LESSONS FROM THE RESOLUTION OF FRANCHISE DISPUTES[1]

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I. INTRODUCTION

Most civil litigation today culminates in settlement, not in verdicts or rulings, but the adjudicatory process and the negotiation process are inseparable. Professor Marc Galanter has written that "the negotiation of disputes is not an alternative to litigation. …[t]here is a single process of disputing in the vicinity of official tribunals that we might call *litigotiation*, that is, the strategic pursuit of a settlement through mobilizing the court process." Professors Robert Mnookin and Lewis Kornhauser have described formal adjudication as casting a shadow on the primary method of dispute resolution - - bargaining and settlement.

Despite the importance of the relationship between the adjudicatory realm and the world of settlement negotiations, the academic discussions on the matter are typically detached from the day-to-day business of case management. This article tries to bridge theory and practice, as we explore the adjudication and settlement of franchise disputes, and offer some insights into how best to negotiate the resolution of a franchise dispute, given the facts about adjudicated outcomes. Our observations are based in part on empirical data drawn from a survey of case outcomes in a large group of prominent franchise systems. Among other things, the data show that:

- Overall, 71% of lawsuits and arbitrations involving franchisors settled, but the settlement rate for arbitration was significantly lower than for litigation;

- Fewer than 20% of lawsuits involving franchisors were resolved by dispositive motion;

[1] This article is based on a program that the authors presented at the 2002 annual meeting of the American Bar Association's Forum on Franchising. The complete results of the survey described here may be found in our prior work, "Franchise "Litigotiation": Understanding the Interplay of Litigation/Arbitration Outcomes and Settlement Negotiation in the Resolution of Franchise Disputes" published by the ABA. Copies of that work may be obtained by contacting the Forum on Franchising. A portion of this article is also derived from Mr. Dunham's article, "Some Thoughts on Settling Franchise Disputes," in the Winter 2003 issue of the ABA Franchise Law Journal.

- Franchisors lost a higher percentage of arbitrations than they did either bench or jury trials;

- The average and median arbitration awards against franchisors were dramatically lower than the average and median jury verdicts against franchisors, but bench trials may have produced the best outcomes for franchisors in cases tried to a conclusion.

In the next section of this article, we offer the survey results and our interpretations. After that discussion, we outline a framework for considering settlement of franchise disputes, enumerating the key variables in the settlement calculus for every franchise case. We hope that our analysis of franchise litigotiation can help identify some pathways to understanding the links between adjudication and negotiation of other types of disputes.

II. WHAT ACTUALLY HAPPENS IN FRANCHISE DISPUTES - - A THIRTY SYSTEM SURVEY

In theory, the best way to measure the quality of a settlement opportunity would be to compare the settlement of a dispute to the adjudication of the same dispute, but such controlled experiments are impossible in actual litigation and arbitration. The case will only be processed one way (settlement or adjudication) and cross-case comparisons are not particularly useful, as many cases that appear to be similar actually differ in many important ways.

Franchising may present an unusual opportunity, however, to harvest a relatively reliable history of dispute resolution, because of franchisors' disclosure obligations under the FTC Franchise Rule and the Uniform Franchise Offering Circular ("UFOC") Guidelines. Every settlement of a significant franchisee claim appears in the franchisor's disclosure document for ten years. In order to further our understanding of franchise litigotiation, we surveyed the disclosed claims history of some of the country's leading franchisors. The results of this survey shed interesting new light on:

- The frequency of litigation and arbitration involving franchisors;

- The forums where those disputes are heard (e.g., federal court, state court, arbitration);

- The method of resolving the disputes (e.g., settlement, bench trial, jury trial, arbitration hearing)

- The outcome patterns - - including the percentages of cases settled, disposed of by motion and tried to a conclusion, and the dollar amounts of settlements, court judgments, jury verdicts and arbitration awards.

A. Survey Methodology

Most American franchisors use the UFOC disclosure format, which requires them to disclose in Item 3 not only certain categories of pending litigation, but also litigation resolved by settlement or judgment in the 10 years before the UFOC issued. We selected thirty of the 100 largest franchise systems measured in total units, as reported in the October 2001 issue of *Franchise Times* magazine, and reviewed Item 3 in the versions of these franchisors' UFOCs in effect when we began work on the project that gave rise to this article. This sample included the ten largest systems, and twenty others chosen to reflect a diversity of industries (including various types of quick-serve restaurants, hotels/motels, cleaning, copying and other services). For pending litigation, we simply counted the number of cases for each system. For concluded matters, we identified these facts:

- Whether the case was in state court, federal court or arbitration.

- Whether the case was resolved by settlement, dispositive motion, bench trial, jury trial, or arbitration award. These categories were not mutually exclusive, because some cases were settled after a trial on the merits or the granting of a dispositive motion. Thus, some of the percentages presented below total over 100%.

- For cases litigated or arbitrated to a conclusion, whether the franchisor won, lost, or obtained a mixed result. We classified as wins and losses cases where, according to the disclosure, all claims were decided for one side; mixed results are those where each side prevailed on at least one claim.

- The dollar amounts of settlements, court judgments, jury verdicts and arbitration awards.

Before we get to the results, let us offer seven disclaimers. First, neither of us is a statistics expert. We do not know whether our sample accurately represents franchising in general, and we make no claim that this survey satisfies any accepted standard of statistical reliability. Second, we assume that each of the thirty franchisors construed its disclosure obligations identically - - that franchisors disclosed matters of similar type and magnitude to cases that appeared in other franchisors' UFOCs. Third, disclosures were not limited to disputes between franchisors and franchisees. Some franchisors were in litigation with developers, landlords and vendors and/or with customers and we have not tried to segregate the data by type of case or claim. Different categories of cases may have different resolution patterns that we have not discerned. Fourth, if a franchisor sued a franchisee and the franchisee did not file a counterclaim with allegations covered by Item 3, the franchisor was not required to list the matter in its UFOC, so some disputes may be missing. Fifth, any disputes resolved, either directly or by mediation, before a franchisee sued or filed an arbitration were not disclosed. Sixth, our definitions of wins, losses and mixed outcomes may be insufficiently nuanced and potentially misleading. For example, we may be literally correct that a result was "mixed," because neither side

won every claim, but if one side prevailed on every truly significant issue, that outcome may have felt like victory to one party and defeat to the other. Moreover, whether a result is, on balance, positive or negative is rarely a function of the simple box score of the judgment, verdict or award. If the verdict or award is less than the franchisee demanded in settlement, or the franchisee had to wait a long time or incur a lot of expense and stress in order to recover, something we measured as a win may have felt otherwise to the party we describe as the prevailing party. Finally, a few franchise systems accounted for a substantial portion of the cases in our sample. Pending cases involving McDonald's and Subway totaled about the same as the other twenty-eight companies combined, and Subway, McDonald's and Jani King's combined resolved cases totaled about as many as the remaining 27 companies.

Of course, the number of claims may have no connection to either their merits or the damage exposure, and may reflect nothing about the business success of either the franchisor or its franchisees. In order to judge a franchisor's claims history and the relative success of its risk management efforts, the number of disputes in a particular system must be viewed in context along with several other factors, including the amounts paid in settlement and the outcomes of cases tried to conclusion. Certain information presented below for categories of cases with a small sampling may not be representative, because one franchisor generated most of the data in the particular category, and that franchisor's approach may not reflect what other franchisors have done, or would do, under similar circumstances.

Notwithstanding these caveats, to our knowledge there is no other survey of franchise litigation, arbitration and settlement outcomes more comprehensive or reliable than this one.

B. Survey Results

1. *How Did Disputes Get Resolved*?

These thirty systems disclosed 420 concluded matters. 71% of these cases settled - - the balance were either resolved by motion or tried to a conclusion. 16% were resolved by motion, 2% by jury trial, 5% by bench trial and 5% by arbitration.

However, state court litigation, federal court litigation and arbitrations had markedly different resolution patterns. In state court, 76% of the cases were settled, while 12% were resolved by motion, 2% by jury trial, 6% by bench trial and 4% by arbitration, while in federal court, 64% of the cases settled, while 25% were resolved by motion, 5% by jury trial, 5% by bench trial and only 1% by arbitration. In the 42 cases in which there was an arbitration, 40% settled while the remaining 60% were arbitrated to conclusion.

Based on this survey, arbitrations settle at a substantially lower rate than lawsuits do. At least five factors may explain this. First, arbitration generally does not share the settlement-provoking features of litigation. There is no jury to strike fear into the franchisor's heart. As our survey results on arbitration awards will illustrate, arbitrators

frequently produce results that may be dissatisfying to franchisors, but seldom system-threatening ones. Second, parties to litigation are often persuaded to settle by the cost of taking the case all the way. Because of filing and arbitrator fees and the unfortunate propensity of certain arbitrators to allow hearings to drag on endlessly, the ostensible cost advantages of arbitration may be overstated. But the absence of the onerous, time-consuming and expensive discovery still present in much litigation may also remove an important prod to settlement. Third, arbitral discovery limitations may reduce the likelihood of settlement in another way as well. Parties learn things during discovery that influence their thinking about the value of a case. If those facts do not emerge until the arbitration hearings are underway, the chance that these facts will provoke a settlement is substantially reduced. Fourth, in almost all litigation a judge will urge the parties to consider settlement, and in many jurisdictions a formal settlement conference or court-annexed mediation is mandatory. In arbitration, often nobody performs that function, and arbitrators may not have much incentive to do so. Fifth, except for preliminary injunction motions, litigation usually takes longer than arbitration to travel from filing to the hearing on the merits, and lawsuits sometimes settle simply because parties become frustrated by the snail's pace. All of this suggests that it may be especially important in drafting franchise agreements to couple an arbitration clause with a clause requiring mediation to improve the odds that settlement opportunities will not be overlooked.

Another notable fact is how few lawsuits end by dispositive motion. Many settlement negotiations include confident proclamations from defendants that they will win summary judgment, and therefore have no interest in the plaintiffs' settlement demands. Even in federal court, only 25% of the concluded matters in this survey were resolved by motion, and the 12% rate in state court confirms the common anecdotal experience of litigators that state court judges in many jurisdictions are reluctant to grant summary judgment.

2. *Trial Outcomes*

These thirty franchisors reported fifty-seven cases (including arbitrations) tried to a conclusion during the subject ten year period. Franchisor win rates in federal court, state court and arbitration trials varied significantly. In state court, franchisors won 45% of the time, lost 45% of the time and obtained mixed results in 10% of the cases. In contrast, franchisors in federal court won 60% of the time, lost 33% of the time and obtained mixed results in 7% of all cases. In the 22 arbitration results, franchisors lost 64% of the time, won only 18% of the cases and obtained mixed results in the other 18%.

It is difficult to know what to make of this data. It may be that in litigation, because of the various settlement incentives, franchisors eliminate more of their problematic cases by negotiation, leaving relatively stronger matters for trial. At first blush, the franchisor success rate in arbitration is hardly an advertisement for this form of dispute resolution from a franchisor's perspective, but the question remains - - success compared to what? Without an arbitration clause, would these franchisors have paid larger amounts to settle, or been hit with substantial jury verdicts? As long as arbitration, even with a low percentage of outright "wins" for the franchisor, produces no knee-buckling damage awards, it may still be serving every franchisor's essential risk

management goal: ensuring that claims, and the burden of handling them, do not impair the franchise system's success.

3. *Bench Trials v. Jury Trials*

We also looked at the outcomes of bench trials and jury trials. The samples are small in each instance, and especially so for jury trials, but these were the results. Franchisors won 63% of bench trials, lost 32% and obtained mixed results in 5% of the 22 cases in the sample. In contrast, they won only 31% of jury trials, losing 54% and obtaining mixed results in 15% of the 13 disclosed cases.

Because our sample of jury verdicts is so small (only 13), however, the data may not be representative of franchising in general. A program (in which Mr. Dunham participated) at the 2001 ABA Forum on Franchising included a verdict search that identified 105 jury verdicts since 1990 in lawsuits between franchisees and franchisors. Franchisees were plaintiffs in 87 of those cases. 61 of these were tried in state court, and only 26 in federal court. Of the 18 actions with franchisor plaintiffs, 12 were in state and 6 in federal court. For the 87 verdicts identified where the franchisee was plaintiff, the franchisee prevailed 71% of the time. That percentage remained the same whether the franchisee was asserting contract, tort or statutory claims. However, the franchisee verdict rate was different for state and federal courts. In the 26 federal actions going to verdict with a franchisee as plaintiff, the franchisee prevailed 61% of the time. Franchisee plaintiffs won 75% of the 61 state court suits that went to verdict.

4. *What Franchisors Paid (and Sometimes Received) to Resolve Disputes*

- The average settlement payment by franchisors was $828,922, but that number was sharply skewed by a handful of huge outliers including a top figure of $23,000,000. The median settlement payment by franchisors was $66,230. In the disclosed cases that settled with payment to the franchisor, the range of settlement amounts was $1,000 to $384,855. The average payment was $61,742 and the median was $25,730.

- In arbitrations, the average award against losing franchisors was $136,325; the median was $74,500. Franchisors received damage awards averaging only $23,300 (with the same median).

- When franchisors lost bench trials, the average judgment was $133,611, with a median of $67,500. Prevailing franchisors in bench trials won an average of $183,897 in damages. However, one franchisor won a judgment of $972,289; the median money judgment for franchisors was only $33,406.

- In jury trials, the average verdict against franchisors was $814,194. Once again, however, one result - - the top verdict of $3,477,905 - - pulled that average upward. The median verdict against franchisors was still

significant, however - - $421,973. When the franchisor prevailed, the median and average verdict were each $285,000.

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Certain of the foregoing statistics may suggest that bench trials should be the franchisor's first choice for resolving claims. Franchisors won 63% of the bench trials in this sample, and when they lost the average and median damages ($133,611 and $67,500) were quite low. Bench trials avoid the risks of juries, but unlike arbitrations are also subject to the rules of evidence and meaningful appellate review. The risk management problem, however, is that securing bench trials of suits with franchisees requires an enforceable jury trial waiver in the franchise agreement, and in many jurisdictions that contract provision is unlikely to withstand challenge. In contrast, courts enforce franchise agreement arbitration clauses in the overwhelming majority of cases, and notwithstanding all the frequently unsatisfying characteristics of arbitrations, in our survey they generally produced modest damage awards against franchisors.

III. A FRAMEWORK FOR CONSIDERING SETTLEMENT OF FRANCHISE DISPUTES

With these results – or at least the questions that they suggest - in mind, how should one prepare for the negotiated resolution of a franchise dispute? In addition to the obvious general principles that always apply, (e.g., realistically assess the strengths and weaknesses of the case), here are five factors that participants in franchise disputes should consider as they contemplate settlement of a particular case.

1. *How Will the Settlement Terms Read in the UFOC and Influence Other Franchisees*?

This is sometimes the franchisor's central consideration, and can be an insurmountable obstacle to settlement. It therefore behooves franchisees, their counsel, and neutrals involved in negotiations to take this concern seriously, and try to identify creative (but lawful) ways to minimize the disclosure impact of settlements.

2. *The Forum and Decisionmaker(s)*

If the case does not settle, where and before whom will it be tried? If the franchisee must travel to the franchisor's home court, there are both economic and psychological consequences. If the franchisee must arbitrate, that also has implications for settlement. First, the transactional costs can sometimes be higher in arbitration than in litigation. Second, while arbitrators may find for the franchisee, they are generally (and probably accurately) perceived as less likely than jurors to issue enormous damage awards. In addition, while the loss of a bench or jury trial can sometimes have adverse peripheral consequences for the franchisor because other franchisees can rely on the decision under the doctrine of collateral estoppel, it may be more difficult for franchisees successfully to assert the preclusive effect of an arbitration award. Because arbitration

awards can be cryptic one-liners, and there may be no accurate record of the proceedings, it may be difficult to reconstruct what was actually at issue and decided. Also, arbitrators in later cases may not be required by law to give preclusive effect to the award, or may simply choose not to be bound by it, with little or no risk of reversal on appeal.

These factors suggest that a claim in arbitration should have less settlement value than the identical claim headed for a jury trial. Certain characteristics of arbitration may, however, actually increase the value of a franchisee's claim. In litigation, well-heeled defendants sometimes have the opportunity to wear down less affluent plaintiffs with onerous discovery; whether the plaintiff (or its counsel) feels the economic effect of that, and perhaps an attendant desire to settle, may depend on the fee arrangement. This leverage is usually absent from arbitration, since discovery is typically minimal. In most arbitrations, moreover, neither substantive law nor the rules of evidence play the same role that they do in court. Many arbitrators see their job as "doing equity" - - fashioning what they envision as the fairest possible result, irrespective of what strict application of the law would yield - - and give short shrift to evidentiary niceties. Thus, in arbitration the chances of defeating a claim by motion, or driving down settlement value by successfully challenging a damage expert's proposed testimony, are slight. And if the franchisor loses the arbitration, in all probability it is stuck with the result, because courts often rubber stamp arbitration awards pursuant to enormously deferential standards of review.

If the franchisor is facing a jury trial, especially in the franchisee's home forum, the settlement dynamics are very different. Every jury is a wild card, particularly if the franchisee has a plausible basis for a big damage claim. As mentioned above, in settlement negotiations, defendants often tout the strengths of their legal position. Every plaintiffs' lawyer, settlement judge and mediator has heard countless defense attorneys express confidence about winning a summary judgment motion and, if all else fails, prevailing on appeal. That confidence can prove well-placed in a given case, and overall statistics may, of course, foretell nothing about the likely outcome in a specific dispute. Those statistics show, however, that in the civil justice system as a whole and in narrower case categories, winning either a dispositive motion or appellate reversal of a plaintiff's jury or bench trial victory is unlikely.

In our survey, for example, only 16% of the concluded cases terminated by motion, and in state court actions the figure was just 12%. Data on state appellate court reversal rates are not readily available, but the federal circuit courts affirm in a clear majority of appeals. For the twelve months ending September 30, 2001, only 9.5% of judgments in private civil appeals were reversed, ranging from a low of 1.8% in the Second Circuit to a high of 16.7% in the Seventh. Because these figures reflect the results of every appeal of every appealable ruling, judgment or verdict, however, they probably overstate the odds against a defendant's success in challenging a plaintiff's trial victory.

In a recent study, Cornell Law Professors Kevin Clermont and Theodore Eisenberg closely examined a database of all federal civil jury trials and appeals decided from fiscal year 1988 through fiscal year 1997. They looked at thirteen case categories,

including general contract and fraud, and calculated appeal and reversal rates on appeals from both bench and jury trials. They found that only about 21% of trial outcomes were appealed, and that in only 21% of those appeals did the circuit court reverse. Several other conclusions from this study are also notable, and perhaps germane to settlement calculations. First, jury and bench trials were appealed and reversed at the same rates. Second, there was a marked difference in the reversal rates in jury verdict appeals by defendants and plaintiffs. Defendants appealing plaintiff victories obtained a reversal 31.14% of the time, while plaintiffs challenging defense victories won reversals in only 13.18% of the cases. In the two case categories most likely to include franchise disputes, general contract and fraud, these were the reversal rates (aggregated for jury and judge trials):

	Overall Reversal Rate	Defendants' Appeals	Plaintiffs' Appeals
General Contract	23.42	25.85	20.25
Fraud	33.33	41.38	24.00

In short, although the prospects for a successful appeal are far from hopeless (at least in federal court), any party trying to overturn a jury verdict or bench trial decision will always be traveling statistically uphill.

3. *Is There a Continuing Business Relationship and Do the Parties Want to Salvage It?*

If a franchisee has already been terminated and damages are the only relief it seeks, that can affect settlement potential in diametrically opposite ways. On the one hand, the franchisee may be in economic straits and ready to make a deal. But the franchisee also may be angry and eager to exact retribution, and that emotional overlay can harden if it does not carry any significant economic cost (i.e., there is no threat of termination; the franchisee's lawyer is working on a contingency.)

If termination is a possible outcome of the dispute, and the franchisee wants to preserve the relationship and its livelihood, that can be a strong incentive to settle. No matter how bullish the franchisee's lawyer professes to be about the likely outcome, the franchisee may not want to take the risk of learning whether its counsel is right. The franchisor faces similar considerations. Moreover, whenever the franchisee is still in the system, that may create a possibility for settlement on terms more creative than simply the payment of money in exchange for a release. If the franchisee wants to exit the system, the sale of its business (including ownership or leasehold interest in any building and real property) to the franchisor, or to another franchisee or third party in a transaction facilitated by the franchisor, can sometimes make settlement far easier to achieve. The franchisor may be better able than the franchisee to identify an acceptable buyer, and this settlement approach may also be more palatable to the franchisor because of how it will

read in the UFOC. This is a classic example of finding joint gains through interest-based negotiation.

In disputes with franchisees who want to remain in the system, franchisors amenable to that outcome may be able to make adjustments in the relationship - - a period of royalty relief, for instance, or extra local advertising - - as the basis for settlement.

4. *The Status of the Franchisor and Its System*

As discussed above, certain franchisors take a hard line on settlement, but that is a luxury not all franchisors can afford, either literally or figuratively. If the system is still at an early stage of development, litigation of any significance can divert management attention and financial resources from growing and improving the system, and depending on the issues, management may fear that an adverse outcome (or the existence of unhappy, vocal franchisees, discouraging prospects) will make it difficult to sell new franchises.

Even for more established systems, undergoing the economic and psychological drain of full-blown litigation is sometimes not advisable, especially if the subject matter of the case has system-wide implications.

5. *The Characteristics of Counsel*

In many relatively straightforward disputes, the quality of counsel may have no impact on settlement value. Often, however, the experience, skill and risk-tolerance of the lawyers, and the client's perceptions of those characteristics of its own and its adversary's attorney, may play a significant part in determining value. A few questions help make the point:

- How many cases do the lawyers actually try?

- If the case is going to a jury, how often have the lawyers been there before?

- Do they understand franchising, or are they generalists with a less detailed knowledge of the business realities?

- Are they demonstrating a command of the facts and the stamina to stay the course, or are they disorganized and seeming eager to make a deal?

- Are they being paid by the hour, which may create an incentive to continue working on the case, or working on a contingency, which may create an incentive to settle a case if it is time-consuming, expensive to prepare and blemished on either liability or damages?

- Given the facts of the case and the intellects and personalities of your witnesses, does opposing counsel have the capacity to hurt them on

cross-examination? Has he already proved that, and influenced settlement value, by extracting damaging concessions during depositions?

Mediocre lawyers sometimes win big verdicts and hold them on appeal, and the excellence of counsel can only do so much to overcome bad facts, ineffective witnesses or adverse precedent. But in settlement negotiations, each client's perceptions of its own and the adversary's lawyers can be an important ingredient in assessing exposure and thus determining settlement value.

IV. CONCLUSION

Litigotiation is here to stay, and the increased use of mediation in lieu of direct negotiation between parties is unlikely to abate. Professor Galanter has explained why:

> Demand for adjudication–backed remedies is increasing faster than the supply of facilities for full-blown adjudication. . . .
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> The enlargement of the legal world enhances the opportunities for compromise. As society gets richer, the stakes in disputes become higher, and more organizations and individuals can make greater investments in litigation. Expenditures on one side produce costs on the other. Again, as the law becomes more voluminous, more complex, and more uncertain, costs increase. Virtually every 'improvement' in adjudication increases the need and opportunity for greater expenditures. Refinements of due process require more submissions, hearings and findings; elaborations of the law require research, investigation and evidence. As transaction barriers (time, resources, uncertainty about recovery and its amount) rise, there is a greater chance of overlap in the bargaining position of parties. There is more of a "settlement range" in which both parties are better off than if they had run through the full course of adjudication.
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> . . . As settlement ranges are extended, actors face the problem of how to reach agreement within the settlement range. The recent proliferation of settlement brokers (e.g., private judges, mediators and special masters) and devices (minitrials and summary jury trials) testifies to the increasing demand for signals to identify points of convergence within the broad settlement ranges created by higher transaction costs.

"Settlement brokers" now play a prominent role in franchising. Several ADR providers have formed panels of mediators with experience in settling franchise disputes, or established franchising-specific mediation programs. Franchise agreements in many leading systems now require mediation as a condition precedent to litigation or arbitration, and some systems have implemented their own internal mediation programs, often tailored to particular categories of disputes, such as encroachment. All sensible businesspeople, including franchisors and franchisees, recognize that litigation and arbitration are inherently unsatisfactory methods of resolving disputes, because of the

time, expense, distraction from productive labor, and risk of wacky results imposed by people who may understand little or nothing about the business that is the subject of the dispute.

As Galanter has also noted, however, the "[p]ower to achieve an attractive settlement may be dependent on having adjudication as a viable alternative." Just as accurate appraisals of real estate value require data from the sale of comparable properties, "the promotion of quality settlements implies at the least a continuing production of adjudicated outcomes needed to equip deserving parties to achieve such settlements" by letting them know what might happen if they do not. Because of the tensions inherent in the franchisor/franchisee relationship and the high emotional content of many franchise disputes, the production line of judgments, verdicts and arbitration awards, relatively modest though it is, will probably continue to run for the foreseeable future, notwithstanding all the powerful incentives for negotiated resolutions. Parties are likely to achieve more satisfactory litigotiation results if they carefully watch the output of that production line, and develop settlement positions that rationally reflect what is happening in the trial and settlement of comparable disputes.