treatment of customers a violation of the law despite the fact that federal law clearly recognizes that some discriminations are necessary in our economy and have a positive competitive impact.

This bill presupposes that in all such commercial transactions the equities are in favor of the franchisor. This is not necessarily so. In the service station business it is the supplier who makes the significant investment in the land and improvements. The magnitude of these individual investments has reached levels unanticipated a few years ago. It is not uncommon for an oil company to invest $500,000 in order to put a new station on stream at a prime metropolitan location. The dealer on the other hand pays no "franchise fee" to the supplier and makes a modest investment in inventory, his stock and trade. Is it unrealistic to ask a company which has a responsibility to its shareholders to make an investment of this size, turn it over to a third party, and say in effect, "do with it what you will, we are not allowed to care."

We have tried to summarize above some of the more obvious and blatant legal deficiencies and economic impracticalities which this legislation represents. There follows a more detailed analysis of the individual provisions of the bill, and the defects therein, as we view it.

PURPOSE

It is the stated purpose of the legislation to "define the relationship between franchisors and franchisees in connection with franchise relationships." Inevitably, the contrary result will follow if this legislation is enacted. The nature, meaning and significance of agreed upon terms of vertical relationships will be inexorably uncertain and this uncertainty will lead to chaos, economic turmoil and distrust. A franchisor will bargain with a potential customer (franchisee) with the knowledge that each provision of the agreement will later be put to the test of "reasonableness and essentiality." If the franchisor is trying to develop a uniform approach he might find that what is essential is not reasonable, what is reasonable is not essential and that what is reasonable in one case is not in another. If he tries to tailor his agreement to fit individual needs, he will find his terms do not meet the "non-discriminatory" standard.

DEFINITION

A threshold defect is the attempt to regulate "oral franchises." The problem is more readily apparent when it is recognized that the statutory standards of "reasonable, essential and non-discriminatory" will apply to oral agreements. Therefore, the parties and the Courts will have to determine the full range of terms and conditions of an oral arrangement, with the magnitude of problems this will create, and then judge each in terms of the above mentioned imprecise standards.

The definition of "franchise" can be logically construed to contemplate employees selling goods under the employer's trademark, insurance brokers or agents, licensees of New Jersey State lottery tickets, and a range of other arrangements. Must an insurance company continue to do business with a broker who defrauds his clients? Must a manufacturer refrain from firing a salesman, regardless of his performance or ability? Must the State of New Jersey continue to license a lottery agent who has violated his legal obligations? The answer in each case would be affirmative. The "injured" party would demand 180 days notice and then litigate the reasons for cancellation. To illustrate this point, assume that a lottery agent engaged in criminal activity in connection with the sale of lottery tickets. It might well be that he has statutory protection against immediate termination and might have a claim against the state if a competing agent were licensed in his "geographical area." We do not dwell on this extreme example except to point out the kind of unanticipated results which can flow from broad, ill-defined, all encompassing legislation.

JURISDICTIONAL UNCERTAINTIES

Section 4 limits the application of the act to franchises in three respects. One, those franchises where the performance of which contemplate or require the franchisee to establish or maintain a place of business within the State of New Jersey; two, where the gross sales of products or services between the fran-

chisor and franchisee covered by such franchise shall have exceeded $35,000 for the twelve month period next preceding the institution of suit pursuant to the act; three, where more than twenty per cent of the franchisee's gross sales are intended to be or are derived from such franchise.

Parties to an agreement should know what standards are to be used to judge their actions. At the outset, it is not possible to predict with certainty whether the above mentioned statutory limits will be met, and therefore not possible to know whether the arrangement in question is a "franchise." This, and the multitude of combinations it opens up, are further examples of the uncertainty which this legislation would engender. For instance, a manufacturer sells trademarked goods to a wholesaler. Sales remain constant at $40,000 per year for a period of years, out of total sales by the customer of $400,000. As a result of factors unforeseen, the customer's total sales drop to $200,000. An ordinary buyer/seller relationship has, then, become a "franchise" by operation of this law since the $40,000 would represent 20% of the gross sales under the franchise arrangement.

Also, a "franchise" one year might not be the next, or vice-versa, depending on things beyond the control of one or both of the parties. It is not unreasonable to expect some manufacturers or distributors to see that no individual seller buys sufficient of his products to bring the arrangement within

the statute. In other words, it may have the practical result, in some cases, in serving as a barrier to growth by the very group it is intended to "protect."

While some limitations would be necessary in this kind of legislation, the attempt to force arbitrary limits will, as shown above, have unreasonable effects which benefit no one. Further, the establishment of such artificial standards presupposes that a "small buyer" is less aggrieved than a "large buyer" when terminated by a supplier regardless of the true facts which led to the decision in the two cases.

TERMINATION OR FAILURE TO RENEW

Section 5 requires that a "franchisor" give 180 days notice, in writing, of any intention not to renew. This provision, which is an absolute requirement, can also be violated indirectly. A second provision in this section requires the franchisor to prove that the termination was for "good cause," which is limited to "failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise which requirements must be essential, reasonable and non-discriminatory."

While the practical problems and inequities inherent in this provision are manifold we shall focus on just a few of them.

First, the 180 day requirement is an absolute, regardless of the business realities or intention of the parties. The franchisee can abandon the business, but cannot be terminated. Assume that a franchisee has a local monopoly, which the statute

grants in many cases, and refuses to promote stock or sell the franchisor's line. Or assume that the franchisee is sent to jail for criminal activities in connection with the sale of the franchor's products. Or assume that he is charged by the Federal Trade Commission with false and deceptive merchandising methods in connection with the sale of the franchisor's products. In all these cases, the franchisor would be required to suffer the relationship through the notice period and then terminate at his peril. Further, if the franchise does not by its terms demand that the franchisee refrain from criminal conduct in connection with the sale of the product, or not engage in false and misleading activities, there may not be any statutory basis for termination.

If there is a franchisor with enough fortitude to end a franchise, regardless of how sound his reasons are, he will do so at his peril. He will know that, although the franchisee did not comply with the franchise terms, that the franchisee's actions might reach the level of "substantial compliance" in the eyes of the Court.

ASSEMBLYMAN THOMAS: Mr. McLoughlin, I want to interrupt you here for a minute because we are running out of time. We have your statement. I am particularly interested in a rebuttal in terms of some of the allegations that have been made by some of the retail dealers here as opposed to your general industry.

You go on to a detailed analysis of the bill and I appreciate that. I have that here and I can read it. Do you have anything that you want to say in rebuttal to what was said earlier?

(Following is the remainder of Mr. McLoughlin's statement which he did not read.)

He will also know that even though there was an absolute failure to comply with the terms of the agreement, that some provisions may be found, with the benefit of hindsight, to be either non-essential or unreasonable, or that in meeting a competitive situation as permitted under the Robinson-Patman Act, he has discriminated among franchisees in transgression of this law. He will not know whether the terms of the contract

are to be judged objectively, as his total business enterprise might dictate, or subjectively as relates to his dealings with the franchise at issue. He will not know whether a term or condition, apparently both "essential" and "reasonable" when the contract is entered into, can become not so at a later point in time. In other words, at what point in time are these so-called standards to be applied. He will also not know whether a contract provision can be reasonable or essential as to one franchisee and not as to another. And, as earlier pointed out, an attempt to treat the individual needs of each arrangement can readily be construed as the failure to be "non-discriminatory."

As has been noted, "indirect" terminations are also prohibited. One wonders whether involuntary bankruptcy is such an indirect termination, or whether the sale of the property where the franchisee is doing business is contemplated, or whether the condemnation or other taking of the premises by a governmental agency presumptively involves the franchisor in a violation of the law.

One also wonders why the legislation does not put a concomitant burden on the "franchisee" to give similar notice to his franchisor. The answer to this question points up a faulty premise that underpins the legislation. Contrary to the common conception, in all cases the equities do not favor the franchisor. In all cases, the franchisor does not have the "leverage" in his favor. All franchisors are not big and all franchisees are not small. In all cases, it is not the franchisee dependent on the franchisor.

We have mentioned earlier that service station investments have reached unanticipated proportions. There are cases, in this

State, where $700,000 has been invested by an oil company for land, site improvement and building. This bill would require tying the hands of an oil company where a dealer abandons his station, fails to pay rent, adulterates or misbrands products in fraud of consumers or blatantly abuses his leasehold. In each case, the oil company must give 180 days' notice, even to the absconded dealer, wait with its hands tied while the unconscionable waste its assets and drive away its business. Is this reasonable? I doubt that any of the members of this Committee would like to run his business on that basis. It also may be an unconstitutional taking of property without due process.

Many service station dealers own their own properties and have only a supply contract from an oil company. Many of these so-called "contract dealers" have become successful because they benefit from competition among suppliers for their business. They have the "edge" and it has benefited them. Ironically, they would be deprived of the benefits of healthy competition because a "discrimination" in their favor could infect a supplier's total business scheme.

There are numerous entrepreneurs who have utilized franchising to develop a broad distributional base for a new product or idea. A life's work or savings can be invested in the project and the franchisee may be a large, well-financed company seeking to diversify. Clearly in such a case an inquiry into the facts would be pertinent if the franchisor, perhaps desperate, sought to terminate for poor representation, or to appoint another franchisee despite a geographical provision in the agreement.

This bill, if encacted, would not permit such an inquiry because of the faulty premise which underlies it.

TRANSFERS AND ASSIGNMENTS

This section is so structured that it appears to give a franchisor some rights under the statute. Any benefit to the franchisor is illusory. In effect it prevents one from treating a "franchise" as a personal relationship. It puts the burden on the franchisor to "advise the franchisee of the unacceptability of the proposed transferree, setting forth material reasons relating to the character, financial ability or business experience of the proposed transferee which reasons must be essential, reasonable and non-discriminatory." We have discussed the difficulties with these "standards" in other places, but there are other practical problems which are hidden in this provision.

Our jurisprudence has recognized an historical right to choose those with whom we want to do business. This right has been restricted in only two areas:

1. Under the federal antitrust laws, a refusal to deal as part of an anti-competitive scheme or plan has been held improper; and
2. If a refusal to deal is grounded in a discrimination based on the religion, color, or national origin of the proposed customer, a violation of the constitutional rights of the individual has been determined to be present.

This section would eliminate this guaranteed right of customer selection. The burdens on the franchisor should he disapprove would be tremendous. Suppose, for example, his investigation of the proposed transferee pointed up a probability of "underworld" connections and involvement. Could he safely put such a reason in writing? Personal safety and the law of libel indicate an answer in the negative. Or, if the investigation showed a pattern of business failures where the concerns had been "milked" for personal gain and left, could this be a reason which could be safely put in written form? There may be character traits repugnant to the franchisor or a general reputation which would impair the value of the trademarked goods. Some of these reasons would be valid, but hard to quantify or express.

A franchise may be granted on a wide geographic basis because of the initiative, character, reputation or success record of the franchisee. The franchisor should not be deprived of the right to make this determination afresh in all cases. The proposal is a radical departure.

GEOGRAPHICAL MONOPOLIES

Section 7 provides a geographical monopoly, "where any franchise designates a franchisee's geographical area" unless 180 days notice is given and "the franchisee shall have failed to substantially comply with essential, reasonable and non-discriminatory requirements ---." This is an absurd requirement as it necessitates not only notice but grounds for termination of the existing franchise. It will effectively eliminate competition in the goods

of the franchisor to the detriment of the public. Our economy will be subject to the whims of geographical monopolists and the frachisor's business will be tied to the one franchisee. There is no conceivable benefit to the economy of this State in such an outrageous provision. Further, there is no suggestion that a geographic area be spelled out initially as "exclusive" or that such protection have been critical to the franchisee's initial investment decision. At some future time it may be assumed that a lease of a specified piece of real estate could be considered to "designate a franchisee's geographical area" and therefore prohibit competitive entry. This would not only have serious impact on the franchisor and the consuming public, but would bar entry by ready, willing and able potential franchisees seeking an opportunity for advancement and independence in a franchised business. It also should be remembered that imposition of geographic limitations on a franchisor's right to resell violates the Federal Antitrust Laws.

VIOLATIONS ENUMERATED

Included in Section 8(f) is a novel and unique legal concept. That section provides that it is a violation of the Act for a franchisor "to provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates this Act." It is our understanding that a state law is either violated, or it is not. Conduct is measured accordingly. We are unable to comprehend how one "indirectly" violates a law. A violation

of a law may be inadvertent, but the conduct has to be either within or without the law. This is a further indication of the failure of this bill to come to grips with business realities and to clearly define the problems at which it is aimed.

REMEDIES

No remedies are provided for a franchisor injured by conduct of franchisees. This statute does not provide a cause of action for an aggrieved franchisor. Nowhere in the statute is there manifest any realization of the avowed legislative purpose - to "protect the substantial investment - tangible and intangible - of both parties in the various franchises."

CONCLUSION

The franchisee not only is granted possible treble damages, if he succeeds, but is entitled to injunctive relief which may perpetuate an improper injury to the franchisor's ultimate interests without the reasonable safeguards engrafted at common law.

We think the above cursory examination vividly points up the shortcomings in the legislative proposal A-2063. Franchising, as we know it today, is a complex undertaking. The tremendous variety of vertical relationships which would be regulated are not susceptible of omnibus regulation of this type which ignores the business and economic realities of the marketplace. If the legislative intent was to encourage, or rather insure, commercial litigation and to foster economic

uncertainty, that goal would be fully accomplished by this bill which will benefit only a select group of businessmen at the expense of the economy.

We believe that the interests of the citizens of this State, who as consumers will be directly affected by this bill, should be foremost in the minds of our Legislature. We posit that these interests are not protected but instead are adversely affected by this proposal.

We suggest, finally, that the matter be given extensive study, with the assistance of interested parties, and the problems be carefully and specifically defined and the optimum legislative solution determined only after careful deliberation and a weighing of all interests.

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MR. MC LOUGHLIN: Seated next to me, Mr. Chairman, is Mr. Glen Davis of the Gulf Oil Company who, I think, is prepared to make such a rebuttal.

ASSEMBLYMAN THOMAS: Well, I would like to hear from him because we are running out of time - if we may.

G L E N D A V I S: Mr. Chairman, I represent Gulf Oil Corporation and I am also a member of the New Jersey Bar.

If you mean specific rebuttal to the arguments that were raised this morning, of course, I can only speak concerning my own corporation.

First of all, I think one of the arguments that was raised this morning is: Was there any legislation that would take care of the unconscionable contract situation? I think this was not only brought up by the Gasoline Retail Dealers but also the Automotive Dealers.

As you know, in New Jersey, Title 12 (a) is the commercial code which contains a section specifically dealing with the unconscionable contract situation where, because of bargining power or strength of the industry, the corporation is, so to speak, overpowering the individual dealing with it. Also, I don't think that this legislation actually covers the arguments that were raised this morning and I think maybe some of the arguments that were raised this morning were brought to the floor because of maybe a lack of knowledge.

We have the Federal Anti-Trust laws which, of course, every corporation, certainly my own, adheres to very strictly. This provides for free competition and, of course, does not permit coercion against a dealer, an individual, or even another corporation. In New Jersey, as of last year, we even have a baby anti-trust law which, essentially, incorporates into the law of New Jersey, the same sort of provisions to prevent coercion and, of course, to foster free enterprise.

ASSEMBLYMAN THOMAS: Well, what about unreasonable termination? That seems to be the crux of many arguments here. Now there appears to be a Federal Law that says that an automobile dealer can't fail to renew unless there is good cause. Is there such a Federal Law that applies to gasoline dealers?

MR. DAVIS: Well, you see, when you are talking about unreasonable termination-- For example, my oil company, Gulf Oil Corporation, has various transactions into which the dealer enters. He has a choice of several.

For example, he may enter into a contract for the sale of petroleum products. This may run for a one year term, a two year term, a five year term, whatever is negotiable. It does contain a renewal provision, it does contain a termination provision, which is for both sides. Either party to the transaction may terminate upon a specific notice. I can't speak for the other oil companies. I know in our contract it is generally thirty days' notice.

ASSEMBLYMAN THOMAS: The termination before the end of the contract period, is that what you are talking about?

MR. DAVIS: Well, there are only certain-- Some contracts cannot be terminated before the end of the period; others can. These reasons are set forth right in the contracts. It may be because of a failure to pay for the product when it is delivered. It may be because, along with a contract for the sale of petroleum products, the dealer has leased from the corporation certain equipment which has been abused or lost or destroyed. There are specific reasons set forth.

ASSEMBLYMAN THOMAS: What about renewal of the contract? Do you have the right, in your contract, to renew?

MR. DAVIS: That's right. In one contract there is an automatic renewal unless either party, in writing, gives notice to the other, within thirty days, that it does not desire to renew it.

ASSEMBLYMAN THOMAS: There was testimony earlier this morning that there is a turnover rate of 30 or 40% in the retail gas dealers' situation. What do you know about that?

MR. DAVIS: Well now, speaking as a member of the New Jersey Bar representing the Gulf Oil Corporation in the State of New Jersey and handling all of the transactions for Gulf Oil Corporation, or a majority of them, within the State, the cancellation ratio is very, very small. I hesitate to give a percentage because it wouldn't be exact but I would

say it would be maybe 5%, maybe 10%, along those lines and the reasons for it would be, as I stated before, maybe the product wasn't paid for, maybe equipment was damaged. It may be the type of transaction where the owner of the property has leased the property to Gulf Oil Corporation who, in turn, leases the property to a dealer and gives him a contract to buy petroleum products. In this situation it may be because of-- maybe he is violating a municipal ordinance. For example, the town may have an ordinance saying there shall be no junk cars kept on the premises and the dealer has junk cars on the premises. Now, this is a violation. So, built into the agreement, of course, is the standard clause, "if the conduct violates any municipal ordinances or State laws, etc., that the deal can be terminated."

ASSEMBLYMAN THOMAS: Does a franchisee purchase the franchise from you?

MR. DAVIS: We don't have-- This word "franchise" is being tossed around here--

ASSEMBLYMAN THOMAS: Well, it has an artful definition in the bill so it includes a lot of things.

MR. DAVIS: I challenge the definition in the bill because the way it is structured in the bill, any product - and it doesn't necessarily have to be gas or oil - any product that contains a trademark or a trade name now means that you have a franchise agreement.

ASSEMBLYMAN THOMAS: Do your dealers pay for whatever agreement--?

MR. DAVIS: No, they don't. They get a contract for the purchase of petroleum products. The don't pay for a so-called franchise.

ASSEMBLYMAN THOMAS: What is the extent of the average investment by a dealer in a gasoline station in terms of money?

MR. DAVIS: Of course now, once again, there are several programs. For example, it may be the type of program where the dealer is eventually going to own--

ASSEMBLYMAN THOMAS: He doesn't own it. 95% apparently

don't own.

MR. DAVIS: He is just a lesee.

ASSEMBLYMAN THOMAS: All right.

MR. DAVIS: Well now, he has his own equipment - he buys his own equipment or he leases his equipment from the corporation. If he buys his own equipment, then the only thing that he has with the oil company is his contract to purchase the products and, of course, he has his lease which may provide that he has to carry certain insurance in case of fire, etc. But his investment is minimal in that situation.

ASSEMBLYMAN THOMAS: How many dollars are we talking about?

MR. DAVIS: It is a hard thing to estimate how many dollars.

ASSEMBLYMAN THOMAS: One hundred thousand?

MR. DAVIS: No. Nowheres near that.

ASSEMBLYMAN THOMAS: Five thousand?

MR. DAVIS: In some situations it could be five thousand. It could be less than that. It depends on what he is bringing with him and what the oil company-- He contracts with the oil company and they provide him with the material to carry on his business.

But we don't have-- There is no exclusive geographical territory.

ASSEMBLYMAN THOMAS: I was just going to ask you that. Do you have that as a part of your contract?

MR. DAVIS: No. There is nothing in there. He can sell to whomever he wants to. There is no specific provision that says, you may only sell within a five mile radius or a ten mile radius.

ASSEMBLYMAN THOMAS: No, I don't mean that. Do you have a geographical prohibition against setting up another Gulf Gas Station within a certain geographical area?

MR. DAVIS: No, there is none.

ASSEMBLYMAN THOMAS: What about the sale of his business to somebody? Do you have to approve that?

MR. DAVIS: Well, again, it depends on the type of transaction which he has entered into. If he is going to own it and we have guaranteed his mortgage - in other words, he has gotten his mortgage from a private financial institution but we have guaranteed it.

ASSEMBLYMAN THOMAS: Forget that. He's leasing, he is a leased dealer. Can he transfer his interest in the business to somebody else, or do you have to first approve?

MR. DAVIS: Before the end of his lease?

ASSEMBLYMAN THOMAS: Yes. Does he have the right to sell his business, that's what I'm saying - without getting approval from you?

MR. DAVIS: No, he would have to-- If he has entered into a lease, just like any other landlord-tenant relationship, he is going to have to notify his landlord that he is going to sell his lease hold or sell his business. You see, he is on the same footing. We are set up with a simple contract plus a lease which makes him subject to all the landlord and tenant laws in New Jersey too, as far as time provisions and concellation of that lease. Therefore, that's why I don't think that this piece of legislation, or proposed legislation, adds anything to the existing state of the laws in New Jersey and, if anything, may cause confusion because of what you already have.

Besides this, for example, the remedies provision -- Now I know that you stated this morning that you dropped the treble damages.

ASSEMBLYMAN THOMAS: I didn't; that has been proposed by the proponents of the bill.

MR. DAVIS: Proposed then. I don't know whether you mean by that that they are taking out the whole injunctive procedure and other remedies.

ASSEMBLYMAN THOMAS: No, just treble damages, that's all.

MR. DAVIS: I'd like to raise this question on that: The New Jersey court rules provide the procedure for obtaining

an injunction and also the dealer has other remedies. He can always go into the Law Division of Superior Court if he wants money. If he wants something other than money damages, he can go into the Chancery Division; he has avenues of remedies.

Now, the way the injunction provision is set up, what you are doing is you are changing Supreme Court procedure plus you are throwing out the body of law that exists in New Jersey, on precedence, concerning the criteria for getting an injunction. In some instances, for example, under our current judicial structure, you must post a bond as security in order to obtain an injunction; you have to show certain things - irreparable damage or something like that. I think that maybe - and of course, this has come up very quickly without an in-depth study - but maybe you are impinging upon the New Jersey Supreme Court's right to promulgate the procedure for the court system in the State of New Jersey.

ASSEMBLYMAN FAY: I have a few questions. This is from the previous testimony this morning. For my own information, do either one of you gentlemen believe there are any inequities in the present law - the present operation right now - do you feel there is no need of reform?

MR. DAVIS: I feel there is no need to reform the present law. I think the laws are there. There are several of them. They may not be all in one place so you can just open the statute book and there it is, but you do have a combination of them. You have your landlord-tenant law, you have your New Jersey--

ASSEMBLYMAN FAY: You see, this is one of the problems; we have found in the tenant-landlord operation that the landlord has most of the power and the landlord has most of the laws on his side. That is why we have been trying to reform the landlord-tenant laws in the last few years. There is just that possibility that this area of operations between the lessor and the lessee or the franchisor and the franchisee - this just might be the time right now to correct a law that is not equitable.

MR. DAVIS: But the problem with this bill is that it doesn't actually distinguish. Now when we are talking of lease hold interest, we are talking about real property; when we are talking about the contracts for the sale of a product, we are talking about personal property. This bill makes no distinction. Every arrangement between the so-called franchisor and the franchisee is subject to this proposed bill. There is no distinction made.

ASSEMBLYMAN FAY: If this is true, I personally find it arbitrary to cancel a man's livlihood in a matter of a ten-day notice - or even thirty days' notice. You are putting a person who has been in business for ten, fifteen, twenty years in the position of suddenly getting a letter stating that he is going to be out of business in ten to thirty days.

MR. DAVIS: Well, getting back to what you say about the reform of the landlord-tenant laws. Isn't that the same arbitrariness concerning our landlord-tenant laws? Some leases can be cancelled on thirty days' notice. There is a provision in Title 46 that says that a lease hold interest must be cancelled on a 90-day notice. By the way, that was once six months but it has been dropped to 90 days. In other situations where there is malicious damage, etc., we only need give the tenant three days' notice to bring a summary proceeding to oust him. But maybe this is where the reform should come in - under the landlord-tenant laws - rather than say, take this all, both personal property and real property, and package it up and call it "law regulating franchises."

ASSEMBLYMAN FAY: Another point that was brought up earlier this morning was the problem with the price wars and the particular pressures that might be brought upon the individuals as far as rebates were concerned or economic pressures.

MR. DAVIS: Well, I think that, of course, now that you have the baby anti-trust law here in New Jersey which right now we know we don't have many decisions, court decisions, on, but then we will have to assume that they will, in all probability, call upon the Federal body of law.

I think the first statement that anybody who deals with a corporation, interstate, and is involved in anti-trust, learns is that the dealer or the franchisee, or whatever you call him, is an independent businessman and that the corporation cannot regulate his prices. As soon as the corporation does that, they are certainly going to find themselves hit with an anti-trust suit and in this state, if it is not federal, it may be under the state law.

ASSEMBLYMAN FAY: The one thing that I believe this committee has to have is the distinction - and I imagine Mr. McLoughlin, as representative of the whole industry, can give this to us - we need the distinction between the figures of 30% to 40% cancellations and the 5% to 10% that Gulf Oil has gone on the record with.

MR. DAVIS: Yes, Assemblyman, we will be most happy to submit those at the earliest possible date.

ASSEMBLYMAN THOMAS: Thank you, gentlemen.

I'd like to have - is it Mr. Davis?

MR. DAVIS: Yes.

ASSEMBLYMAN THOMAS: Mr. Davis, I don't know whether you have a prepared statement or not.

MR. DAVIS: I do not.

ASSEMBLYMAN THOMAS: All right. Can I just start out by asking you some questions? We are running out of time and I do have some questions about this bill.

First of all, why are the $35,000/20% qualifying figures in there? Is there some reason for that?

MR. DAVIS: The qualifying figures in paragraph four are primarily to insure that the courts are not burdened with problems arising under franchises where the amount in controversy is inconsequential compared to the tremendous size of business under franchises for which the bill was primarily designed.

ASSEMBLYMAN THOMAS: All right. What about the situation that was outlined before, where two entities start out not qualifying as a franchise arrangement and then because of a change in the man's business, he finds that he now has backed into a franchise situation?

MR. DAVIS: It may very well be a situation where a franchisee, not originally within the jurisdiction of the act, backs into a situation where his franchise would be regulated by the act.

ASSEMBLYMAN THOMAS: That is not intended by this act, though, is it? Isn't the intention to cover those entities that people know they are getting involved with?

MR. DAVIS: The act is silent on that question and I assume the question of judicial interpretation as to what was the intent of the Legislature, assuming that no language is inserted by your committee, will be clarified. I see nothing wrong with a situation where the act is made applicable to a franchise relationship which gains in stature sufficient to meet the jurisdictional amounts set forth in paragraphs 4, 2 and 3. I don't think there is anything in the constitution about that situation.

ASSEMBLYMAN THOMAS: I'm not questioning the constitutionality of it; I am questioning whether you are imposing something arbitrarily on two bargaining parties that they didn't start out bargaining for and it doesn't necessarily involve a situation where you grow into it. The example set this morning was where a man's business drops to the extent to which he now backs into this.

MR. DAVIS: You mean increases to the extent--

ASSEMBLYMAN THOMAS: No, his business gross sales drop by one-half and his $40,000 of sales in a particular area now qualify him under the "over $35,000 and over 20% of the business" to become a franchise operation and here neither of the parties intended, when they started, to be involved as a franchise setup.

MR. DAVIS: Except that the parties bargained in the context of commercial reality where we don't have fixed grosses, we don't have fixed amounts of revenue. Therefore, it would certainly be a factor that could be contemplated and would be contemplated by the parties to the agreement and the franchisor would necessarily have to take into consideration the factors in this bill which would guide a court in construing

whether certain actions were unreasonable under the statute, if enacted.

ASSEMBLYMAN THOMAS: Well, do you know what I could foresee happening here if I were a lawyer advising somebody? I might write into my contract - where we don't start out being franchisee-franchisor - that if we ever reached that point, your contract ends.

MR. DAVIS: Do you think that would be reasonable, under the statute?

ASSEMBLYMAN THOMAS: It might be to one of the parties bargaining that didn't want to get involved with a franchise arrangement.

I understand what we are talking about. Now, isn't the effect of section five to grant a franchise in, virtually, perpetuity?

MR. DAVIS: I disagree.

ASSEMBLYMAN THOMAS: All right. Will you tell me-- The only reason you can terminate or fail to renew a contract is on good cause which is defined to be reasonable and non-dicriminatory. Now you tell me what good cause and reasonable and non-discriminatory mean.

MR. DAVIS: Fine. I've been waiting to do this all morning.

ASSEMBLYMAN THOMAS: And tell me if it is defined in the bill.

MR. DAVIS: It is not defined specifically or expressly within the bill and there are very good reasons for that. The bill is designed to apply to many different kinds of franchising businesses. It is impossible for one particular business to set forth the various standards of performance under a given franchise agreement. It is not only a drafting nightmare, it is a physical impossibility. Therefore, as in the case of the original Federal Anti-Trust legislation, the drafter is faced with the problem of finding verbiage which will articulate a kind of relationship. Just as the rule of reason of Mr. Justice White evolved to govern the first cases

arising under the Sherman Act, so did we install in this particular bill concepts of reasonableness and also non-discriminatoriness.

The actual meat, if you will, of those two terms are set forth in the various franchise agreements, for instance, those which exist in the automobile industry where, as the General Motors representative testified, standards of performance are set forth in a contract of adhesion which was unilaterally drawn, unilaterally negotiated - in fact, it wasn't even negotiated at all in most instances. The attempt here is to insure that those standards of performance, as written are reasonable and non-discriminatory. Furthermore--

ASSEMBLYMAN THOMAS: Let's stop there a minute. First of all, when you start out with a dealership, there is nothing that says you have to become an automobile dealer. The real area that disturbs me is the pressure that can be brought after you have involved yourself with an investment in a business and the time comes when you renew your contract - that's the real area that bothers me.

MR. DAVIS: Well, as a lawyer there is something that disturbs me too. When a man wants to sign up for a particular franchise, I think that he should have an ability to negotiate the contractual relationship pursuant to which, in many instances, his entire life savings are going to be invested. However, the older more established businesses, franchisors, such as in the automobile industry, will not tolerate the negotiation of even a comma, even a period.

ASSEMBLYMAN THOMAS: Well, do the contracts differ between the different manufacturers?

MR. DAVIS: Yes, sir, to a degree they do. However, the patterns are approximately the same.

ASSEMBLYMAN THOMAS: Well, what you are telling me then is that all of the automobile manufacturers have created a monopoly in the first instance of contract negotiation with the prospective dealer.

MR. DAVIS: Yes, sir, that is precisely what I'm saying.

ASSEMBLYMAN THOMAS: O.K. Now, would it be unreasonable to include in the contract - a five-year contract - that you must increase your sales by 10% every year or we will not renew you at the end of the five-year contract period?

MR. DAVIS: Within the context of the statutory scheme, the ultimate determination as to the reasonableness of that provision would be for a court - only if a termination, or failure to renew, resulted and the franchisee chose to seek arbitration, if you will, from a court of competent jurisdiction here in New Jersey, namely the State Court.

ASSEMBLYMAN THOMAS: Well, let us assume that is a contract provision and he has not met this standard of performance and General Motors says, "we are not going to renew your contract" and the dealer says, "that's unreasonable." Now, what standard or guide does the court have to judge whether this is reasonable or unreasonable; isn't that a business decision?

MR. DAVIS: It is, to a certain degree, a business decision but all business decisions must be tested by a concept of reasonableness, as applied to a given market area, and there are many experts who are available to testify, on the basis of market analysis, as to whether a given standard of performance, whether it be the standard of sales performance articulated by General Motors for a particular dealership or for a given metromarket, is a reasonable one. These are questions that are debatable.

What the dealers are concerned about is the fact that a particular standard is unilaterally rammed down a dealer's throat and after he has made a substantial investment of capital and time in that particular dealership, he is faced with a termination based upon, again, a unilateral determination that a particular standard has not been met.

ASSEMBLYMAN THOMAS: Why isn't the federal law sufficient protection to the dealer?

MR. DAVIS: All right, I've been waiting to answer that one too. The so-called "Dealer's Day in Court Act" was passed in 1956. I've had occasion to work with that statute considerably since I was one of the attorneys who handled the Simms case.

That statute has a legislative history which makes it useless in the cause of dealer rights, if you will. It is useless because of the tremendous burdens of proof placed upon a dealer and also because of the statutory facts it is necessary for the dealer to show in order to be entitled to relief under the statute. Good cause is defined in that statute and limited to acts, as I recall, of coercion and intimidation. To attempt to prove in a court of law acts of coercion and intimidation in an industry which is notorious for not having written documents governing the day-to-day business decisions as between the manufacturer and the dealer is an impossibility.

ASSEMBLYMAN THOMAS: Well, doesn't this act shift the whole burden of proof and, if so, isn't that illegal?

MR. DAVIS: The New Jersey act?

ASSEMBLYMAN THOMAS: Yes.

MR. DAVIS: What is illegal about the legislature determining who shall have the burden of proof in a given situation? I see nothing that contradicts the - is it the Salsbury case - governing rules of evidence, etc. I think the legislature has the prerogative to enact a bill such as this one which will declare that a given party has the burden of proof - particularly here where the public policy would be served because the resources of a given dealer are so small compared to the resources of an automobile manufacturer, if you will.

ASSEMBLYMAN THOMAS: Doesn't a dealer now have the right of injunctive relief pending the outcome of any court suit?

MR. DAVIS: The answer to that question is anybody's guess, in New Jersey. And I say that after having worked with the law of injunctions in New Jersey and in the Chancery Division for, certainly three years. That is not a considerable length of time but it is the most that I have been able to do since I have only been a lawyer for five years and I have been in the army for two.

However, let's examine what the burden is upon an

applicant for an injunctive order, an interlocutory injunctive order. He has to show undue hardship. Well, under the recent cases - namely the Simms case and the famous Schwartz case right here in our Federal District Court right here in New Jersey - it is possible, it is not only possible but these cases establish, that the termination effective immediately of an automobile dealership constitutes undue hardship. However, it was not until the Simms case that that became quite clear because in that case Ford came into court and argued that they were a one billion eight hundred million dollar corporation capable of compensating anyone in money damages and, therefore, since there is an adequate remedy at law, namely money damages, injunctive relief should not lie.

We don't have a case in New Jersey that, thus far, parallels the Simms case, which was decided first in the southern district of New York and then in the Second Circuit, which clearly indicates that the availability of money damages will preclude the granting of injunctive relief.

The second burden is - and that is what this statute, or bill, is really designed to get at - the liklihood of success. Today a lawyer faced with a dealer termination case in New Jersey would have to go back over the vast body of case law and probably could construct an argument out of the cases of common law to the effect that, yes, a dealer faced with an arbitrary and unreasonable termination would have a clear likelihood of success - an element that he would necessarily have to show in order to get an interlocutory injunction just to stay in business, just to fight the case. This bill then, if that is the synthesis of the various cases, is merely then a codification. I firmly believe that it is more than merely a codification. What it does is establish, quite clearly and conclusively, a course of action which a dealer would merely point to and allege in his pleadings, that given acts or actions on the part of the franchisor are unreasonable, and, based upon that, a court - a chancery court - would, assuming the validity of the allegations of unreasonableness and the acts complained of, grant the interlocutory relief on a

temporary basis so that the case could proceed.

One of the tactics utilized in fighting termination cases by the manufacturers, of course, is their overwhelming resources. So, the harder they make it to get that initial injunction, the more likely they will be able to avoid the determination of the ultimate issues by an impartial court of law - a tactic that in itself is somewhat unfair and, if you will, subversive of the American system of jurisprudence.

ASSEMBLYMAN THOMAS: Mr. Davis, we are going to have to, unfortunately, stop now but I wonder if we could ask you and an attorney that represents the other persuasion in this to attend our committee meeting this Thursday because I've got a number of--

MR. DAVIS: I would be more than happy to.

ASSEMBLYMAN THOMAS: I've got a number of other questions that I'd like to ask you about the bill and we are seeking help with this bill. I think it has some problems and we would like to clear those up.

MR. DAVIS: I would be more than happy to work with the committee in resolving those problems.

ASSEMBLYMAN THOMAS: We are going to meet at 10:00 in room 227 in this building on Thursday and I would like very much if you could be with us because I would like to discuss the bill further with you then. Mr. Nasmith, if somebody from the other side, an attorney, could also be in attendance that also would be helpful. Could that be arranged?

We are going to have to conclude now because we have a meeting downstairs that is on now and the legislature is going to convene very shortly so we are going to have to clear the Chamber.

MR. NASMITH: My name is Augustus Nasmith; I am an attorney representing General Motors Corporation. This is a request of you, Mr. Chairman and members of the Committee.

Since the testimony in the four hours this morning has shown that this is an extremely far reaching bill, I request a new date for a public hearing be set down so that other people may be heard. Those unheard, whom I know, who are

opposed to the bill include the Major Pool Equipment Corporation, Avis Rent-A-Car System, Hertz Rent-A-Car, the Chrysler Corporation, American Motors Corporation, Ford Motor Company.

I believe that there is no haste as far as this bill is concerned although I did hear the President of the New Jersey Automobile Dealers' Association discuss it. Obviously they would like to accomplish its passage this year. However, may I point out that undoubtedly both the General Assembly and the Senate will return this fall and there is ample time during this year to give careful consideration to the bill and to develop, if in the wisdom of the legislature some bill should be passed, a sound and reasonable bill. But because of the interest and because of the far-reaching effects, we respectfully ask for a continuation of this public hearing.

ASSEMBLYMAN THOMAS: Mr. Nasmith, we will, at our committee meeting on Thursday, consider your request. In the meantime, if you could arrange to have an attorney representing your side on this bill to be with us, that would be helpful too. I understand Mr. Davis will be there.

MR. NAISMITH: Yes, sir. I will personally be there even if someone else is not.

ASSEMBLYMAN THOMAS: We will call this hearing to a close for today.

(Hearing Adjourned)

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TESTIMONY OF EDWIN J. MULLANE TO THE ASSEMBLY JUDICIARY COMMITTEE OF THE LEGISLATURE OF THE STATE OF NEW JERSEY

HEARINGS ON ASSEMBLY NO. 2063

My name is Edwin J. Mullane. I have been a Ford dealer in Bergenfield, N. J. for the past 15 years and I am President of the Ford Dealers Alliance Inc., a New Jersey non-profit corporation which was organized for the purposes of improving business conditions with respect to the retail distribution of passenger cars, trucks, parts and service. Two of the Alliance's express purposes are to correct abuses in the automotive franchise system and to protect the independence of automobile dealer franchises.

To these ends, in my capacity as president of the Alliance, I have been privileged to present testimony to the Federal Trade Commission, to the United States Senate Sub-Committee on Anti-Trust and Monopoly and to the United States Senate Commerce Committee's Subcommittee on Consumers at hearings on proposed Guarantee-Warranty legislation. I have also testified before legislative committees in Iowa and Massachusetts on legislation concerning dealer franchise bills. In the past two years I have traveled more than 150,000 miles talking to dealer associations and I believe I relate to their problems. These problems exist in New Jersey and in every other state in the union.

In 1966 I represented 800 Ford dealers in the Northeast section of the Country on Ford's own National Dealer Council, which is Ford's advisory service, or said more pregnantly "Ford's Baby-Sitting Service". At that time I realized the great disparity of equity between the Dealers and the Mother Company; the equalization of this disparity can only be achieved by legislation and thereby hangs the tale and the reason for our testimony.

The motor companies are losing their favored position state by state. One has only to review the recent legislation in Wisconsin, Iowa, South Dakota, Mississippi, Louisiana, Tennessee, and Massachusetts among other states. Ironically, consumer interest appears to be more secure in the Midwest than in our sophisticated East, except for the enlightened Commonwealth of Massachusetts.

I have been asked by the New Jersey Automobile Dealers Association to express the viewpoint of the Alliance with respect to the bill which is the subject of this hearing.

We support the proposed legislation. We urge passage of Assembly No. 2063, the Franchise Practices Act.

With the Committee's permission, I should like to spend just a few minutes discussing certain key features of the pending legislation in light of the problems of the automobile industry.

The sales agreement, or franchise, pursuant to which all automobile dealers operate is the most unfair, one-sided, unilateral contract of adhesion the world has ever seen. An automobile franchise agreement makes baseball's reserve clause look like labor's Bill of Rights. It makes baseball's

reserve clause look like flaming socialism, like contractual utopia.

As a result of the onesideness of that franchise, not only is the dealer penalized, but consumers are devastated with respect to certain aspects of the purchase and service of automobiles. These problems for the most part have resulted from the overwhelming economic power of the manufacturer vis a' vis the automobile dealer. Our industry is on the way to resolving these problems but the impetus for solution has come from the dealer body at considerable cost. Because of the one-sided franchise agreement the individual dealers who championed these issues were exposed to the naked brutalness that absolute raw power unfortunately has a habit of creating.

For example, an important area in which the consumer was short changed as a result of the actions of the manufacturer concerns the warranty which the consumer receives when he purchases that sparkling new automobile. Unfortunately, and unknown to the public at large, because of developments in the automobile industry, that same assembly line in too many cases did not end in Detroit, but ended in the dealership. The dealer was required to perform numerous functions for which he was not reimbursed by the factory or if reimbursed then on a far inadequate basis. In effect, the factory forced the dealer to subsidize the completion of the manufacturing process, a function which should not be the dealers unless he is adequately and fairly compensated. A group of dealers in New Jersey and New York recently spent $130,000 to

retain the noted management consulting firm of Booz, Allen & Hamilton to conduct a study which clearly demonstrated that at that time Ford Motor Company utilized unfair methods in their relations with their dealers with respect to the administration of the warranty and policy program, particularly as to the computation of cost recovery allowed dealers.

As a consequence, the consumer did not receive the same satisfaction on warranty work as he did on retail labor work because the manufacturers did not allow the dealers to recover their costs let alone a fair profit. On warranty and policy, the manufacturer'strack record had been one of unfairness, deceptiveness, bad faith - - capricious and unconscionable dealings with respect to both the dealer and consumer.

What Assembly Bill No. 2063 will do, if enacted, will be to provide a degree of equity as to certain fundamental aspects of business operations so that the local franchisee will be able to firstly, negotiate as to business practices deemed objectionable and secondly, say no to unreasonable demands of absentee franchisors. He will be able to do this without fear of reprisal or loss of his method of making a living for himself and his family if the legislation is enacted. Otherwise the dealer who champions the interests of the local consumer and the local business may find a fundamental business right jeopardized.

I wish to comment firstly on Section 8/(b). It is <u>imperative</u> that this provision be adopted. Freedom of association of franchisees is one of the few ways in which the franchisees, on their own, can attempt to redress the

inequity in bargaining power between a powerful franchisor, like an automobile manufacturer, and isolated individual dealerships.

A case in point is the very organization which I represent. We have brought change to the automobile industry through association with each other which changes have benefited not only automobile dealers but also consumers. I need only point to our work on warranty and policy which has resulted in increasing warranty reimbursement rates thereby enabling the dealer to put the tools and the manpower properly to work on warranty items for the consumers ultimate benefit. With freedom of association guaranteed by legislation, comes bargaining power. Until the dealer bodies of America receive the right to bargain collectively by law, they and the consumer will be at the mercy of the four giant manufacturers.

I must comment on Section 5. We live in a day and age when discrimination is rightfully becoming the evil it deserves to be, not only in the area of civil rights, but in the area of franchise law. It is not right to terminate a franchisee who has performed in the same or similar manner as most other dealers. There should be no termination unless there has been substantial non-compliance with essential reasonable non-discriminatory requirements.

If you gentlemen want to really know what discriminatory termination really is, read the famous Madsen case, or ask your own automobile dealer about the sad saga of Bill Semmes and the injunction that he had to get from Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York in order to stay in business when treated unfairly and discriminatorily by Ford.

Another matter of vital interest to all franchisees is the overcrowding of franchises in a given trade area. Section 7 is a significant contribution to prohibiting this grossly unfair activity. It is clearly unfair for a franchisor to require investment of capital, time and energy based on the grant of sales responsibility for a given area which area is subsequently unilaterally reduced by the franchisor after the franchisor has successfully established a market for the franchisor's goods. Usually this is done on the excuse that the franchisee can no longer handel the volume. This just isn't the American way of doing business because it unfairly penalizes success.

Another interesting and important aspect of your bill concerns Sections 6 and 8(d). Do you realize that in the automobile business, a dealer cannot recover the value of the good will that he has built up over the years. Has anyone said to the Ford Motor Company, you can't sell your stock for more than book value? But in the sale of their franchise, dealers, because of the franchise, are not allowed any multiple for good will. Is this free enterprise in America? Moreover, do you know that a dealer under the present agreement, cannot sell his business unless the manufacturer approves the candidate. It is fair to require the approval of the manufacturer but it is <u>not</u> fair for the manufacturer to withhold such approval where the candidate is qualified. The history of this business is replete with examples of arbitrary determinations by the factories not to mention the incidence of factory men receiving the choicest plums.

Perhaps the most important provisions of the bill are Sections 5 and 8 (e) which must be read together. The various automobile franchise agreements contain many provisions which require the dealer to perform to the satisfaction of the manufacturer or to provide adequate facilities and performance. There are no published mutually agreed upon criteria or guide lines. There is no freedom of contract for the automobile dealer or any other franchisee. My lawyer doesn't sit down and negotiate these matters. I sign or resign. The latter is obviously not a realistic alternative. Consequently, the factory has unlimited muscle. He can, and sometimes does, act arbitrarily, dictatorially and capriciously in deciding whether a dealer meets the requirements. If a dealer refuses, he is not renewed or is terminated. The mere threat of absolute commercial death buckles even the strongest of spirit.

Because the franchise agreement gives the manufacturer unfettered authority, or a life and death stranglehold on the supposedly local independent businessman, Detroit, based on unilateral determination, subject to no meaningful recourse, is prosecutor, judge and jury. Sections 5 and 8 (e) merely permit an aggrieved dealer to seek the justice of our courts. If the dealer is wrong, then the franchisor has nothing to fear. That is only fair.

In conclusion, I wish to leave you with this thought. The new car dealer is truly the first line of defense for the consumer. The stereotype that a car dealer is a guy with a big smile and a gold watch chain who is interested only in taking the public for all that the traffic will bear, is wrong. Many if not all of the consumer ills in the automobile business are the result of practices

engaged in by the manufacturers or forced upon the dealer because of the unilateral sales agreement. The changes that have come and that are coming in our industry are not the results of efforts by the manufacturers who have great resources at their command but rather are the results of militant dealer pressure throughout the states and America. Passage of A-2063 will certainly strengthen the dealers' hand in permitting him to service and satisfy his consumer.

As the New Jersey legislature considers A-2063, the future of automobile quality and methods of distribution hangs in the balance. The outcome will dramatically affect the quality, price and service that the consumers of America will receive.

Statement of the Independent Dodge Chrysler Dealer Association

My name is Raphael Cohen and I appear today on behalf of the membership of I.D.C.D.A.. We are a national organization of Dodge-Chrysler and Plymouth dealers. A number of our dealers are located in this Garden State. I am a resident of Paramus, N.J., although my dealership is located in Yonkers, N.Y.

Our appearance today is not our first before a legislative committee. We have testified before the Sub-Committee on Anti-Trust and Monopoly of the, U.S. Senate, Chaired by Senator Phillip Hart of Michigan, as well as the Small Business Committee ofthe same body Chaired by Senator Gaylord Nelson of Wisconsin and the U.S. Post Office Committee Chaired by former Senator Mike Monroney. The Federal Trade Commission has heard our testimony four times in the past three years. Our testimony before these various governmental bodies is on the public record, one to which we point with great pride. This record will prove that we are not single minded in thinking or purpose. All parties, Consumer, Factory and Dealers are taken into consideration, for they have equal stakes in the Franchised Auto Dealer. That work equal is slightly misused, for it is the motoring consumer that really has the greatest stake.

Public transportation at present does not serve the need of citizens across our grat nation. The reliance of our population on the motor vehicle as principle means of daily travelgoes unchallanged and it might be added regretfully so. The need, in the public sector for new methods of mass transportationfor comparatively short distances of travel is urgent and is not being truly faced.

With this short background limited due to the lack of time, we would now like to go on record in favor of Assembly Bill #2063 and urge this committee to reccommend its passage during this session of the legislature. Why do we feel the need so urgent? In 1949 there were 49,000 plus auto dealers in the United States that sold under five million domestic manufactured autos. Today we have 26,000 plus dealers selling approximately 8 million domestic cars. Statistics for the State of New Jersey unfortunately are not available for the same period of time. However, from 1960 thru 1970 we lost approximately 12% of all our dealers. In 1960 there were 1020 total dealers in this state. In 1970, 870 remained. This figure is more alarming than it appears. For the national figure is for domestic dealers only, while the New Jersey figure includes imports as well as domestic. The record of imports and their growth is well known to all. So the total amount of dealers who left this industry for U.S. manufacturers far

exceeds that 12% shown by these statistics.

Why do we feel this type of legislation will stop this trend toward fewer establishments to both service and sell new and used motor vehicles? Maybe we can make this point with the following example.

Swartz Motors of Dover, N.J. was franchised as a Dodge-Plymouth dealership in 1932. Isaac Swartz bought his son and son-in-law Isaac Jr. and Bruno Storch into the business and upon his death the heirs continued the Franchise. (with the needed consent of the franchisor) In 1946 Isaac Swartz was joined by his son Norman and prior to his death in 1954 Herb joined this family business. Upon his death in 1954 his brother-in-law and sons continued. That is with one slight difference. When a principle dies the Franchise agreement must be rewritten and the Swartz family was deprived of the Plymouth Franchise and allowed to continue as a Dodge Dealer only.

It might be pointed out that Plymouth enjoyed the number three rating nationally. So being deprived of one of the top three sellers in the nation is quite a loss.

It might be further stated that all Dodge Dealers were pressured to relinquist their Plymouth Franchise in 1959.

many against their will and business judgement. Although this move initially injured the parent Chrysler Corporation more than its' dealers, for Plymouth lost third place and did not regain it until 1969, the dealers felt its loss one year later in 1961 and never recovered.

Getting back to Swartz Motors, Chrysler Corporation began to pressure Herb and Norman Swartz to force their uncle Bruno out of the business. Finally in 1968 under the implied threat that only the removal of the uncle might save the franchise the nephews reluctantly bought out their uncle.

It should be stated that this was not done by the Swartz brothers in such a fashion as to destroy the family unit. Bruno Storch wanted his nephews to continue the agency that carries the family name proudly and sacrificed his pride at an age when it should have not been necessary. He was paid fairly and the three enjoy an excellent family relationship to this day.

After disposing of Bruno Storch, Chrysler then notified the two brothers one month later that their franchise would not be renewed.

They were offered $6000 for 36 years of contribution to the Chrysler Trade Marks.

Swartz called on I.D.C.D.A. for assistance and we responded with legal aid and monetary contributions to their defense.

During the hearing on a preliminary injunction before Federal Judge James Coolihan, in Newark it was revealed that the true intent of Chrysler was to establish their own dealership in the Dover area. They had taken an option on prperty in Mountain Lakes, a neighboring community. Zoning hearing were going on while Judge Coolihan was hearing testimony.

Judge Coolihan saw the lack of Good Faith on behalf of Chrysler and granted a preliminary injunction. But at the time he was only the second Judge in the nation to see that mere dollars could not make the Swartz brothers whole again.

What a blow to a man's confidence to be caste out as unfit. The laws of our lands unfortunately usually measure justice with dollars. If a man can receive monetary compensation he is usually considered whole again. Upon reflection, is this not the problem that our total society faces today, that is justice by dollars?

The legislation you are considering today grants injunctive relief to any franchise who substantially complies with the terms of the franchise. This is important for it acts as a

balancing weight in aneconomic relationship that favors the larger more powerful force. What can be wrong with legislation that provides justice of this type?

The Swartz case proves the franchise agreement is unfair, injust and downright coersive. As stated in paragraph seven of the Chrysler franchise agreement a standard of performance on sales is set in which approximately 50% of all its dealers can be held in default of contract at all times.

If Chrysler points to its record stating it is only enforced in extreme cases it further makes a case for the need of this legislation. For who are these Solomon that have this great wisdom to determine extreme cases.

Those who oppose legislation granting equal rights for the franchisee point out that it is the poor performing franchisee that seeks laws to protect his rights. They further claim that the successful dealer seldom is heard raising hsi voice in protest against injustice and use this argument to prove that injustice really does not exist. Are our national and local problems in areas of plenty or are they in those areas society labels deprived? Some humans only raise their voices when their own security is threatened. Fortunately for our nation their have always been those who will not tolerate unfair treatment for others.

In this State we have such a franchise in Ed Mullane, President of Mullane Ford of Bergenfield and of the Ford Dealer Alliance. As successful as he is, and the record will substaniate this, he refused to bow down to the great Ford Motor Company.

The Alliance instituted legal action on behalf of Semmes Ford seeking injunctive relief against instant termination of William Semmes. Semmes was a leader in the Alliance and the Ford Motor Company was going to prove that you listen to big daddy or you will not be around to listen any more.

A distinguished jurist, Judge Sylvester Ryan of N.Y., stated that Ford had acted in a questionable fashion, and indeed granted only the third injunction on record in a "Good Faith Case." The language of this law is so ambiguous that it takes a judge who believes the words, law and justice, are synonomous to interpret in favor of the franchisee. So the need for State legislation of the type proposed in Assembly Bill#2063 is imperative.

This is not class legislation. It does not act to protect small entrepeneurs in one industry. Franchising has grown in size and dimension in the past ten years.

If ones desires an education on franchising one should read

"Franchising A Trap For the Trusting," by Harold Brown an attorney in the Commonwealth of Mass. It spells out the bilking of many people by so called respectable franchisors.

In closing allow me to point out that many States of our Union now have similiar laws to protect auto dealers. Your passage of this legislation will assist all franchisee's in realizing the American Dream, to be independent businessmen under a capital system that insures equality for all.

RC:lc

STATEMENT BY CHARLES U. DAVIS, EXECUTIVE VICE PRESIDENT
NEW JERSEY HOTEL/MOTEL ASSOCIATION
SUPPORTING ASSEMBLY BILL 2063
ASSEMBLY JUDICIARY COMMITTEE HEARING
March 29, 1971

The New Jersey Hotel/Motel Association is pleased to stand together with New Jersey businessmen in many other fields in support of Assembly Bill 2063, the long needed Franchise Practices Act.

As most of us have seen, franchising is perhaps the fastest growing factor in the hotel and motel business in this State. Not only are new properties being developed under franchise agreements, but many older hotels and motels are joining franchise systems. Thus it is vital to the stability of our industry that the Legislature enact a measure such as A-2063 which provides for judicial guidelines in disputes growing out of the franchise relationship.

This bill gives neither the franchisor nor franchisee the upper hand. What it does, however, is to prevent arbitrary or capricious actions by the franchisor who generally has vastly greater economic power than the franchisee.

When a hotelman signs a franchise agreement, he begins to build his entire operation around that agreement. Thus the loss or threatened loss of the franchise can have a catastrophic impact on his business.

We do not say that a franchisee is entitled to his franchise under all circumstances. If he is not doing the job required of other franchisees in similar circumstances, we agree that he should stand to lose his franchise. But if he is meeting reasonable and non-discriminatory standards, he should have the full right to retain the privileges that go with the franchise. A-2063 is based on this premise.

A franchisee also operates under inhibitions that do not apply to non-franchised businesses. This is in regard to the opportunity to sell an enterprise or an equity interest in it for the best possible value. Under most franchis agreements, such sale or change in ownership must have the approval of the franchisor.

A-2063 does not do away with this requirement but it does assure that it will be exercised in a non-discriminatory and reasonable manner.

Most franchisees in our industry as well as the others are taxpaying local businessmen whose futures are tied to the State of New Jersey. Now, when they need assistance, they have turned to their legislators with a reasonable request for help. We hope you will grant that request by quickly voting your approval of A-2063.

MEMORANDUM

FROM: Ross L. Malone

March 12, 1971

Re: New Jersey Assembly Bill No. 2063

Assembly Bill No. 2063 is designed to regulate franchising as an industry without regard to the type of franchisee or franchisor, or even to certain basic distinctions such as whether the franchise is sold by the franchisor as marketable property or granted without charge as a personal service type agreement.

Likewise, it does not recognize the possibility of different needs between franchisees in different types of industries.

Section 2 of the bill recites that there is a public interest in defining the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements. This may or may not be, but there clearly is a definite public interest in fair competition among competing franchisees who sell to the public. This bill is not in the public interest. Rather, it is more of a special interest bill designed to protect dealers from franchisors and from competition.

As an illustration of the unrealistic approach of this bill, Section 5 requires 180 days notice of termination or intent not to renew. What if the franchisee went bankrupt or were convicted of a crime? In cases such as that the public would wait six months for a new dealer.

Section 6 vests a franchisee with the right to sell a franchise even though he didn't pay for it and it is a personal service type franchise in which the franchisor without fee or charge grants the franchise in reliance upon the franchisee's personal qualifications, capital and facilities. This section has the capacity to destroy the franchise system. For instance, an automobile dealer could sell his franchise to a new party located in poor facilities or perhaps adjacent to another dealer in the same make of product. Franchise brokers are a possibility, but more likely the wealthiest franchisees will buy up the franchises.

The franchisor is granted only a limited right to object to such a sale of his franchise and then at the risk of libeling the proposed purchaser.

Not only does Section 6 inhibit the franchisor's ability to maintain an orderly channel of distribution through properly located franchisees, but it also restricts the right to grant new franchises in response to public needs occasioned by population growth and shifts, changing traffic patterns and the like. This is anticompetitive and contrary to the public interest.

One group of franchisors, that is the automobile industry, is already governed by federal law requiring good faith dealing between factories and dealers. Additionally, the major domestic automobile manufacturers also have private arbitration type machinery to resolve disputes as well as sales agreements or franchises enforceable in the courts.

Other types of franchisees, such as in the food industry, have less protection. These facts merely demonstrate that there is a vast difference between the situations of various franchisees and the difficulty of lumping them together for regulatory purposes.

We have already seen some of the fruits of overregulation, such as in the railroad and air carrier industries, where mere survival is today's criteria of success. Let's not be guilty of contributing to over-regulation of franchising.

It may well be that there is need for some legislation in this field, but Assembly Bill No. 2063 is not it.

Ross L. Malone
General Counsel

SDW/sjs