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NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

**Washington's Farm Implements  
Act: How to Implement It**

by

Susan L. Sockwell

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# WASHINGTON'S FARM IMPLEMENTS ACT: HOW TO IMPLEMENT IT\*

In 1975 the Washington Legislature enacted the Farm Implements Act.<sup>1</sup> The Act requires manufacturers, wholesalers, or distributors of farm machinery to repurchase new farm implements and parts from retailers to whom they originally sold the machinery whenever the written contract between them is terminated by either party for good cause.<sup>2</sup>

The purpose of this Comment is twofold: to inform practicing attorneys of the Farm Implements Act's provisions, and to discuss the problem created by the Act's restrictive language, which conditions the availability of the "buy back" remedy upon the existence of a written contract between the parties. The approach taken is as follows: first, an explanation of the provisions and purpose of the Act; second, an analysis of various remedies available when a written contract exists between a manufacturer and a retailer; third, a discussion of possible remedies available when there is no typical written contract between the retailer and the manufacturer; and, finally, a proposed legislative amendment.

## I. PURPOSE AND PROVISIONS OF WASHINGTON'S FARM IMPLEMENTS ACT

The legislature's purpose in passing the Farm Implements Act was to equalize the bargaining positions between the manufacturer, wholesaler or distributor, and the retailer.<sup>3</sup> The legislature, convinced that manufacturers and distributors are in a position superior to that of retailers,<sup>4</sup> believed that passage of the Act would introduce "a necessary element of fairness" by requiring that fu-

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1. WASH. REV. CODE §§ 19.98.010-.040, .900, .910 (1979).

2. *Id.* § 19.98.010.

3. Debate on Substitute House Bill 211, March 26, 1975 (remarks of Rep. Frank J. Warnke) (on file at Gonzaga Law Review).

4. *Id.*

ture contracts be subject to a buy back provision.<sup>5</sup>

Originally, the proposed bill applied to automobiles and trucks as well as farm implements. However, due to a possible conflict with RCW chapter 46.70, which regulates motor vehicle franchise agreements, the legislature deleted the words, "automobiles and trucks" before passing the Act.<sup>6</sup>

The Farm Implements Act applies to "any person, firm, or corporation engaged in the retail sale of farm implements and repair parts."<sup>7</sup> To fall within the provisions of the Act, the retailer must have entered into a written contract with the manufacturer to maintain a stock of complete machines and repair parts.<sup>8</sup> The manufacturer is then obligated to buy back new machinery and "repair parts which are new, unused, and in good condition."<sup>9</sup> The Act does not pertain to rebuilt parts, nor to parts which the manufacturer did not originally sell to the retailer.

Either the manufacturer or the retailer may elect to cancel the contract upon a showing of "good cause." The Act provides that good cause includes, but is not restricted to, "the failure of any party to comply with the lawful provisions of the contract, the adjudication of any party to a contract as a bankrupt, [and] wrongful refusal of [a] manufacturer, wholesaler, or distributor to supply farm machinery, farm implements and repair parts therefor."<sup>10</sup> There is no case law at present which further defines good cause under the Act.

Other sections of the Act deal with equipment secured by Article IX liens,<sup>11</sup> a formula for calculating the repurchase price,<sup>12</sup>

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5. *Id.*

6. See Senate Committee Amendment to Substitute House Bill 211 by Committee on Commerce, p. 1, lines 11, 12. See also Committee Bill Analysis (revised) of Bill No. ESHB 211, at 2 (Apr. 29, 1975); Final Bill analysis of Bill No. ESHB 211, at 2 (May 9, 1975).

7. WASH. REV. CODE § 19.98.010 (1979).

8. *Id.*

9. *Id.*

10. *Id.* The Senate attorney who analyzed the bill pointed out that good cause was not defined completely, was vague, and should have been clarified. Despite this advice the legislature passed the measure without further elaboration on the meaning of good cause. See Committee Bill Analysis (revised) of Bill No. ESHB 211, at 2 (Apr. 29, 1975); Final Bill Analysis of Bill No. ESHB 211, at 2 (May 9, 1975).

11. WASH. REV. CODE § 19.98.020 (1979) provides:

All repurchase payments to retailers and sellers made pursuant to RCW 19.98.010

and the retailer's right to bring a civil action if the manufacturer refuses to repurchase equipment.<sup>13</sup>

## II. SIMILAR STATUTES IN OTHER JURISDICTIONS

Seven other states have enacted statutes which are nearly identical to Washington's Farm Implements Act.<sup>14</sup> These states are: Arkansas, Idaho, Kansas, Minnesota, Nebraska, North Dakota, and South Dakota. Five of the statutes were enacted prior to Washington's law,<sup>15</sup> one became law in the same year,<sup>16</sup> and one was passed after the Washington statute.<sup>17</sup>

Only one of these statutes, however, has been litigated. The North Dakota court dealt with an election of remedies issue under that state's farm implement statute in *Kaisershot v. Gamble-Skogmo, Inc.*<sup>18</sup> In *Kaisershot* a retailer chose to sell some of the farm machinery in his inventory upon the termination of his contract with the manufacturer. The retailer later attempted to force the manufacturer to repurchase the remaining farm implements. The court reasoned that because the retailer had elected the first

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shall be less amounts owed on any lien or claim than outstanding upon such items covered by this section. Any wholesaler, manufacturer, or distributor making repurchase payments covered by this chapter to any retailer or seller shall satisfy such secured liens or claims pursuant to chapter [article] 62A.9 RCW less any interest owed to the lienholder arising from the financing of such items which shall be paid to any such secured lienholder by the retailer or seller. In no case shall the wholesaler, manufacturer, or distributor, in making payments covered by RCW 19.98.010, pay in excess of those amounts prescribed therein.

12. *Id.* § 19.98.030 provides:

The prices of farm implements, machinery and repair parts therefor, required to be paid to any retail dealer as provided in RCW 19.98.010 shall be determined by taking one hundred percent of the net cost on farm implements, machinery, and attachments, and eighty-five percent of the current net price of repair parts therefor as shown upon the manufacturer's, wholesaler's, or distributor's price lists or catalogues in effect at the time such contract is canceled or discontinued.

13. *Id.* § 19.98.040.

14. ARK. STAT. ANN. §§ 70-819 to -826 (1979); IDAHO CODE §§ 28-23-101 to -111 (Supp. 1979); KAN. STAT. ANN. §§ 16-1001 to -1006 (Supp. 1979); MINN. STAT. ANN. § 325.635 (West Supp. 1979); NEB. REV. STAT. §§ 69-1501 to -1504 (1976); N.D. CENT. CODE §§ 51-07-01 to -07 (1974 & Supp. 1979); S.D. CODIFIED LAWS ANN. §§ 37-5-5 to -9 (1977).

15. The North Dakota statute was enacted in 1937 and amended in 1971 and 1975; the Nebraska statute was enacted in 1971; the South Dakota statute was enacted in 1969; the Minnesota statute was enacted in 1974; and the Idaho statute was enacted in 1975.

16. The Kansas statute became effective in 1976, as did Washington's Act.

17. The Arkansas statute was enacted in 1979.

18. 96 N.W.2d 666 (N.D. 1959).

remedy of selling the machinery to the public, he was precluded from electing the repurchase remedy as well. The North Dakota Legislature subsequently amended its farm machinery statute to permit retailers to pursue both contractual and statutory remedies.<sup>18</sup>

### III. RELIEF AVAILABLE TO THE RETAILER

The Farm Implements Act creates a duty on the part of a manufacturer to buy back all the new machinery and repair parts which a retailer has on hand at the time the contract is terminated or which he thereafter receives from the manufacturer. The correlative right created by the Act is a retailer's right to sue a manufacturer to enforce this statutory repurchase provision.

A retailer can recover one hundred percent of the net cost of all current, new farm implements, attachments, and accessories, plus transportation costs.<sup>20</sup> The manufacturer must pay the retailer eighty-five percent of the current net prices for repair parts and superceded parts listed in current catalog or price lists.<sup>21</sup> The statute provides that expenses incurred by the retailer in packing the equipment for return will be partially reimbursed.<sup>22</sup> Although the original bill also provided for the award of court costs and reasonable attorney's fees, this provision was deleted prior to passage.<sup>23</sup>

### IV. POSSIBLE ADDITIONAL REMEDIES

#### A. Contract Remedies

The provisions of the Farm Implements Act are supplemental

19. N.D. CENT. CODE § 51-07-01 (1974 & Supp. 1979) (amended 1971).

This election of remedies problem should not arise in Washington, as the Washington Act specifically provides "an election by the retailer to pursue his contract remedy shall not bar his right to the remedy provided herein." WASH. REV. CODE § 19.98.010 (1979). Remedies are discussed at greater length in Part IV *infra*.

20. WASH. REV. CODE § 19.98.010 (1979).

21. *Id.* The repair parts and superceded parts must have been previously purchased from the manufacturer or distributor and must either be held on the date of cancellation or be received subsequently from the manufacturer.

22. *Id.* The amount of compensation for packing is five percent of the current net price of all the parts returned.

23. See Final Bill Analysis of Bill No. ESHB 211, at 2 (May 9, 1975) (Tony Canorro, Senate Attorney, and Alan Kimura, Research Analyst).

to any agreement between the retailer and the manufacturer.<sup>24</sup> If the retailer and the manufacturer include a repurchase clause in the contract, then the retailer can pursue either his contractual remedy or the statutory remedy. The scope of recovery based on a contractual claim depends on the provisions of the contract itself, and varies depending on whether the contract includes a repurchase clause, a liquidated damages clause, or other agreement as to measure of damages in the event of a breach. A retailer can sue both under the Act and on the contract as to those implements and repair parts not covered by the statute.<sup>25</sup> Because the statutory remedies are supplemental, the retailer may wish to allege other causes of action in addition to his Farm Implements Act claim. Specifically, he may wish to sue the manufacturer under the Franchise Investment Protection Act (FIPA)<sup>26</sup> and the Consumer Protection Act.<sup>27</sup>

### B. *Franchise Investment Protection Act Remedies*

Although the focus of this Comment is on the Farm Implements Act, the Franchise Investment Protection Act (FIPA) will be discussed briefly as FIPA remedies may be helpful to many plaintiffs who are franchisees in the farm machinery business. It is important to note that not all the retailers who are protected by the Farm Implements Act are covered under the FIPA. Only those who meet the definition of "franchisees" can pursue FIPA remedies. The elements necessary for a franchise are spelled out in the statute.<sup>28</sup>

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24. WASH. REV. CODE § 19.98 (1979) provides in part:

The provisions of this section shall be supplemental to any agreement between the retailer and the manufacturer, wholesaler, or distributor covering the return of farm implements, machinery, attachments, accessories, and repair parts so that the retailer can elect to pursue either his contract remedy or the remedy provided herein, and an election by the retailer to pursue his contract remedy shall not bar his right to the remedy provided herein as to those farm implements, machinery, attachments, accessories, and repair parts not affected by the contract remedy.

25. *Id.*

26. *Id.* ch. 19.100.

27. *Id.* ch. 19.86.

28. "Franchise" is defined in *id.* § 19.100.010(6), as a "person to whom a franchise is offered or granted." "Franchise" is defined in *id.* § 19.700.010(4). For text of the statute, see note 72 *infra*.

The FIPA prohibits the franchisor from infringing upon the rights of its franchisees. It is unlawful for a franchisor to require that a franchisee buy only from certain sources. A franchisor can not grant competing franchises in an exclusive territory previously granted to one franchisee, nor can he refuse to renew a franchise without fairly compensating the franchisee for his inventory. Termination of a franchise prior to its expiration without good cause is also a prohibited practice.<sup>29</sup>

A FIPA provision which requires a franchisor to "purchase from the franchisee at fair market value at the time of termination, the franchisee's inventory and supplies"<sup>30</sup> is similar to the Farm Implements Act's repurchase provision. Thus, if a farm implements franchise is wrongfully terminated, the franchisee may sue the manufacturer to compel repurchase under either statute. However, the amount which the manufacturer must pay the retailer for his inventory differs depending on which statute is used.

The Farm Implements Act requires the manufacturer to pay the full net purchase price<sup>31</sup> of the machinery, while the FIPA merely requires payment of the fair market value at the time of termination. A franchisee should estimate the market value of his inventory to determine which measure of damages would be more advantageous to him. If high demand and short supply of equipment have caused the price which he could obtain on the market to rise above the catalog list price, it would probably be more advantageous to sue for fair market value under the FIPA. If the fair market value of the inventory is less than its list price, the Farm Implements Act remedy would permit greater compensation and thus be a more attractive remedy to the retailer in this limited sense.

However, a potential plaintiff should consider the entire scope of relief provided by the two statutes, for there is a critical difference. Although the Farm Implements Act allows recovery in the amount of the repurchase payment for machinery and parts, the FIPA provides for the discretionary award of treble damages, plus

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29. *Id.* § 19.100.180(2)(a)(j).

30. *Id.* § 19.100.180(2)(j).

31. *Id.* § 19.98.030.

reasonable attorney's fees and costs to the prevailing party.<sup>32</sup> Thus, the total dollar amount of the recovery is potentially much greater under the FIPA than under the Farm Implements Act.

### C. Consumer Protection Act Remedies

The Washington Court of Appeals has held that the remedies available under the Consumer Protection Act are not exclusive, but are available in addition to other relief.<sup>33</sup> Therefore, a retailer could press claims for relief under both the Farm Implements Act and the Consumer Protection Act. There are two possible approaches which the retailer could take. The first approach would be of limited utility since it is available only to franchisees and not to all retailers.

The threshold requirement in the first approach is the establishment of a FIPA violation, as discussed above. The legislature has declared that the commission of an unfair practice which is prohibited by the FIPA<sup>34</sup> is also a per se violation of the Consumer Protection Act.<sup>35</sup> Thus, if the retailer proves that the manufacturer has failed to comply with the FIPA, the manufacturer will automatically be liable for a consumer protection violation.

A second approach could be used by all retailers, including those who are not protected by franchise remedies. This approach is to argue that a manufacturer's refusal to repurchase machinery and spare parts constitutes a direct violation of the Consumer Pro-

32. *Id.* § 19.100.190(3) provides that suit may be brought to recover the actual damages sustained by the plaintiff and the court may in its discretion increase the award of damages to an amount not to exceed three times the actual damages sustained: *Provided*, That the prevailing party may in the discretion of the court recover the costs of said action including a reasonable attorneys' fee.

(emphasis in original).

33. *MacCormack v. Robins Constr.*, 11 Wn. App. 80, 82, 521 P.2d 761, 762 (1974).

34. See text accompanying note 29 *supra*.

35. The Franchise Investment Protection Act, WASH. REV. CODE § 19.100.190 (1979) specifies: "(1) The commission of any unfair or deceptive acts or practices or unfair methods of competition prohibited by RCW 19.100.180 as now or hereafter amended shall constitute an unfair or deceptive act or practice under the provisions of chapter 19.86 RCW . . ."

For a general discussion of per se violations of the Consumer Protection Act, see Comment, *State v. Reader's Digest Association—A Knockout Punch to Unfair or Deceptive Acts or Practices in Washington?*, 10 GONZ. L. REV. 529 (1975). See also Comment, *Attempts to Restrict Actionable Conduct Pursuant to Washington's Consumer Protection Act*, 12 GONZ. L. REV. 621 (1977).



tection Act, that is, that the refusal is an unfair trade practice prohibited by RCW 19.86.020.<sup>36</sup> To succeed with this claim, a retailer must meet the requirements which the Washington courts have enunciated in recent consumer protection opinions.

The requirements were articulated in a 1978 case, *Salois v. Mutual of Omaha Insurance Co.*<sup>37</sup> as twofold: "1) [I]s the action illegal, *i.e.*, is it unlawful; and 2) [I]s it against public policy as declared by the legislature or the judiciary?"<sup>38</sup> Applying this test to a situation in which a manufacturer has refused to repurchase farm machinery from a retailer, one must determine first whether the manufacturer's refusal is unlawful. Because RCW chapter 19.98 creates a duty on the part of the manufacturer to repurchase the farm implements, the refusal to do so is a violation of the statute, which is clearly an unlawful action. Therefore, the first part of the test would provide no stumbling block to a plaintiff-retailer.

To satisfy the second part of the test, a retailer must show that a violation of the Farm Implements Act contravenes public policy. If the action complained of is "injurious to the public interest," then a litigant can establish a violation of the Consumer Protection Act.<sup>39</sup> It appears that the court has interpreted the public

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36. WASH. REV. CODE § 19.86.020 (1979) prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ."

37. 90 Wn. 2d 355, 581 P.2d 1349 (1978).

38. *Id.* at 358, 581 P.2d at 1351. The two criteria are derived from *State v. Reader's Digest Ass'n*, 81 Wn. 2d 259, 276, 501 P.2d 290, 301-02 (1972), in which the court held: "[A]n act which is illegal and against public policy is per se unfair within the meaning of RCW 19.86.020."

39. *Brown v. Charlton*, 90 Wn. 2d 362, 368, 583 P.2d 1188, 1192 (1978). It should be noted that the court found no violation of the Consumer Protection Act in *Brown* because the legislature had determined that the defendant's action did not affect the public interest. *Id.* at 368, 583 P.2d at 1192.

In an earlier case, *Lightfoot v. MacDonald*, 86 Wn. 2d 331, 544 P.2d 88 (1976), the court held that "[a] breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, is not an act or practice affecting the public interest." *Id.* at 334, 544 P.2d at 90. The court later limited *Lightfoot* to its facts and pointed out in *Salois* that the above-quoted statement was "apparently . . . being misinterpreted." 90 Wn. 2d at 361, 581 P.2d at 1352. The court explicitly stated that "if private contracts affect the public interest then the private remedy provided in RCW 19.86.090 becomes viable." *Id.* Thus, it seems that the court is broadening its view of the public interest requirement.

A case involving a violation of the Farm Implements Act is not a contract dispute, but rather a statutory cause of action which the legislature has provided to ensure that the interests of both retailers and the consuming public are protected. Thus, a dispute under

policy inquiry to mean that if some public interest in the trade or transaction is shown, then an unlawful act within the sphere of that trade is automatically against public policy. Public interest is at the heart of the Farm Implements Act. The protective legislation in RCW Title 19 is based upon the state's police power to regulate trade to the extent necessary to protect the public interest.<sup>40</sup> Since the provisions of the Farm Implements Act protect not only those in business but the consuming public as well, the court should find that a refusal to comply with the statute is contrary to public policy. Thus, both requirements of the test could be satisfied and a plaintiff could argue that a refusal to repurchase is a direct violation of the Consumer Protection Act.<sup>41</sup>

A comparison of the Consumer Protection Act and the FIPA remedies for unfair practices reveals that they are substantially the same.<sup>42</sup> Like the FIPA, the Consumer Protection Act provides for

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the Act is analogous to the *Salois* case (involving statutory violation) and not to *Lightfoot* (involving breach of a private contract).

40. See 87 C.J.S. *Trade-Marks, Trade-Names, and Unfair Competition* § 237 (1954) which states:

A state police power includes the power to enact legislation to secure fair trade practices, and such statutes are valid where the means selected are not arbitrary, unreasonable, or capricious, have a reasonable relation to the legislative purpose, and do not deprive anyone of his just or constitutional rights. Legislation prohibiting fraud and deception or prohibiting unfair competition and acts which stifle competition is within the permissible limits of police power.

(emphasis added) (footnotes omitted).

See also WASH. REV. CODE tit. 19 (1979), which contains fair trade laws and other business regulations. The collateral references which are cited in the annotated code version of the Farm Implements Act deal with the purpose and scope of trade regulations. The state's power to enact such regulations has been questioned; however, in Washington, at least one fair trade statute has been upheld as a valid exercise of the state's police power. See *State v. Sears*, 4 Wn. 2d 200, 103 P.2d 337 (1940).

41. One defense which the manufacturer might raise against the retailer in such a case is that the farm implements business is statutorily exempted from the Consumer Protection Act because it is a "regulated" industry. See WASH. REV. CODE § 19.86.170 (1979). This defense will fail because the Washington Supreme Court has very narrowly construed the statutory language which does exclude "actions or transactions otherwise regulated . . ." from coverage of the Act. See, e.g., *Dick v. Attorney Gen.* 83 Wn. 2d 684, 687, 521 P.2d 702, 704 (1974). The regulated industry exemption is of such limited scope that it would probably be ineffective as a defense to the retailer's consumer protection claim. Absent complicating factors, the retailer is likely to prevail with the argument that the manufacturer's refusal to repurchase is an unlawful trade practice in violation of the Consumer Protection Act.

42. Compare WASH. REV. CODE § 19.100.190 (1979) with *id.* § 19.86.090. Compare also *id.* § 19.100.210 with *id.* § 19.86.080. Both state that the Attorney General can seek an injunction, costs, and attorneys' fees.

the award of treble damages<sup>43</sup> plus reasonable attorneys' fees and costs to the prevailing party.

## V. REMEDIES AVAILABLE WHEN NO FORMAL WRITTEN CONTRACT EXISTS

### A. *The Problem Presented*

The Farm Implements Act remedies are available only to retailers who agree by written contract "to maintain a stock of parts or complete or whole machines, attachments, or accessories."<sup>44</sup> However, some retailers and manufacturers do business together without ever executing a written contract. Many times, in the ordinary course of dealing, a retailer enters into a business relationship with a manufacturer or distributor based solely on an invoiced billing arrangement. The dealer develops a retail outlet for the manufacturer's products based on this arrangement and is required to maintain a supply of parts to service the equipment which he has sold to his customers.

If the manufacturer wrongfully ceases to do business with a retailer who still has thousands of dollars worth of its new farm machinery, the retailer may be forced to sell his inventory at drastically reduced prices. A retailer with a written contract could seek redress of the injuries by statutory or contractual means, but his counterpart who lacks a formal document would be denied a remedy.

This example illustrates the major problem caused by the restrictive wording of the Act. In light of the stated purpose of the Act, to equalize the bargaining power between the manufacturer and the retailer, it appears that to protect one retailer—while leaving a similar one unprotected—creates an anomaly which the legislature could not have intended. Clearly, there is a gap between the intended and actual protective coverage provided by the Farm Implements Act. There are two possible ways to close this gap. One is for the legislature to amend the Act to protect all disadvantaged retailers, not just those who operate with formal written contracts.

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43. *Id.* § 19.86.090 specifies that "such increased damage award for violation of RCW 19.86.020 may not exceed one thousand dollars." There is no similar limitation in *id.* § 19.100.190.

44. *Id.* § 19.98.010 (1979).

The other means is for the courts to construe the existing statute so that it serves its intended purpose. As the Washington Court of Appeals asserted in *Franks v. Meyer*,<sup>45</sup> "the primary obligation of the court in interpreting a statute" is to construe it so that it "best effectuates the legislative purpose in enacting" it.<sup>46</sup>

### B. Implied Contract Argument

The Act's drafters probably intended the "written contract" requirement to be construed as a statute of frauds provision.<sup>47</sup> Under this rationale a retailer must show not only that an agreement exists but that the statute of frauds does not render it unenforceable. Specifically, the retailer could introduce written invoices, in addition to evidence of the parties' course of dealing to show that each invoice is a separate written contract for sale of goods between the manufacturer and the retailer, and that based upon the invoices and course of dealing, an implied contract exists which will satisfy the requirement of the Farm Implements Act. In addition, the retailer could argue that delivery of the implements to the retailer and his acceptance and payment therefor constitute part performance of the contract, thereby rendering the statute of frauds inapplicable.<sup>48</sup>

The argument that each invoice is a contract for sale of goods would only be the starting point of the retailer's argument. It is crucial to note that the Farm Implements Act requires more than a mere contract for the sale of goods. The Act contemplates a contract whereby the retailer agrees to maintain a stock of farm machinery and parts.<sup>49</sup> Thus, the retailer has a heavy burden of proof. He must show that he has engaged in a deliberate and ongoing course of business with the manufacturer.

To prove his first contention, that each invoice is a contract for sale of goods between the manufacturer and retailer, the retailer must show that the statute of frauds requirements can be satisfied. To do so, the retailer must prove that a writing evidences the sale of goods, that it is signed, and that it contains a "quanti-

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45. 5 Wn. App. 476, 487 P.2d 632 (1971).

46. *Id.* at 480, 487 P.2d at 635.

47. See text accompanying note 85 *infra*.

48. WASH. REV. CODE § 62A.2-201(3)(c) (1979).

49. *Id.* § 19.98.010.

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ty" term.<sup>50</sup> Washington case law reinforces the statutory rule that these three elements are critical to a contract.<sup>51</sup> A typical invoice satisfies the first requirement because it does evidence a sale of goods.<sup>52</sup> The third requirement, a quantity term, is clearly satisfied because the quantity, description, and price of the goods are written on the invoice.

The only possible issue is whether the typical printed heading, which contains the manufacturer's name, is a signature within the meaning of the Uniform Commercial Code. The statute, and the official comments thereto, indicate that an invoice heading can be the type of signature contemplated by the Code drafters.<sup>53</sup> Case law, too, supports the proposition that an invoice heading can be a signature. In *Automotive Spares Corp. v. Archer Bearings Co.*<sup>54</sup> a federal district court held that the heading on an invoice was a signature, and, thus, the invoice was a contract.<sup>55</sup> "[T]he need to use common sense and commercial experience in regards to the signature question" was a key element in the court's reasoning.<sup>56</sup>

Recently, the Idaho Supreme Court held that the business name in the heading of a salesman's printed worksheet was a "signature," and the worksheet is a contract.<sup>57</sup> The court relied on cases which have held a typed name, an invoice, and the printed heading of a confirmation form to be signatures.<sup>58</sup> The mere *form*

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50. WASH. REV. CODE ANN. § 62A.2-201(1) (West 1979), Official Comment.

51. *Alaska Indep. Fishermen's Mktg. Ass'n v. New England Fish Co.*, 15 Wn. App. 154, 157, 548 P.2d 348, 351 (1976) (quoting *Hankins v. American Pac. Sales Corp.*, 7 Wn. App. 316, 319, 499 P.2d 214, 216 (1972)).

52. The term "goods" is defined in WASH. REV. CODE § 62A.2-105(1) (1979): 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be served from realty (RCW 62A.2-107).

53. WASH. REV. CODE ANN. 62A.1-201 (39) (West 1979), Official Comments.

54. 382 F. Supp. 513 (N.D. Ill. 1974).

55. *Id.* at 515 (citing *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114 (3d Cir. 1966)).

56. *Id.*

57. *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 588 P.2d 939 (1978).

58. *Id.* at —, 588 P.2d at 943 (citing *Automotive Spares Corp. v. Archer Bearing Co.*, 382 F. Supp. 513 (N.D. Ill. 1975); *Kohlmeyer & Co. v. Bowen*, 125 Ga. App. 700, 192 S.E.2d 400 (1972)). See also *In re Save-on-Carpets of Ariz. Inc.*, 545 F.2d 1239 (9th Cir. 1976); *A & G Constr. Co. v. Reid Bros. Logging Co.*, 547 P.2d 1207 (Alaska 1976).

of the signature, however, is not the determinative factor; rather, a court must decide whether the symbol was executed with the *intent* to authenticate the writing.<sup>59</sup> That determination is a question of fact which must be resolved in each particular case.<sup>60</sup>

The Washington courts have not yet ruled on whether an invoice would suffice as a signature. The official Washington comments to the state's version of the Uniform Commercial Code prescribe a liberal interpretation of the signature requirement. Comment (1) explains, "[T]his section incorporates the same liberal, though more extensively expressed, interpretation of 'signed' as has been attached by the Washington court."<sup>61</sup> Given that guidance plus the liberal trend in other jurisdictions, it seems likely that an invoice would be considered an enforceable contract for sale of goods in Washington.

The second step in the retailer's burden of proof is to show that he and the manufacturer agreed to have an ongoing business relationship as contemplated by the Farm Implements Act. Evidence of the parties' conduct will help prove that the necessary type of implied contract exists.<sup>62</sup> The Washington Court of Appeals has stated that an implied contract "arises by inference or implication from circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention on the part of the parties to contract with each other."<sup>63</sup> The retailer could use the invoices, business records, and other evidence to show that he regularly stocked machinery and that the business relationship was not limited to isolated or sporadic transactions.

Evidence of course of dealing or trade usage can be used to explain the meaning of an agreement between the parties.<sup>64</sup> Course

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59. WASH. REV. CODE 62A.1-201(39) (1979).

60. *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho at \_\_\_, 588 P.2d at 944.

61. WASH. REV. CODE ANN. 62A.2-201 (West 1979), Official Comment (1).

62. *See id.* § 62A.2-204(1) which states regarding formation of a contract: "A contract for sale of goods may be made in any manner sufficient to show agreement, including *conduct* by both parties which recognizes the existence of such a contract." (emphasis added).

63. *Kilthau v. Covelli*, 17 Wn. App. 460, 462, 563 P.2d 1305, 1306 (1977) (citing *Ross v. Raymer*, 32 Wn. 2d 128, 201 P.2d 129 (1948); *Ammerman v. Old Nat'l Bank*, 28 Wn. 2d 239, 182 P.2d 75 (1947); *Kellogg v. Gleeson*, 27 Wn. 2d 501, 178 P.2d 969 (1947)).

64. WASH. REV. CODE § 62A.1-205(3) (1979) provides: "A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of

of dealing refers to "previous conduct between the parties to a particular transaction" which can be regarded as providing "a common basis of understanding for interpreting their expressions and other conduct."<sup>65</sup> Such evidence can *supplement* an agreement but cannot be admitted to *create* a contract.<sup>66</sup> Evidence that oral contracts are common in the normal course of dealing will not override the statute of frauds.<sup>67</sup> That is why the retailer must also meet the statute of frauds requirements discussed above. If a Washington court decides that an invoice is not an enforceable contract, then the retailer must prove that some other written memorandum meets the requirements. Otherwise, the court will not find an implied contract which will satisfy the Farm Implements Act's requirements.

A different approach to the statute of frauds problem is for the retailer to argue that although his contract with the manufacturer is oral, the contract is enforceable because full or partial performance renders the statute of frauds inapplicable.<sup>68</sup> In both pre- and post-UCC opinions,<sup>69</sup> the Washington Supreme Court has held that partial performance removes the contract from the statute of frauds. For example, in *Dodd v. Polack*,<sup>70</sup> the court held that the statute of frauds did not bar an oral contract of sale where the

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which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement." (emphasis added).

65. *Id.* § 62A.1-205(1).

66. See *Dangerfield v. Markel*, 222 N.W.2d 373, 378 (N.D. 1974), *rev'd on other grounds*, 252 N.W.2d 184 (N.D. 1977). See also *Kinne v. Lampson*, 58 Wn. 2d 563, 364 P.2d 510 (1961) (parol evidence admitted to clarify the nature of the consideration involved in a contract, but not to establish the existence of consideration).

67. *Dangerfield v. Markel*, 222 N.W.2d 373, 378 (N.D. 1974), *rev'd on other grounds*, 252 N.W.2d 184 (N.D. 1977). In reversing the decision, the court did not hold that course of dealing can override statute of frauds requirements, rather, the court found that the case fit into an exception to the statute of frauds as codified in North Dakota. 252 N.W.2d at 189-90. Furthermore, the court found that performance by both parties subsequent to the oral modification functioned as a waiver of prior nonperformance under the original contract. *Id.* at 188-89.

68. *Rutcosky v. Tracy*, 89 Wn. 2d 606, 574 P.2d 382, *cert. denied*, 439 U.S. 930 (1978).

69. *Id.*, (post-UCC case); *Dodd v. Polack*, 63 Wn. 2d 828, 389 P.2d 289 (1964); *Kinne v. Lampson*, 58 Wn. 2d 563, 364 P.2d 510 (1961); *Becker v. Lagerquist Bros., Inc.*, 55 Wn. 2d 425, 434, 348 P.2d 423, 430 (1960) (pre-UCC cases). The UCC was enacted in 1965, to be effective 1967. Ch. 157, 1965 Wash. Laws (1st Ex. Sess.) at 2333 (codified at WASH. REV. CODE tit. 62A (1979)).

70. 63 Wn. 2d 828, 389 P.2d 289 (1964).

buyer had received the goods and made a payment.<sup>71</sup> When a manufacturer regularly ships farm machinery to a retailer who accepts it, and when financing is arranged, the performance of both parties indicates the existence of an agreement to conduct business in a certain manner. This outward manifestation of the intent to fulfill an agreement obviates the evidentiary need for a written document. Therefore, the retailer can argue that lack of a written contract is not fatal to his Farm Implements Act claim because partial performance of the oral contract eliminates the necessity of satisfying statute of frauds requirements.

### *C. Franchise Investment Protection Act Remedies Available When no Written Contract Exists*

The Franchise Investment Protection Act specifically states that a franchise agreement can be either oral or written, express or implied.<sup>72</sup> Thus, absence of a *written* franchise contract would not adversely affect a retailer's suit under the FIPA. However, the retailer must prove that he is a franchisee within the meaning of the FIPA. To show that an *implied* franchise agreement exists, the retailer must fulfill the minimum statutory requirements.<sup>73</sup> Specifically he must show<sup>74</sup> that the manufacturer granted him a "license

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71. See also WASH. REV. CODE 62A.2-201(3)(c) (1979).

72. *Id.* § 19.100.010(4) provides:

'Franchise' means an oral or written contract or agreement, either expressed or implied, in which a person grants to another person, a license to use a trade name, service mark, trade mark, logotype or related characteristic in which there is a community interest in the business of offering, selling, distributing goods or services at wholesale or retail, leasing, or otherwise and in which the franchise is required to pay, directly or indirectly, a franchise fee: *Provided*, That none of the following shall be construed as a franchise within the meaning of this chapter:

(a) The payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring such credit card or any transaction relating to a bank credit card plan;

(b) Actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state;

(c) Any motor vehicle dealer franchise subject to the provisions of chapter 46.70 RCW.

73. *Id.* (statutory requirements for establishment of a franchise by implication).

74. See *American Oil Co. v. Columbia Oil Co.*, 88 Wn. 2d 835, 840, 567 P.2d 637, 640 (1977), in which the Washington Supreme Court stated that under WASH. REV. CODE ch. 19.100 (1979), "a business which distributes products of another has a franchise if two requirements are met: (1) the agreement between the parties includes a license to the franchisee to use a trademark or 'related characteristic' of the franchisor, and (2) the franchisee pays a 'franchise fee.'"



to use a trade name, service mark, trade mark, logotype or related characteristic;<sup>75</sup> and that he is required to pay a franchise fee.<sup>76</sup> In some instances it will be fairly simple to prove the existence of an implied franchise contract. Even in less obvious cases, there is still room for the retailer's argument for the parameters of the FIPA requirements have not been fully construed by the Washington courts.

In one fairly recent case, *American Oil Co. v. Columbia Oil Co.*,<sup>77</sup> a retailer (Columbia Oil) alleged that its supplier (American Oil) had violated the FIPA and the Consumer Protection Act by wrongfully terminating its supply contract. In order to qualify itself as a franchisee, Columbia Oil argued that the "franchise fee" requirement was satisfied by its purchase of tires, batteries, accessories, and fuel oils from American Oil and by its rental of a sign and credit card imprinter from American Oil. The court refused to accept this contention, reasoning that "purchases and rental charges are specifically excluded from the definition of a 'franchise fee.'" <sup>78</sup> Because Columbia Oil failed to prove the existence of a franchise fee the FIPA was inapplicable as a matter of law.<sup>79</sup> Although, the court permitted Columbia Oil to proceed under the Consumer Protection Act, the jury found that American Oil was not guilty of an unfair trade practice under the Act.<sup>80</sup>

Once the retailer establishes the existence of a franchise agreement, he can seek the same relief under the FIPA as can a plaintiff who has a written contract.<sup>81</sup>

#### *D. Consumer Protection Act Remedies Available When no Written Contract Exists*

If the retailer wishes to pursue consumer protection remedies

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75. WASH. REV. CODE § 19.100.010(4) (1979).

76. *Id.* § 19.100.010(11). For the legislative definition of franchise fee, see *id.* See also Chisum, *State Regulation of Franchising: The Washington Experience*, 48 WASH. L. REV. 291, 342 (1973) for additional guidance on the meaning of "franchise fee."

77. 88 Wn. 2d 835, 567 P.2d 637 (1977).

78. *Id.* at 841, 567 P.2d at 641 (citing WASH. REV. CODE § 19.100.010 (11)(a), (e) (1979)).

79. *Id.*

80. *Id.* See also discussion of Consumer Protection Act violations in text accompanying notes 33-43 *supra*.

81. See text accompanying note 30 *supra*.

as well, there are two possible approaches he can take. One is the "piggyback" tactic discussed previously,<sup>82</sup> that is, if he succeeds in proving a violation of the FIPA,<sup>83</sup> there is a per se violation of the Consumer Protection Act. Only a retailer who succeeds in proving the requisite elements of an implied franchise agreement, so as to bring himself within the purview of the FIPA, could use this strategy.

The second approach is to allege a direct violation of the Consumer Protection Act without reference to FIPA. This method can be used by retailers who are not franchisees, as well as by those who are. They must make a policy argument to persuade the court that a manufacturer's refusal to repurchase farm implements is violative of the Consumer Protection Act. However, when a retailer who has no written contract argues that the manufacturer has breached his duty to repurchase farm implements, a problem arises. The problem is simply that the manufacturer's statutory duty is conditioned upon the existence of a written contract. Thus, it will be difficult for the retailer to repurchase when, technically, no such duty exists in that situation. Of course, if the court finds an implied contract which satisfies the Farm Implements Act, then the retailer has overcome the problem and is squarely within the Act's coverage.

Absent a finding of an implied contract, the retailer can base his policy argument on two concepts: the duty of the court to effectuate the protective purposes of the Farm Implements Act, and the legislative command that the Consumer Protection Act be liberally construed.<sup>84</sup> The court should be urged to extend the broad protective coverage of the Consumer Protection Act to a retailer who is foreclosed from the narrow provisions of the Farm Implements Act but who is harmed in the same manner as those retailers who are covered by the Act. If the court focuses on the unfairness of the situation and on the interests of the consuming public, rather than on technicalities, the retailer may be able to obtain relief under the

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82. See text accompanying note 35 *supra*.

83. The violation would be the same as that discussed previously. See text accompanying notes 29 & 34 *supra*.

84. WASH. REV. CODE § 19.86.920 (1979) provides that the "act shall be liberally construed [so] that its beneficial purposes may be served." See also *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 82 Wn. 2d 265, 510 P.2d 233 (1973).

Consumer Protection Act without a contract.

## VI. A PROPOSAL FOR REFORM

In the four years since its enactment, the Farm Implements Act has not been cited in any reported cases. This lack of litigation could be the result of the restrictive requirement of a "written contract." This wording may present a technical barrier which discourages retailers from utilizing the statutory remedy specifically enacted to protect them.

On the other hand, one might argue that if the legislature had not intended to restrict the statutory coverage to those parties having written contracts, the legislature would not have included the word "written" in the statute. Nothing exists in the legislative history of the Act which lends support to either argument, since neither the committee members nor the legislature as a whole discussed the "written contract" requirement.<sup>85</sup> It is likely that the drafters followed the language used in another state's statute,<sup>86</sup> without seriously questioning the inclusion of the "written contract" requirement.

The lack of reported case law in Washington and in other states reinforces the argument that the statutes, as drafted, do not serve their intended purpose. If a statute is not used, those whom it was designed to protect generally do not benefit from it. Certainly, there are other plausible reasons for the absence of case law, such as lack of appeals and settlement of disputes without legal action. Another factor contributing to the paucity of litigation may be lack of familiarity with these statutes, since virtually nothing has been published on farm implements laws. One might also argue that perhaps there are very few repurchase disputes which arise and that it is not the wording of the Act, but rather the lack of grievances which accounts for the absence of litigation. Nevertheless, Washington's House Committee on Commerce found that some manufacturers did not buy back their products and that con-

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85. See transcripts of committee reports and H. Jour. legislative history which reveal no discussion of the "written contract" provision (on file with Gonzaga Law Review).

86. The source of the language was not indicated, nor was there any reference to other similar statutes in the legislative history. The wording of sister states' statutes varies only slightly from that of Washington's Act. The similarities are too great to be mere coincidence. For other states' statutes, see note 14 *supra*.

sequently, dealers suffered economic loss.<sup>87</sup> Thus, a legislative measure was found to be necessary to prevent such harm by equalizing the bargaining positions between manufacturers and retailers.<sup>88</sup>

The enactment of this legislation did not automatically equalize that bargaining power. It is possible that the passage of the Act encouraged manufacturers to deal more frequently than before on an oral, or transaction-by-transaction, basis. By avoiding written contracts, manufacturers may be able to escape liability under the Act. A manufacturer could easily thwart the legislative intent by refusing to execute a written agreement with its retailers, thereby excluding them from the provisions of the Act and effectively cutting off their statutory recourse. Although many factors contribute to the lack of case law, the fact remains that the "written contract" restriction precludes many aggrieved retailers from suing under the Farm Implements Act.

The simplest way to alleviate this problem would be to amend the statute by deleting the word "written" from RCW 19.98.010.<sup>89</sup> The courts would then be free to construe the meaning of the word "contract" as they have always done, by looking to the common meaning and examining the pertinent facts of each case.

If the legislature hesitates to use the general term "contract" without further defining it, then perhaps the various types of contractual arrangements which are within the legislators' contemplation could be spelled out in the statute. Examples would be sales agreements, security agreements, and express or implied contracts.

## VII. CONCLUSION

While the Farm Implements Act provides needed protection

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87. See Floor Presentation on Substitute House Bill 211 (statement of Rep. Frank J. Warnke) (Mar. 26, 1975) (on file with Gonzaga Law Review).

88. *Id.*

89. The Washington Act would then read:

Whenever any person, firm, or corporation engaged in the retail sale of farm implements and repair parts therefor enters into a *contract* with any wholesaler, manufacturer, or distributor of farm implements, machinery, attachments, accessories, or repair parts whereby such retailer agrees to maintain a stock of parts or complete or whole machines, attachments, or accessories, and either party to such contract desires to cancel or discontinue the contract, unless the retailer should desire to keep such merchandise the manufacturer, wholesaler, or distributor shall pay the retailer for the merchandise. . . .

for retailers of farm implements who have written contracts with their manufacturers, this requirement may prove to be a major barrier to many retailers. In an effort to surmount this barrier, several alternatives are proposed. In the absence of legislative action expanding the statute to include other types of agreements besides written contracts, one can still argue that the application of the Act to implied contracts will carry out the legislative intent. This measure is possible through interpretation of present Washington law and may be done without a large leap in logic. It must be remembered that the remedies under the Act are supplemented by those of the Consumer Protection Act, the Franchise Investment Protection Act, and any contractual remedies available between the parties. Taken together, these provide broad protection for those retailers with written contracts. Until this protection is afforded to those retailers without written contracts, however, manufacturers will be able to avoid their statutory obligations by exercising their superior bargaining power, which is the problem the legislature sought to remedy through the Farm Implements Act.

*Susan L. Sockwell*