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# Law and the Balance of Power

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THE AUTOMOBILE  
MANUFACTURERS AND  
THEIR DEALERS

**Stewart Macaulay**  
*University of Wisconsin  
Law School*

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**To Nini**



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## Foreword

This is a book for anyone interested in law as part of the living processes of the society. As such, it is a book for the imaginative practicing lawyer and for the realistic scholar. As such, too, it is a book not just for scholars of law but also for all social scientists interested in the roles of the market and of the modern big business corporation, whether the focus be primarily on resource allocation or on the organization of power.

The special contributions of Professor Macaulay's book grow out of the range of his hypotheses and his raw materials. Seen as an integral part of living social processes, the roles of law present challenging complexity. Important functions of law consist in giving form to substance—bringing values to definition, helping to make experience meaningful by providing criteria of relevance, in mustering facts, and legitimizing inescapable choices among values based on relevant facts. So law helps make meaning. With more or less success, this creation of meaning is going on all the time in statute law making, in court decisions, in administrative rule making and adjudication. Thus it fits reality that Professor Macaulay sets this legal-economic, legal-social study within a frame of statutes, administrative rules, and judicial and administrative decisions and opinions. However, reality lies also beyond these formal products of formal processes. One key

proposition about legal order which this book demonstrates is that law typically works as a marginal force in society. To say so—as the book also demonstrates—is by no means to say that the uses of law are not of material weight in affairs. But to grasp the marginality of law is to enlarge the focus of inquiry into the social roles of law.

Thus as Professor Macaulay pieces together the complex working relations of the big automobile companies, their franchised dealers, and the law, he is not content merely to examine the formal products of legal process. He takes us into business offices where men chart the strategy and tactics of using both business and legal power. He has interviewed lawyers, read their memoranda and their briefs, and added to the story the considerable dimension of law which exists in the counseling and document drafting of the bar. Within the broad permissiveness which our public policy accords to private association, big corporations create procedures for making and applying rules and deciding complaints that arise within their systems of private order. Automobile dealers find strength by pooling their forces in trade associations which undertake to use and affect both official and private machinery for adjusting interests. In turn, public officers charged to implement statutory policy mesh their contributions to the living content of the law with those of lawyers, businessmen, and trade association bureaucrats.

Over a generation ago Roscoe Pound challenged lawyers and scholars to achieve a more realistic understanding of the many-dimensioned role of law as part of larger social processes. His challenge was to grasp law in action as well as in books. His invitation was to perceive the limits of effective legal action—not in a negativist spirit, but in order to see where and how law's effectiveness depended on its interplay with other social institutions. Legal scholarship and social science research have been scandalously slow to respond to these challenges. This book is such a response, rich in concept and in data rewarding because the data were gathered under the discipline of meaningful hypotheses on the relations of law to general social structures and processes. This is sociological jurisprudence translated from prospectus to product.

WILLARD HURST  
*Vilas Professor of Law*  
*University of Wisconsin*



## Preface

It has been said that if a bureaucratic system were to be operated strictly by its formal rules, it would shortly become immobilized and fall apart. This may or may not be a valid prediction, but it is true that sociologists who study organizational behavior usually give the formal structures short shrift and devote most of their attention to the “real” rules and patterns of action—the informal structure of mutual expectations and interdependent activity through which the system functions. This skepticism concerning the “rules in the book” may be one reason (there are others) that sociologists have paid so little attention to law as a field for research and theory.

Legal scholars on the other hand tend to “search the law,” or if they go beyond and consider what the law ought to be, they pay scant attention to what goes on in the interstices of the formal structure. Practicing lawyers, of course, learn from experience that there is much more to a relationship than that provided for in the rules and explicit contractual obligations. But law-school training does not provide such knowledge, nor a systematic conceptualization and methodology for encompassing and using it.

In certain respects this book justifies both orientations. As the author shows, automobile dealers have tried for forty years to find a legal remedy for their complaints against what they consider unfair practices of the

manufacturers. Resorts to court action under general law of contracts failing, they organized and lobbied for changes in the law. Although new legislation provided the basis for new court action, nothing much came of working through the legal machinery. Nevertheless, there have been very substantial changes in the relationships between manufacturers and dealers quite apart from the legal definitions of those relations and it is in the non-legal processes that major gains have been made by the dealers. But it is doubtful that these extralegal processes would have progressed had not a formal legal framework provided a structure of requirements, expectations, and sanctions within which informal processes could be developed that had real force and went well beyond anything that was written into law.

The real point, of course, is that Professor Macaulay has presented a compelling demonstration of the necessity for a close coordination of the two approaches if an adequate understanding of organizational behavior is to be achieved. He has done this by tracing the interplay between attempts at legal and informal solutions to the problems and the concomitant shifts in the balance of power between dealer and manufacturer. In so doing, he makes it quite clear that the legal scholar must be capable of comprehending the processes beyond those found in his search of the law and of relating these changes to those of the formal legal structure. The student of organizational behavior, for his part, must gain a firmer grasp of the formal system and its impact on the informal processes.

The author is a law professor who has enjoyed a limited exposure to sociological theory and method. He is not and does not claim to be a social scientist; in fact, he apologizes for the lack of social science sophistication in his work. No apologies are needed. Although the study does not set forth clear-cut hypotheses that are then tested in the manner familiar to social scientists, it is a solid descriptive analysis of organizational change that not only opens up significant questions for systematic research, but advances our understanding of the limitations as well as the positive functions of formal rules in the regulation of human conduct. Students of organizational behavior will find a careful examination of this report amply rewarding.

In its continuing effort to aid the development of productive working relations between the fields of law and the social sciences, Russell Sage Foundation is happy, indeed, to have had some part in the successful completion and publication of this study.

New York  
July 14, 1966

LEONARD S. COTTRELL, JR.

## Author's Preface

A preface seems to be a place to talk about the book, to comment on the research that produced it, and to say thank you. I am a Contracts teacher at the University of Wisconsin Law School, and am interested in the part the legal system plays in implementing, regulating, and hindering economic relationships, and how it does these things. In general, this is what the book is about.

My earlier field research convinced me that contract law as it is usually taught in law schools is far from central in most business affairs. A host of other-than-legal sanctions push businessmen to negotiate their transactions and settle any disagreements as if the law of contracts as usually taught in law schools had been repealed; in fact, most businessmen react with little interest to suggestions that they channel their conduct so as to produce a legally enforceable contract or that they use legal remedies to solve disputes. Often the costs of using contract law far outweigh any conceivable gain.

But automobile dealers are a little different. Once their franchises have been terminated, they have been willing to sue. For over forty years they have been trying to get help from the legal system to give them enforceable rights against the manufacturers which would influence the daily operations of their relationships with them. One can guess why. The "franchise"

which governed the arrangement was drafted by the manufacturer to minimize the dealer's rights, and the dealers lacked the bargaining power to gain a better contract without outside help. Moreover, once the franchise was gone a lawsuit provided at least a long-shot chance of some recovery from the manufacturers at relatively little cost—especially if an attorney would take the case on a contingent fee.

The decline of pure contract has been prompted by the rise of regulation in various special areas. But what happens once an area leaves contract and becomes another branch of licensing? The material available in law libraries suggested that the dealers had not gained much ground by appealing to the legislatures since the laws which had been passed were dead-letters. Law-review articles seized the few reported cases and glossed the text of the acts only to conclude that nothing had been accomplished. Generally, the law-review writers were unhappy, since they viewed the battle as one between the corporate giants and the small local merchants.

However, there is a great deal more to the legal system than appears in the statutes and reported opinions of appellate courts. By interviewing officials of the Wisconsin Motor Vehicle Department, I learned that they did a thriving business in mediating disputes between automobile manufacturers and dealers at informal "pre-hearing conferences." These officials viewed the Wisconsin statute as very much alive and highly successful. Of course, one can say that this sort of thing is not law, and thus is outside the proper jurisdiction of law professors. But law professors have been quick to pronounce evaluative judgments on legal rules in terms of whether or not the rules produce consequences which square with their views of public policy. The law professors have tended to assume that they knew the actual consequences of these rules well enough to make those judgments. As a review of much of the law-review writing on this subject shows, often they do not. Of course, most of the articles on automobile manufacturers and dealers were written by law students, but these are the best students at the best law schools. I think it entirely safe to assume that their case-oriented approach reflects a view of the legal system that they heard from their professors in class and read in their professors' articles.

This book tries to sharpen awareness of the many informal operations of the legal system such as regulation through a congressional committee hearing or through requests of a commissioner who has the power to delay needed approval of licenses. It stresses that creating a right by statute is not the same thing as paying a lawyer to enforce it. Moreover, the book emphasizes that the legal system both supports and hinders systems of private government such as systems of internal review within the organizations of automobile manufacturers which control decisions relating to

dealers with a kind of corporate due process. One who would evaluate consequences must touch base here, too.

Of course, everyone in the legal business knows all this. Many law teachers know far more about informal governmental action and private sanction systems from their law practices than I do from extensive interviewing. Somehow these considerations seem to get left out of their articles and their teaching. Yet if one is interested in law as a method of solving problems, he needs some theory of the limits of effective legal action. Those who would tell us what the legal system ought to do would do better if they had more information about what it does do and what difference it makes to what people.

If one is going to look at informal operations of the legal system and private governmental systems, he needs much hard-to-get data. Although I have been interested in social science for some time, I am not an expert field researcher or statistician. Undoubtedly this book would have been more accurate if sophisticated methods of data gathering had been employed. Also it probably never would have been written in the available time since the subject is too big. When those who have command of social science methodology turn to problems such as the manufacturers and their dealers, it will be a happy day—if they apply their methods to get answers to the right questions. Until then law professors will just have to ask questions, perhaps guided by some of the notions implicit in the law of evidence and by the skepticism which is their stock-in-trade.

Much of the information for this book was derived from contact with people who, for various reasons, desired not to be identified. I corresponded with officials of General Motors Corporation, Ford Motor Company, Chrysler Corporation, and American Motors Corporation. The manuscript was submitted to representatives of each manufacturer for comment; however, not all replied, and some of the manufacturers did not agree with many of the interpretations found in this book. I also wrote to all of the attorneys who represented dealers in reported cases under the federal Good Faith Act, 15 U.S.C. §§ 1221.25 (1963). Where states had administrative-licensing statutes regulating the dealer-manufacturer relationship, I wrote to the head of the administrative agency, asking how often and in what way this statute had been applied. Where states had penal statutes, I wrote to the attorneys general for data on the use of the statute. The response rate was high but to disclose it might serve to identify the source of certain information reported in the book. In addition, many interviews were conducted. I interviewed by telephone the executives or managers of the new-car dealer trade associations in the forty-eight states having such associations (the directory I used lists no associations in

Alaska or Hawaii). In these telephone conversations I was able to talk with all but one trade association executive, and in many instances very lengthy and informative conferences resulted. By the very nature of their jobs, these gentlemen and ladies are experts in manufacturer-dealer relationships and know what is going on in their states.

Thomas Travers, a student when this material was gathered, read transcripts of all hearings held by the Wisconsin Motor Vehicle Department in proceedings to deny, suspend, or revoke licenses of manufacturers or their representatives because of alleged wrongful conduct. Both Mr. Travers and I separately interviewed several officials of the Department about its formal and informal practices related to the dealer-manufacturer licensing statute and also talked to Louis Milan, executive vice-president of the Wisconsin Automotive Trades Association. During the course of two days spent at the National Automobile Dealers Association offices in Washington, D.C., I talked with Steven Simmerman, general counsel of NADA, and John Winston, the assistant general counsel. They allowed me to examine certain materials in their files and to use their research library.

Of course, I also referred to the more traditional research sources in legal materials. I made extensive use of the briefs and records of appellate cases and the transcripts of hearings and reports of the Congress of the United States. I checked the *New York Times* from 1954 to 1965, and scanned all issues of *Automotive News*, a weekly industry paper, covering the same period. I read the lively monthly, *Motor News Analysis* for 1965. Although I have placed great reliance on this library material, I have tried to use it all with appropriate caution.

Most of the information obtained through letters and interviews was given to me with the understanding that the source of the information would not be identified, and I have tried not to breach this trust. All of these people are engaged in relatively private, ongoing relationships, and while no questionable conduct was revealed to me, disclosures could nevertheless impair these relationships. Therefore, references to letters and interviews will be cited simply as "Letter" and "Interview," unless I am free to give more information. This anonymity is a necessary price to pay for answers in sensitive areas.

The book follows law-review style because of its origins as two law-review articles. The citations are in "bluebook" form, following *A Uniform System of Citation* (tenth edition, 1958), copyright by the *Columbia, Harvard, and University of Pennsylvania Law Reviews*, and the *Yale Law Journal*. Those with legal background tend to consider it the "true faith." Those from other areas tend to find its conventions irrational, and I sympathize with them. Moreover, the footnotes appear at the bottom of each

page rather than at the back of the book, and they frequently comment on the text or add illustrations of the point being made. Again, this "iceberg" form is a convention with substantial gains and costs. I apologize to those who find it annoying.

So much for comments on the book and the research; now to say thank you. The research reported here was supported by Russell Sage Foundation as part of its Law and Social Science Program at the University of Wisconsin and by the Walter E. Meyer Research Institute of Law. While the study would not have been possible without these grants, neither foundation should be held responsible for the opinions expressed. The manuscript was read by my colleague, Professor Lawrence M. Friedman, by my wife, Dr. Jacqueline R. Macaulay, a social psychologist, and by my father, Ralph S. Macaulay, a former executive of the Chevrolet Division of General Motors. All three made important suggestions. In addition, my colleague, Professor Joel Handler, offered important help.

The study has appeared in only slightly different form in two issues of the *Wisconsin Law Review*. Two of the *Review's* article editors, Philpott Southerland and Gary B. Simon, devoted great effort to sharpening my ideas and refining my prose. San W. Orr, Jr., editor-in-chief, and Joseph W. Skupniewitz, managing editor, both made substantial contributions in the editing process. Moreover, I appreciate the careful attention given the manuscript by Dr. Leonard S. Cottrell, Jr., and Miss Margaret R. Dunne of Russell Sage Foundation.

Of course, I should thank all those who gave me information, particularly Mr. Louis Milan of the Wisconsin Automotive Trades Association, who went out of his way to be helpful during the entire course of research and writing. Professor Malcolm Sharp has long provided ideas, criticism, and encouragement; by express suggestion and by example, he has led me to see Contracts not as a narrow first-year law course but as an appropriate starting point to think about the relations of legal systems and society. Moreover, his work has made me slow to accept easy arguments based on sympathy for the supposed plight of a particular group which, it is said, lacks "bargaining power." Finally, I would like to express my indebtedness to my colleagues at the University of Wisconsin Law School, especially Professor Willard Hurst. While many of my colleagues will find their ideas throughout the text of this book, I have drawn most heavily on Professor Hurst's ideas as expressed in his work and at discussions in his office and over lunch during the course of the past nine years. I count myself fortunate that I began my academic career, quite by chance, at Wisconsin.

Madison, Wisconsin  
February, 1966

S. M.





# 1. Introduction

This book is about business relationships between the major American automobile manufacturers and their dealers—in a very nonlegal sense, their “contracts.” Although these relationships are intrinsically interesting to me, I am concerned with them for several other reasons. First, I will deal with an extensive lobbying effort by the automobile dealers that has produced hearings, statutes, and administrative agencies on federal and state levels, all of which were supposed to change the way the manufacturers and dealers did business with one another. One of my concerns will be the consequences of this use of almost the total legal system by an interest group and the counterattacks within that system by the manufacturers: To what extent, if at all, have the dealers succeeded in changing the business practices of the manufacturers to the dealers’ advantage and at what costs to themselves, the manufacturers, and the public? In a more general sense, what can we learn about what the legal system offers to those who deal with large and powerful corporations?

Second, I will consider how the legal system functioned when dealers tried to use existing laws and processes and when they tried to change the rules of the game to produce results that favored them. Also I will consider how the legal system promoted or hindered other nonformal or nongovern-

mental means of solving the problems that prompted the lobbying. In the legal battles between the dealers and the manufacturers, the courts initially applied the common law of contracts so that the manufacturers were free to manage their business relationships with dealers without outside review of their good faith or the reasonableness of their business judgment. Legislatures and administrative agencies then imposed some degree of review, but the courts have rather narrowly confined this new limitation on the manufacturers' power to do business with their dealers. This book will attempt to explain how and why these agencies took the courses they did and will look at the information available to the legal agencies about the consequences and costs of possible solutions. To what extent do we have no more than a test of political power; to what extent reasoned choices about ends and means? Also I will consider the nonformal ways of solving the problems raised by the dealers that developed in response to all of this action in the legal system. The impact of legal action may be far more than what is reflected by appellate cases or even complaints filed before trial courts or administrative agencies because people may plan their conduct or bargain about disputes in light of even potential legal action far in the future.<sup>1</sup>

Finally, this book is about certain ideas that law professors sometimes examine in "Contracts" courses. Professor Lawrence Friedman<sup>2</sup> argues that while "Contracts" is a body of generalized rules that are supposed to serve any and all types of transactions, when any problem becomes socially significant it tends to be removed from the domain of generalized contract law and becomes the particularized law of, say, "sales," "insurance," or "labor law." As a result, when operating in the area left to contract law, the courts have become more and more free to fashion results that are fair in terms of the facts of the particular case since they no longer must worry about maintaining or creating clear, predictable rules for important economic transactions. In terms I used in an early study,<sup>3</sup> the courts have moved from a policy of aiding the functioning of the market as their primary goal ("functional" policy) to one of carrying out the reasonable expectations of the parties in a particular transaction ("transactional" policy) or even to seeking relief of hardship or engaging in some social engineering

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<sup>1</sup> For a consideration of the relationship of other-than-legal systems of sanctions to legal sanctions in the area of contracts, see Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMERICAN SOCIOLOGICAL REV. 55 (1963).

<sup>2</sup> FRIEDMAN, *CONTRACT LAW AND AMERICAN SOCIETY* (1965).

<sup>3</sup> Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 813-17 (1961).

(the nonmarket particularistic "relief-of-hardship" and generalized "economic planning" policies).<sup>4</sup> In this study, I will look at the "removal"

<sup>4</sup> I explained these policies as follows:

*The transactional policy* calls for courts to support the market by taking action to carry out the *particular* transaction brought before them. The court should discover the bargain that was made and enforce it. If this discovery is not possible, the court should work out a result involving the least disruption of plans and causing the least amount of reliance loss in light of the situation at the time of the dispute. The market is supported by transactional policy because the legal system is directed to seek the result which best solves the problem in the particular case in market terms. A court following this policy will be eager to look at all the "legislative history" of a written contract and will confine or overturn rules which let people back out of bargains or disrupt plans.

*The functional policy* calls for the lawmaker to create generally applicable rules which facilitate bargaining by producing a system or structure in which exchanges can take place. Rules should be adopted which aid quick and rational bargaining and allow the parties to consider the impact of contract law in their planning. The courts should not seek the best result case-by-case since predictable law is a more important means of supporting the market. Most functional rules fill in gaps left in making contracts, or draw lines indicating when reliance will be protected or when a contract has been performed, and the like.

In sum, transactional policy calls for a case-by-case approach, and functional policy the creation of generally applicable rules. Of course, these are only extreme points on a scale useful for analysis. Few, if any, decisions turn on either an application of a general rule to facts with no judicial choice involved or on an application of pure discretion unfettered by any standard. It is the tendency in either the direction of rules to promote individual planning or discretion to reach good results which is significant in the analysis presented here.

As in the case of the market-oriented policies, the strategies designed to promote general economic welfare through social control can be divided into the particular and the general. *The relief-of-hardship policy* calls for courts to let one party out of his bargain in exceptional cases where enforcement would be unduly harsh, or, where the content of the bargain is in doubt, to place the burden on the party best able to spread the loss or absorb it. This case-by-case approach is based not on considerations of market functioning but on ethical ideals and emotional reactions to the plight of the underdog, to pressing an advantage too far, to making undue profit, or to inequality of resources. It is reflected in some aspects of the impossibility-of-performance doctrine, of the certainty and foreseeability limitations on contract damages, of the requirement of mutuality of performance, and of the application of many other devices which let bargainers out of contracts.

*The economic planning policy* is the other nonmarket strategy and the one calling for generalized rules to promote economic welfare. This policy is something of a catchall as these goals can range from wealth redistribution to regulation of particular industries or types of transactions. The most obvious examples involve a change in the market context by removing certain types of bargains from the kinds which will be legally enforced or by requiring particular terms in some bargains. More subtly the policy may shape the construction of contracts in desirable directions or affect other general rules.

A great deal of overlap among these policies is possible. A particular result may be justified by reference to several different policies, both market and nonmarket in orientation.

*Id.* at 814-15.

I am not pleased with my names for the two market supporting policies, but I have not been able to think of more descriptive terms. Despite any problem with the terms "transactional" and "functional," the law does tend to focus both on the expectations of the parties in the particular case and on the needs of the market institution. Yet what is good for the market as an impersonal mechanism is not necessarily going to carry out the expectations of particular parties, and so it is often helpful to keep these means of market support separate.

of manufacturer-dealer relations from the area of the common law of contracts, asking both how this was done and what kinds of policies are reflected in the legislation and in the applications of that legislation by administrative agencies and courts. To reveal the ending of the story at the outset, the legislation ambiguously combines elements of "transactional," "relief-of-hardship," and "economic planning" policies. However, the major emphasis of the courts and administrators has been on "transactional" policy: While the manufacturers have lost their power to write their own ticket without interference from the legal system, a power which might be justified in terms of supporting the functioning of the market, no legal agency has yet done much to relieve the hardship imposed by a manufacturer on a conscientious and nice but inefficient dealer who has been unable to live up to reasonable business requirements. In short, some of the traditional ideas upon which old-fashioned classroom contract law is based reemerge to govern these new statutes and their applications; in one sense, the field of "Contracts" is hard to kill.

In order to carry out, to some extent, this ambitious program, some facts are needed.<sup>5</sup> First, we need to understand the problems inherent in the manufacturer-dealer relationship. Next, I will describe the creation and application of the new laws and the effect that this has had on the dealers' problems. Then, I will be able to draw some conclusions about the dealers' gains and their costs, the functioning of the legal system, and the types of policies that are being carried out in the area of manufacturer-dealer relations.

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<sup>5</sup> Professor Kessler has reported many of the facts about manufacturer-dealer relations and the history of legal action in a fine article. See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957). Undoubtedly my study is greatly influenced by his. However, since I am asking different questions about the manufacturers and their dealers nine years after he wrote, our reports differ slightly where we discuss the same events. Professor Kessler's article is an important social fact that itself influenced developments after its publication. See also Kessler & Stern, *Competition, Contract and Vertical Integration*, 69 YALE L.J. 1, 103-14 (1959).

## **2. The Nature of the Dealers' Problems:**

### **2. The Setting for Legal Warfare**

In this section we will consider how problems are both avoided and created in the manufacturer-dealer relationship and how those that do arise are solved privately without resort to outside forces such as publicity or law. We will also survey what the dealers viewed as major wrongs committed by the manufacturers and for which the dealers had no remedies. This information should help to explain why the dealers turned to the legal system for assistance in changing their relationships with the manufacturers, some of the purposes of the statutes and cases that were the result of this appeal to the legal system, and the consequences of all of this lawmaking.

#### ***A. General Considerations: The Relationship and the Balance of Power***

##### **1. THE NATURE OF THE RELATIONSHIP: PROBLEM AVOIDANCE AND CREATION**

Initially, one must recognize that to describe the nature of the relationships between manufacturers and dealers requires generalization and thus

some degree of inaccuracy. Not all dealers are alike. Some run an efficient volume operation selling, in a large city, a popular make such as Chevrolet. But others are not so efficient or skilled as salesmen. Others sell fewer cars at higher markups. Some sell in smaller towns or in rural areas. Still others sell less popular makes of cars. One would expect that these differences would affect the relationships with the manufacturer. Nor are all manufacturers, or even all divisions of any one manufacturer, alike. Ford's policies toward its dealers have been far different from Cadillac's toward its dealers. Then, too, these relationships change over time and are influenced by such things as depressions, wars, sales campaigns, and governmental policies. Yet what follows is generally true if read with due allowances for the influences of such particular factors.<sup>6</sup>

The goal of the relationship is simple: to sell new automobiles so that profits are produced for both the manufacturer and the dealer. Both must provide significant resources if the relationship is to achieve this goal, and both must take significant risks. The dealer gives the manufacturer representation in a particular sales area by investing in plant, equipment, inventory, personnel, and promotion. Thus the dealer pays for much of the distribution system in the automobile industry, and his money rather than the manufacturer's is tied up in bricks and mortar, and, more important, in unsold new automobiles. Manufacturers require dealers to have a large inventory of various models of new cars, and the dealers buy their cars from the factory for cash upon delivery or even upon order.<sup>7</sup> Moreover, the dealer provides the skills in, and takes the risk of, making sales of new cars and handling used cars traded in on new cars. The dealer in seeking his own success helps to achieve success for the manufacturer as well. The manufacturer, on the other hand, is supposed to give the dealer a salable product—an appropriate selection of different types of cars and trucks as well as opportunities to sell financing and insurance, accessories, and repair parts and service. Of course, a salable product is the result of such things as design and engineering, quality production, planning, advertising, trade name, nationwide service facilities, and a competitive price.

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<sup>6</sup> In addition to material specifically cited, this section of the study is based on interviews and such works as DRUCKER, *CONCEPT OF THE CORPORATION* 98-114 (1960); PASHIGAN, *THE DISTRIBUTION OF AUTOMOBILES, AN ECONOMIC ANALYSIS OF THE FRANCHISE SYSTEM* (1961); Ridgeway, *Administration of Manufacturer-Dealer Systems*, 1 *ADMINISTRATIVE SCIENCE Q.* 464 (1957).

<sup>7</sup> See Skilton, *Cars for Sale: Some Comments on the Wholesale Financing of Automobiles*, 1957 *Wis. L. REV.* 352.

This relationship is held together by many factors, but primarily by mutual profit. The dealer is not left alone to sink or swim. He is at the end of an elaborate bureaucratic structure that is focused on his efforts. Manufacturers stand ready to train his salesmen and mechanics and advise him on management methods. He receives relatively frequent visits from the manufacturer's "road man" whose job is to help the dealer sell more cars. The dealer's and road man's degree of success is watched by a district and a territorial staff of the manufacturer. Problems common to many dealers are taken to Detroit for solution at the top levels of the corporate hierarchy of the manufacturer.<sup>8</sup> For example, top management has been concerned with helping their dealers handle used cars taken as trade-ins.<sup>9</sup> Moreover, the manufacturer's general success helps individual dealers since it is quite profitable to sell a "hot" car, there being less need to give customers large discounts.

To a great extent there is a shared agreement about the rights and duties of both manufacturer and dealer. To some extent this value system is formalized in an elaborate carefully drafted document called a "selling agreement" or a "franchise." Here the obligations of the dealer are defined in terms of what is rational in business—for example, the dealer must sell as many cars as dealers in similar areas sell, but there is no requirement that he have a pleasing personality or be unquestioningly loyal to the manufacturer.<sup>10</sup> On a less formal level, the nature of the business and the practices of manufacturers and dealers over time tend to create patterns of expectations. For example, although the selling agreement may give a manufacturer a right to cancel for inadequate sales, the company may have an announced policy of rehabilitation or giving dealers a second chance.<sup>11</sup> Many dealers would expect to be treated as others had been treated and thus feel that they had a right to a second chance and help from the manufacturer to increase sales. Also manufacturer and dealer tend to share the general values of our society concerning business. Both believe that one is not in business for his health, but both have some view of the requirements of "business statesmanship."<sup>12</sup> Both usually share the values of part of our

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<sup>8</sup> See DRUCKER, *op. cit. supra* note 6, at 108.

<sup>9</sup> *Ibid.*

<sup>10</sup> See, e.g., FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION (1962).

<sup>11</sup> See, e.g., *Automotive News*, Feb. 3, 1964, p. 10, col. 1.

<sup>12</sup> See, e.g., DRUCKER, *op. cit. supra* note 6, at 103; GENERAL MOTORS, ANNUAL REPORT 3 (1964); NATIONAL AUTOMOBILE DEALERS ASSOCIATION, THE FRANCHISED NEW CAR & TRUCK DEALER STORY 39-40 (1964).

society concerning the desirability of limiting the role of government in economic activity—few officials of manufacturers or of dealers are likely to be found on the membership list of the Americans for Democratic Action.<sup>13</sup>

Despite all of these reasons for harmony, the manufacturer-dealer relationship is not always a happy one. The goal of the relationship is profit for both, but different business strategies will produce varying payoffs for each party. For example, a Ford dealer might be able to make a hundred dollar profit on the sale of one car or a ten dollar profit on each sale of ten cars. The immediate result of either strategy is the same for the dealer, but clearly the impact on the Ford Motor Company differs greatly, because in one case it sells only one car while in the other it sells ten. And even if our hypothetical Ford dealer sells ten cars at only a ten dollar profit on each one, he has no reason to care whether he sells Mustang sports cars, Falcon station wagons, or Thunderbirds. Yet the Ford Motor Company does. It must sell many units of all of the various models it makes, and it must sell its less popular models to recover its tooling costs on them.<sup>14</sup> Moreover, our hypothetical Ford dealer might seek to minimize his capital investment in his dealership in order to reduce indebtedness or to free his capital for other uses.<sup>15</sup> Yet if increased investment results in increased sales of new cars, as is often assumed, Ford has an interest in seeing that the dealer remodels his premises, builds new facilities, keeps a large inventory of cars and parts, and adds more salesmen and mechanics.

The fact that modern manufacturers are large organizations is in itself a disintegrative factor. To some degree the dealer is part of an impersonal bureaucracy taking orders that come down from the top in the guise of

<sup>13</sup> See, e.g., "The newly rich and the shopkeepers, auto dealers, realty men and other small businessmen . . . tended for Barry [Goldwater] . . ." Otten, *Business & Government*, Wall Street Journal, Feb. 2, 1965, p. 16, cols. 4-5. The dealers and the executives of the manufacturers were closer together in their Republicanism during the Eisenhower Administration. See *Hearings Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 960-61 (1956) [hereinafter cited as *S. Hearings, Marketing Practices, Monroney*].

Other congressional hearings which will be cited in this study are *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. (1955) [hereinafter cited as *S. Hearings, General Motors, O'Mahoney*]; *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess. (1956) [hereinafter cited as *H.R. Hearings, Dealer Franchises, Celler*]; *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. (1956) [hereinafter cited as *H.R. Hearings, Marketing Legislation, Klein*].

<sup>14</sup> See, e.g., *Preamble to FORD MOTOR COMPANY, FORD SALES AGREEMENT* at ii (1962).

<sup>15</sup> Often the dealer will be an older man who is concerned whether or not his wife and family will be able to get back the capital he has invested in the dealership upon his death. Interviews.



advice and assistance. The road man, in his zeal to establish a good record of increased sales, may unofficially alter company policies to the dealer's detriment. These policies already may have been slightly altered in that direction as they were passed from top management to territorial offices to district offices and then to the road man.<sup>16</sup> Road men tend to be younger men without a great deal of experience.<sup>17</sup> As a result, an older dealer, with a great deal of experience, may resent the source of the company's advice and demands.<sup>18</sup> Road men change frequently in many companies, and thus the chance for friendship is decreased.<sup>19</sup> Finally, the goal of the manufacturer's organization is to sell automobiles, and it is set up to reward attainment of that goal and penalize failures. Consequently, even though a road man is sympathetic to a dealer's personal excuse for failure—family problems or ill health, for example—he is limited by his position in the organization as to how far he can consider such noneconomic factors.

Also there is not always full agreement about the rights and duties of the parties. The selling agreement is drafted by the manufacturer's lawyers in fairly legal language and accepted without change by the dealer.<sup>20</sup> Thus the dealer may have to acquiesce in the imposition of many duties without, through the process of bargaining, forming a belief that they are justified. In a negotiated contract one may see the advantages gained by the other man as rightfully his since he paid a price for them by making a concession about another matter. However, in a printed-form, take-it-or-leave-it contract, one may resent a particular obligation or be surprised when he learns of it during the course of the relationship, because he failed to read or to understand the printed document. The conduct of the manufacturer may create an impression about the dealer's rights that contradicts the terms of the selling agreement.<sup>21</sup> Moreover, the dealer is likely to consider himself an independent, and largely self-made, businessman, and the manufacturer may do a great deal to foster this view of the situation.<sup>22</sup> As a result, the dealer may think of the dealership as "his" business with all of

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<sup>16</sup> "Many . . . field men just get the smell of a new sales drive and, in their ambition, the suggestions from the top gather momentum until they're pretty awful when they reach the dealer level." *Automotive News*, Feb. 13, 1956, p. 1, cols. 2-3, at 43, col. 3.

<sup>17</sup> *S. Hearings, Marketing Practices, Monroney* 708.

<sup>18</sup> Interview.

<sup>19</sup> Interview with dealer.

<sup>20</sup> Interview.

<sup>21</sup> The dealer may even be told that he will not be required to comply with a provision of the franchise by one representative of the manufacturer and then be held to it by another. See, e.g., *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964).

<sup>22</sup> See, e.g., *S. Hearings, Marketing Practices, Monroney* 695.

the attributes usually implied by this concept. For example, most retailers who are successful own their own going business and are not dependent upon a single supplier for the very existence of that business. They can rely on the market for a product to sell; if they lose the Jones Furniture Company line, they can always stock Smith Furniture. Thus the typical retailer can pass on his business to his son or widow, sell it to whomever he pleases for a profit that reflects the going business value, and, most important, run it as he pleases. Yet the automobile manufacturer sees to it that its dealers have, as an absolute matter, none of these rights.<sup>23</sup> This is done either through the terms of the selling agreement or by company policies since manufacturers need a great deal of control over who sells their products and how they do it—life is easier for the manufacturer if it can treat the dealer as a subordinate employee subject to orders and without tenure rather than as a typical independent retailer. Employees who are fired are often unhappy; a man who has had “his” business destroyed by having his franchise canceled is likely to feel even a greater sense of wrong.

## 2. PRIVATE SOLUTIONS OF PROBLEMS: THE BALANCE OF POWER

The relationship between manufacturer and dealer is not an evenly balanced one. Generally, the manufacturer of a successful line of automobiles has the dominant position both at the initiation and during the life of the relationship. However, one must not fall into the trap of thinking of the “poor little dealer” battling one of the nation’s largest manufacturing corporations. Sometimes this may be the case; sometimes it may not. Many times the dealer is successful and wealthy, and his bargaining “opponent” is not General Motors but a particular road man or district manager. If a Ford dealer, for example, is doing an outstanding job selling cars, he will be able to ignore many of the requests or demands of the road man and demand that the road man use his influence to get the dealer more of the best selling models quickly.<sup>24</sup> Also the dealer may have contacts with

<sup>23</sup> See, e.g., GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION (1962).

<sup>24</sup> See the following statement by one of Ford’s dealers with a very high sales record for many years:

Senator MONRONEY. You have received pressure?

Mr. HOLTSINGER. Yes, sir.

Senator MONRONEY. Do you think it reached a point where it would be intimidation or fear of termination of your contract?

Mr. HOLTSINGER. I have never been afraid of that. Maybe I didn’t have sense enough to be afraid, but I never have been afraid.

Senator MONRONEY. It isn’t imaginary that dealers have been fearful that unless they did what the zone and district men said, they would have some rather serious problems? Is that a correct statement?

Mr. HOLTSINGER. I presume some of them did, but there has never been any fear

friends at various levels of the manufacturer's sales organization or in top management, and thus he may be able to go over the road man's head.<sup>25</sup> Then, if the make of automobile is not as successful as Chevrolet or Ford, a dealer with ability will receive some deference since he would be difficult to replace and since he may have a chance to become a dealer for another manufacturer.

Nonetheless, in most instances the manufacturers' representatives have held the balance of power over the dealers. Until the middle 1950's, the formal selling agreement between the parties said that the manufacturer made no promise to supply the dealer with cars and that the manufacturer could terminate the franchise at will and without showing cause.<sup>26</sup> Manufacturers could adopt this approach since the gains to them of having legally enforceable rights against dealers are slight as compared with the costs of giving dealers legally enforceable rights. Typically, the manufacturer gets what it wants from its dealers. It often has more applicants who would like to be dealers than it has dealerships available.<sup>27</sup> It can either replace a particular dealer with another or even afford to lose representation in one dealer's market area without suffering a serious loss. A dealer is in a very bad position if his franchise is terminated. Upon termination it is difficult to salvage his large investment because a canceled dealer finds it hard to get a franchise from another manufacturer of popular cars or has

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on my part. I had one tell me not long ago he didn't think I had bought enough automobiles and I told him to guess further. "I don't give a damn what you think. I think I have bought enough."

*S. Hearings, Marketing Practices, Monroney* 1403.

Mr. HOLTSINGER. I never have had any trouble speaking my mind to them. I don't know whether you ever heard of Mr. Charlie Sorensen or not, but I will tell you that people that spoke of him spoke under their breath, and I told him once I was further in the Ford business than he was, that I had every nickel in the world I had in it, and he had a job. I have still got my contract.

Senator MONRONEY. Do you know of any other dealers that did that?

Mr. HOLTSINGER. I don't know. If they had told him that and meant it, they probably could.

Senator MONRONEY. They probably didn't have the sales record you had, either. That would have some bearing on it.

Mr. HOLTSINGER. I am not my brother's keeper, as far as that is concerned.

*Id.* at 1406-07.

<sup>25</sup> Interview.

<sup>26</sup> See, e.g., FORD MOTOR COMPANY, FORD SALES AGREEMENT §§ 8(b), 10 (1949).

<sup>27</sup> Interview; *H.R. Hearings, Dealer Franchises*, Celler 381. However, an official of one manufacturer commented, "It may be difficult in many areas to find people who desire to be automobile dealers or who are willing to risk their venture capital in the retail business. Therefore, termination of any dealer always presents an immediate problem with respect to replacing that dealer." Letter. Undoubtedly, Chevrolet dealers in big cities are easier to replace than Peugeot dealers in small towns and other makes fall somewhere in between.

difficulty selling his building, tools, inventory, and good will to another dealer.

Short of canceling a dealer's franchise, a manufacturer has another important sanction. The dealer naturally wants a stock of the best selling cars—the "hot" models—but often allocations are necessary because of shortages.<sup>28</sup> Those dealers who, in the factory representative's view, are most deserving get the most cars.<sup>29</sup> Also a dealer needs the factory's cooperation in getting fast delivery of cars that have to be built to the customer's order; delays here can cost sales.<sup>30</sup> Thus a dealer thinking of opposing a factory policy may fear that to do so will cost him in the day-to-day operation of his business. Moreover, the nature of a bureaucracy gives top management certain advantages over one at the end of the chain of command. For example, it is difficult for a dealer who wants to negotiate for favors, exceptions to general policies, or recognition of unusual circumstances to find anyone he can talk with who has the power to make these concessions.<sup>31</sup> As a result, the dealer will be frustrated and give up unless the matter is worth all of the many costs of a trip to Detroit or unless the dealer knows higher officials personally.

Even if the dealer can find someone who has power to make concessions, in many instances he has relatively little to bargain with. The dealer might offer, in exchange for a concession from the factory, to exert more efforts to sell cars, not to switch franchises to another make, not to take on another franchise along with the manufacturer's, or not to sue. Unfortunately for dealers, in most instances, manufacturers need not buy these things from dealers. The threat to switch manufacturers' makes is only credible if an equally profitable alternative franchise is available in the dealer's community, and as fewer and fewer manufacturers sell most of the cars sold, the dealers have less and less of a "market out." Lawsuits against manufacturers are costly, time consuming, and hard to win. Dealers can be replaced or the factory can give a franchise to another dealer at a location close to the one who wants to bargain. If it is hard to find another dealer with sufficient capital, the manufacturers have programs to finance a young man with ability—say, the negotiating dealer's general manager—so that he can go into business with modern facilities and a large inventory of best-selling cars.<sup>32</sup>

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<sup>28</sup> See, *e.g.*, *Zarbock v. Chrysler Corp.*, 1965 Trade Cas. ¶ 71, 361 (D. Colo. 1964).

<sup>29</sup> *Ibid.*; Interviews.

<sup>30</sup> *Ibid.*

<sup>31</sup> Interviews.

<sup>32</sup> *Ibid.*

### **B. Some Relatively Recent History: Problems and Solutions the Dealers Found Unsatisfactory**

One can point to a number of examples of disharmony and the use of a manufacturer's power. Events in the 1920's and 1930's are reported vividly by historians Allan Nevins and Frank Ernest Hill.<sup>33</sup> We must look at this material in some detail since an understanding of the historical background is needed to understand the dealers' attempts to use the legal system to solve their problems. Often there is a "cultural lag" in the response of the legal system to social problems. It is easier to outlaw yesterday's practices than to anticipate tomorrow's. Later it will be seen that the legal system has done a better job handling the manufacturers' tactics of the 1920's and early 1930's than their more recent policies.

In the Ford Motor Company in the 1920's, "the discipline was military, each individual reporting to his superior."<sup>34</sup> Ford's position was that nothing was wrong with the Model T or Ford's policies, and so any lack of sales must be caused by the dealer's failings.<sup>35</sup> Dealers were supposed to talk only with road men and were not to complain to the company.<sup>36</sup> When cars are selling and profits are high, this kind of system can work; when the market for cars breaks, those at the bottom of the chain of command will be most unhappy and ready to try to do something about their problems. In 1921, Ford forced its dealers to take unordered cars. At that time Ford owed several banks about \$30 million and the United States \$40 million. There was a depression that year, and Ford's factories were closed as a result of a lack of demand for cars. Henry Ford was faced with loss of some of his control over his company. The bankers wanted representation as a condition of giving him financial aid. To avoid borrowing from the bankers, Ford began production at his factories, shipped cars to his dealers although none had been ordered, and tacitly told them to accept the cars and pay for them on delivery or resign their franchises, "As one commentator put it: 'Instead of borrowing money himself, Ford compelled his dealers to borrow.'"<sup>37</sup> Most dealers survived, but the forcing of unordered cars made many angry.<sup>38</sup>

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<sup>33</sup> NEVINS & HILL, *FORD: EXPANSION AND CHALLENGE 1915-1933* (1957).

<sup>34</sup> *Id.* at 259.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Id.* at 165.

<sup>38</sup> *Id.* at 159-66.

As would be expected, the depression of 1929 and the early 1930's caused great trouble for automobile dealers.<sup>39</sup> General Motors did the most to protect its dealers, but even many of them were forced out of business as sales dried up. Other manufacturers' dealers had a harder time. In 1929, Ford made his contribution to fighting this depression by applying the remedy that had worked in 1921. He expanded production, raised wages, and cut car prices. However, at the same time he announced a new sales policy. He believed that many dealers had made money without any effort on sales of the then new Model A, and so he cut the markup or commission given the dealers from 20 to 17.5 per cent of the list price. Then he increased the number of dealers so that there would be a Ford dealer at all "cross-roads." Nevins and Hill have described the consequences:

. . . the brusque, domineering [Charles] Sorensen was entrusted with the execution of the program. Believing that many dealers had become rich and lazy, he went to work with a will. . . .

A Ford branch manager, Henry C. Doss, has given us an account of Sorensen's ironfisted approach. Having seen some of the worst effects of the . . . "cross-roads" program, Doss was against both the reduced discounts and the increase in dealerships. He was called in to give his opinion.

Sorensen explained that the 8,300 dealers affiliated with the Ford Company must be increased to 10,000, and that every dealer would be expected to give extra effort to his work. He looked at Doss defiantly.

"I think that will be a great mistake and it will be disastrous," replied the branch manager. "You will be years living it down. You'll lose a lot of your dealers to Chevrolet and others."

But Sorensen was adamant. Fresh dealers were given contracts in droves. Experienced agents who opposed the new policies and spoke their minds frankly were replaced as rapidly as possible. Stressing the importance of weeding out "undesirables," the company reminded branch managers of their wide powers in canceling franchises. The "cross-roads" program was now at its worst. Many newcomers went into business in corner stores with the most rudimentary service facilities. "No objection," states *Motor*, "was raised to dealers getting locations as close as possible to established operators with large investments." Doss . . . resigned—but in vain.

As indignation spread among the Ford dealers, their outcry reverberated across the country. Even agents for other cars, who still enjoyed discounts ranging from 20 to 24 per cent, and who perhaps felt themselves threatened, joined their voices in protest. One Detroit newspaperman termed the clash of interest "the biggest factory-dealer

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<sup>39</sup> *Id.* at 578-80.

battle in the automobile industry since its start thirty years ago." A convention of Illinois bankers attacked the Ford policy on the double ground that failing dealers were a financial problem, and that the multiplication of agencies had stimulated excessive allowances for old cars and fomented an unhealthy condition in the industry. So incensed were the bankers that they refused to give credit to any of the newly-established "cross-roads" agencies. Meanwhile, the defections from the Ford ranks which Doss had predicted grew into a steady stream. Chevrolet in particular recruited many able Ford dealers, who added strength to the already well-schooled and well-protected General Motors corps.

Even amid the nation's varied troubles that winter of 1929-1930, the rebellion of the Ford dealers attracted the sympathetic gaze of industrial analysts. . . . *Business Week* offered a measured appraisal of the outbreak:

Specifically, many Ford dealers object to: (1) road-men who tour the country and report all violations of factory rules and enforce strict discipline upon the dealer organization; (2) reduced discounts by which the possible margin for net profit has been reduced to approximate invisibility; (3) treating contracts as "scraps of paper" as was done with the demand upon dealers to sign riders to their franchises accepting 17.5 per cent discount at the peril of their business lives; (4) ironbound, factory-set quotas which frequently have little relation to sales possibilities in the dealer's territory but are ever before them; (5) inclusion of Lincoln cars and Ford trucks in quotas for localities where sales of either may be practically impossible; (6) failure of factory to consider dealer's needs in distributing models and colors; (7) having to buy all garage equipment from a recognized Ford source regardless of relative need or price of equipment; (8) factory exercising authority over amount of money to be spent for show rooms, garages, and similar investments in the business.

Ford and Sorensen, seeing that if they persisted the network of dealers would be torn to shreds, had to retreat. . . . [They appointed a new sales manager, gave higher discounts and gave more attention to public demands for different designs.]

"Dealers naturally are gratified over their victory," wrote a newspaper observer, "but they are not wildly enthusiastic because they have no illusions as to what it presages." They had two fears: that the company would force cars upon the well-established dealers by high-pressure methods, and that it would multiply small new dealers with contracts calling for low quotas, and hence earning lower commissions. Both fears proved to have some justification. As competition grew hotter, all companies did a certain amount of forcing. All applied various kinds of pressure; and the Ford Company was not behind its rivals. [And Ford increased the size of its dealer force in 1931.]<sup>40</sup>

<sup>40</sup> NEVINS, ALLAN AND HILL, FRANK E. *FORD EXPANSION AND CHALLENGE: 1915-1933*. Charles Scribner's Sons, New York, 1957, pp. 580-83. (Footnotes omitted.)

Another crisis for the dealers came in the early 1950's. The dealers emerged from World War II with the pleasant situation of demand far exceeding supply.<sup>41</sup> The Studebaker was a big seller, and Nash, Hudson, Packard, and even the new Kaiser-Frazier dealers found themselves in good positions.<sup>42</sup> Dealers for the big three were very successful, too.<sup>43</sup> But supply began to catch up with demand in the early 1950's about the time the newly rebuilt Ford Motor Company began its serious efforts to challenge General Motors for sales leadership. Moreover, some of the models produced by some manufacturers were not well accepted by consumers who now could get delivery of the cars they wanted within a reasonable time; in short, there was distress merchandise on the car market available at highly discounted prices.<sup>44</sup>

During this period all manufacturers sought to induce their dealers to sell more cars. The race between Chevrolet and Ford was hotly contested. More "high volume" dealers appeared who seemed to offer to sell cars for less. One way to profit from volume selling is to make many small profits that add up to a big total profit. Another is to "pack prices" so that the actual price paid by the customer only appears to be small. For example, if a dealer gives a customer \$1,000 as a trade-in on a car worth only \$500, the dealer can recover his loss by telling the customer that the list price of his new car is \$500 greater than it actually is. Or a dealer can pack in very high insurance charges and interest costs and turn a tidy profit.

This "discount house" approach dismayed many, but clearly not all, dealers.<sup>45</sup> On one hand, volume selling requires great effort, sharp trading, and efficient cost controls and business methods. On the other hand, volume selling implies a loss of status—the respected solid merchant must become "Horse Trader Harry, the Mad Mongolian" and engage in distasteful practices that cost him community esteem. Ford, in effect, told its dealers it approved of misleading advertising and the pack;<sup>46</sup> General Motors "reluctantly" decided to go along with the practices of the industry.<sup>47</sup> From the viewpoint of top management, it was just aggressive salesmanship or meeting the competition. Yet it could look very different from the position of a dealer. He was likely to view aggressive salesmanship as coercion and pressure.

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<sup>41</sup> See, e.g., NEVINS & HILL, *FORD: DECLINE AND REBIRTH 1933-1962*, at 315 (1963).

<sup>42</sup> *Automotive News 1965 Almanac*, April 26, 1965, § 2, pp. 74-75.

<sup>43</sup> *Ibid.*

<sup>44</sup> *S. Hearings, General Motors, O'Mahoney* 3603.

<sup>45</sup> See, e.g., *S. Hearings, Marketing Practices, Monroney* 278-79.

<sup>46</sup> *Id.* at 993-95.

<sup>47</sup> *Id.* at 206, 733.



Factory representatives—road men and district managers—were in the middle. Promotion came to those who produced sales, and the more the dealers were pushed, the more they sold.<sup>48</sup> As a result, dealers were pushed and pushed harder.<sup>49</sup> Each year as it was time to renew the franchise, the dealer had to review his performance with the district people, promise in

<sup>48</sup> See *Automotive News*, Feb. 13, 1956, p. 1, cols. 2-3, at 43, cols. 1-3. A Dodge field man explained that dealers would not order trucks since they were harder to sell than cars but that if one got trucks into a dealer's hands, he would sell them. "Frequently, he'll make a profit, too." *Id.* at 43, col. 3.

<sup>49</sup> See *id.* at 43, cols. 1-3.

A fictional account of a meeting between a road man and a dealer, which has been called an accurate one by an industry paper, illustrates the problem as it was seen by many dealers:

"What I want . . . is for the factory to cut the quota down. By thirty-five percent. If you can't see your way to get this through, Mr. McGregor, then I'll put it up to the factory directly," Scott stated.

"Boys," McGregor stood up for the first time, his smile still undiminished in brilliance, "your schedule for June calls for two hundred units, and two hundred units is what I know you'll sell. Before the month is out you'll be calling in begging us for more. . . ."

"Mr. McGregor," Scott said, "why can't we have a working arrangement that makes sense? A quota based on a rate of sales rise. . . ."

"We've got to work out a system that'll allow us to reduce the number of units, based on a—"

"My boy—" McGregor's gaze was incredulous, "that's like asking the President of the United States if he'd mind cutting down his term to two years."

"I'm going to the factory then."

"My boy," McGregor said, and a new fiber of toughness threaded through his tone, "as far as the factory is concerned, I'm it."

"I'm sorry. I'm going to the factory myself."

"With what?" McGregor stood, his legs splayed in a stance of confidence. "Let's assume you get up to the third floor. What's your weapon, my boy? Do you think you can walk in and organize a new system when the system we have produces a first quarter of over five million dollars? What's your weapon, my boy? But before you try to figure that one out, let me just give you a few hints as to how the future stacks up. . . . What's on the drawing boards for 1965 and '66 is staggering! . . . We've had over one hundred applications for franchises for next year. Why? Because in this business you can smell a good thing, and everyone wants to get in on it . . . which means the company is going to be very choosy about its dealerships, which means that by 1965 they might be scratching off the gripers from their back, which means they only play ball with the happy teams. . . . I'd say you'll want to get in for the big blast-off, I doubt if you'll want to bow out just when it carries the biggest payload. . . ."

"I wasn't talking about bowing out," Scott said.

"You might not have known it," McGregor said softly, "but you were."

GILBERT, EDWIN, *AMERICAN CHROME* (published in 1965 by Putnam's & Coward-McCann, New York).

"Here for the first time are reconstructed actual conversations between dealers & factory representatives, so lifelike that it would seem that the author is present when his mythical regional sales manager . . . puts heat on dealer. . . ." *Motor News Analysis* 4 (March 1965). Another fictional version of a road man-dealer interview will be found in KEATS, *THE INSOLENT CHARIOTS* 114-22 (1958).

writing to do better or resign his dealership, agree to buy tools and equipment that the factory said he needed and receive a pep talk.<sup>50</sup> In addition, during the year dealers would review their performance with several manufacturer's representatives in a parked car or in a hotel room—but not at the dealership where witnesses could make records of what was said.<sup>51</sup> Cooperation could be rewarded with allocations of hard-to-get stationwagons. To get those “hot” models dealers could be persuaded to order hard-to-sell trucks.<sup>52</sup> Unordered cars would arrive, and dealers who returned them lost favor with their district managers.<sup>53</sup> The manufacturer typically told the dealer that he was expected to sell his make's national average.<sup>54</sup> If Buick sold 8 per cent of the cars that were sold nationally, the Buick dealer in each town had to sell 8 per cent of the cars sold in that area.<sup>55</sup> Given the nature of an average, many dealers were bound to be in trouble. Moreover, in a town where the income level was low, the Chevrolet dealer had a much easier job than the Buick dealer.<sup>56</sup>

All of this sales pressure had many consequences. Consumers probably paid somewhat less for their cars, but dealers, in some cases, offset this by higher charges for financing and insurance or by increasing the alleged list price of the car from which discounts would be given.<sup>57</sup> Some dealers saved

<sup>50</sup> *S. Hearings, Marketing Practices, Monroney* 239.

<sup>51</sup> Munn, *What Dealers Tell Me*, *Automotive News*, May 16, 1955, p. 3, cols. 1-2, at 76, col. 5; *S. Hearings, Marketing Practices, Monroney* 104-05, 216. Road men explain meetings in hotel rooms or automobiles by saying, “We have been trained and taught to respect a man's privacy.” *Record*, Vol. II, p. 346, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

<sup>52</sup> See, e.g., *S. Hearings, General Motors, O'Mahoney* 3389.

<sup>53</sup> Interview with former road man for one of the manufacturers.

<sup>54</sup> See, *S. Hearings, General Motors, O'Mahoney* 3456-57, 3459, 3547-48, 3787-91.

<sup>55</sup> *Id.* at 3787-91.

<sup>56</sup> *Id.* at 3243-44; but see *id.* at 3789-91.

<sup>57</sup> The following is a partial list of the sales tactics common in the 1950's in some parts of the country:

*The switch.*—Advertising a notable bargain, then telling customers it has been sold and persuading them to switch to another car—and a less attractive deal.

*Bushing.*—Luring a buyer by offering a bargain price, then hiking the price. The original offer is made by a salesman “subject to the manager's approval.” The manager later indignantly disclaims it and persuades the buyer, by this time emotionally committed, to accept the higher price. In some cases bushing is cruder—the buyer is given a price, persuaded to sign a blank sales agreement. Later he finds it has been filled in for much more than he expected to pay.

*Lowball.*—Sometimes the same as bushing—a low price given verbally, later repudiated—but also used to describe the practice of giving an unsophisticated customer much less than the going trade-in value of his car.

*Highball.*—A very high offer made verbally on a trade-in just to get the customer inside the salesroom, where he will be pressured to take less. *Continued*

money by cutting down on the predelivery service given to new cars and on effort given to repairs under the warranty obligation.<sup>58</sup> Still others sold new cars to used car dealers for a small profit in order to achieve the expected "market penetration" and keep the factory pleased—of course, the used car dealer operated in another area so that he did not compete with the "bootlegging" dealer who sold him new cars. The new car dealer with whom he did compete was not happy.<sup>59</sup>

Some dealers flourished. Some quit. Others were canceled by the factory or pushed into an involuntary "voluntary" termination.<sup>60</sup> The internal review that existed within the manufacturers' organizations was thought to

*Would you take?*—Cards are tucked under your windshield wiper in a parking lot asking "would you take" a fantastically high price for your car because the dealer "has a buyer." If the prospect goes around to try to collect he gets the full highball treatment.

*Unhorsing.*—Lending a prospect a car while his own car is taken and held for sale in an allegedly rising used-car market. It turns out after a month or so that the market has inconveniently fallen and his car has been sold for considerably less than he expected—leaving the customer with no car and under obligation to the dealer.

*The pack.*—A simple method of luring buyers with nonexistent bargains. A group of dealers—sometimes only one—raise their list price for a new car by several hundred dollars. This permits all sorts of alleged bargain offers from "\$1 profits" to "double book value" trade-ins. In at least one case it recently enabled a dealer to offer customers more than they paid for their 1955 cars if they would trade them in on 1956 models. The pack . . . [was] facilitated by the fact that there is no real local list price; manufacturers' prices are quoted f.o.b., Detroit. This practice is sometimes called the top pack in contrast to a plain pack, in which various charges for mysterious accessories and services are packed onto the sales price.

*The finance pack.*—A maneuver to increase the profit on financing of car purchases. Here the dealer can sometimes recoup profits that have been squeezed out of a sale. Using a rate chart supplied by the finance company, the dealer can set the rates so high that he can sell the time contract to the finance company at a discount and still receive an extra profit for himself. This "commission" to the dealer is of course paid by the buyer in his installments to the finance company. Sometimes overcharges for insurance are included. Where these charges are lumped together into a single monthly payment, as they often are despite a Federal Trade Commission order that they be itemized, the buyer has no real way of knowing what he is paying for.

*Ballooning.*—Drawing up a time contract with low monthly payments except for the last installment, which in some cases is so big the buyer has to refinance his note. *H.R. Hearings, Dealer Franchises, Celler*, 591. See also Miller, *The Social Base of Sales Behavior*, 12 *SOCIAL PROBLEMS* 15 (1964), for a study which analyzes "sales behavior focusing on the interaction which occurs between the new car salesman and customer during the sales transaction: the 'contract,' marking the beginning; the 'pitch,' the middle; and the 'close,' signifying the end of the social encounter." *Id.* at 16.

<sup>58</sup> See *S. Hearings, Marketing Practices, Monroney* 1258. "We recall a time some years ago when many dealers were following the example of the wild traders in confining new-car preparation to a wash and polish in order to have another \$30 to trade away." *Automotive News*, May 3, 1965, p. 12, cols. 1-2.

<sup>59</sup> See, e.g., *id.*, Feb. 28, 1955, p. 38, cols. 1-2; *id.*, April 18, 1955, p. 1, cols. 2-4, p. 66, cols. 1-3.

<sup>60</sup> See, e.g., *S. Hearings, Marketing Practices, Monroney* 206.

uphold almost uniformly the cancellations.<sup>61</sup> A large group of dealers were unhappy with their lot. Some wanted to control their relationships with the manufacturer; perhaps more wanted to control the conduct of other automobile dealers by ending "bootlegging" or achieving "territorial security" so that neighboring dealers would be discouraged from selling to consumers outside "their territory."<sup>62</sup> Some wanted to control advertising and sales practices.<sup>63</sup> Many wanted all of these things, but some were opposed to any interference with free enterprise.<sup>64</sup>

But there are two sides to this story. The manufacturer's case is much more simple, but not, for that reason, less compelling. Some dealers are poor salesmen and inefficient; others will work at less than full capacity if they are not pushed.<sup>65</sup> Lower sales ultimately mean higher priced cars for the public. Manufacturers must sell huge quantities of all models of cars and trucks to cover their costs, pay their employees, and return a profit to their shareholders and at the same time provide transportation to the public at an acceptable price. While no single inefficient dealer can injure the manufacturer seriously, collectively many dealers exerting less than their best efforts could. Any system of "due process" for reviewing the action of the sales force of the manufacturer has fairly high costs. Most seriously, such curbs on the men who see dealers might inhibit their efforts to push the dealers to make sales, thus reducing the number of units sold and thereby

<sup>61</sup> From 1938 to 1955, the General Motors Dealer Relations Board reversed the termination or nonrenewal of a dealer by a car producing division 6 times and affirmed the division 47 times. In 1954 and 1955, there were no decisions in favor of dealers and 16 in favor of the divisions. Of course, it should be stressed that in those same two years, the general sales managers of divisions reversed nonrenewals and granted new selling agreements in 105 cases and affirmed the division in 74 cases. As a result, the cases where cancellation was not justified may have been screened out before they ever got to the stage of an appeal to the Dealer Relations Board. See *S. Hearings, General Motors, O'Mahoney* 4382-83. On the other hand, the information furnished by General Motors does not show how often the general sales manager's reversal was a one-more-chance decision that ultimately would have resulted in termination for failure to reach high quotas. Significantly the number of cases appealed to general sales managers jumped from 15 in 1953 to 47 in 1954 and 144 in 1955, and the cases appealed to the Dealer Relations Board jumped from 1 in 1953 to 14 in 1954 and 24 in 1955. *Id.* at 4383. Undoubtedly this increase reflects the changed competitive conditions in the new-car market which occurred at this time. It might also reflect changed policies of the sales staffs of the car divisions of General Motors.

<sup>62</sup> See *Automotive News*, Jan. 24, 1955, p. 1, cols. 2-5; *id.*, April 18, 1955, p. 1, cols. 2-4, p. 66, cols. 1-3.

<sup>63</sup> See *S. Hearings, General Motors, O'Mahoney* 3172-73.

<sup>64</sup> See, e.g., *H.R. Hearings, Dealer Franchises, Celler* 100.

<sup>65</sup> As a result of hearings before two committees of the United States Senate which were held in 1955 and 1956, see *S. Hearings, General Motors, O'Mahoney*; *S. Hearings, Marketing Practices, Monroney*, the manufacturers eased the pressure for sales. Sales of new cars dropped. Some dealers said at that time that the manufacturers must push dealers just as hard as the dealers pushed their salesmen. *Automotive News*, Feb. 13, 1956, p. 1, cols. 2-3, at 43, cols. 1-3.

raising costs and lowering profits. Until relatively recently,<sup>66</sup> these costs have not been seen as worth any benefits that might result.

Moreover, the manufacturers can assert that the pressure for sales helped to hold down the inflationary price push of the 1950's since many consumers received their cars for less. Also, even conceding that pressures and coercion existed in some cases, it is difficult to assess how often they occurred.<sup>67</sup> Finally, many dealers, if not the majority, have been given an opportunity by the manufacturer to earn a great deal of money by selling a product that is in demand, and many dealers have used this opportunity to make a great deal of money. The price of this opportunity is performance—the dealer must sell cars. Dealers are well aware of the requirement that they sell, and they take the risk of failure as well as the chance of success.<sup>68</sup>

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<sup>66</sup> See note 408 *infra* and accompanying text.

<sup>67</sup> One dealer said that there were no real problems but that dealers always complain just as those in service "gripe" at the system. *S. Hearings, Marketing Practices, Monroney* 1403. A similar comment was made by a trade association manager whom I interviewed. Ford had about 6,300 dealers in 1954 and 1955. In 1954, it terminated the franchises of 8; in 1955, 28. *Id.* at 978. One must recall Kessler and Sharp's warning, "As always when dealing with opinion, the student should be alert to the possibility that the counter-current supporting social control by state action draws its psychological strength from attitudes and convictions which may not have accurately reflected the objective facts of economic and social life." *KESSLER & SHARP, CASES ON CONTRACTS* 6 n.19 (1953).

<sup>68</sup> The most drastic example is the failure of the Edsel. A Ford official has written:

The subject of Edsel dealers, as you might expect, involves several complex and difficult matters. Suffice it to say that the entire matter was an unhappy and a trying experience for all concerned. In many instances, Edsel dealers were given a Sales Agreement for another product line of our Company. We also attempted to limit their losses by repurchase of inventories. . . . While we felt then, and feel now, that dealers must be willing to share losses as well as profits with us, the Company did make every reasonable effort to assist Edsel dealers in limiting their losses.

Letter.

### 3. Attempted Solutions: Individual Lawsuits, Collective Bargaining, and an Appeal to the Legal System for Changes in the Rules

In the process of changing the nature of a relationship through the use of the legal system there is a pattern which involves a typical sequence of stages.<sup>69</sup> In the first stage, individuals seek relief by taking their case to an agency of government. While usually individuals go to court, at times they will turn to an attorney general's office or a regulatory agency. However, usually the individual will fail if the problem requires significant changes in the law. Even if he wins, he may do so in a way that promises little to others in similar situations or his victory may come at unacceptably high costs so that others cannot use his precedent to their advantage. The second stage involves organization of a group of those aggrieved by the problem or the mobilization of a group that already exists. This group usually will attempt

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<sup>69</sup> I prefer to call this sequence of stages a useful pattern for analysis rather than a model. The term "model" may imply that, absent imperfections, events ought to occur in a certain order or bear certain relationships to each other. I do not make this claim for my five stages of changing relationships through the use of the legal system.

While I can think of examples where these five stages clearly are observable, I am sure they would not be so effective in describing some social movements which used the legal process. All I can claim for this five-stage pattern is that it helps one understand the dealers' and manufacturers' skirmishes before courts, agencies, and legislatures.

For a different sequence of stages, see HARRIS, *THE REAL VOICE* (1964). This book is the story of the late Senator Kefauver's fight for legislation controlling practices in the drug industry. In this case the legislative effort was initiated by a legislator and his committee staff.

to “collectively bargain” with those who are creating the problem (the opponents). Collective private action succeeds sometimes. If it fails, the group reaches the third stage: collective action to induce the legal system—typically the legislature—to make changes that bring solutions. Success in lobbying usually brings about the fourth and fifth stages. The fourth stage involves attempts by the opponents to deal with the situation and responses of the proponents. The opponents may view the law in its most narrow construction and comply only that far, or, at the other extreme, they may seek to make major changes in policies or in organizational structure to modify the circumstances that caused the problem in the first place. The fifth stage involves further legal battles when someone thinks that the new legislation has not been complied with. The failure of an individual at this stage may prompt a repetition of at least part of the process—an organization may begin lobbying for repairs to its statute. These stages are like battles in a war. Victory or defeat at any point does not necessarily mean that the war has been won or lost. Only when we have surveyed all of the stages and determined that it is unlikely that the cycle will begin again can we ask who won the war.

This “model” reflects what has happened in many instances. However, it is clear that things are not always that neat. For example, the probability that any later stage may occur may influence any earlier stage. When one comes to court to enforce rights created by a statute (the fifth stage), often the statute is challenged on constitutional grounds. The possibility of such a challenge probably influenced the drafting of the statute (the third stage). Moreover, action in several states may influence action on a federal level which, in turn, influences action in several other states which, in turn, influences voluntary compliance elsewhere. Also those seeking legal help may skip any stage if it is obvious that they will be unsuccessful at that point.

It is likely that this pattern of stages would have to be refined to be a true model which covered all social movements that sought to control other individuals or organizations with superior market power. However, the attempts by the automobile dealers to solve their problems with the manufacturers have followed the pattern of five stages fairly closely. As a result, it has been found useful and less confusing to organize this part of the study in terms of this model rather than chronologically.

### ***A. The First Stage: Individual Legal Action and Individual Defeat***

In the 1920's, the 1930's, and the early 1950's, dealers were unhappy about being forced to take unwanted and unordered cars from the factories

and about sales quotas enforced by terminations of the franchises of those who failed to meet them. Attempts to stop these practices through the common law of contracts were largely unsuccessful.<sup>70</sup> To a great extent the common law has facilitated the operation of large corporations by not looking to the "inequality" of bargaining power or skill in transactions between manufacturers and dealers and by allowing the manufacturers to deal on the basis of legally unenforceable agreements—"treaties" that are supported by the manufacturers' collection of other-than-legal sanctions. Thus, typically, the manufacturers have been able to act as they pleased because their lawyers drafted the provisions of the dealer-manufacturer selling agreements, and dealers accepted these standard forms without modifications. Until fairly recently, when major changes were made in the franchises, they were legally unenforceable as contracts because they lacked mutuality of obligation. While the manufacturer demanded that the dealer sell enough cars and invest enough capital in the dealership to satisfy the manufacturer, it reserved the right to cancel the agreement at will and was careful not to promise to do anything.<sup>71</sup> Thus the document gave the dealers no rights.

If a dealer wants to stop a manufacturer's action through the common law of contract, the dealer must find a promise on which to sue. His best hope is to convince a court to "imply" some obligation of the manufacturer into the selling agreement—for example, an obligation to use its powers only in good faith. Most dealers who have tried have not succeeded in persuading a court to fashion such an implication.<sup>72</sup> This is not surprising. It is clear that the manufacturer intended to make no such promise to its dealer, and the formal document carefully makes no such promise. Treating the document as written arguably provides predictability and certainty and also carries out the allocations of risks reached in the market. Market functioning<sup>73</sup> is aided since this legal response is a certain item of

<sup>70</sup> Attempts to stop these practices through the use of private antitrust litigation also have been largely unsuccessful. See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1165-67 (1957).

<sup>71</sup> See, e.g., FORD MOTOR COMPANY, FORD SALES AGREEMENT (1938). "Company agrees to give careful consideration to all orders received from Dealer but expressly reserves the right to follow or depart from such orders, and Company shall in no way be liable for failure to ship, or for delay in shipments however caused. . . ." *Id.* at § 8(b). "This agreement may be terminated at any time at the will of either party by written notice to the other party. . . ." *Id.* at § 10.

<sup>72</sup> The cases are surveyed in HEWITT, *AUTOMOBILE FRANCHISE AGREEMENTS* (1956), and Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1149-56 (1957).

<sup>73</sup> See Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 813-17 (1961). See also Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U. L. REV. 751 (1965).



information and the manufacturer can plan its operations without the costs of challenges to its policies. It can benefit the public by removing inefficient dealers quickly and thus keep the prices of cars low and the quality of service high. Moreover, to read in a limitation of good faith would require courts to define that term on a case-by-case basis over a long period of time. Until the courts had decided sufficient cases to give content to the concept of good faith, the manufacturer would be faced with the choice of making a compromise with its complaining dealer or submitting its actions to review by judge and jury. This unpredictability and the chance of jury awards based on sympathy does not aid market functioning. One can add to this "functional" policy argument some element of "transactional" policy. The dealer assumed the risk that he could run a profitable business and sell sufficient cars to satisfy the manufacturer's increasing quotas, or, at least, he should be treated *as if* he had. He signed a document that gave him no rights, and the pressure on dealers to sell has been widely publicized. Thus perhaps it makes some sense to say that the dealer accepted a status as a dealer for the X Motor Company at its pleasure and subject to its whims.

In order to give a dealer a remedy, a court must turn from this "functional" policy argument mixed with a little risk assumption and seek to carry out another policy. It could try to follow the lines of "transactional" policy by asking what were the dealer's reasonable expectations for which the company was responsible and look to all of the company's conduct to determine the answer to this question. Quite possibly, the company caused the dealer to believe that it would behave as a rational business organization; its representatives would deal in good faith, recognizing his rights as an independent businessman; it would not mislead him and cause him to make a large investment without a fair chance to reclaim it; or some or all of these things. While the written selling agreement may convey none of these impressions, a court might conclude that actions speak louder than words. Moreover, a court could turn to nonmarket policies and relieve hardship or do some economic planning. Judge Clark once argued against any action that would require the court to depart from the four corners of the selling agreement:

With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take. The onerous nature of the contract for the successful dealer and the hardship which cancellation may bring him have caused some writers to advocate it, however; and an occasional case has seized upon elements of overreaching to come to such

a result on particular facts. . . . But, generally speaking, the situation arises from the strong bargaining position which economic factors give the great automobile manufacturing companies: the dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact one-sided. To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains.<sup>74</sup>

As we have seen, the bargaining position of all but those dealers who have very high sales or who know the right people is weak. The judicial response under the common law of contract does nothing to improve it. Rather this level of the legal system validated and aided the practices of the manufacturers. However, it is a mistake to assume that the hands-off position of most courts was the major cause of the dealers' troubles. One cannot be sure that the dealers would have been content even if they had won all of their cases and a duty of good faith had been imposed on the manufacturers. On one hand, the cluster of other-than-legal sanctions held by the manufacturers would have left them with great power over the dealers. Good faith is not a precise standard that would diminish much of this type of control. On the other hand, an award of common-law damages is not a very good remedy for defaults in the operation of a continuing long-term relationship. Those manufacturers who would have been sued would not have thought highly of the litigating dealers; the future of these business relationships would not have been promising. Moreover, proving the amount of damages would have been difficult: Had the manufacturer acted in good faith and the relationship continued, how much profit would the dealer have made over how many years?<sup>75</sup>

### **B. The Second Stage: Organization and Collective Private Action**

The failure of individual bargaining and contract doctrine to provide dealers security in their relations with the manufacturers prompted collective action. Dealer trade associations had existed for a long time<sup>76</sup> and

<sup>74</sup> *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675, 677 (2d Cir. 1940).

<sup>75</sup> *Cf.*, Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 *YALE L.J.* 1135, 1184-89 (1957).

<sup>76</sup> The National Association of Automobile Dealers was organized in 1917 to fight a proposed 5 per cent tax on factory prices of new automobiles and a ruling by the War Industries Board that since cars were nonessential luxuries manufacturers would have to devote their energies to war work. *NATIONAL AUTOMOBILE DEALERS ASSOCIATION, THE FRANCHISED NEW CAR & TRUCK DEALER STORY* at iii-vii (1964).

could be mobilized to battle the manufacturers. As dissatisfaction grew at particular times, these organizations sought remedies. State trade associations passed resolutions calling for an end to unwarranted pressure for sales and to other policies of the manufacturers that displeased the dealers.<sup>77</sup> Some managers of the state associations talked with friends who held high positions with the manufacturers.<sup>78</sup> The National Automobile Dealers Association (NADA) also passed resolutions,<sup>79</sup> and its representatives sought to negotiate with the manufacturers about both general policies and the cases of specific dealers who were facing termination.<sup>80</sup>

Dealer associations could do certain things that individual dealers could not do. They could hire professionals with skills in negotiation, legislative drafting, and lobbying. They could object to a manufacturer's policies without fear of retaliation, and thus they could serve an insulating function. They could seek access to top management in Detroit, unlike dealers who, in many instances, could not afford to travel there. They could seek to have top management address state or local dealers' meetings and be available for informal talks afterwards. They could collect facts and inform dealers about the practices of the companies. They could pass resolutions, and resolutions of dealer associations are more likely to cause the manufacturers to reexamine their policies than the complaints of one dealer. But, most important, dealer associations could purport to speak for a relatively large group of small businessmen before forums sympathetic to this group—in short, they could lobby or threaten to do so.

Dealer associations are likely to favor private negotiations with manufacturers rather than governmental regulation. If such negotiations work, the costs of a solution are minimized. It takes less time and effort, and both parties are more likely to leave the conference room with a good opinion of each other than if governmental force is used to reach a solution. Moreover, dealer associations have ideological problems that may inhibit any attempt to use the legal system or affect the form of governmental help sought. For example, many members of dealer associations are small businessmen with a history of opposition to government interference with free

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<sup>77</sup> See, *e.g.*, *Automotive News*, Nov. 7, 1955, p. 6, cols. 4-5, at 73, col. 1 (Connecticut Automobile Dealers Association passes resolution stating that unless threats and coercion by manufacturers' representatives end, the Association will seek legislation); *id.*, Dec. 12, 1955, p. 1, col. 5, at 4, cols. 2-3 (Nebraska Automobile Dealers Association passes similar resolution).

<sup>78</sup> Interviews.

<sup>79</sup> See, *e.g.*, *Automotive News*, Feb. 7, 1955, p. 1, cols. 3-5, p. 48, cols. 1-5.

<sup>80</sup> See, *e.g.*, *NADA Magazine*, Feb. 1957, p. 22 (Speech by George Romney describing 1947 meetings between the Automobile Manufacturers Association and NADA). See also *S. Hearings, Marketing Practices, Monroney 57*.

enterprise.<sup>81</sup> However, from a dealer's standpoint probably the most effective legal approach to manufacturer-dealer problems is a licensing scheme covering both parties that is administered by a governmental agency. Representatives of some associations have said that their groups rejected this approach because of the affront to free enterprise principles.<sup>82</sup> It is much easier to rationalize in free enterprise terms a penal statute against coercion or the creation of a private cause of action than the creation of an administrative-licensing system.

Unfortunately for the organized dealers, before the mid-1950's private negotiations with manufacturers were disappointing. At one time the Ford Motor Company told its dealers not to join trade associations,<sup>83</sup> and it never welcomed suggestions from them.<sup>84</sup> In the 1930's, a high official of the Buick division of General Motors refused to discuss problems with NADA since it was a "polyglot" organization representing dealers from all makes rather than just Buick dealers.<sup>85</sup> During this period, officials of General Motors insisted that they could "deal directly" with their dealers as individuals rather than through outside intermediaries.<sup>86</sup>

Some manufacturers created their own dealer organizations to advise top management. The General Motors Dealer Council was established in 1935,<sup>87</sup> the Ford Dealer Council in 1945,<sup>88</sup> and the Chrysler Corporation's divisions created councils in 1950 and 1951.<sup>89</sup> Until the early 1950's, these groups were composed of members appointed by the manufacturers. A number of dealers felt that these dealer councils faithfully told top management just what it wanted to hear and no more.<sup>90</sup> Of course, management

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<sup>81</sup> The executive vice-president of the National Automobile Dealers Association in 1957 called for right-to-work laws to curb unions. "It's only by laws of this type that we will regain our economic freedom." NADA Magazine, Nov. 1957, p. 9. He also deplored "a country whose citizens seem to accept, albeit in an attitude of apathy, the growing encroachment of Federal power, Federal benevolence, Federal paternalism, Federal injection in the lives of its citizens." *Id.* at 11 (June 1957).

One dealer recently "complained that dealers are 'losing control over their businesses because of the increasing number of controls and regulations enforced by the government.'" *Automotive News*, March 29, 1965, p. 3, col. 5.

<sup>82</sup> Interviews.

<sup>83</sup> NEVINS & HILL, *FORD: EXPANSION AND CHALLENGE 1915-1933*, at 259.

<sup>84</sup> Interviews.

<sup>85</sup> Interview with dealer who was one of the NADA representatives involved in the incident.

<sup>86</sup> Interview. See also *S. Hearings, General Motors, O'Mahoney* 3183, 3452-53; *H.R. Hearings, Dealer Franchises, Celler* 74-5.

<sup>87</sup> *S. Hearings, Marketing Practices, Monroney* 1444.

<sup>88</sup> *Id.* at 975.

<sup>89</sup> *Id.* at 445.

<sup>90</sup> See *id.* at 16, 57, 125-26, 181-82; *S. Hearings, General Motors, O'Mahoney* 3461.

has denied this, citing the criticism and argument that was presented at the meetings of the groups.<sup>91</sup> Alfred P. Sloan, Jr., the chief executive officer of General Motors until after World War II, explained General Motors' system:

The group of dealers comprising the General Motors Council . . . has always been appointed by General Motors rather than elected. We have felt that this method, because of the particular setup of General Motors—made up as it is of five car divisions and one truck division—would require quite a complicated arrangement if the council of dealers was to be on an elected basis. Membership in the various groups of this council reflects sizes of dealerships, sizes of dealers' communities, and geographical location, as well as numbers in each division.<sup>92</sup>

Whatever the merits of these channels of communication and means for collective negotiation, many dealers were not satisfied with the results. The battle had to pass to the third stage.

### **C. The Third Stage: Lobbying and Battles Before Legal Agencies**

The organized dealers, perhaps in some cases regretfully, turned to the legal system to change manufacturer-dealer relations once it was apparent that they would not solve their problems with individual lawsuits or negotiation by the dealer organizations. First, they attempted to use laws of general application with some success. But then they tried to create new laws by state legislation and to use the powers of Congress. We will consider the dealers' activities in that order.

#### **1. THE USE OF LAWS OF GENERAL APPLICATION**

The various dealer associations first turned to the laws they found on the books and made appeals to have them enforced to the advantage of the dealers. The National Industrial Recovery Act of the early 1930's<sup>93</sup> provided that the members of an industry could create a code of fair competition to end cutthroat competition; it was hoped that this repeal of the

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<sup>91</sup> See, e.g., *S. Hearings, Marketing Practices, Monroney* 725, 975, 990.

<sup>92</sup> SLOAN, *MY YEARS WITH GENERAL MOTORS* 301 (c) 1964 by Alfred P. Sloan, Jr., from *MY YEARS WITH GENERAL MOTORS*, published by Doubleday and Company, Inc., New York, 1964.

<sup>93</sup> National Industrial Recovery Act § 3, 48 Stat. 195, 196 (1933).

antitrust laws would help end the depression. A code was written for automobile dealers by dealer associations. Professor Kessler has described the dealers' National Recovery Administration days as follows:

With the advent of the NRA and the introduction of a Code for dealers, group action had its first noticeable success. During this period, price competition among dealers was substantially eliminated by controlling used-car prices. The so-called Blue Book, which prescribed a ceiling on trade-in allowances, was introduced. Marked by the absence of vigorous competition, the NRA period often has been labeled the golden age of dealers. The manufacturers, on the other hand, suffered a reduction in market from the lack of aggressive dealer competition. Accordingly, manufacturer pressure defeated the dealers' attempts, after the demise of NRA, to preserve by self regulation the benefits enjoyed during its life.<sup>94</sup>

Also during the 1930's, the Federal Trade Commission and the Department of Justice were induced to take action to curb two abuses. In 1937, the Federal Trade Commission began proceedings against General Motors, asserting that it had coerced dealers, forcing them to buy unwanted parts and accessories as a condition of obtaining desirable models and retaining their franchises. It was also asserted that General Motors had forced dealers to refrain from buying parts from other suppliers. These proceedings led to a cease and desist order against General Motors.<sup>95</sup> In 1938, the Department of Justice began proceedings under the Sherman Act, alleging that General Motors, Ford, and Chrysler had coerced their dealers to finance sales of cars through particular financing firms. This action led to consent decrees that prohibited such coercion,<sup>96</sup> and it has not been a major complaint of dealers since.<sup>97</sup>

The NRA Code was lost when that statute was declared unconstitutional,<sup>98</sup> and the two antitrust proceedings took a great deal of time but dealt with only some of the problems of the dealers. Some representatives of the dealers thought that new laws were needed.

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<sup>94</sup> Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1168 (1957). (Footnotes omitted.)

<sup>95</sup> In the Matter of General Motors Corp., 34 F.T.C. 58 (1941), *modified*, 34 F.T.C. 84 (1942).

<sup>96</sup> *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941). See also *United States v. Ford Motor Co.*, 1932-39 Trade Cas. 524 (N.D. Ind. 1938).

<sup>97</sup> See *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. 470-72 (1959).

<sup>98</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

## 2. BATTLES BEFORE THE STATE LEGISLATURES

Organized dealers have turned to state legislatures for leverage to change manufacturer-dealer relations. Many state associations have succeeded in lobbying legislation through, but others have been defeated. Some have considered whether or not to attempt to get a statute enacted and decided against it. In this section, we will look at the types of statutes that have been passed, when and where several types of statutes have been considered, passed, or defeated, and why action has or has not been taken.

### *a. The Types of Statutes*

The twenty statutes governing factory-dealer relations can be classified as: (1) administrative-licensing statutes, (2) penal statutes, and (3) other statutes.

The administrative-licensing statutes generally follow the pattern of the Wisconsin legislation of 1935<sup>99</sup> and 1937,<sup>100</sup> but the Oklahoma statute of 1953<sup>101</sup> made some modifications which have been frequently followed in subsequent legislation. This borrowing is an example of legislative common law and the practice of following the "majority view." One cause of this uniformity is that the Wisconsin Automotive Trades Association was largely responsible for drafting the Wisconsin legislation, and WATA has

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<sup>99</sup> Wis. Laws 1935, ch. 474, at 748. Inspection of the records at the Wisconsin Legislative Reference Library indicates that the 1935 legislation was the product of an effort to regulate trade practices of dealers. The bill also outlawed action by manufacturers which would coerce dealers to sell installment contracts to a particular finance company. That provision is now Wis. STAT. § 218.01(7) (1963).

<sup>100</sup> Wis. Laws 1937, ch. 377, at 602, ch. 378, at 603, ch. 417, at 688. The material at the Wisconsin Legislative Reference Library discloses that the administrative-licensing provisions were selected after the draftsmen and sponsors of the bill considered and rejected many other sanctions. Initially, Senator Ingram asked the Legislative Reference Service to draft a bill declaring "open contracts" between automobile manufacturer and dealer to be against public policy. An open contract is one that requires a dealer to buy any and all cars sent to him by the manufacturer. The bill that was drafted stated that such a contract was not enforceable before the courts unless it contained provisions specifying the exact kind and number of motor vehicles with which the dealer was to be charged. Since manufacturers have many other-than-legal sanctions, this would have been an ineffective statute.

The word "coercion" is written on that draft along with the suggestion that criminal penalties be imposed. Several more drafts were prepared by the Legislative Reference Service. One stated that a manufacturer that coerced a dealer would forfeit its charter and right to do business in Wisconsin. Of course, this would have meant that all of the people in Wisconsin who wanted to buy such a manufacturer's cars and all of the manufacturer's other dealers would be penalized along with the manufacturer; in today's terminology it involved "overkill." Another draft called for the award of double damages to the injured dealer which he could obtain in a private civil action. Finally, a bill appears in the file that added the manufacturer licensing features to the 1935 legislation along with provisions on when licenses could be denied, revoked, or suspended. See Wis. Senate Bill 206 (1937).

<sup>101</sup> OKLA. STAT. ANN. tit. 47, §§ 561-68 (1962).

given groups in other states a great deal of assistance both in drafting and in strategy.<sup>102</sup>

The Wisconsin act requires all manufacturers, dealers, and the representatives of both to be licensed to do business in the state.<sup>103</sup> The statute is administered by an independent state agency<sup>104</sup> with an advisory board of dealers available for consultation.<sup>105</sup> The act labels as wrongful many kinds of conduct, including the following actions by manufacturers and their representatives: (1) inducing or coercing a dealer to accept delivery of cars or other things that he did not order, or attempting to do this;<sup>106</sup> (2) inducing or coercing a dealer to enter any agreement with the manufacturer or "to do any other act unfair to said dealer" by threatening to cancel the dealer's franchise, or attempting to do this;<sup>107</sup> or (3) "[u]nfairly, without due regard to the equities of said dealer and without just provocation . . ." canceling the franchise of a dealer.<sup>108</sup>

Dealers and their salesmen also are prohibited from engaging in certain conduct. They cannot make misrepresentations to sell cars,<sup>109</sup> sell on Sunday,<sup>110</sup> or sell from other than a permanent building with adequate facilities for sales and service.<sup>111</sup>

The primary sanction under this statute is the denial, suspension, or revocation of a manufacturer's, dealer's, or individual's license.<sup>112</sup> The license may be revoked as to only a particular area of the state; for example, the X Motor Company could lose its license to do business in the city of Madison but retain it for the rest of the state if this were an appropriate remedy.<sup>113</sup> The statute also provides for criminal penalties. Violations of the sections governing manufacturers can result in a \$5,000 fine.<sup>114</sup>

The Oklahoma manufacturer-dealer licensing law and those that are modeled on it follow the Wisconsin licensing pattern and even the Wisconsin statutory language but with several significant changes. First, the

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<sup>102</sup> Interview.

<sup>103</sup> WIS. STAT. § 218.01 (2) (bd) (3) (1963.)

<sup>104</sup> WIS. STAT. §§ 218.01 (1a), 218.01 (1) (j)-(l) (1963).

<sup>105</sup> WIS. STAT. § 218.01 (4) (1963).

<sup>106</sup> WIS. STAT. § 218.01 (3) (a) (15) (1963).

<sup>107</sup> WIS. STAT. § 218.01 (3) (a) (16) (1963).

<sup>108</sup> WIS. STAT. § 218.01 (3) (a) (17) (1963).

<sup>109</sup> WIS. STAT. §§ 218.01 (3) (a) (5), (8)-(10) (1963).

<sup>110</sup> WIS. STAT. § 218.01 (3) (a) (21) (1963).

<sup>111</sup> WIS. STAT. § 218.01 (3) (bf) (1) (1963).

<sup>112</sup> WIS. STAT. § 218.01 (3) (1963).

<sup>113</sup> WIS. STAT. § 218.01 (8) (d) (1963).

<sup>114</sup> *Ibid.*



act in Oklahoma is administered by a Motor Vehicle Commission composed of seven members appointed by the Governor.<sup>115</sup> "[E]ach shall be of good moral character and each shall have been actually engaged in the manufacture, distribution or sale of motor vehicles in the State of Oklahoma for not less than ten (10) consecutive years. . . ."<sup>116</sup> In effect, a group of established automobile dealers sits in judgment on other dealers and on manufacturers and their representatives rather than an independent state agency as in Wisconsin. Clearly, this Commission will have a certain type of "expertise."

The Oklahoma law expands the list of prohibited conduct of manufacturers and their representatives to include, in addition to the Wisconsin provisions: (1) refusing to deliver to any franchised new-car dealer of the manufacturer's make, any motor vehicle publicly advertised for immediate delivery within sixty days after the dealer orders it,<sup>117</sup> and (2) refusing to extend to a dealer "the privilege of determining the mode or manner of available transportation facility which said dealer desired to be used or employed in making deliveries of new motor vehicles to him or it."<sup>118</sup> These two sections have the virtue of dealing with particular problems in a more specific fashion than the Wisconsin provisions, but they impose very heavy burdens on manufacturers.<sup>119</sup>

The penal statutes are more varied, but all leave enforcement to local law enforcement agencies and use fines rather than licensing as sanctions. The Minnesota<sup>120</sup> and South Dakota<sup>121</sup> acts closely follow the Wisconsin language in defining the things that a manufacturer may not do. The Wyoming statute prohibits a manufacturer from requiring the construction of a building or the purchase of anything to keep a dealership.<sup>122</sup> The North Dakota statute does no more than require that a manufacturer repurchase certain items from a dealer upon termination of a franchise.<sup>123</sup>

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<sup>115</sup> OKLA. STAT. ANN. tit. 47, § 563 (1962).

<sup>116</sup> OKLA. STAT. ANN. tit. 47, § 563 (a) (1962).

<sup>117</sup> OKLA. STAT. ANN. tit. 47, § 565 (j) (1) (1962).

<sup>118</sup> OKLA. STAT. ANN. tit. 47, § 565 (j) (4) (1962).

<sup>119</sup> Manufacturers face difficult problems in distribution since they offer so many combinations of models, colors, and accessories and since they must schedule production far in advance. Moreover, there are economies if the manufacturer can arrange transportation to combine shipments to dealers in the same general area. For a discussion see *Zarbock v. Chrysler Corp.*, 1965 Trade Cas. ¶ 71,361 (D. Colo. 1964).

<sup>120</sup> MINN. STAT. ANN. § 168.27 (14) (1960).

<sup>121</sup> S.D. CODE § 54.1103 (Supp. 1960).

<sup>122</sup> WYO. STAT. ANN. §§ 40-39 to -40 (1957).

<sup>123</sup> N.D. CENT. CODE §§ 51-07-01 to -03 (Supp. 1963).

A separate category is needed for the New York statute.<sup>124</sup> It says that a manufacturer may not terminate a dealer's franchise "except for cause" but does not provide expressly any remedy or sanction if a manufacturer fails to comply.

*b. When and Where What Kinds of Statutes Have Been Passed*

Statutes have been passed in 20 states, defeated in at least 11, and dealer associations in at least 9 states have considered pressing for legislation but decided not to do it. Table 1 indicates what has been done and where. Unfortunately, as one moves from the formal enactments of state legislatures to consideration by dealer associations, the available information becomes more and more fragmentary and less reliable.

*c. Why Action Has or Has Not Been Taken*

Why have dealers' associations in some states pressed for statutes and succeeded in getting them passed while in other states the associations have failed? Why would an association decide not to press for some type of statute? To answer these questions as far as they can be answered, one must look to the balance of power between the dealers and the manufacturers when they appeal to state legislatures and to the balance of gains and costs to the dealers which comes with these statutes.

The organized dealers have a number of advantages in a power struggle at the state level. They can present arguments directed toward social policy in terms of the abuses of "coercion" and "arbitrary" cancellations of a business that represents a man's life work. Coercion and arbitrariness are bad things, and to have a man's effort destroyed by either clearly is an evil. The existence of these abuses and the need for action can be "proved" by the fact that other state legislatures have passed statutes. Also dealer associations can argue that the Wisconsin-Oklahoma statutory language is not an innovation but a tried and proven product without undesirable, unanticipated consequences.

Moreover, the villain is a giant corporation with wealth and power, and, in many instances, it is a foreign corporation coming into the state from outside to push around local small businessmen. The spirit of Populism is still with us, and the argument has some appeal. Also in many states the dealers' political power is great. Often several legislators are automobile dealers.<sup>163</sup> Dealers often are active in local and state politics and have close ties with legislators and party leaders.<sup>164</sup> Finally, in many states it costs the legis-

<sup>124</sup> N.Y. GEN. BUS. LAW §§ 195-98.

For notes 125-162 see Appendix A.

<sup>163</sup> See, e.g., *id.*, Feb. 21, 1955, p. 1, col. 5; *id.*, April 25, 1955, p. 3, cols. 3-4.

<sup>164</sup> Interviews.

**Table 1. STATE LEGISLATION, CHRONOLOGICAL LIST OF PROPOSALS AND DEFEATS  
IN 37 STATES**

State	Statute passed: date first passed and type	Statute introduced and defeated; date and type where known	Statute considered and rejected by dealer organization	Rank in 1964 as to:	
				Number cars sold in state <sup>125</sup>	Number new- car dealers in state <sup>126</sup>
(1) Wisconsin	1937 <sup>127</sup> (admin.-licensing)	—	—	17th	8th
(2) Iowa	1937 <sup>128</sup> (admin.-licensing; limited application) 1965 <sup>130</sup> (admin.-licensing; typical application) 1937 <sup>131</sup> (penal; limited application) 1941 <sup>132</sup> (admin.-licensing) 1944 <sup>133</sup> (admin.-licensing) 1949 <sup>134</sup> (penal; limited application) 1950 <sup>135</sup> (admin.-licensing) 1951 <sup>136</sup> (penal) 1953 <sup>137</sup> (admin.-licensing— dealer board)	1963 <sup>129</sup> (admin.-licensing)	—	23d	10th
(3) North Dakota		—	—	47th	35th
(4) Florida		—	—	9th	18th
(5) Virginia		—	—	13th	16th
(6) Wyoming		—	—	50th	45th
(7) Rhode Island		—	—	39th	46th
(8) South Dakota		—	—	44th	38th
(9) Oklahoma		—	—	26th	20th

*Table continued on next page*

Table 1. STATE LEGISLATION, CHRONOLOGICAL LIST OF PROPOSALS AND DEFEATS  
IN 37 STATES (Continued)

State	Statute passed; date first passed and type	Statute introduced and defeated; date and type where known	Statute considered and rejected by dealer organization	Rank in 1964 as to:	
				Number cars sold in state <sup>125</sup>	Number new- car dealers in state <sup>126</sup>
(10) Mississippi	1935 & 1954 <sup>138</sup> (admin.-licensing)	—	—	33d	28th
(11) Louisiana	1954 <sup>139</sup> (admin.-licensing— dealer board)	—	—	21st	27th
(12) Arkansas*	1955 <sup>140</sup> (admin.-licensing— dealer board)	—	—	31st	32d
(13) Colorado**	1955 <sup>141</sup> (admin.-licensing)	—	—	30th	33d
(14) Tennessee	1955 <sup>142</sup> (admin.-licensing— dealer board)	—	—	19th	22d
(15) North Carolina	1955 <sup>143</sup> (admin.-licensing)	—	—	16th	15th
(16) Minnesota	1955 <sup>144</sup> (penal)	—	—	18th	12th
(17) Kentucky	1956 <sup>145</sup> (admin.-licensing)	—	—	25th	21st
(18) New York	1956 <sup>146</sup> (Right created; no remedy or viola- tion specified)	1949 <sup>147</sup> (approval of contracts by state agency)	—	2d	2d
(19) Nebraska	1957 <sup>148</sup> (admin.-licensing— dealer board)	—	—	32d	25th
(20) Utah	1965 <sup>149</sup> (admin.-licensing— dealer board)	—	—	38th	43d

(21)	Connecticut	—	Early 1950's <sup>150</sup> (type unknown) 1965 <sup>151</sup>	—	20th	24th
(22)	Maryland	—	(admin.-licensing) Early 1950's <sup>152</sup>	—	14th	31st
(23)	Missouri	—	(type unknown) 1955 <sup>153</sup>	—	12th	14th
(24)	New Hampshire	—	(type unknown) 1955; <sup>154</sup> 1963 <sup>155</sup>	—	41st	40th
(25)	California	—	(admin.-licensing) 1963 <sup>156</sup>	—	1st	3d
(26)	Maine	—	(admin.-licensing— dealer board) 1963 <sup>157</sup>	—	37th	37th
(27)	Massachusetts	—	(admin.-licensing) 1956; <sup>158</sup> 1963 <sup>159</sup>	—	10th	13th
(28)	Vermont	—	(admin.-licensing) 1963 <sup>160</sup>	—	49th	44th
(29)	Alabama	—	(admin.-licensing)	Early 1950's <sup>161</sup>	22d	26th
(30)	Georgia	—	—	Early 1950's	15th	19th
(31)	Illinois	—	—	Early 1950's	4th	4th
(32)	Indiana	—	—	Early 1950's	11th	9th
(33)	Michigan	—	—	Early 1950's	3d	7th
(34)	New Jersey	—	—	Early 1950's	8th	11th
(35)	South Carolina	—	—	Early 1950's	29th	34th
(36)	Texas	—	—	Early 1950's	7th	5th
(37)	Washington	—	—	Early 1950's <sup>162</sup>	27th	23d

\* Statute defeated in referendum.

\*\* Statute declared unconstitutional.

(For footnotes 125-162 to this table, see Appendix A, pp. 208-209.)



lators little if anything to give benefits to the dealers since the large automobile manufacturers have little influence.

However, the dealers' lobby is not invulnerable. One trade association manager commented that the organized new-car dealers could pass any statute they desired in his state if the membership were solidly behind it.<sup>165</sup> The qualification reveals the difficulty. Since rural and urban, Chevrolet and Ford, and high volume and lower volume dealers have different interests, unity behind any proposal is hard to achieve. For example, a metropolitan dealer might not be disturbed if a small town or rural dealer located near him were canceled and not replaced. The larger dealer might think that he could attract some of the smaller dealer's customers in the future. Also trade associations are likely to be controlled by the well-established, successful dealers who are interested in association activity. As long as manufacturers are canceling only the more marginal dealers, those in control of the associations may not view the problem as worth much effort.

Not all dealers think that the manufacturer-dealer statutes are worth much effort. Trade association managers in those states where the question was appropriate were asked why their group had not pressed for a statute.<sup>166</sup> Thirteen answered that the problems in manufacturer-dealer relations were not great enough to justify a major battle with the factories. Seven answered that dealers in their state did not believe in governmental regulation. One commented that the experience of dealers in World War II and the Korean War had made his members hostile to any regulation by government and pointed out that dealers were licensed under these statutes as well as manufacturers. Six said their state was too small to justify any elaborate regulatory scheme. Views like these will be held by some members of the dealer trade association in any state, and they could prompt enough disunity to block action.<sup>167</sup> Several trade association managers commented that they had been greatly embarrassed when individual dealers appeared before legislative committees to oppose bills that the association was advocating.<sup>168</sup> Thus a minority with strong free enterprise or don't-rock-the-boat views can discourage a majority that does not see a manufacturer-dealer licensing statute as vitally important. These statutes are passed in times of crisis in manufacturer-dealer relations: The dates of the state statutes tend to coincide with the depression of the 1930's and the

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<sup>165</sup> Interview.

<sup>166</sup> See discussion of research in the Author's Preface to this book.

<sup>167</sup> A prominent Chevrolet dealer fought the proposed Massachusetts statute. He said that most dealers "did not want politicians running their business." *Automotive News*, March 9, 1964, p. 6, col. 5.

<sup>168</sup> Interview.

pressures on dealers from the factories in the 1950's. The number of 1960 dates present in Table 1 may indicate that problems are arising again.

Dealers can have problems in getting legislation passed even when they have a fair degree of unity. The dealers' political contributions tend to be to the more conservative political leaders, which may cost them some liberal support.<sup>169</sup> Many dealer associations have advocated right-to-work laws and low or no minimum wage laws and other things not calculated to impress organized labor favorably.<sup>170</sup> Also a state's used-car dealers often are not warm friends of the new-car dealers, and the used-car dealers will certainly do what they can to block licensing laws that along with handling coercion by manufacturers also often inhibit the sale of new cars by other than franchised dealers.<sup>171</sup>

Obviously, to a great extent the manufacturers' strengths and weaknesses before state legislatures are the converse of the dealers'. In some states the manufacturers have attempted to capitalize on the dealers' weaknesses. They can work for disunity among the dealers. "Factory-minded" or "captive"<sup>172</sup> dealers can be asked to speak out against regulation. Some dealers may think that cooperation with such a request may result in better allocations of scarce models of best selling cars. Some dealerships are owned by relatives of the top management officials of the manufacturers.<sup>173</sup> Those dealers who are officers of a state trade association advocating an administrative-licensing or a penal statute and those dealers who testify for such legislation can be talked to.<sup>174</sup> Such discussions can be most persuasive, given the dependence of any dealer on factory good will, although the manufacturers' representative makes no overt threats and confines his remarks to logical arguments against the bill. A statement issued to all dealers may persuade some to break ranks. For example, in one state a high official of General Motors stated that if a proposed administrative-licensing statute were enforced, General Motors would have to deal with nonfranchised dealers because inefficient dealers would be able to hang on to their franchises for life. To avoid promoting inefficiency, General Motors

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<sup>169</sup> Interviews.

<sup>170</sup> Interviews. See, e.g., *Automotive News*, March 29, 1965, p. 3, col. 5, p. 8, col. 1; *id.*, April 5, 1965, p. 3, col. 5.

<sup>171</sup> For example, "The Tennessee Automotive Assn. had reported concerted opposition to final passage [of the Tennessee administrative-licensing statute] by 'factories, Cleveland (Tenn.) used car dealers and representatives with labor sympathy.'" *Id.*, Feb. 28, 1955, p. 4, col. 1. See also *id.*, March 21, 1955, p. 3, cols. 3-5.

<sup>172</sup> These are the terms used by several trade association managers in the interviews.

<sup>173</sup> See *S. Hearings, Marketing Practices, Monroney* 889-92, 1093-94.

<sup>174</sup> See *id.* at 61. Also instances were discussed in interviews.



would have to sell to anyone who wanted to sell its cars.<sup>175</sup> As a result of this threat to end the franchise system, many members of the state association withdrew support, and finally the association itself formally opposed enactment of the bill it had originally sponsored.<sup>176</sup> Divide and conquer can be a potent strategy. Also at times the manufacturers have formed alliances with the dealers' enemies, although organized labor and legislators whose views are "liberal" are unlikely to be enthusiastic friends.

The manufacturers may have their own influence with legislators apart from playing on dealers' weaknesses. They maintain an active lobby in many states and participate in political activities.<sup>177</sup> If they have manufacturing plants in a state, they may be able to work through the state's manufacturers' lobby.<sup>178</sup> Their relatively large deposits in banks in a state may make some bankers willing to exert their influence with state legislators.<sup>179</sup> Apart from pure influence, the manufacturers can offer some attractive arguments. Primarily, they assert that their control over dealers is in the interest of automobile buyers since franchises typically are canceled because the dealers' prices are too high to sell enough cars or their service is poor, or both. The automobile dealer has a sufficiently bad image in some areas that some legislators are very responsive to this position.<sup>180</sup> Moreover, if farm or labor groups can be persuaded to view these statutes as protection for high-priced dealers who give poor service, their natural hostility to aiding a giant corporation may melt, and legislators representing these interests may vote against manufacturer-dealer legislation. Manufacturers also can talk about interference with free enterprise and free bargaining. For example, a General Motors executive called a proposed bill in Iowa "grossly unfair, unnecessary and, mind you, un-American."<sup>181</sup> It is difficult to assess the impact of this kind of argument.

<sup>175</sup> *Automotive News*, May 28, 1955, p. 4, cols. 4-5; *id.*, March 4, 1957, p. 3, cols. 3-4; *id.*, March 11, 1957, p. 8, cols. 1-2.

<sup>176</sup> *Id.* at p. 1, col. 4; *id.*, March 25, 1957, p. 6, cols. 2-3.

<sup>177</sup> Interviews.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> At the 1965 National Automobile Dealers Association convention, David Ogilvy, a noted advertising executive, reported that a Gallup poll showed that the public considered new-car dealers the least honest and trustworthy of seven types of businessmen. *N.Y. Times*, Feb. 4, 1965, p. 50, col. 3. The executive vice-president of the Wisconsin Automotive Trades Association, Louis Milan, responded by saying, "I think we've been smeared . . . the broad criticism certainly isn't justified in Wisconsin." *Milwaukee Journal*, Feb. 7, 1965, Part I, p. 16, cols. 1-2. Justified or not, in some areas new-car dealers are not viewed as trustworthy. For example, see the characterization of Simon Greed, "president, general manager and sales director of Honor Bright Motors, Inc." in KEATS, *THE INSOLENT CHARIOTS* 87-113 (1958).

<sup>181</sup> *Automotive News*, May 6, 1963, p. 4, col. 1.

After reviewing all of these factors, one might speculate that in larger states the factories' strengths would be maximized. Where there are more dealers, there may be more diversity and less unity. A number of franchise cancellations in, say, Pittsburgh may not be viewed as a threat by dealers in Philadelphia or rural Pennsylvania.<sup>182</sup> Big-city high-volume dealers may have closer contacts with factory people than other dealers, and these close contacts may serve as a less costly and more efficient way of getting what these dealers want from factories than an administrative-licensing scheme. Moreover, in the larger states the organized new-car dealers may have had more battles with labor, and the used-car dealers are more likely to have an organized lobby than in a smaller state. In larger states the manufacturers' lobby may be more significant as may the liberal group in the legislature. On the other hand, in the smallest states, the problems may not be important enough to warrant action. Some trade association representatives from small states said that their dealers had never been subjected to pressure from manufacturers' field representatives.<sup>183</sup> They thought that the amount of increased sales which would be possible in their areas would not justify a major effort by a field man. Pressure for increased sales pays off better in areas with larger populations where there are more potential customers who can be attracted by intense price competition but where market conditions do not produce this competition naturally. Also in small states appeals to free enterprise and individualistic values, according to the trade association representatives,<sup>184</sup> may carry more weight than elsewhere.

To a great extent, manufacturer-dealer statutes have been passed in middle-sized states—in what may be described loosely as "Mid-West Republican" and Southern States—and defeated in New England. The major exception, New York, has a statute that is a compromise accepted by the dealer association to salvage something from defeat. The dealers asked for a statute that would have provided for treble damages and would have prohibited coercion and bad faith cancellation of dealers.<sup>185</sup> They accepted amendments, after legislators said they did not think that the bill was in the

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<sup>182</sup> Nine out of the approximately ninety cases I know about which have been brought under the federal Good Faith Act, 15 U.S.C. 1221-25 (1963) by dealers against manufacturers alleging coercion, have involved Pennsylvania dealers, and seven of the nine have involved dealers from the Pittsburgh area. Only Michigan, with eleven Good Faith Act suits, has had more litigation under this statute. Pennsylvania has no state dealer-manufacturer statute. Its trade association officials doubt the effectiveness of state statutes that license manufacturers. Interview. Pennsylvania has more dealers than any other state. *Automotive News* 1965 Almanac, April 26, 1965, § 2, p. 92.

<sup>183</sup> Interviews.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Automotive News*, March 12, 1956, p. 61, col. 2.

public interest,<sup>186</sup> which watered down the statute so that it provides only that a franchise cannot be terminated "except for cause."<sup>187</sup> These amendments stripped the act of any express remedy for a dealer whose franchise is terminated in violation of its provisions.<sup>188</sup>

Of course, the answer to why these bills succeed in some states and not in others may be simpler. A tough regional manager for Ford or General Motors may try to boost sales and an aggressive trade association manager may respond by rallying his members and using his lobbying skills.<sup>189</sup> One cannot overlook this kind of factor, but it is exceedingly difficult to measure.

### 3. THE USE OF THE POWER OF THE UNITED STATES CONGRESS

#### *a. The Background for the Battles to Come*

The organized dealers have sought to use federal power to change manufacturer-dealer relations at several points in recent history, but the most significant activity took place in the early 1950's as a response to the manufacturers' policies at that time. Although the National Association of Automobile Dealers (NADA) was formed in 1917, until the mid-1950's it would be hard to credit it with significant permanent successes in controlling manufacturers' power over their dealers.<sup>190</sup> In 1953, NADA appointed a new executive vice-president, Frederick J. Bell, a retired admiral in the

<sup>186</sup> *Ibid.*

<sup>187</sup> N.Y. GEN. BUS. LAW § 197. See 1956 NEW YORK STATE LEGISLATIVE ANNUAL 40-42.

<sup>188</sup> N.Y. GEN. BUS. LAW § 198.

<sup>189</sup> Many trade association managers explain the presence or absence of legislation in these terms. Interviews.

<sup>190</sup> Some might challenge the statement in the text. In 1937, Congress was memorialized by resolutions passed in the Wisconsin and Indiana Legislatures, largely in response to requests by the two state dealer trade associations. These resolutions asked for relief from the evils of the manufacturers. Congress directed the Federal Trade Commission to investigate the manufacturers' policies. The FTC's report criticized both the manufacturers and the dealers, charging that many dealers engaged in anticompetitive practices. A bill was drafted by NADA in 1940 and introduced into Congress at its request. The bill would have allowed the FTC to police manufacturer-dealer relations. In a referendum only 22 per cent of NADA's members voted but 90 per cent of those dealers opposed the bill. The bill died. See HEWITT, AUTOMOBILE FRANCHISE AGREEMENTS 107-10 (1956).

The effort was not a total loss. Many manufacturers did make some concessions in their policies and franchise terms. Perhaps most significant, General Motors' chief executive officer, Alfred P. Sloan, Jr., announced his "quality dealer" plan in a speech before NADA in 1938. He advocated: (1) a forum for discussion of policies, (2) review of administrative action, (3) protected territories, and (4) a known, uniform, and fixed price for cars. The speech is reproduced in *S. Hearings, Marketing Practices, Monroney* 80-87. General Motors instituted much of this program.

While these benefits were important, during 1955 and 1956 NADA would have agreed with the statement in the text.

United States Navy. Bell was an aggressive and articulate man who made significant changes in NADA policies. Before his administration NADA had requested changes in the manufacturers' practices, had been heard politely, and then usually had been ignored.<sup>191</sup> In early 1954, NADA held a convention in Miami, during which Bell and the Association's officers in speeches and resolutions demanded changes, expressed extreme distaste for government interference in business, but said that if negotiations failed, something would be done.<sup>192</sup>

The manufacturers responded in several ways. On the one hand, General Motors and Ford took some action to meet complaints. General Motors offered to buy back any cars a dealer thought were excess inventory so that the dealer would have no reason to "bootleg" these cars to a used-car dealer in another area.<sup>193</sup> However, some representatives of dealers said that any General Motors dealer who conceded he could not sell his inventory would risk his franchise or his allotment of "hot" models.<sup>194</sup> Its representatives also went to the Department of Justice and asked for approval of territorial security clauses in franchises (devices to deter, for example, one Chevrolet dealer from selling to customers who lived in another Chevrolet dealer's territory) and action against "bootlegging." The Department refused to give its approval.<sup>195</sup>

Ford made the first revision in its franchise terms since 1938.<sup>196</sup> Most significant, it allowed dealers to nominate a son, son-in-law, brother, brother-in-law, or nephew to take over their dealerships upon their death. Such a nominee had to have adequate capital and have participated in the dealership for a reasonable time. Qualified nominees would be given "first consideration" as the replacement dealer.<sup>197</sup> While this was an important benefit, it did not end pressure and threats, or "bootlegging" and cross-selling into another's territory.

The manufacturers made other less considered responses which helped NADA rally support for the action that was to come. Admiral Bell reported that in 1954 and 1955 factory men had said to him:

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<sup>191</sup> Interviews. See also *H.R. Hearings, Dealer Franchises*, Celler 74-75.

<sup>192</sup> N.Y. Times, Jan. 10, 1954, p. 81, col. 1. See also *id.*, Oct. 6, 1954, p. 21, col. 1.

<sup>193</sup> See *S. Hearings, General Motors*, O'Mahoney 3500.

<sup>194</sup> See *S. Hearings, Marketing Practices*, Monroney 750.

<sup>195</sup> See *id.* at 819-25. Representative Crumpacker asserted that General Motors knew it would not get the Department of Justice's approval. "This was all a grand public relations show to try to prove that they were sincerely concerned about this bootlegging practice and wanted to do something about it, but the Government was preventing them from doing so." *H.R. Hearings, Marketing Legislation*, Klein 56.

<sup>196</sup> *Automotive News*, Feb. 7, 1955, p. 2, col. 3, p. 7, col. 1.

<sup>197</sup> *Ibid.*

No association and no dealers are going to tell us how to run our business.<sup>198</sup>

Ours is a horse trading business; we like to see our dealers on the lean and hungry side!; why don't the dealers sell their yachts and racing stables and get back to work; the dealers are making too much money; why can't their wives be satisfied with last year's mink!; what's wrong with price packing?<sup>199</sup>

Moreover, in late 1954 and 1955, the number of cancellations of franchises and threats to cancel increased.<sup>200</sup> During that time a common tactic used by district managers to "shake up" a dealer was to send him a notice that his franchise would not be renewed when it expired at the end of the year. When the dealer asked for another chance, the district manager would agree if the dealer would sign a promise to sell more cars during the next year.<sup>201</sup> Sales quotas were increased drastically, and high-volume dealers were given franchises near established dealers.<sup>202</sup> Ford dealers, for example, were told to outsell competing Chevrolet dealers or a dealer who could do it would be found. Chevrolet dealers received the same "encouragement."<sup>203</sup>

During this period General Motors in particular made several major public relations errors. First, Lee Anderson, a Chevrolet, Buick, and Pontiac dealer in the Pontiac, Michigan, trading area, gave a speech before a Rotary Club that was reported in an industry trade paper, *Automotive News*.<sup>204</sup> Anderson charged that Pontiac executives obtained cars from the factory at a discount. Thus some of his potential customers were removed, and some executives resold these cars to other potential customers. Anderson also had written a book about problems in manufacturer-dealer relations and sent it to General Motors' management. Although Anderson had a new showroom and adequate sales, his franchise was canceled because of his disloyalty.<sup>205</sup> The cancellation was reviewed before Harlow Curtice, General Motors' president, and other top management officials. Curtice indicated that the group had reached a decision before Anderson presented his case. Anderson said that at this meeting Curtice called him a "Red," but

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<sup>198</sup> Bell, *Point of No Return*, NADA Magazine, Feb. 1955, pp. 20, 21.

<sup>199</sup> Bell, *While We Work For It—Let's Work At It*, NADA Magazine, Nov. 1955, pp. 15, 16.

<sup>200</sup> *Automotive News*, Nov. 14, 1955, p. 1, col. 1, p. 52, col. 3.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Id.*, June 13, 1955, p. 3, cols. 3-5.

<sup>205</sup> *S. Hearings, General Motors, O'Mahoney* 3333.

Curtice's associates who had been present denied this, explaining that "Red" was Curtice's nickname and the word had probably been used with this meaning at the meeting.<sup>206</sup> In any event, General Motors created the impression that a dealer had to follow "the party line" and be a good organization man or suffer the loss of his business.

Second, J. E. Travis, a Buick dealer in St. Charles, Missouri, which is near St. Louis, gave a speech asserting that it was vital that dealers have protected territories so they could afford to carry parts in stock and have trained mechanics available.<sup>207</sup> Travis was a former president of the Missouri Automobile Dealers Association and had been in business for thirty-five years. He had been active in civic affairs and was a leading citizen of St. Charles. However, his sales had declined in the face of competition from large dealers in St. Louis, and he asserted he received smaller allotments of the best selling models than he deserved. His franchise was canceled for inadequate sales, but some thought his speech was a factor.<sup>208</sup> The Missouri Automobile Dealers Association passed a resolution accusing General Motors of "disgracefully shabby treatment."<sup>209</sup> The very influential Representative Clarence Cannon,<sup>210</sup> Chairman of the House Appropriations Committee, wrote Harlow Curtice about the Travis cancellation, saying that it "indicates an industrial ruthlessness which warrants protective legislation."<sup>211</sup>

Third, both Ford and General Motors forced dealers to register cars falsely as sold so that sales leadership could be claimed.<sup>212</sup> Finally, Harlow Curtice refused an invitation in July, 1955, to appear before a Senate committee studying mergers and economic concentration.<sup>213</sup> This greatly annoyed Senators Kefauver and O'Mahoney,<sup>214</sup> and Senator O'Mahoney was to even the score within a few months.

Quite apart from the actions of either NADA or the manufacturers, another event happened in late 1954 that was significant. The Democratic Party captured control of both the House and the Senate. Many of its leaders hoped to expose the evils of large corporations and unchecked

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<sup>206</sup> *Id.* at 3713.

<sup>207</sup> *Automotive News*, May 2, 1955, p. 14, cols. 1-5.

<sup>208</sup> See *S. Hearings, General Motors, O'Mahoney* 3234-63, 3724-26.

<sup>209</sup> *Automotive News*, Oct. 31, 1955, p. 1, col. 2. The resolution is reprinted at *S. Hearings, General Motors, O'Mahoney* 3260.

<sup>210</sup> Representative Cannon was a Democrat from Missouri.

<sup>211</sup> *Automotive News*, Nov. 7, 1955, p. 2, col. 5, p. 72, col. 5.

<sup>212</sup> *S. Hearings, General Motors, O'Mahoney* 3370, 3397, 3769-71, 4056.

<sup>213</sup> *Automotive News*, July 4, 1955, p. 1, col. 2, p. 42, cols. 4-5.

<sup>214</sup> *Ibid.*

economic power and relate this to the close association of big business with the Eisenhower Administration. And 1956 was to be an election year. Some prominent Republicans also were worried about the size of General Motors and its effect on the economy. For example, Stanley Barnes, Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice in the Eisenhower Administration, proposed that General Motors be split into two or more independent corporations.<sup>215</sup> The political climate was not too favorable for the manufacturers.

When NADA decided to turn to Congress for aid in late 1954 and early 1955, it faced a number of problems. Most significant, the nation's approximately 42,000 franchised new-car dealers were not clear about their objectives. When NADA first acted, its primary interest seemed to be in stopping "bootlegging" and gaining "territorial security"<sup>216</sup>—both of which are protections against the actions of other franchised dealers. Yet NADA's membership was divided on the question of territorial security because some dealers made their living selling in the territories of others and could not be expected to support legislation that would stop this practice.<sup>217</sup> A divided membership was unlikely to achieve legislation. Furthermore, the antitrust policies of the Eisenhower Administration stood in the way. The Department of Justice promised to fight to block any attempt to legislate against "bootlegging" or for "territorial security."<sup>218</sup> The possibility of a presidential veto hung over the heads of the proponents of legislation favoring the dealers throughout the battle that was to come.<sup>219</sup> The Administration was ideologically committed to free competition, and thus opposed to any action that might isolate dealers from this healthy spur to efficiency. In February of 1955, Admiral Bell remarked that President Eisenhower would "have to choose between the public interest and his own Justice Department advisors."<sup>220</sup>

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<sup>215</sup> See 102 CONG. REC. 7073 (1956).

<sup>216</sup> *Automotive News*, Feb. 7, 1955, p. 1, cols. 3-5. See Heuerman, *Dealer Territorial Security and "Bootlegging" in the Auto Industry*, 1962 WIS. L. REV. 486.

<sup>217</sup> The Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce (the Monroney subcommittee) sent a questionnaire to all new-car dealers in 1955. Of those responding, 8,693 favored a territorial security system, but 7,766 opposed it. The opposition tended to come from dealers in the larger states who operated in cities with a population of between 2,500 to 25,000 which were within 25 miles of a metropolitan area. These were the dealers who could best gain from invading the territories of others. See SUBCOMMITTEE ON AUTOMOBILE MARKETING PRACTICES OF THE SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 84TH CONG., 2D SESS., *THE AUTOMOBILE MARKETING PRACTICES STUDY* (Comm. Print 1956).

<sup>218</sup> *Automotive News*, Feb. 7, 1955, p. 1, cols. 3-5, at 48, col. 3.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

While "bootlegging" and "territorial security" were of primary interest, NADA soon began talking about coercion applied by factory representatives to take unwanted vehicles, parts, accessories, tools, and advertising as well as unfair terminations of franchises—the argument that has succeeded in some state legislatures. Undoubtedly these were real problems for some dealers. They were also related to "bootlegging" and "territorial security," or so it was said. According to this view, a new-car dealer engaged in "bootlegging" in order to get rid of the cars forced on him by the factory because of its overproduction and maldistribution.<sup>221</sup> Thus if coercion were controlled, the source of new cars appearing on used-car lots would dry up. Then, too, "territorial security" was desired not only to save a dealer's own profits but to enable him to make enough sales so that his franchise would not be canceled. If it became more difficult to cancel franchises, a dealer who wanted to make higher profits on fewer units would not need to be so concerned about invasions of his territory by neighboring dealers since convenience, lack of knowledge, and inertia would, in many cases, produce a profit that satisfied him if not his manufacturer.

*b. The Monroney Committee's Study*

In 1956, the manufacturers were to rewrite their dealer franchises to grant the dealers more benefits; the manufacturers' internal organizations were to be changed so that dealer opinion could reach top management and so actions of district managers would be reviewed; a federal statute allowing dealers to sue for damages caused by coercion was passed; and manufacturers ordered their sales organizations to change their methods of supervising dealers. The first significant event in the long process that brought about this apparent revolution was the appointment in February of 1955, of a subcommittee of the Senate Committee on Interstate and Foreign Commerce to study automobile marketing.<sup>222</sup> The subcommittee consisted of Senators Monroney (the chairman), Thurmond, and Payne.<sup>223</sup> The appointment of a subcommittee was in response to the complaints of state associations and NADA. NADA said that the investigation would be "welcomed, if not sought after."<sup>224</sup> The reason for NADA's lack of greater enthusiasm for the Monroney study might have been reflected in a report of *Automotive News* that "Republican congressmen cooperated on NADA's

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<sup>221</sup> See, e.g., *id.*, April 25, 1955, p. 1, cols. 1-2.

<sup>222</sup> *S. Hearings, Marketing Practices, Monroney 4.*

<sup>223</sup> Senator Monroney was, and is, a Democrat from Oklahoma. Senator Thurmond was a Democrat, and now is a Republican, from South Carolina. Senator Payne was a Republican from Maine.

<sup>224</sup> *Automotive News*, Feb. 7, 1955, p. 1, cols. 3-5, at 48, col. 3.



program last year. However, it is quite possible that Democratic leaders, who now head Senate committees, will go off on their own."<sup>225</sup> NADA could not be sure that the Democrats' zeal to attack big business would benefit automobile dealers.

The Monroney committee and its staff began its study in March, 1955.<sup>226</sup> The subcommittee counsel, David Busby, investigated back issues of the *Automotive News* and the materials in the NADA library. He talked with representatives of the Federal Trade Commission and the Department of Justice.<sup>227</sup> *Automotive News* stated that "NADA is holding secret meetings across the country in preparation for the investigation . . . NADA has embarked upon a series of regional meetings aimed to produce dealer witnesses when-and-if hearings are staged. . . ."<sup>228</sup> "[T]here is deep concern among manufacturers as to the public-relations aspects of the inquiry. . . ."<sup>229</sup>

Senator Monroney later described the subcommittee's activities in the spring and summer of 1955:

Senator Thurmond checked throughout South Carolina and other southern areas. Senator Payne checked throughout Maine and some points in New England. I checked Oklahoma and then held meetings in other states. These conference meetings were called with the help of . . . NADA officers in California and Florida. Mr. Busby, special counsel, cross-checked many dealers in Virginia, Maine, South Carolina, Maryland, Pennsylvania, New Jersey, New York, and the Massachusetts area. Everywhere our personal conferences were held without fanfare or publicity, and with good cross-checks and representation of dealers.

We found largely the same types of dealer trouble. To me and to the other members of the committee and to the staff, the problems we found indicated a dangerous malignancy in America's No. 1 industry.<sup>230</sup>

These informal contacts proved highly troublesome to the manufacturers since they had no way to counter the impressions created at this preliminary stage.<sup>231</sup> Moreover, Senator Payne was a former automobile dealer with

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<sup>225</sup> *Id.*, Jan. 24, 1955, p. 1, col. 3.

<sup>226</sup> *Id.*, March 21, 1955, p. 1, col. 3, p. 11, col. 1.

<sup>227</sup> *Id.*, April 4, 1955, p. 1, cols. 2-5.

<sup>228</sup> *Id.* at 1, col. 2, p. 4, col. 1.

<sup>229</sup> *Id.* at 1, col. 3.

<sup>230</sup> Monroney, *Free Markets for Free Men*, NADA Magazine, Feb. 1956, pp. 44, 45.

<sup>231</sup> The general counsel of the Ford Motor Company complained about the lack of opportunity to present both sides of the story. *S. Hearings, Marketing Practices, Monroney*, 1055-57.

his own knowledge and opinions about the business. Senator Monroney's college roommate was a General Motors dealer who thought he had been pushed around;<sup>232</sup> Senator Thurmond served in the Army Reserve with NADA's legislative counsel.<sup>233</sup> The manufacturers' only rebuttal at this stage came when, soon after he was appointed chairman of the subcommittee, Senator Monroney was approached by friends who were Ford dealers in Oklahoma. They told him he was making a mistake to investigate this area since there were no real problems.<sup>234</sup> It looked as if the dealers had been coerced to get in touch with Senator Monroney, and Ford's position was that it was against its policy to coerce dealers.<sup>235</sup> Henry Ford II was very concerned about this tactical mistake of his subordinates.<sup>236</sup>

In July, 1955, the Monroney subcommittee issued a staff report that was highly critical of the manufacturers' treatment of dealers.<sup>237</sup> The manufacturers suffered further public relations damage when a Detroit newspaper reported that the factories considered the staff report a joke and the inquiry an attempt to use the industry as a whipping boy by Senators who had been goaded into action by dealers who could not stand the competitive gaff and who objected to giving buyers "a little discount."<sup>238</sup> The story was sent out over a national wire service, and representatives of the manufacturers soon denied its truth.<sup>239</sup>

In early September, the Monroney subcommittee, in a burst of social science most unusual for Congress, sent a questionnaire to the 42,000 franchised new-car dealers in the country.<sup>240</sup> As a matter of survey technique, the first question was objectionably ambiguous, but it was undoubtedly valuable politically for just this reason. It read: "1. Do you feel there is a need for congressional study *or* Federal legislation with regard to automobile dealers' problems in the field of automobile marketing?"<sup>241</sup> Some might agree with study but oppose legislation; mixing the two gave one no

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<sup>232</sup> *Id.* at 105.

<sup>233</sup> *Id.* at 113.

<sup>234</sup> *Id.* at 725-26, 996.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Id.* at 996.

<sup>237</sup> STAFF OF SUBCOMMITTEE ON AUTOMOBILE MARKETING PRACTICES OF THE SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 84TH CONG. 1ST SESS., THE AUTOMOBILE MARKETING PRACTICES STUDY (Comm. Print 1955).

<sup>238</sup> Automotive News, Aug. 8, 1955, p. 42, col. 1.

<sup>239</sup> *Ibid.*

<sup>240</sup> N. Y. Times, Aug. 1, 1955, p. 40, col. 4.

<sup>241</sup> STAFF OF SUBCOMMITTEE ON AUTOMOBILE MARKETING PRACTICES OF THE SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 84TH CONG., 2D SESS., THE AUTOMOBILE MARKETING PRACTICES STUDY (Comm. Print 1956). (Emphasis added.)

way to determine this. Other questions concerned "bootlegging" and "territorial security." There were no questions on coercion or unfair cancellations other than a general invitation to make further comments.

*c. Senator O'Mahoney Sees an Opportunity*

The Monroney subcommittee did not have exclusive rights to dealer-manufacturer problems. Another Senate subcommittee also studied this area. This dual jurisdiction had important consequences as both dealers and manufacturers got a chance to modify positions taken before one subcommittee when they faced the second. During 1955, the subcommittee on antitrust and monopoly of the Senate Judiciary Committee was holding hearings on industrial concentration and reviewing the operations of large corporations.<sup>242</sup> General Motors was the topic of one group of hearings, and the initial sessions concerned such things as General Motors' non-automotive divisions and its competition with its suppliers in selling replacement parts to its dealers. The active members of this subcommittee were Senators O'Mahoney (the acting chairman),<sup>243</sup> Dirksen, and Wiley.<sup>244</sup>

In early November, 1955, Senator O'Mahoney announced that the Committee would look into General Motors' control over its dealers.<sup>245</sup> Harlow Curtice said that General Motors would cooperate gladly.<sup>246</sup> O'Mahoney invited dealers to testify, and said that the subcommittee would bar reprisals.<sup>247</sup> Admiral Bell of NADA criticized the hearings because they were limited to General Motors and advised dealers not to testify because the subcommittee could not protect them from reprisals.<sup>248</sup> Undoubtedly Bell was upset because Senator O'Mahoney's action might undercut the impact of the planned Monroney committee hearings. Senator O'Mahoney probably turned his subcommittee's hearings in this direction because he sensed

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<sup>242</sup> See *S. Hearings, General Motors, O'Mahoney*.

<sup>243</sup> Newsweek gave its view of the senator in the following language:

After nineteen years in the U.S. Senate, 71-year-old Joseph C. O'Mahoney, the Wyoming Democrat, thinks that no matter how much investigating may be done, there is always more to do. As chairman of the Temporary National Economic Committee (TNEC), he spent three years before Pearl Harbor in a marathon study of the economy. This week, as chairman of the Senate Antitrust and Monopoly Subcommittee, O'Mahoney was still at it. His subject this time: General Motors. Newsweek, Nov. 28, 1955, p. 89, col. 1.

<sup>244</sup> Senator Dirksen was, and is, a Republican from Illinois, and Senator Wiley was a Republican from Wisconsin. Senators Kefauver and Hennings were the other Democrats on the subcommittee, but they took little part in these hearings.

<sup>245</sup> N.Y. Times, Nov. 1, 1955, p. 61, col. 8.

<sup>246</sup> Automotive News, Nov. 7, 1955, p. 2, col. 5, p. 72, col. 1.

<sup>247</sup> N.Y. Times, Nov. 24, 1955, p. 30, col. 5.

<sup>248</sup> *Id.*, Nov. 27, 1955, p. 72, col. 3.

that he could embarrass General Motors more effectively in this area than his committee had been able to in its study of economic concentration.<sup>249</sup> After some hurried negotiations with the Senator, NADA decided to make use of the O'Mahoney committee, and on November 29, it fired the opening shot in a long congressional battle.<sup>250</sup> Admiral Bell and Professor Charles Hewitt of the University of Indiana School of Business<sup>251</sup> appeared and discussed the dealers' problems, attempts to deal with the manufacturers, and poor position before the courts. Then thirteen former dealers and one current dealer told the Committee of their experiences with General Motors<sup>252</sup>—two of the group were Lee Anderson and J. E. Travis, whose stories evoked sympathy and indignation.<sup>253</sup> The dealers painted a picture of overproduction, a sales race, coercion to take cars and establish sales leadership by dishonest advertising and "packing" prices, arbitrary cancellations of ethical dealers, lack of fairness in internal appeal procedures, and unfair prices when canceled dealers tried to sell out because manufacturers refused to give franchises to qualified buyers and tried to protect a new dealer's capital by not allowing him to pay too much for the canceled dealer's assets.

These dealers told a shocking story, and the hearings attracted the attention of the press, news magazines, and television. "[R]eporters were crowded shoulder to shoulder around press tables."<sup>254</sup> General Motors was scheduled to begin its presentation on Friday, December 2, in the morning.

<sup>249</sup> See *S. Hearings, General Motors, O'Mahoney* 3156 *passim*, where General Motors was not embarrassed. Time, in its usual objective fashion, commented, "New Dealing Senator Joseph C. O'Mahoney of Wyoming likes to play the role of a giant killer with a special shillelagh cocked for big business. Since General Motors is a giant . . . it was the logical target. . . ." *Time*, Nov. 28, 1955, p. 91, col. 2.

From a publicity standpoint, Senator Joseph C. O'Mahoney's four-week investigation of General Motors was turning out to be a dismal flop. Finally, last week, Joe O'Mahoney landed his antitrust hearings on Page One. To a packed Senate hearing room he brought 14 G.M. dealers (out of 17,000) who charged they had been badly used by G.M.

*Time*, Dec. 12, 1955, p. 96, col. 3.

<sup>250</sup> *S. Hearings, General Motors, O'Mahoney* 3156-58, 3159-89.

<sup>251</sup> *Id.* at 3191-234. Professor Hewitt has been described as "the dealers' professor." Interview. He served as a consultant to NADA in 1955 and 1956, and he participated in the drafting of the proposed bills that came before the 84th Congress. Undoubtedly his statements and writings have helped the dealers far more than the manufacturers. See HEWITT, *AUTOMOBILE FRANCHISE AGREEMENTS* (1956); Hewitt, *The Furor Over Dealer Franchises*, 1 *Business Horizons* 80 (Winter 1958).

<sup>252</sup> *S. Hearings, General Motors, O'Mahoney* 3234-481.

<sup>253</sup> "Senator WILEY. I was very much impressed with his [Travis] integrity and fairness this morning. And it seemed to me that after years of association with that business that he got a raw deal." *Id.* at 3261. Lee Anderson said that several Senators told him, they voted for the Good Faith Act with reservations but were moved to favor it by the free speech issue involved in his case. Finlay, *Dealer Forum*, *Automotive News*, Sept. 8 1958, p. 3, cols. 1-2.

<sup>254</sup> *Id.*, Dec. 12, 1955, p. 16, col. 1. See note 249 *supra*.

However, when Harlow Curtice and the other General Motors officials arrived at the hearing room, they were told by Senator O'Mahoney that there were three more dealer witnesses to be heard. Curtice appeared "quite startled" and started to leave.<sup>255</sup> Senator O'Mahoney told him to remain, and Curtice stayed to listen to a Pontiac dealer call him "a bully of the greatest magnitude."<sup>256</sup> Moreover, a press photographer took a picture of Curtice and other General Motors officials being confronted by three angry dealers. The picture made the front page of the *New York Times* the next morning.<sup>257</sup> Also Curtice and Senators O'Mahoney and Wiley appeared on television at the beginning of the hearings.<sup>258</sup> It is obvious that presentations at the hearings were timed for the best news coverage.<sup>259</sup> In short, the hearings were planned to serve an "educational" function, and they succeeded to a great extent.

At first, General Motors' strategy seemed only one of attack. For example, shortly before NADA made its presentation, Henry Hogan, General Motors' general counsel, charged that the dealer talks "poverty with a ham under his arm."<sup>260</sup> Harlow Curtice began his statement to the subcommittee by showing how well off General Motors dealers were.<sup>261</sup> The company's theme was that almost all dealers were extremely prosperous and happy, and that only a handful of inefficient dealers were complaining.<sup>262</sup>

However, the results of NADA's publicity campaign, which was assisted by Senator O'Mahoney, cast doubt on the effectiveness from a public relations standpoint of trying to do no more than argue that no real problem existed.<sup>263</sup> Thus at the beginning of the hearings on Monday morning, December 6, Harlow Curtice said:

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<sup>255</sup> *Ibid.*

<sup>256</sup> *S. Hearings, General Motors, O'Mahoney* 3447. The comment was publicized in *Newsweek*, Dec. 19, 1955, p. 71, cols. 1, 3.

<sup>257</sup> *N.Y. Times*, Dec. 3, 1955, p. 1, col. 2.

<sup>258</sup> *S. Hearings, General Motors, O'Mahoney* 3472.

<sup>259</sup> See *id.* at 3705.

<sup>260</sup> *Newsweek*, Dec. 5, 1955, p. 82, cols. 2, 3.

<sup>261</sup> *S. Hearings, General Motors, O'Mahoney* 3492, 3501-04.

<sup>262</sup> *Id.* at 3499-500.

<sup>263</sup> Time reports its version of what happened between the Friday when General Motors began its presentation and the Monday morning when it continued:

The committee system can move fast when it has to: for example, after the lamentations of a few G.M. dealers were widely publicized in the hearings before Wyoming's Senator Joseph C. O'Mahoney last month . . . Curtice and the Operations Policy Committee went into session one Sunday, came out that evening with a far-reaching decision to extend all G.M. dealers' contracts from one to five years. This also indicated how the committee system can put pressure on Curtice. He thought that the complaints of dealers were exaggerated, that he did not have to pay much attention to them. But other top men thought that Curtice was wrong and they made no bones about saying so.

*Time*, Jan. 2, 1956, p. 46, col. 1, at 53, col. 2.

Within the last few days the public has been grossly misinformed by widespread publicity given to misleading statements made by witnesses, including the few complaining dealers who have appeared before this committee.

Because of the public misunderstanding and the possible damage to General Motors good will . . . I feel impelled to do what I have not considered necessary heretofore—namely, to formalize a continuing long-term relationship with our dealers, which for all practical purposes has been in effect in General Motors for many years.<sup>264</sup>

He then said that he had offered all 17,000 General Motors dealers a five-year selling agreement that could not be terminated but for cause.<sup>265</sup> This was front page news<sup>266</sup> of a kind more to Mr. Curtice's taste.

Clearly, the company had made an impressive gesture that was to be of great benefit to dealers, but it had not conceded that any problem existed. It returned to the attack,<sup>267</sup> and it countered the story of each dealer who had appeared before the subcommittee and said that their allegations were false.<sup>268</sup> It probably was least effective in the cases of Anderson and Travis, the two dealers whose rights of "free speech" had been impaired.<sup>269</sup> Generally, the rebuttal was telling since most of the complaining dealers had been canceled for lack of sales and thus were vulnerable to charges of inefficiency. However, apparently the rebuttals did not get equal time in the mass media and attained less prominence than the charges.<sup>270</sup> Moreover, the subcommittee allowed each of the complaining dealers to file a sworn reply to the rebuttal which was printed in the record of the hearings immediately after General Motors' contentions about each dealer.<sup>271</sup> At times relations between Mr. Curtice and Senator O'Mahoney were tense,<sup>272</sup> and later Curtice was to talk of the "emotional" atmosphere.<sup>273</sup>

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<sup>264</sup> *S. Hearings, General Motors, O'Mahoney* 3555.

<sup>265</sup> *Id.* at 3556, 3688-98.

<sup>266</sup> *N.Y. Times*, Dec. 7, 1955, p. 1, col. 2.

<sup>267</sup> "[O]ther G.M. brass handled the skirmishing, Curtice stuck to grand strategy." *Newsweek*, Dec. 19, 1955, p. 71, cols. 1, 2.

<sup>268</sup> *S. Hearings, General Motors, O'Mahoney* 3709-73.

<sup>269</sup> *Id.* at 3562 ("Mr. CURTICE. He [Anderson] has never liked us, you know."), 3713-21, 3724-26 (G.M. asserted Travis had inadequate sales but made no rebuttal of his charges that standards were applied unfairly because of admitted false registration practices of G.M. and made no comment on the fact that Travis did well in sales contests.)

<sup>270</sup> Note the absence of entries in the *New York Times Index* for Dec. 1-15, 1955.

<sup>271</sup> *S. Hearings, General Motors, O'Mahoney* 3711-13, 3721-23, 3726-28, 3734-37, 3747-49, 3752-57, 3762-64, 3766-68.

<sup>272</sup> See, e.g., *N.Y. Times*, Dec. 2, 1955, p. 56, col. 1; *S. Hearings, General Motors, O'Mahoney* 3541-42.

<sup>273</sup> *S. Hearings, Marketing Practices, Monroney* 687.

On December 9, 1955, the last day of the O'Mahoney subcommittee's hearings, Senator Monroney sent Senator O'Mahoney a telegram with a summary of General Motors dealers' responses to the questionnaire that the Monroney subcommittee had sent out in September. Of the 17,000 General Motors dealers, 8,276 had replied at that time, and 6,047 of them favored congressional study or legislation in the field of automobile marketing.<sup>274</sup> These responses to the ambiguous first question were released to the press<sup>275</sup> to rebut General Motors' contention that all but a few inefficient dealers were content.

General Motors' position was further weakened<sup>276</sup> by another event. George Romney, president of the newly formed American Motors Corporation, on December 19, announced a sweeping program to improve dealer relations with AMC.<sup>277</sup> The essence of this program was the creation of new channels of communication from dealer to top management and a board to hear appeals from franchise cancellations. Romney was at the beginning of his campaign for the "compact car" and his war on the "gas-guzzling monsters" produced by his competitors, and he was willing to break ranks and concede that there were major problems in automobile marketing. He netted some favorable publicity for AMC and helped his sales staff recruit and retain good dealers.<sup>278</sup>

#### *d. The Monroney Hearings*

The second round of the fight began on January 19, 1956, when Senator Monroney's subcommittee to study automobile marketing practices began

<sup>274</sup> *S. Hearings, General Motors, O'Mahoney* 4073-74.

<sup>275</sup> See *N.Y. Times*, Dec. 10, 1955, p. 27, col. 1.

<sup>276</sup> Time did not conclude that General Motors' position had been weakened at all. What had O'Mahoney accomplished? The hearings showed that G.M. executives did their homework before they took the stand, that they freely cooperated with the committee, and that they ran a highly efficient business. While some of G.M.'s 17,000 dealers were clearly sore, the records proved that even they had done well. Quipped one newsman: "It's just an argument between big millionaires and little millionaires." In what O'Mahoney had originally billed as a full-dress probe into big business, G.M. had come off well. *Time*, Dec. 19, 1955, p. 86, cols. 1, 3. Time aided General Motors' public relations by naming Harlow Curtice "Man of the Year" for 1955. *Time*, Jan. 2, 1956, p. 46, cols. 1-3.

<sup>277</sup> *N.Y. Times*, Dec. 19, 1955, p. 10, col. 1.

<sup>278</sup> In an advertisement directed to dealers, American Motors earlier had pointed a finger at the larger manufacturers:

There are two ways for a car-maker to achieve volume sales in the automobile business today.

One is to build a flood of cars, load them up on a dealer, and let him sweat it out. The factory makes the money—the dealer cuts his profit per car.

The other way is to make volume selling so profitable to a dealer that he will double and triple his volume on his own hook.

AMC asserted that Nash and Hudson followed the second method. *Automotive News*, Jan. 24, 1955, pp. 60-61.

its hearings. The subcommittee released a report<sup>279</sup> setting out the results of the questionnaires in great detail. Senator Monroney stated:

The subcommittee for the last 10 months has attempted to avoid unduly disturbing the industry. It has quietly gone about gathering data and facts, and has hoped its mere presence would bring about reforms necessary. This failing, the subcommittee now hopes that the spotlight of public attention will do much to alleviate the situation. That failing, legislative action may be necessary.<sup>280</sup>

The first witness was George Romney of American Motors.<sup>281</sup> He conceded that there were abuses in automobile marketing for which American Motors and its competitors were at least partially responsible.<sup>282</sup> He said that the manufacturers had forgotten the wisdom of Alfred P. Sloan, Jr., the former president of General Motors, who had retired at the end of World War II.<sup>283</sup> Sloan had called for a program to develop "quality dealers" who sold cars ethically and profitably.<sup>284</sup> In the 1950's, Romney stated, Ford had challenged Chevrolet's sales leadership and overproduction had followed.<sup>285</sup> Cars were pushed on dealers who had to "bootleg," "pack" prices, and unethically advertise to meet quotas.<sup>286</sup> Romney called the situation "a crisis."<sup>287</sup> Needless to say, these deviationist views were not popular in Detroit.<sup>288</sup> The subcommittee then heard Admiral Bell<sup>289</sup> and another group of complaining dealers.<sup>290</sup> The subcommittee still was largely limited to canceled dealers because those with existing franchises had too much to lose. It was reported that Senator Monroney had some 20,000 letters from dealers, but in most instances he had been requested not to disclose the name of the sender for fear of reprisal by the manufacturers.<sup>291</sup>

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<sup>279</sup> SUBCOMMITTEE ON AUTOMOBILE MARKETING PRACTICES OF THE SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 84TH CONG., 2D SESS., THE AUTOMOBILE MARKETING PRACTICES STUDY (Comm. Print 1956).

<sup>280</sup> S. Hearings, *General Motors, O'Mahoney* 4.

<sup>281</sup> *Id.* at 7-89.

<sup>282</sup> *Id.* at 11.

<sup>283</sup> *Id.* at 47.

<sup>284</sup> *Id.* at 80-87.

<sup>285</sup> *Id.* at 14, 22-24, 27, 30, 65.

<sup>286</sup> *Id.* at 38.

<sup>287</sup> *Id.* at 63-64.

<sup>288</sup> *Id.* at 1301.

<sup>289</sup> *Id.* at 91-127.

<sup>290</sup> *Id.* at 169-368.

<sup>291</sup> *Automotive News*, Jan. 16, 1956, p. 2, cols. 4-5.



The hearings were then recessed until after the NADA convention.<sup>292</sup> At that convention Senators O'Mahoney and Monroney were featured speakers. Senator Monroney explained the strategy and function of the hearings by his subcommittee:

You know we didn't put [George Romney] . . . on just by accident as our opening witness. We wanted to show some of the big boys what some of their new competition was willing to do for dealer partnership, and we are going to work up on our hearings. We are going to take next Studebaker-Packard. We are going to take Chrysler, and we are going to have a nice little sandwich—General Motors between Ford and Chrysler. We are going to have ample testimony from dealers, and we are going to document this story on the front pages under the Washington spotlight for all this country to see exactly what is happening.<sup>293</sup>

At this point, matters were not going particularly well for the manufacturers. General Motors began making some strategic moves. On February 3, Harlow Curtice issued a statement to the press that laws in the manufacturer-dealer area were not needed,<sup>294</sup> and on February 11, he unveiled the new 1956 model dealer contract<sup>295</sup> which he had announced at the O'Mahoney hearings on December 2, 1955.<sup>296</sup> A principal feature was the previously announced five-year term, but the selling agreement also contained a whole cluster of other benefits for the dealer. For example, dealers could nominate a successor, widows of dealers got more benefits, General Motors paid more for warranty work, and the dealer would receive a greater allowance at the end of the model year for cars still in stock to aid in "clean up." NADA publicly praised the changes.<sup>297</sup>

On February 13, *Automotive News* reported that, according to a nationwide survey, factory pressure on dealers had eased since the hearings began.<sup>298</sup> The dealers interviewed thought that this was temporary. However, sales were down, and many dealers conceded that the factory had to push dealers just as the dealers pushed their salesmen. Dealers representing Studebaker, Nash, and Hudson reported that they were under little pres-

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<sup>292</sup> *Ibid.*

<sup>293</sup> Monroney, *Free Markets for Free Men*, NADA Magazine, Feb. 1956, pp. 44, 52.

<sup>294</sup> N.Y. Times, Feb. 3, 1956, p. 1, col. 3.

<sup>295</sup> *Id.*, Feb. 11, 1956, p. 22, col. 6.

<sup>296</sup> *S. Hearings, General Motors, O'Mahoney* 3555.

<sup>297</sup> N.Y. Times, Feb. 14, 1956, p. 31, col. 4.

<sup>298</sup> *Automotive News*, Feb. 13, 1956, p. 1, cols. 2-3, at 43, col. 3. Time reported that the concessions were not caused as much by the hearings as by large inventories of unsold cars. Time, Feb. 2, 1956, p. 80, col. 3.

sure and had not been subjected to it; the problem primarily involved Ford and General Motors.<sup>299</sup>

General Motors completed its action to head off criticism and legislation. On March 2, Harlow Curtice talked to General Motors' wholesale staff and many dealers throughout the country by closed circuit television.<sup>300</sup> He explained the new selling agreement, stated that no additional dealers would be appointed in 1956, said that gimmick sales devices should cease, and pointed out that the wholesale staff had a responsibility to see that dealers were profitable. The circumstances indicated to the zone and district managers watching that Curtice was not just talking for public relations but that he meant what he said.<sup>301</sup>

On March 8, the top officials of General Motors once again visited Washington at the invitation of the United States Senate.<sup>302</sup> This time the reception they received from Senator Monroney was much more friendly than that provided by Senator O'Mahoney in December of the previous year. Instead of spending his time primarily answering complaints by angry canceled dealers, Harlow Curtice now could talk about his new program for dealers,<sup>303</sup> and take pride in his industry leadership.<sup>304</sup> He also could talk about General Motors' new vice-president in charge of dealer relations.<sup>305</sup> This idea was very appealing to Senator Monroney.<sup>306</sup> Now there would be a channel of communication from the dealers to top management independent of the sales staffs of the various divisions. In theory, the generals could learn what was happening at the firing line.

On March 6 and 7, the effects of a well-organized campaign by state and local dealer trade associations became apparent. Ultimately, 34 Representatives and 14 Senators testified in favor of some legislative help for dealers, and 21 Representatives and 11 Senators wrote letters to the Committee.<sup>307</sup> They were prompted by requests from their dealer constituents.<sup>308</sup> The tenor of many of their remarks is, perhaps, shown by Senator Goldwater's comment: "I have been ashamed of those people in Detroit who have not

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<sup>299</sup> *Automotive News*, Feb. 13, 1956, p. 1, cols. 2-3, at 43, col. 3.

<sup>300</sup> *S. Hearings, Marketing Practices, Monroney* 732-33, 825-35.

<sup>301</sup> *Ibid.*

<sup>302</sup> *Id.* at 683-817.

<sup>303</sup> See, e.g., *id.* at 689-95.

<sup>304</sup> See, e.g., *id.* at 707.

<sup>305</sup> *Id.* at 712-13.

<sup>306</sup> *Id.* at 62-63, 183.

<sup>307</sup> See, e.g., *id.* at 473-682.

<sup>308</sup> See, e.g., *id.* at 657, 661, 666-67, 1308-16.

been able to see this situation developing in this country and who have not bent over backwards to correct it. . . ."<sup>309</sup>

Henry Ford II and the top officials of the Ford Motor Company appeared before the subcommittee on March 12, 1956.<sup>310</sup> In many ways, Ford was in even a weaker position than General Motors had been in at the O'Mahoney hearings the previous December. Henry Ford II had to concede that in his grandfather's day at Ford—prior to 1946—many of the abuses complained of had taken place. He said:

[B]ut you must realize, and I don't think this is a condemnation of our company, but in the old days some strange things did happen and we had to rebuild our company from top to bottom and many of the people in the sales department weren't of the new type of organization that we tried to build starting in 1945, and were thinking in a different way. . . .

We have recently made several personnel changes in the Ford Division and we think that these changes are going to help the situation. . . .<sup>311</sup>

He admitted that in the "old days" dealers had been coerced to donate expensive gifts to zone managers to keep their good will.<sup>312</sup> He said that the hearings had allowed him to learn of problems he shared with his competitors and the solutions they had adopted.<sup>313</sup> Robert McNamara, then head of the Ford Division, was forced to admit that the advertising of the largest chain of Ford dealerships was "disgraceful."<sup>314</sup> An exhibit was introduced to show that in 1953, this chain's advertising was held up to Ford dealers as a model.<sup>315</sup> The Ford Motor Company was made to appear as if its representatives advocated misleading advertising as a standard practice. Reading the hearings today, I think Ford's reply to this charge, at best, can be called evasive.<sup>316</sup> On the other hand, Ford did a good job of rebutting the charges made against it by dealers it had canceled and who had testified at the hearings.<sup>317</sup>

At one point, Henry Ford II expressed confidence that his dealer councils within the company actually represented dealer opinion and not just what

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<sup>309</sup> *Id.* at 557.

<sup>310</sup> *Id.* at 957-1060.

<sup>311</sup> *Id.* at 990.

<sup>312</sup> *Ibid.*

<sup>313</sup> *Id.* at 1059.

<sup>314</sup> *Id.* at 994.

<sup>315</sup> *Id.* at 995, 1066-78.

<sup>316</sup> *See, e.g., id.* at 993-95.

<sup>317</sup> *See, e.g., id.* at 1035-43.

the members thought was safe to say. Senator Monroney lectured Ford about what the dealers thought would happen if an unpleasant view were voiced at such a meeting. He had been told of instances where the conversations at these meetings had been reported back to a dealer's district manager and road man to be used against the dealer. Ford could not deny these stories.<sup>318</sup>

Ford did not fare well at this hearing.<sup>319</sup> Undoubtedly Ford had pushed its dealers very hard in its effort to catch Chevrolet, and its dealer force was restless under the pressure. Whether or not the spur applied to most Ford dealers was just good business or outrageous is a matter of one's values. However, many dealers viewed Ford as the principal villain in this story. After the Ford presentation, the "informational" or public relations phase of the Monroney committee's hearings ended. While General Motors and American Motors had taken the lead in reforming their agreements and procedures, Ford had taken no action and many dealers became impatient.<sup>320</sup> Ford reacted on April 19. Henry Ford II stated that he was opposed to any legislation to control dealer relations.<sup>321</sup> On April 20, Ford announced an elaborate program, including franchise changes and a Dealer

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<sup>318</sup> Senator MONRONEY. . . . These individual Ford dealers do not feel that in the dealer councils they have the freedom to initiate action without fear of reprisal.

Mr. FORD. Well, if that is true, and I can't say that it is not true, I am sorry that it is true, and we are doing everything that we possibly can to eradicate it.

*Id.* at 990.

Earlier Henry Ford II, commenting about his dealer councils, said:

The plan works and it works well. It will work *even better* in the future since we *now* afford our national council an opportunity to discuss any ultimately unresolved questions with staff officers of the company in meetings at which representatives of the car divisions will not be present.

*Id.* at 975. (Emphasis added.)

<sup>319</sup> Statements such as the following, while conciliatory, did not help the manufacturers in their attempt to argue that there were no problems:

Senator MONRONEY. . . . Some of these older dealers can be led and convinced but they can't be driven, and in many cases I get the feeling in countless interviews that they have the feeling that they are being driven without choice into a merchandising system which they abhor and which you yourself abhor.

Mr. FORD. Mr. Chairman, if we are driving them, we don't have the right people running our sales department. That is all I can tell you. There is no way to get along with anybody in any kind of business or in any kind of relationship if you are going to drive them. . . .

I hope they are not driven. I hope that isn't the case, but if it is, we are going to do something about it.

*Id.* at 996.

<sup>320</sup> Admiral Bell stated that NADA, as a result of the hearings, had excellent relations with four manufacturers which he named. Ford was omitted pointedly. *Id.* at 1248. He also said, "In the case of every manufacturer but one, there are excellent communications and a businesslike and wholesome relationship between NADA and the factory top management." NADA Magazine, June 1956, p. 11.

<sup>321</sup> N.Y. Times, April 29, 1956, § II, p. 55, col. 3.

Policy Board under Benson Ford, a brother of Henry Ford II.<sup>322</sup> From then on, the Ford Motor Company took the lead for the manufacturers in seeking to block legislation in this area.

*e. The Road to Legislation*

Legislation was introduced by Senators O'Mahoney and Monroney on May 18. S. 3879<sup>323</sup> would have allowed dealers to recover double damages and attorneys' fees where manufacturers had failed to act in "good faith" in dealing with the dealer or in canceling or failing to renew a dealer's franchise.<sup>324</sup> The bill defined "good faith" as

. . . the duty of the automobile manufacturer . . . to act in a fair, equitable, and nonarbitrary manner so as to guarantee the dealer freedom from coercion . . . or intimidation, and in order to preserve and protect all the equities of the automobile dealer which are inherent in the nature of the relationship between the automobile dealer and automobile manufacturer.<sup>325</sup>

This definition of good faith required more than freedom from coercion. The manufacturer had to act fairly "in order to preserve . . . all the equities of the . . . dealer," whatever those equities might be. Enactment of this statute would not have pleased the manufacturers. The balance of power could have swung sharply to the dealers since even a dealer with poor sales might be said to have "equities." NADA supported this statute; it had a major part in drafting the bill.<sup>326</sup>

Chrysler, on May 27, got into the act and set up a group of executives charged with finding ways to give dealers direct contact with top management and to improve the franchise.<sup>327</sup> On May 30, General Motors sought to perfect its argument that no legislation was needed by following a suggestion made at the O'Mahoney subcommittee hearings. General Motors named a retired federal judge as the impartial umpire to decide dealer-company disputes.<sup>328</sup> Internal "due process" was improving.

The Senate Judiciary Committee approved S. 3879, the "Good Faith" bill now known as the "Dealer's Day in Court Act," on May 31, although

<sup>322</sup> N.Y. Times, April 20, 1956, p. 50, col. 8.

<sup>323</sup> S. 3879, 84th Cong., 2d Sess. (1956).

<sup>324</sup> Admiral Bell commented, "I do not see how any reasonable person can oppose the concept of 'good faith' and 'equity.'" NADA Magazine, June 1956, p. 11.

<sup>325</sup> S. 3879, 84th Cong., 2d Sess. § 1(e) (1956); S. *Hearings, Marketing Practices*, Monroney 1237.

<sup>326</sup> Interview.

<sup>327</sup> N.Y. Times, May 28, 1956, p. 38, col. 2.

<sup>328</sup> *Id.*, June 1, 1956, p. 36, col. 2.

no hearings on the provisions of this bill had been held.<sup>329</sup> The bill's proponents now were racing to get enactment before the adjournment of the second session of the 84th Congress and before the 1956 presidential political season began.

The Monroney subcommittee resumed its hearings on June 4, 1956. Senator Monroney then announced his Omnibus bill,<sup>330</sup> designed to pick up various ideas on regulating manufacturer-dealer relations (including most of the thirty bills then pending).<sup>331</sup> Under this bill coercion to take cars, parts, accessories, and other items was named an unfair trade practice to be policed by the Federal Trade Commission. Contracts between manufacturers and dealers would have to spell out the dealer's obligations rather than use the then common practice of demanding performance "to the Company's satisfaction." Dealers with excess stocks of cars would have to offer them to their manufacturers for repurchase, and the manufacturers would have to buy them back if this was "consistent with the financial resources of such manufacturer."<sup>332</sup> While the manufacturers found the "Good Faith" bill highly objectionable, Senator Monroney's Omnibus bill would have been disastrous from their point of view.<sup>333</sup> NADA supported the Omnibus bill, but many of its members would not have been pleased by regulation by the FTC.

The two bills prompted alarmed action from the Ford Motor Company to ward off what they saw as a real threat to their business. On June 12, Henry Ford II wrote letters to members of Congress opposing the legislation.<sup>334</sup> The manufacturers found some allies. A representative of the National Grange testified before the Monroney committee that his organization was concerned that the bills would fence in dealers against competition and therefore increase prices.<sup>335</sup> Perhaps more significant, William P. Rogers, Deputy Attorney General, wrote Senator O'Mahoney about the Eisenhower Administration's views on both the Omnibus and the Good Faith bills.<sup>336</sup> In short, he said that the Administration did not like them. While it had no strong objection to legislation dealing with coercion, it op-

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<sup>329</sup> 102 CONG. REC. 10572 (1956).

<sup>330</sup> S. 3946, 84th Cong., 2d Sess. (1956), reproduced in *S. Hearings, Marketing Practices, Monroney* 1232-33.

<sup>331</sup> Many of the pending bills are reproduced in *id.* at 1206-25.

<sup>332</sup> S. 3946, 84th Cong., 2d Sess. § 17(a) (2) (1956).

<sup>333</sup> Ford's general counsel called the Omnibus bill "frightening." *S. Hearings, Marketing Practices, Monroney* 1334.

<sup>334</sup> N.Y. Times, June 13, 1956, p. 74, col. 8.

<sup>335</sup> *S. Hearings, Marketing Practices, Monroney* 1264-83.

<sup>336</sup> The letter is reprinted in *H.R. Hearings, Dealer Franchises, Celler* 18-19.

posed any legislative authorization for "territorial security" or prohibition against "bootlegging" because such provisions would protect franchised dealers at the cost of denying consumers the benefits of competition. For the same reasons, it also opposed the language in the Good Faith bill that required the manufacturer to act in a "fair . . . manner . . . in order to preserve and protect all the equities of the . . . dealer which are inherent in the nature of the relationship. . . ." <sup>337</sup> Rogers argued that a dealer with a large investment might have an equity in a certain margin of profit, that the manufacturer would have to produce and operate to protect that margin rather than to get as many cars as possible sold to customers at the lowest price. Thus the language could build "for dealers a sanctuary from the rigors of competition. . . ." <sup>338</sup> These comments were consistent with the antitrust philosophy of the Department of Justice. Conveniently, they also pleased Ford and General Motors whose officers were supporters of the Eisenhower campaign for re-election. Of course, the Administration's position may well have been the best one for the total public interest; it is a happy event when what is good for a particular political party is good for the United States.

Next, the Ford Motor Company attempted to make the classic divide-and-conquer move in legislative strategy. On June 18, Henry Ford II invited about 125 Ford, Mercury, and Lincoln dealers to Dearborn, Michigan, to a meeting to be held on June 20 to discuss the pending legislation. <sup>339</sup> Most of these dealers were members of NADA. If they could be induced to oppose the bills, doubt could be cast on NADA's right to speak for the nation's dealers. If the dealers were divided on the desirability of the Good Faith and the Omnibus bills, many members of Congress would not be eager to force a statute on them which was supposed to be for their benefit. The manufacturers had a respectable case to make against these bills, but they could not hope to persuade NADA that it was wrong because it was too far committed at this point. So the only practical recourse open to the manufacturers was to present the case to the dealers as individuals. <sup>340</sup> The meeting could accomplish both divide-and-conquer and educational ends.

The next day the Good Faith bill was passed by the Senate by a vote of 75 to one, with 19 not voting. <sup>341</sup> Senator Potter of Michigan cast the one

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<sup>337</sup> *Ibid.*

<sup>338</sup> *Id.* at 19.

<sup>339</sup> The meeting is described in *id.* at 6-9, 107-14.

<sup>340</sup> Ford's general counsel said, "If they [the dealers] knew the implications of this bill and knew that as a result of this bill you could not get rid of inefficient dealers who were operating in good faith, they would be against it." *Id.* at 381.

<sup>341</sup> 102 CONG. REC. 10588 (1956).

vote against the bill, complaining of the lack of hearings and representation of consumer interests.<sup>342</sup> Several amendments were made on the floor of the Senate to satisfy Senators Curtis and Bricker.<sup>343</sup> The bill was given "mutuality" by allowing the manufacturer to show as a defense that the dealer had not dealt in good faith, and the provision for double damages was modified to allow recovery of only the dealer's actual damages. NADA's representatives had been prepared to make concessions to get a bill passed.<sup>344</sup> Senator Case questioned Senators O'Mahoney and Monroney about the meaning of "good faith," and established as legislative history that it was not intended to create a perpetual franchise, that the manufacturers could add new dealers where the market justified them, and that a dealer had no right to "bootleg" cars to used-car dealers.<sup>345</sup>

On June 20, the meeting between the management of Ford and their selected dealers was held in Dearborn.<sup>346</sup> After Henry Ford II's opening remarks, and William T. Gossett's (Ford's general counsel) explanation of the two bills and their defects, Ernest R. Breech (Ford's chairman of the board) "summarized the concern of the company that the proposed legislation, if passed, would disrupt and perhaps destroy the whole authorized dealer system of automotive distribution."<sup>347</sup> Then the dealers present held their own meeting, set up an organization to oppose the two bills, and adopted a statement stressing that the Good Faith bill would protect "bootleggers" since their franchises could not be canceled nor could they be ordered to stop sales to used-car dealers. The dealers appear to have been most concerned about the Omnibus bill and its impact, but their displeasure with it overflowed and led them to condemn any and all legislation. The statement also indicated the effectiveness of Mr. Breech's point as it asserted that the proposed legislation would endanger the franchise system because "manufacturers may well be forced to seek entirely new methods of distributing, selling, and servicing the cars and trucks they make. . . ." <sup>348</sup> This statement was printed and circulated by the Ford Motor Company to all of its 9,000 dealers, with a suggestion that they communicate their opposition to their Senators and Representatives. Each of the dealers attending the meeting was to return to his community, arrange local meetings,

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<sup>342</sup> *Id.* at 10587, 10588.

<sup>343</sup> *Id.* at 10587.

<sup>344</sup> Interview.

<sup>345</sup> 102 CONG. REC. 10583-85 (1956).

<sup>346</sup> *H.R. Hearings, Dealer Franchises, Celler 6-9, 107-14.*

<sup>347</sup> *Id.* at 107.

<sup>348</sup> *Ibid.*



educate dealers, and get appropriate resolutions against the bills sent to Congress.<sup>349</sup> Admiral Bell of NADA later commented, "It's well organized, all right, and I take off my hat to those who dreamed it up."<sup>350</sup>

Clearly, NADA had to counter this rebellion from the ranks. On June 30, the Ford group at the New York State Automobile Dealers' Association meeting backed the Good Faith bill and stated that the Ford dealers who went to Dearborn were not representative of most Ford dealers.<sup>351</sup> Senator O'Mahoney was the first witness when the antitrust subcommittee of the House Committee on the Judiciary began hearings on the Good Faith bill on July 2. He made great effort to discredit the Dearborn meeting and the lobbying against the bill that had taken place. He contended that the Dearborn dealers' organization was a "company union" motivated by fear of reprisals. He argued that the activity on the part of the Dearborn dealers showed Ford's power to coerce and that voluntary action by manufacturers was not enough.<sup>352</sup>

A number of dealers testified against the Good Faith bill, and most appear to have been moved to do so by the Dearborn meeting.<sup>353</sup> Chairman Celler kept questioning them about Ford's stage managing and direction of appearances before the subcommittee.<sup>354</sup> Many hotly denied charges that they were not expressing their own views freely,<sup>355</sup> but one conceded that an assistant general counsel of Ford had given him a great deal of help in writing his statement.<sup>356</sup> Some dealers who appeared attacked NADA's officers for pushing a bill without informing its members of the consequences of the bill.<sup>357</sup> Chairman Celler, who obviously favored some version of the bill from the outset of the hearings, allowed Admiral Bell of NADA to reply to these charges very soon after they were made.<sup>358</sup>

The response from Ford dealers to the requests from the Dearborn dealers organization for communications to Congress opposing the Good Faith bill was very small. One release said that only 19 letters and telegrams were received from Ford dealers opposing the bill, and of these, 12 were from branches of a single dealership in California.<sup>359</sup> There is some reason

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<sup>349</sup> *Ibid.*

<sup>350</sup> NADA Magazine, July 1956, p. 13.

<sup>351</sup> N.Y. Times, July 1, 1956, p. 40, col. 1.

<sup>352</sup> H.R. Hearings, Dealer Franchises, Celler 6-11.

<sup>353</sup> *Id.* at 100-27, 138-48, 220-33, 457-67.

<sup>354</sup> See, e.g., *id.* at 104, 115, 144-45, 147-48.

<sup>355</sup> *Id.* at 104, 125-26, 127.

<sup>356</sup> *Id.* at 105.

<sup>357</sup> *Id.* at 115, 119, 121, 142.

<sup>358</sup> *Id.* at 122-23, 137.

<sup>359</sup> Automotive News, July 2, 1956, p. 1, col. 2.

to doubt these figures because NADA and Senator O'Mahoney reacted as if there was a far more serious threat posed by the Dearborn meeting.<sup>360</sup> In any event, the Dearborn dealers did not succeed in their effort to show real division among dealers.

On July 9, Robert Bicks, then legal assistant to the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, appeared before the House subcommittee considering the Good Faith bill.<sup>361</sup> He restated the administration's opposition to the "equities of the automobile dealer" language in the bill. On the same day, Secretary of Commerce Sinclair Weeks wrote to Chairman Celler to oppose the bill. He repeated the manufacturers' basic theme: voluntary action had ended the need that might have once existed for legislation.<sup>362</sup>

On July 12, Mr. Gossett testified before the committee.<sup>363</sup> The Ford Motor Company's appearance before the Monroney committee had not been too successful because there it had to defend the past actions of all of its representatives. However, Mr. Gossett's appearance before the Celler committee went very well, for now attention was turned to the defects in drafting specific legislation and Gossett is a first-rate lawyer. Although he failed to block passage of the Good Faith Act, he succeeded in changing it to preserve the manufacturers' freedom to push dealers to sell cars. Gossett stressed that after all of the steps that had been taken voluntarily by the manufacturers, legislation was unnecessary.<sup>364</sup> He asserted that the bill had constitutional problems<sup>365</sup> and unfairly singled out the automobile manufacturers for special treatment.<sup>366</sup> He expressed his fear that a local jury would interpret the requirement of fairness and respect for a dealer's equities to mean that a manufacturer could not cancel a nice but inefficient dealer.<sup>367</sup> He said that the law would require the manufacturers to spell out

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<sup>360</sup> See, e.g., 102 CONG. REC. 11722-24 (1956) (Remarks of Senator O'Mahoney).

<sup>361</sup> H.R. Hearings, *Dealer Franchises*, Celler 246-75.

<sup>362</sup> *Id.* at 505.

<sup>363</sup> *Id.* at 275-457.

<sup>364</sup> *Id.* at 284, 446-47.

<sup>365</sup> *Id.* at 277-78, 446.

<sup>366</sup> *Id.* at 288.

<sup>367</sup> *Id.* at 376-77, 382, 384, 439-40. Some of the discussion will illustrate Mr. Gossett's concern and the committee's response; the material is relevant to questions frequently raised in cases seeking to use rights granted by the Good Faith Act:

Mr. SCOTT. Mr. Chairman, Mr. Gossett has mentioned the question of the inefficient dealer. I am thinking of two instances, one where the man is inefficient and other where another situation applies.

If you had a dealer who unfortunately, let us say, was an alcoholic although he did the best he could, and you terminated his dealership, how would that operate under this bill?

Mr. GOSSETT. Well, I think that if we terminated his dealership on the ground that he was inefficient, he would have a right to a jury trial as to whether or not he acted in good faith under the definition in this bill, and the jury would determine whether, in the light of all the circumstances, we were being fair to him and we were acting in a manner calculated to preserve the equities that had grown up over the period of our relationship.

Mr. SCOTT. Suppose you had a very wealthy dealer, one that was interested only in low volume and who did not want to work very hard, and who made all the money he could afford to make in consideration of the tax situation. He is not pushing very hard, but you are persuading him; you are using recommendations and persuasion, and you want more volume which he will not get for you. And so you terminate him. Would that same situation apply here? Could he go to court?

Mr. GOSSETT. I would think so, sir. And I would think the same situation would apply where we did not terminate him, but left him in and put another dealer in.

The CHAIRMAN. I think he could go into court, but he would not have much remedy.

Mr. GOSSETT. That is a question of fact for a jury to decide, sir, in his community. And the dealers stand pretty well in their communities, and justifiably.

The CHAIRMAN. You forget that there is a judge that presides, too.

Mr. GOSSETT. But the judge cannot decide the facts in a situation like this. I would think—I hope they will interpret the bill that way, but I would not think so.

The CHAIRMAN. Have you no faith in the jury system?

Mr. GOSSETT. Sir, I have the same faith in the jury system that you, as a distinguished and experienced lawyer, have. [Laughter.]

The CHAIRMAN. We see to it that the judges give proper instructions. And in the Federal Courts, you know that the judges have an extensive degree of power in that regard.

Mr. GOSSETT. I would hope that in the case cited, the judge would instruct the jury, but I would not have confidence in it, and I would like to have that cleared up as a matter of legislative interpretation. Certainly the bill does not clear it up.

The CHAIRMAN. It will take time for a legislative interpretation by the courts of the words that we announce by statute to develop.

Mr. GOSSETT. Mr. Chairman, how would you like to have a jury decide how to run your clients' business?

The CHAIRMAN. That is not the case here.

*Id.* at 382.

The CHAIRMAN. In order to protect your company and similar companies, we welcome from you any suggestions as to language so that you would not be hampered in your appointment of new dealers.

Mr. GOSSETT. Mr. Chairman, you said that if we were prevented by this statute from appointing new dealers—I think you said getting rid of an inefficient dealer—it would be a barbarous law. I think it would be barbarous. I think in many cases—let's assume, Mr. Chairman, that this dealer about which we have been talking here, suppose we went to the end of the franchise and we tried to straighten him out and get him back on his feet and tried to get him to go to work. Let's assume that he was being outsold 3 to 1 by the competition, with a car that was no better than ours.

Now, then, we go to the end of the franchise period, and we say, "The franchise is terminated, and we are going to replace you." Then he has a right to go to the jury and have the jury decide whether that is fair to him and equitable in the light of all the past circumstances.

The CHAIRMAN. I would say that the statute would be barbarous if you couldn't get rid of an inefficient dealer.

*Id.* at 384.

Mr. GOSSETT. . . .

The term "good faith" shall mean the duty of each party to any franchise and all its officers, employees, or agents thereof to act in a fair, equitable, and nonarbitrary

*Continued on next page*

in their franchises detailed descriptions of the duties of dealers and keep careful records on each dealer so that a dealer could not say he was being coerced if a manufacturer insisted on performance of any of these duties.<sup>368</sup> Finally, although he opposed enactment, he asked:

But could you not take the risk out of this from our standpoint without doing violence to the purposes of the statute by saying in so many words that nobody could misunderstand, that so long as the manufacturer was acting under the provisions of the contract and so long as he was using normal persuasive selling methods, that he is not subject to a charge of bad faith?<sup>369</sup>

Chairman Celler asked Gossett to make suggestions later as to the language that would accomplish this apparently simple and reasonable request.<sup>370</sup>

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manner toward each other so as to guarantee one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party.

Now let's assume that the manufacturer has a 5-year contract and he has complied with all of the terms of the contract.

The dealer has had trouble, and the manufacturer suggests to him certain changes. He suggests he hire more salesmen, he suggests that he increase his facilities and personnel for service and warranty work and the dealer complies with all the suggestions.

He gets down at 8 o'clock in the morning and he leaves late at night. He works very hard and he acts in good faith. But he does not do a good job. He is being out-sold, he is inefficient. He is the inefficient dealer to which you have referred, Mr. Chairman.

Now then, what is the situation?

The manufacturer decides that as a last resort he must terminate the dealer and he so advises him.

Maybe he, a couple of times says to him, "If you don't do those things, we have no alternative but to terminate you."

In the first place he gets charged with coercion. In the second place, he gets charged with bad faith or lack of good faith for having suggested these things and done these things, and that has to be decided by a jury.

Now if you have a contract and the manufacturer fails to perform the contract, then I can understand that would have to go to a jury.

Of [*sic*] if the dealer fails to perform the contract or is inefficient, the manufacturer terminates, the only issue then is whether there has been performance or non-performance of contract.

But when you get before a jury with terms like this where the question of fairness and equity are involved, in a fair, equitable and nonarbitrary manner are involved, you do not know where you are coming out. . . .

And even though the manufacturer has performed his obligations under the contract to the letter he gets charged with having acted in bad faith.

The CHAIRMAN. I would not view it that way. In the case that you have cited, I don't see how the manufacturer could be charged with either being unfair or inequitable or arbitrary. I don't think so.

Mr. GOSSETT. But that is up to the jury, is it not?

The CHAIRMAN. Yes.

*Id.* at 444.

<sup>368</sup> *Id.* at 447.

<sup>369</sup> *Id.* at 445.

<sup>370</sup> *Ibid.*

Many dealers who sought to use the statute that was ultimately passed would regret Gossett's request and the chairman's acceptance of it. Assuming there had to be a statute, the manufacturers won a major victory at this point.<sup>371</sup>

NADA, Senators O'Mahoney and Monroney, and Chairman Celler were faced with the threat of a presidential veto and a persuasive argument from Ford. Moreover, Celler had a lawyer's distaste for the imprecision of the Senate bill and was worried that it would protect even a clearly inefficient dealer. Compromises had to be made. The Good Faith bill was then amended so that it made both the Antitrust Division of the Department of Justice and the Ford Motor Company happier. First, the "equities of the automobile dealer" language was deleted. Second, a proviso that had been drafted by the legal department of the Ford Motor Company<sup>372</sup> was added to the definition of "good faith." It now read:

The term "good faith" shall mean the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threat of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.<sup>373</sup>

The Department of Justice and the Federal Trade Commission had no objection to the bill in this form.<sup>374</sup> However, as future court decisions would show, its sponsors had paid a high price for this neutrality.

<sup>371</sup> Chairman Celler, a proponent of the bill, ended Mr. Gossett's presentation by saying, "I just want to offer my compliments to you on a very cogent and most illuminating statement." *Id.* at 457. It is my opinion that Gossett's presentation was extremely able and greatly influenced the committee.

<sup>372</sup> "Thereafter, Ford Motor Company submitted to Mr. Maletz, Chief Counsel for the Committee, the language that became ensconced in the statute as the proviso to the definition of 'good faith'." Brief for Defendant, p. 50, *Milos v. Ford Motor Co.*, 206 F. Supp. 86 (W.D. Penn. 1962), *aff'd*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>373</sup> 15 U.S.C. § 1221(e) (1963). The entire statute is now 15 U.S.C. §§ 1221-25 (1963). Section 1222 provides:

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

Clearly, the definition of "good faith" is the key to the act.

<sup>374</sup> *Automotive News*, July 16, 1956, p. 1, col. 1.

On July 23, the amended bill was passed by the House by a vote of 146 to 45.<sup>375</sup> Debate was limited, and the committee report on the bill was available only thirty minutes before the debate began.<sup>376</sup> One congressman predicted that the bill would raise car prices.<sup>377</sup> Congressman Charles Halleck<sup>378</sup> pressed Chairman Celler for a statement that the bill applied only to coercion and was not broader; Celler conceded that the bill was limited to coercion<sup>379</sup> and made some legislative history, which was valuable or damning depending on how you view the bill.

On July 25, the Senate agreed to the House amendments,<sup>380</sup> thus sending the "Dealers Day in Court Act of 1956" to the President. During this debate, Senator Bennett of Utah argued against the bill since he thought it would bar manufacturers from controlling dealers who "bootlegged" cars by selling them to used-car dealers.<sup>381</sup> The Senator, a former Ford dealer, accepted the position of the Dearborn dealers. The bill's proponents would spend much time denying this charge after its passage.<sup>382</sup>

President Eisenhower was to sign or veto the bill on August 8. The Department of Justice and the FTC had withdrawn their objections,<sup>383</sup> but the arguments of Secretary of Commerce Weeks against the bill were still as valid as they ever were. The supporters of the bill were concerned. The President left for a round of golf without making an announcement, and NADA was worried.<sup>384</sup> However, he signed the bill with some reluc-

<sup>375</sup> 102 CONG. REC. 14078 (1956).

<sup>376</sup> *Id.* at 14072-73.

<sup>377</sup> *Id.* at 14074 (remarks of Congressman Scott).

<sup>378</sup> Congressman Halleck is a Republican from Indiana.

<sup>379</sup> Mr. HALLECK. Mr. Speaker, will the gentlemen yield?

Mr. CELLER. I yield to the gentleman from Indiana.

Mr. HALLECK. It strikes me that subsection (e) on page 4 is probably the heart of this matter. That is the subsection that defines the term "good faith." May I inquire of the gentleman whether or not that is so written as to really define "good faith" as freedom from coercion, intimidation, or threats of coercion or intimidation?

Mr. CELLER. The gentleman indicates what "good faith" means. It is limited to the duty to act in a fair and equitable manner so as to guarantee freedom from coercion or intimidation, or threats of coercion or intimidation.

Mr. HALLECK. In other words, while the words "fair and equitable" are used, speaking of the relationship between the parties, those words "fair and equitable" would be limited, as this language is contained in the bill, to "coercion and intimidation"?

Mr. CELLER. That is correct.

102 CONG. REC. 14070 (1956).

<sup>380</sup> *Id.* at 14376-78.

<sup>381</sup> *Id.* at 14374.

<sup>382</sup> See, e.g., *Automotive News*, Oct. 29, 1956, p. 3, cols. 3-4.

<sup>383</sup> *Id.*, July 16, 1956, p. 1, col. 1.

<sup>384</sup> Ullman, *Automotive Washington*, *id.*, Aug. 20, 1956, p. 10, cols. 1-3.

tance.<sup>385</sup> NADA assumed it had won a significant victory. Whether it really had is still debatable.

Senator Monroney's Omnibus bill, with its FTC regulation and other provisions, died with the adjournment of the 84th Congress, and the 85th Congress was to be occupied with the impact of Sputnik and a new view of the Soviet Union rather than with domestic issues. However, *Automotive News* reported that the real purpose of Senator Monroney's bill was "to serve as a warning to the auto industry to either clean its own house or face the prospect of federal controls."<sup>386</sup> The effectiveness of this type of threat also is debatable.

On August 16, the Democratic Party attempted to use the plight of the automobile dealers and the battle for the Good Faith bill in their 1956 platform as evidence of the Republican Administration's concern with favoring big business and neglect of small business.<sup>387</sup> Needless to say, this issue failed to decide the election.

Almost two years later the "Automobile Information Disclosure Act"<sup>388</sup> was passed. This statute required manufacturers to affix to the side window of any new automobile a label which states a number of things. Most significant, it states the name of the dealer and where he takes delivery, the method of transportation from the manufacturer to the dealer, and the retail delivered price of the automobile, optional equipment, and accessories. Disclosure of the "list price" inhibits "packing" since it is more difficult to give unrealistically high trade-in allowances and add the difference to the quoted prices. Disclosure of the original dealer and the method of transportation allows the consumer to see whether his car has been towed or driven across country with the speedometer disconnected. However, it also makes it easy to spot which dealers are "bootlegging" and for manufacturers to insist that the practice be stopped if they desire to do so.<sup>389</sup> Moreover, the effect of the price sticker statute when added to the Good Faith Act is to deter manufacturers' field representatives from suggesting that dealers "pack" or "bootleg" to meet artificially high sales quotas.

#### **D. The Fourth Stage: Truce, Response, and Change by Manufacturers and Dealers**

Once a statute is passed, its proponents can hope for changes caused by voluntary compliance and usually there is some amount of this. To a great

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<sup>385</sup> N.Y. Times, Aug. 9, 1956, p. 21, col. 5.

<sup>386</sup> *Automotive News*, July 23, 1956, p. 1, col. 2.

<sup>387</sup> N.Y. Times, Aug. 16, 1956, p. 13, col. 1.

<sup>388</sup> Now 15 U.S.C. §§ 1231-33 (1963).

<sup>389</sup> Senator Monroney talked about a price sticker bill in 1956, primarily in terms of a measure to stop "bootlegging." See *S. Hearings, Marketing Practices, Monroney 120*.

degree the manufacturers complied with both state and federal statutes, and they attempted to do much more by taking steps to end the problems that prompted the dealers to turn to the government for help. Probably the extensive federal hearings were responsible for most of the changes although it is clear that the statutes had some effect. NADA also made changes. In this section we will consider the reestablishment of diplomatic relations between the manufacturers and dealers, the internal changes made by the manufacturers, and the new franchises given to dealers.

### 1. COMMUNICATIONS ARE REESTABLISHED

Even before its congressional victory, NADA attempted to reestablish good relations with the officials of the manufacturers. These officials were more than willing, and the ultimate result was the creation of an atmosphere where both sides could talk to each other. The NADA board met with factory and government officials at a formal dinner in Washington on June 14, 1956, while the legislative battle was still going on. At this dinner meeting Admiral Bell praised the new era of good feeling.<sup>390</sup> The presidents of the major American automobile manufacturers addressed the next NADA convention in February, 1957, and Admiral Bell introduced each one in glowing terms, including his former major antagonist, Harlow Curtice.<sup>391</sup> However, at the end of 1958, Bell was forced to resign as NADA executive vice-president because of differences with the NADA board of directors about such things as whether or not NADA should fight for a territorial security statute, Bell's \$70,000 annual salary, and his concept of his role with NADA.<sup>392</sup> Apparently Bell's exit further helped good relations. "There was considerable animosity in factory circles toward Bell. Many factory executives were convinced that he was an agitator of dealers rather than a spokesman for them."<sup>393</sup> At a dinner in July, 1959, Chrysler's president, L. L. "Tex" Colbert, said, "I think that the NADA is to be congratulated on having in Jim Moore [Bell's successor] an executive officer who can get results *through* mutual understanding. . . ."<sup>394</sup> The contrast with Bell was implicit.

NADA organized to take advantage of its new opportunity to talk with the top officials of the manufacturers and have its requests seriously con-

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<sup>390</sup> NADA Magazine, Aug. 1956, p. 24.

<sup>391</sup> *Id.*, Feb. 1957, p. 22 *passim*.

<sup>392</sup> See Automotive News, Dec. 22, 1958, p. 1, cols. 2-3; *id.*, Jan. 12, 1959, p. 1, cols. 4-5.

<sup>393</sup> *Id.* Dec. 22, 1958, p. 1, cols. 2-3.

<sup>394</sup> NADA Magazine, July 1959, pp. 36, 37.



sidered. It had several committees to work with the manufacturers; at present there is the Industry Relations Committee. This group holds meetings throughout the year and meets with the manufacturers regularly. It considers matters that cross manufacturer or divisional lines. For instance, in 1964, the Committee talked with manufacturers about the discount, or markup, given dealers, compensation for warranty work, ending subsidies from manufacturers to fleet and leasing companies, ending factory-owned dealerships, revisions of the franchises of all manufacturers, and the attitude of manufacturer field personnel toward dealers.<sup>395</sup> The Committee has been successful in solving some dealer problems.<sup>396</sup>

## 2. INTERNAL CHANGES IN THE ORGANIZATIONAL STRUCTURE OF MANUFACTURERS

In discussing the tactics the manufacturers used in attempting to block federal legislation, I noted many changes in the internal structure of these corporations that were announced with the hope of persuading Congress that legislation was unnecessary. Most of these changes were put into effect and were not simply public relations stunts. For example, communications now can move more freely from dealer to the top management and the conduct of the manufacturers' field personnel is subject to detailed review. Although there are a few complaints from the dealers, it is generally agreed that the situation is greatly changed for the better.<sup>397</sup>

### *a. Communications*

Basic changes have been made in the operation of companies' dealer councils so that these groups are more representative and management will hear about the actual views of the dealers rather than what the dealer representatives think will please the companies' sales staffs. All four American manufacturers now have elected dealer councils for each division of their companies—there are Chevrolet and Buick councils in General Motors and Plymouth and Dodge councils in Chrysler, for example. Typically, regional council members are elected by all the dealers selling a make in a particular area. There is an attempt to have metropolitan, small-town, and

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<sup>395</sup> Address by Sam H. White, *Report of the NADA Industry Relations Committee*, 48th Annual NADA Convention and Exhibition, Feb. 3, 1965.

<sup>396</sup> We enjoyed a fine atmosphere in which to meet with the top factory officials. . . . we feel a real sense of accomplishment that the views expressed, discussions held, decisions made and actions taken were done without recourse of "going to Government" . . . this is the way a great industry should approach its problems and find solutions.

Galles, *The NADA Task Force Report*, NADA Magazine, March 1963, p. 30.

<sup>397</sup> Interviews with trade association managers.

rural dealers represented. The members tend to be established dealers who have been in business long enough to be known favorably to others who sell the same make of car. A maverick will not often be elected. The members of the regional council then elect one man to be a member of that make's national council. The manufacturers have taken steps to create independent and free discussion since they find the meetings a valuable source of information about the health of their organization. These councils consider problems of particular interest to those who sell a certain car. They can talk about such things as problems in the design of a car that are causing trouble, problems concerning distribution and allocations, and even problems concerning the operations of a zone or district representative of the factory. The manufacturer's men at these meetings listen and many, but not all, of the councils' suggestions are adopted. Many dealer trade association managers think that the councils are very effective.<sup>398</sup>

In addition to the dealer councils, there have been organizational changes to bring the dealers' views to the management. General Motors and Chrysler have appointed committees of dealers that advise the presidents of these corporations.<sup>399</sup> The Chrysler group has considered the appearance of Chrysler cars to be produced in the future, long an area closed to dealers.<sup>400</sup> Undoubtedly these groups have ready access to the most important people in their corporation. However, some dealer organizations dislike the fact that these groups are appointed rather than elected. They assert that at times discussion is stopped, for example, in a Pontiac dealer council meeting because the matter affects all of the divisions of General Motors and is not just a Pontiac problem. Then the problem must move to a body that is not responsible to an electorate.<sup>401</sup>

General Motors established a vice-president in charge of dealer relations apart from the sales staff so that conflicting interests would be avoided. Ford created its Dealer Policy Board which is composed of top executives with broad experience.<sup>402</sup> This group is available for conferences with

<sup>398</sup> All of the material in this paragraph is based on interviews. See also *Automotive News*, May 7, 1962, p. 4, col. 1; *id.*, March 14, 1960, p. 2, cols. 1-3.

<sup>399</sup> *Id.*, April 4, 1960, p. 2, cols. 1-3; *id.*, Nov. 13, 1961, p. 1, col. 2, p. 44, cols. 1-3.

<sup>400</sup> *Id.* at 44, cols. 1-2.

<sup>401</sup> See *id.*, April 4, 1960, p. 2, cols. 1-3.

<sup>402</sup> Benson Ford, chairman of the Dealer Policy Board, said, "We have no direct sales responsibility, as far as the corporation goes, and so dealers can come in to us on anything and we consult with the divisions on various things that they bring up, and we have had some division policies changed because of what some of the dealers have brought in. . . ." *Id.*, May 23, 1960, p. 22, col. 3. A dealer does not have to go through the chain of command—through district, region, and division—to talk with the Board but can come directly to it. *Ibid.* The division is not informed unless appropriate and then not until after the dealer has talked with the Board. *Id.* col. 4. The Board also conducts surveys of dealer opinion. *Id.* col. 1.

any dealer about any subject he wants to raise. Ford also brings many dealers to Dearborn for training programs, and they have an opportunity to talk with company executives about problems.<sup>403</sup>

*b. Review of Decisions to Terminate a Franchise*

The manufacturers have created elaborate procedures to cancel a franchise that are designed to protect both their interests and the dealer's. The automotive sales vice-president of American Motors Corporation described its approach to termination as follows:

We work with the dealer for as long as we feel it is necessary to come to a conclusion as to whether he is going to represent Rambler properly.

If we think he isn't, we tell him so but he still gets "one last day in court." We sit down with him and the zone manager in an attempt to work out the problem.

This isn't a method of termination, it's a method of helping the dealer to cut the mustard.<sup>404</sup>

Ford has an elaborate system for handling dealers who fail to meet sales quotas or other requirements. (1) The field manager requests management assistance for the dealer. Specialists "in all phases of the retail business are employed at our field offices, and their services as consultants are offered without charge to any dealer who may need them."<sup>405</sup> A program is developed for the dealer by Ford's staff. Often the dealer is given deadlines by which he must adopt the program and remedy the situation. (2) If the problem is not solved by the deadline, the field manager may recommend termination. (3) The district staff meets to evaluate the dealer's performance and to see that the file shows both inadequate performance and that all reasonable help has been offered. (4) The district staff may recommend termination and forward the file to the regional office. (5) The regional office reviews the file and a representative visits the dealer. He is interested in the dealer's attitude and the help that has been offered by the field manager and the district staff. (6) The regional office may recommend termination and send the file to the head office in Dearborn, Michigan. (7) The Ford General Sales Office reviews the recommendation as does the vice-president in charge of sales. (8) The dealer is sent a termination notice.<sup>406</sup> The process may be stopped at any point if the official questions the judg-

<sup>403</sup> See *id.*, May 22, 1961, p. 1, col. 5; *id.*, May 7, 1962, p. 4, col. 1.

<sup>404</sup> *Id.*, Feb. 3, 1964, p. 10, col. 1, at 10, col. 5.

<sup>405</sup> Letter from official of Ford Motor Company.

<sup>406</sup> Brief for Appellant, pp. 47-48, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); *S. Hearings, Marketing Practices, Monroney* 980.

ment of his subordinates.<sup>407</sup> While such an official is unlikely to overrule a subordinate very often because of the obligation to back up one's staff, the official's own action may subject him to criticism from his superiors. As a result, the process requires the field managers to build a careful file to protect their own reputation and for each decision maker to comply with Ford policy as interpreted by his superiors. Clearly, all this "red tape" makes capricious judgments to cancel a dealer rather unlikely.

General Motors and Ford have still another step in their internal cancellation procedure. They have some type of court of last resort to which the dealer may appeal after he receives a termination notice.<sup>408</sup> General Motors, as a result of the criticism voiced in the O'Mahoney hearings, moved this function from a group of the top executives of the corporation to an impartial umpire and appointed a retired federal judge to the job.<sup>409</sup> This avoids any suspicion that the proceeding is a sham because the umpire should feel very little pressure to back up the sales staff to keep up morale or to keep up the pressure for sales. A General Motors official said that the umpire has decided relatively few cases but that some have been decided in favor of the dealer.<sup>410</sup> Ford and Chrysler dealers probably could have had an independent umpire if they had pressed for one in the 1950's after General Motors had led the way. However, these dealers did not see an umpire as particularly valuable because they could always take cases to the federal courts under the Good Faith Act.<sup>411</sup> One should consider this decision after the cases interpreting that act are discussed later.

Ford's Dealer Policy Board will review terminations if the dealer asks it to. This Board has no sales responsibility and reports only to the company's board of directors.<sup>412</sup> A Ford official has said, "Historically, the Board has set aside Notices of Termination in approximately one-third of the cases brought before it, and given the dealers an additional period of time in which to improve."<sup>413</sup> However, many trade association officials said that it is very hard to win a case before the Board and hard to get action quickly.<sup>414</sup>

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<sup>407</sup> *Ibid.*

<sup>408</sup> See *id.* at 20-21, 694; Automotive News, May 23, 1960, p. 22, cols. 1-5.

<sup>409</sup> N.Y. Times, June 1, 1956, p. 36, col. 2.

<sup>410</sup> Automotive News, June 13, 1960, p. 2, cols. 1-2.

<sup>411</sup> "For cancellations are relatively rare and the [Ford] dealers feel little need for an umpire, as GM will soon provide. Ford dealers said the U.S. courts could handle the few chores an umpire might perform." *Id.*, March 19, 1956, p. 82, col. 3. Plymouth and DeSoto "dealers also rejected an umpire for adjudicating cancellations, apparently feeling that this was no problem." *Id.*, March 26, 1956, p. 58, col. 3.

<sup>412</sup> Letter from official of Ford Motor Company.

<sup>413</sup> *Ibid.*

<sup>414</sup> Interviews.

An example partially based on a report of an actual case will indicate the kind of situation in which the Board may offer some relief.<sup>415</sup> A Ford dealer had been in business for many years in a smaller city. He had always had adequate sales. A Chevrolet dealer was established in his town by Motors Holding Corporation—a subsidiary of General Motors which finances a man who wants a dealership but has insufficient capital. The new Chevrolet dealer received especially favorable allocations of the best selling models immediately after that year's car was introduced. He had new facilities opened with money obtained by Motors Holding credit. He was able to arrange unusually favorable financing terms for his customers from General Motors Acceptance Corporation, another subsidiary. Finally, to establish himself the Chevrolet dealer was willing to take a very low rate of return on his and Motors Holding's investment. The effect of this Chevrolet campaign was to cut Ford sales drastically. The Ford dealer's facilities were not new; he did not have unusual numbers of the best models and he could not offer nearly so favorable financing terms. Moreover, the Chevrolet dealer's low return was largely on General Motors' money; the Ford dealer was playing with his own. The Ford dealer's franchise was canceled for poor sales and an unwillingness to invest heavily in new facilities and to cut prices to compete. All of the sales division's chain of command review relied heavily on the field man's reports. The Dealer Policy Board conducted an independent investigation and reversed the decision as it viewed the case as one where Ford had not done enough to aid the dealer. In effect, the Board created new policy on the company's responsibility to meet this kind of attack from General Motors.<sup>416</sup>

### *c. The Revised Franchises*

It will be recalled that General Motors announced sweeping revisions of its dealer selling agreements so that the O'Mahoney and Monroney com-

<sup>415</sup> For an interview with the members of the Ford Dealer Policy Board about its operations, see *Automotive News*, May 23, 1960, p. 22, cols. 1-5, p. 28, cols. 1-5, p. 30, cols. 3-5. It was reported that a member of the Board said:

In the field of contract terminations . . . the board has sometimes agreed with the car division. In other cases, it has rescinded the termination or has recommended that the division give the dealer further opportunity to improve his performance.

"There is no rubber stamping of a division's recommendations. We know full well that if we ever fail to hear out a dealer or lose our impartiality, we would lose our reason for existing."

*Id.*, May 22, 1961, p. 1, col. 5, at 13, col. 1.

<sup>416</sup> The case presented in the text is based on several examples obtained through interviews. Of course, I do not know that General Motors has ever given any particular Motors Holding dealer so many advantages. Some Ford dealers think that General Motors has.

mittees could discuss at their hearings General Motors' future virtues rather than its alleged past sins.<sup>417</sup> The other manufacturers responded to both the hearings and the Good Faith Act as well as to the leadership of General Motors by reworking their standard from "contracts" with their dealers.<sup>418</sup> This was a significant example of the fourth stage—compliance with the demands of the legal system without the necessity of enforcement.

#### i. THE FUNCTIONS OF A FRANCHISE

To understand the significance of the changes that were made in the franchises, we must ask whether the language used in these documents makes any difference. Many dealers say that they never read their franchise because "if I do the job, I will be all right."<sup>419</sup> The road men who talk with dealers seldom discuss problems in terms of a failure to perform paragraph 2(a) (i) of the sales agreement; rather they talk about a failure to sell enough cars.<sup>420</sup> Some have said that everything turns on the views and attitudes of the dealer and the factory representatives who decide whether or not the dealer is selling enough cars, has adequate facilities, and has enough capital invested in his business. While undoubtedly this is all true, these documents do have functions. The selling agreement is at a minimum a symbol of the relationship, and the dealer needs one to be in business. As a result, the factory can impose conditions on giving the dealer one or renewing an existing one. Often, the dealer will have to sign a letter drafted by the company in which "he states" that his sales or facilities are inadequate and that he will take steps such as hiring more salesmen or building a new showroom.<sup>421</sup>

Moreover, the words used in these documents have significance. In the words of a Ford official, "a termination cannot help but engender motivations apart from purely business considerations, including pride."<sup>422</sup> As a

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<sup>417</sup> See note 265 *supra* and accompanying text.

<sup>418</sup> See *Automotive News*, April 29, 1957, p. 1, cols. 1-3, p. 6, cols. 3-5, p. 8, cols. 2-4.

<sup>419</sup> Interview. See also *S. Hearings, Marketing Practices, Monroney* 1410.

<sup>420</sup> Interview.

<sup>421</sup> See, e.g., *Milos v. Ford Motor Co.*, 317 F.2d 712, 714 n.2 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>422</sup> Letter from official of Ford Motor Company. See also the following comments: There are many reasons why a dealer will object to termination of its dealer agreement by the manufacturer. Perhaps there are as many reasons as there are dealers facing such termination. I personally believe one of the most important reasons is purely psychological; that a dealer does not want to feel "defeated" by having been terminated. Most people who become automobile dealers, in my opinion, are strong-minded individualists who enjoy the position of being an independent business man in their communities. Of necessity, they must have confidence in their own ability or they would not be willing to take the risk of entering

result, a canceled dealer has strong reasons to seek revenge in court, where contract language may be crucial. Since the document must serve this function, it may become the focus for considering and defining many company policies relating to the dealers. In effect, the words used in the document set the outer limits and define the points where the field staff's discretion begins. Also some dealers do read the document and all will read it when there is trouble. Thus the terms and conditions do tend to create expectations, both by being read and by influencing the actions of the company's personnel whose conduct, in turn, causes dealers to make assumptions about their rights.

## ii. THE INTERESTS OF THE PARTIES

Assuming that the document will serve some functions, what might manufacturers and dealers hope to achieve through the language used in the franchise? The manufacturers may seek several things. They want to create a relationship in which they can promote sales. They want to define and limit their exposure to all risks they can foresee so that these risks can be planned for or avoided. They want, finally, to establish efficient procedures for ending their relationship with a dealer. In many ways, the most rational selling agreement from this point of view was the type used in the 1930's. This document typically was relatively short; it required, in effect, that the dealer keep the company satisfied with his sales, service, facilities, and personality; it carefully said that the company was not promising to fill any of the dealer's orders for cars or parts and that the dealer was not an agent for the company; and it allowed either party to terminate at will. The dealer had no contract rights that could be enforced in court; third parties would have trouble holding the company responsible for the dealer's actions; and the company could press for greater sales by being hard to satisfy and using its right to terminate at will as a sanction.<sup>423</sup>

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into business for themselves. Therefore, I believe they view termination by a manufacturer as a substantial blow to their own self-confidence or self-esteem.

Many individuals operate automobile dealerships as one of several business enterprises. Whether or not their automobile dealership is substantially profitable may or may not be important to them, if they have adequate revenues from other sources. Under such circumstances an individual may operate an automobile dealership because he enjoys the business. Others, I believe will "hang on" out of sheer desperation, since they may have all of their available investment funds tied up in the business or may even be substantially in debt to a bank or finance company for the capital which was required to begin operating as an automobile dealer. Their continuing operation is the only possible means they have of meeting their obligations.

The above are my personal opinions based on some degree of experience but again do not reflect any study of the question.

Letter from official of Chrysler Corporation.

<sup>423</sup> See, e.g., FORD MOTOR COMPANY, FORD SALES AGREEMENT (1938).

While this document expressed the manufacturers' interests nicely, it did little for the dealers. They have sought over the years to add provisions which would cost the companies many of the benefits of the 1930 model agreement.<sup>424</sup> Dealers want their risks and expenses minimized. For example, a dealer must buy a stock of cars, but his inventory loses value when new models are introduced. Dealers want the manufacturer to assume this loss. Dealers want recognition of their control over their own business. For example, they want the right to leave the business to a son or sell the going business to a third party. Dealers also want security in the existence and profitability of their business. For example, termination at will is an insecure foundation for an investment of several hundred thousand dollars and demands to build new facilities or double the salesforce strain the ability of the enterprise to produce a satisfactory return on a dealer's investment.

iii. THE CHANGES IN THE FRANCHISES AND THE EFFECT ON THE INTERESTS OF THE PARTIES: THE MANUFACTURERS' POWERS

The changes in the 1956 and 1957 franchises represent some movement from a selling agreement that maximized the manufacturers' interests to one that recognized more of the dealers' interests, but the manufacturers did not give up all of their power. Much of a manufacturer's power comes from its ability to end the relationship at less cost to itself than to the dealer. This provides the starting point in our survey of how much power the manufacturers gave up. Realistically, why might a manufacturer, or some of the people working for it, want to end the business relationship with a particular dealer? (1) Usually the dealer is not selling enough cars, as measured by the factory's view of the potential of his area. Since each man in the manufacturer's sales staff is judged by the sales in his area of responsibility, the failure of a dealer to maximize sales may hurt those in the chain of command above him. Most directly injured is the road man who talks with dealers. He will want to replace all dealers in his area who are below the mark and cannot be rehabilitated quickly so that his area can set records and win him promotion. (2) The dealer may have smaller or older facilities or less capital devoted to the business than the factory thinks appropriate. (3) The dealer's business may have been disrupted by any number of personal problems such as illness or withdrawal of a partner. The dealer may be in jail after conviction of a crime. The dealer may not be opening his business regularly during normal business hours. He may be a step away from bankruptcy. (4) The manufacturer may want to punish the dealer for

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<sup>424</sup> See, e.g., *S. Hearings, Marketing Practices, Monroney* 173.



taking on the franchise of another maker's car or buying parts from independent suppliers rather than the manufacturer. (5) A "better" dealer may be available. He may have more capital or skill. He may be willing to move the dealership to a new suburban location to keep up with population trends. He may be a relative of top factory officials or an executive who wants to move from Detroit to a profitable dealership. (6) The dealer may be disliked by some people in the employ of the manufacturer who want to do him harm for purely personal reasons.<sup>425</sup>

Under the new franchises, can the manufacturers end their business relationship with the dealer for any or all of these reasons? In one sense, the answer is that they can. Under the terms of most franchises, a manufacturer can wait until it expires and refuse to renew without giving reasons.<sup>426</sup>

<sup>425</sup> See the following comments: "The most common specific reasons for cancellation are inadequate sales performance, inadequate service performance, inadequate facilities, inadequate inventory and inadequate working capital." Letter from official of American Motors Corporation.

While I have not made any study of the question, I believe the most common specific reasons for our terminating a Direct Dealer Agreement are death of the principal owner or manager and poor sales performance by the dealer. There are, of course, many other reasons such as dealer's insolvency or bankruptcy or a change of principal owners in a dealer corporation. Also, dealers occasionally relocate their place of business or lose occupancy of acceptable facilities, and we find their new facilities unacceptable. Termination for other reasons is much less common than for the above reasons.

Letter from official of Chrysler Corporation.

<sup>426</sup> Ford offers its dealers a choice of a one- or five-year contract cancellable only for cause or an indefinite contract that Ford may terminate at will upon 120 days' notice. Letter from official of Ford Motor Company; FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 17(a) (6) (1962). General Motors offers its dealers a choice of a five-year contract cancellable only for cause or an indefinite contract that General Motors may cancel at will. Letter from official of General Motors Corporation; GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 4 (1962).

On the other hand, Chrysler Corporation gives its dealers an indefinite term contract which, as a matter of its express terms, can be cancelled only for cause. See CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 5 (1964). At the other extreme, almost all American Motors Corporation dealers are on a one-year contract but a few outstanding dealers have three-year contracts. Letter from official of American Motors Corporation; AMERICAN MOTORS SALES CORPORATION, AUTOMOTIVE DEALER FRANCHISE AGREEMENT § 5 (1962).

Consider the following comments by the former general counsel of General Motors about nonrenewals:

Let us assume a dealer who has performed all the terms and conditions of his contract quite well—he has lived up to his agreement, he has done a good job as a dealer within the confines of the agreement—but the man, because of personal misconduct on his part, we don't consider him very desirable—or *let us say that he is a man that just doesn't agree with the policies of the corporation*. Now, it is just the same as an employee after a while if you are not getting along it is better for him to leave and it is better for us to let him go, and give him the thing that he is entitled to—the separation allowance, if that is in the picture.

Now, we do the same thing here, under our contract, on nonrenewal. We are not happy with this man, he is not happy with us, so the best thing, after 5 years—and you have given it a pretty good twirl for 5 years—so you want to part company.

*H.R. Hearings, Dealer Franchises, Celler 539. (Emphasis added).*

While most American Motors selling agreements run for only one year,<sup>427</sup> General Motors offers dealers a choice of one- or five-year terms and most have elected the five-year agreement.<sup>428</sup> Ford offers its dealers a one- or five-year selling agreement or an agreement for an indefinite term cancelable at will on 120 days' notice.<sup>429</sup> Most Ford dealers have elected the indefinite term selling agreement.<sup>430</sup> Chrysler agreements have no expiration date.<sup>431</sup> Thus in the early years of the term, Ford and General Motors would not have this easy way to get rid of the dealer, and Chrysler might not have it at all.<sup>432</sup> In most instances, Ford would be able to cancel at will.

Most of the new franchises cannot be terminated at will by the company, but all of them can be terminated for cause.<sup>433</sup> The first three reasons for wanting to cancel might constitute cause as it is defined in these documents. All allow termination for inadequate sales.<sup>434</sup> Before the 1956 and 1957 revisions, some franchises said no more than that the dealer would sell to the manufacturer's satisfaction.<sup>435</sup> Other franchises did not mention adequate sales.<sup>436</sup> However, these franchises could be canceled at will,<sup>437</sup> and

<sup>427</sup> Letter from official of American Motors Corporation.

<sup>428</sup> Letters from officials of General Motors Corporation and Ford Motor Company.

<sup>429</sup> Letter.

<sup>430</sup> *Ibid.*

<sup>431</sup> CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 5 (1964).

<sup>432</sup> Under § 2-102 of the Uniform Commercial Code, a manufacturer-dealer selling agreement might be said to involve "transactions in goods" and thus come within article 2. If this is true, § 2-309(2) would apply to the Chrysler Direct Dealer Agreement. It provides, "Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party."

Even if a dealer franchise is not covered by article 2 of the Uniform Commercial Code, courts might construe a selling agreement of indefinite duration as terminable at will. See 1 CORBIN, CONTRACTS § 96 (rev. ed. 1963).

Apparently, Chrysler's indefinite term arrangement was desired by its dealers. They may have thought that as a result of this form, the franchise ran forever unless it were cancelled for cause. See *Automotive News*, March 26, 1956, p. 58, col. 3.

<sup>433</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION §§ 26(e), (d) (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 21 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 17(a) (1), (2) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 18B(2) (1962).

<sup>434</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION §§ 16, 26(c) (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION §§ 7, 21 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION §§ 2(a) (i), 17(a) (1) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 9, 18B(2) (1962).

<sup>435</sup> *E.g.*, GENERAL MOTORS CORPORATION, DIRECT DEALER TERMS AND CONDITIONS, CHEVROLET MOTOR DIVISION § 16 (1955).

<sup>436</sup> *E.g.*, FORD MOTOR COMPANY, FORD SALES AGREEMENT (1949).

<sup>437</sup> *Id.* § 10.

this power was used when sales did not meet the national penetration percentage formula.<sup>438</sup> Under this formula if Buick sold 8 per cent of the cars nationally, a Buick dealer had to sell 8 per cent of the cars sold in his area.<sup>439</sup> Now more complicated formulas are expressly set out in all<sup>440</sup> but the American Motors franchise.<sup>441</sup> For example, a Ford dealer's sales performance is measured, first, by comparing the dealer's sales with: (1) the total registrations of all cars in his locality, (2) the sales objectives established by Ford for his locality, (3) the sales of Chevrolet, Plymouth, and Rambler in his locality. Second, the dealer's sales are compared with: (1) those of three other Ford dealers of comparable size in the nearest comparable areas, and (2) the average of all Ford dealers in his zone, district, region, and nationally. In making these comparisons Ford will also consider: (1) the history of the dealer's sales performance, (2) the availability of cars, and (3) "special local conditions that might affect the Dealer's sales performance."<sup>442</sup> Both General Motors and Chrysler also consider these

<sup>438</sup> See, e.g., *S. Hearings, Marketing Practices, Monroney* 270.

<sup>439</sup> See discussion at note 54 *supra*.

<sup>440</sup> CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 7 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2(a) (i); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 9 (1962).

<sup>441</sup> Dealer shall assume the responsibility for developing sufficient sales volume of Manufacturer's products in Dealer's market area to meet the sales planning potential from time to time determined by the Zone. . . . Dealer's sales performance shall be evaluated on the basis of comparison of Dealer's sales of new motor vehicles to such sales planning potential. The evaluation shall be based on records and considerations generally accepted by the automobile industry.

AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 16 (1962).

<sup>442</sup> FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2(a) (i) (1962). A Ford official has explained how his company uses this formula to measure dealer performance:

In strengthening the dealer organization, McLaughlin said, the first step is to determine the weakest district and to go to the weakest dealers in the district.

Determining what district or dealers are weak is a complicated process, based on performance in relation to the national average market penetration of the make. But there are many other factors to be considered, he said.

To illustrate, he said that in the Dallas district in 1961, Ford sales accounted for 25 per cent of the cars sold, compared with a national average penetration of 23 per cent.

At first glance, McLaughlin said, this looks very good. However, a breakdown of model sales showed that Falcon was selling very well, Thunderbird about average, but Galaxie sales were low. Thus action was indicated where at first glance it wasn't.

Other factors which must be considered in evaluating district and dealer performance, he said, include:

1. How many people in the district already own Fords? He said that 60 to 70 per cent will purchase the same make again, thus an area with many Ford owners should automatically do better than one with few.

*Continued on next page*

special circumstances in their formulas.<sup>443</sup> Undoubtedly dealers gained some security and tenure when the new formulas were substituted for the old.<sup>444</sup> Yet some have pointed to the broad discretion the factory has to increase the sales objectives for an area as it conducts new surveys, to select the nearest comparable areas for comparison, and to judge both whether cars were available and whether there were local conditions that affected sales. Some would conclude that if a manufacturer honestly is unhappy with sales, it can cancel for cause without much trouble under such a formula.<sup>445</sup> In short, it has not given up much in this area in terms of its rational business interests.

No real gain was made by the dealers relating to the second reason for canceling. The franchises still require facilities and capital to be adequate, with little definition of what is demanded, and allow cancellation for cause

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2. The regional market must be considered. Compacts will generally sell better on both coasts than in the Midwest. Sports models and convertibles usually sell better in warm areas, such as Florida and California.

3. The effect of special laws. For example, a high tax on eight-cylinder cars for many years in Chicago put Ford at a disadvantage with its V-8s against other makes which offered sixes.

Having determined that a dealer is weak, McLaughlin said there are four steps the company may take:

1. It may advise on management techniques and encourage the dealer to expand sales.

2. It may relocate a dealership.

3. In rare cases, it may add a dealership to an area.

4. As a last resort, it may replace the dealer.

After steps have been taken to strengthen the dealer, his performance is then measured against his earlier performance to determine whether the action has had any effect.

It is not enough that sales go up, McLaughlin said, since they might have anyway because of a general rise in the market. On the other hand, the dealer may show an improvement even though sales go down.

McLaughlin said the dealer's performance in sales, penetration and profits is compared with the balance of the district for a base period of 12 months before the change was made.

The dealer's relative strength is then compared in these three areas with the rest of the district after the changes were made.

Besides giving a true measure of the dealer's effectiveness, McLaughlin said, it also allows the company to determine how good its district manager is in spotting weaknesses and correcting them.

*Automotive News*, May 7, 1962, p. 8, cols. 1-2, p. 51, col. 1.

<sup>443</sup> CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 7 (1964); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 9 (1962).

<sup>444</sup> In 1956, some viewed General Motors' abandonment of a rigorous national average requirement for the minimum satisfactory performance as a major and significant change in policy. Now dealers must do only as well as those in their own area, but, of course, this could impose a higher standard on a dealer if those in his area did better than the national average. See *Automotive News*, Feb. 20, 1956, p. 8, cols. 1-5.

<sup>445</sup> *Id.* col. 5; *id.*, March 19, 1956, p. 82, cols. 1-2; *id.*, April 1, 1957, p. 1, col. 2, p. 52, cols. 1-3; *id.*, April 29, 1957, p. 6, col. 5.

if they are inadequate.<sup>446</sup> For example, General Motors requires the dealer to have a "place of business satisfactory as to appearance and location, and adequate in size and layout for new motor vehicle sales operations, service operations, parts and accessory and used car sales. . . ."<sup>447</sup> Chrysler tells the dealer to have "the amount of net working capital and net worth necessary for DIRECT DEALER successfully to carry out DIRECT DEALER's undertaking in this agreement. . . ."<sup>448</sup> There is also broad freedom to cancel for the third reason: The franchises all have long and detailed lists of such disruptive elements as grounds for cancellation.<sup>449</sup> The manufacturers have carefully reserved this power for obvious reasons.

The fourth, fifth, and sixth reasons—a desire to punish for becoming a dual dealer or to substitute a better dealer and personal dislike—are not covered expressly. Of course, if the manufacturer thinks that a dealer's second franchise is diluting effort or that an area has a potential for more sales than the present dealer is making and that a substitute dealer would better realize that potential, probably it could cancel for inadequate sales.<sup>450</sup> However, if a manufacturer cannot show that the second franchise is costing sales, if the substitute dealer is being given a franchise only be-

<sup>446</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOBILE DIVISION §§ 13, 26(c) (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION §§ 7, 21 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION §§ 2(b) (c), 17(a) (1); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION §§ 6, 7, 18B(2) (1962).

<sup>447</sup> *Id.* § 6.

<sup>448</sup> CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 7 (1964).

<sup>449</sup> (2) The Company may terminate by notice given to the Dealer, effective immediately, in any of the following events: . . . (v) a disagreement between or among managers named in paragraph F, principals, partners, officers or stockholders of the Dealer which in the opinion of the Company may affect adversely the ownership, operation, management, business or interest of the Dealer or the Company; (vi) conviction in a court of competent jurisdiction of Dealer, or a manager named in paragraph F, partner, principal officer or major shareholder, for any violation of law tending, in the Company's opinion, to affect adversely the operation or business of the Dealer or the good name, good will or reputation of the Company, COMPANY PRODUCTS or the Dealer; or (vii) submission by the Dealer to the Company of false or fraudulent reports or statements. . . .

(3) Either party may terminate by notice given to the other, effective immediately, in any of the following events: (i) dissolution of the Dealer if the Dealer is a corporation or partnership; (ii) insolvency of the Dealer, filing by the Dealer of a voluntary petition in bankruptcy, adjudication of the Dealer as a bankrupt pursuant to an involuntary petition, appointment by a court of a temporary or permanent receiver, trustee or custodian for the Dealer or the Dealer's business, or an assignment by the Dealer for benefit or creditors. . . .

FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION §§ 17(a) (2)-(3) (1962). See AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOBILE DIVISION § 26(e) (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 21 (1964); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 18(4) (1962).

<sup>450</sup> See note 440 *supra*.

cause he is the friend of the right people or if some person in the company's staff dislikes the present dealer, there is no way to cancel him openly. It is true that the present dealer might be persuaded to sell his dealership in exchange for some benefit, the franchise might be allowed to expire by its own terms and not be renewed, or grounds for cancellation might be trumped up. Actually, the dealer's protection from cancellation for any of these reasons comes from a variety of sources in addition to the terms of the franchise. The manufacturer's insistence on exclusive dealing in its products may violate the antitrust laws<sup>451</sup> or the Good Faith Act.<sup>452</sup> For many reasons such insistence is likely to be against company policy as are canceling to install someone's brother-in-law as a dealer and canceling to further personal dislike. The elaborate company internal review procedures probably would block a clear-cut case of cancellation based on any of these reasons.<sup>453</sup> It is in these areas that the dealers have received the greatest gains as a result of the events of the mid-1950's. At least, it is far more difficult to cancel now.

One new factor in the situation is the federal and state legislation.<sup>454</sup> To some extent, all of the manufacturers have sought to meet this threat to their sovereignty by draftsmanship. All manufacturers have expanded the definitions of the dealers' duties so that one cannot assert that a demand for performance of one of these duties is evidence of bad faith—rather it is merely an insistence on getting what is the company's right under a "contract."<sup>455</sup> All manufacturers have made some effort to make their selling agreements look fair.<sup>456</sup> However, the Ford Motor Company has done the most elaborate job of drafting in an attempt to keep a free hand. Its sales agreement begins with a three-page preamble that states the company's

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<sup>451</sup> See, e.g., *Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11 (6th Cir. 1959); 37 BNA ANTI-TRUST & TRADE REG. REP. A-14 (March 27, 1962); 42 *id.* at A-2, A-3 (May 8, 1962); Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959).

<sup>452</sup> 15 U.S.C. §§ 1221-25 (1963).

<sup>453</sup> See note 406 *supra*.

<sup>454</sup> See notes 127-49, 385 *supra*.

<sup>455</sup> In 1957, the general manager for group marketing for Chrysler said, "If you are going to have 'causes', you have to define them . . . the purpose of the 'minimum sales responsibility' is to terminate a dealer, if necessary." *Automotive News*, April 22, 1957, p. 1, col. 2, at 52, col. 3. See also *H.R. Hearings, Dealer Franchises*, Celler 447.

<sup>456</sup> See, e.g., *AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS*, AUTOMOTIVE DIVISION 2 (1962) ("Purposes and Mutual Objectives"): "the economic fate of the Manufacturer in the authorized Dealer's market area is entrusted by the Zone to the Dealer. Failure of the individual Dealer to obtain satisfactory sales volume can work to the detriment of such Dealer, the Zone, the Manufacturer and ultimately other authorized Dealers."

reasons for its policies concerning sales, termination, and the like.<sup>457</sup> The preamble is a brief that reads much like Ford's statements to congressional committees,<sup>458</sup> and it skillfully attempts to convince the reader that the duties required of dealers make good economic sense and benefit the dealer, the company, and consumers.<sup>459</sup> Since the preamble is part of the contract signed by the dealer, arguably he has "agreed" to this view of the situation.<sup>460</sup> Also the agreement states that Ford will give the dealer "a reasonable opportunity to cure any failure by the Dealer to fulfill or perform"<sup>461</sup> such duties as sales, facilities and capital "prior to giving the Dealer notice of termination based upon such failure." Certainly, this is a consideration of one of the equities of the dealer. Another paragraph states:

In the interests of maintaining harmonious relationships between the parties to this agreement, the Dealer shall report promptly in writing to the Chairman of the Company's Dealer Policy Board . . . any act or failure to act on the part of the Company or any of its representatives, which the Dealer deems not to have been, or that the Dealer proposes to use in support of a claim that the Company has not acted, in good faith as to the Dealer. For the purposes of this subparagraph . . . the term "good faith" shall mean the Company and its representatives acting in a fair and equitable manner toward the Dealer so as to guarantee the Dealer freedom from coercion, intimidation, or threats of coercion or intimidation, from the Company.<sup>462</sup>

This paragraph allows Ford to argue that claims of bad faith which have not been sent to the Dealer Policy Board should not be considered by courts and administrative agencies—a kind of exhaustion of administrative remedies position. Still another paragraph states that the dealer agrees not to claim that termination or nonrenewal constitutes evidence of coercion or intimidation or action not in good faith, if it is based on the reasonable

<sup>457</sup> *Preamble to FORD MOTOR COMPANY, FORD SALES AGREEMENT (1962).*

<sup>458</sup> *Cf.*, Henry Ford II's statement in *S. Hearings, Marketing Practices, Monroney* 973-74. The parallel was suggested by Professor Monroe H. Freedman of George Washington University Law School.

<sup>459</sup> At the time the franchise was introduced it was reported that "Some dealers also were curious about the meaning of the contracts' 'Preamble' which spelled out at much greater length than the previous agreement the company's problems and the dealer's responsibilities." *Automotive News*, April 1, 1957, p. 52, col. 3.

<sup>460</sup> One can wonder if a court would allow the "Preamble" to serve as evidence of the "manner of operation of the automotive industry, the nature of the relationships among the automotive manufacturer, its dealers and the public, and the interdependence of the success of the manufacturer and the dealer" (*Preamble to FORD MOTOR COMPANY, FORD SALES AGREEMENT (1962)*) to influence a court's appraisal of the reasonableness of the conduct of Ford representatives.

<sup>461</sup> *FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 17(c) (1962).*

<sup>462</sup> *Id.* § 2(g).

belief that certain things have occurred.<sup>463</sup> Examples of these are bankruptcy, failure of the dealer to function in the ordinary course of business, disagreement among the principals of the dealer's business or death, or physical or mental incapacity of the dealer. Finally, the dealer, by signing the four-page agreement that incorporates by reference the twenty-eight-page standard provisions, is said to acknowledge:

. . . that this agreement has been entered into by him without fear and with freedom from coercion, intimidation, or threats of coercion or intimidation from the Company, and that the terms and conditions of this agreement, and each of them, are reasonable and fair and equitable.<sup>464</sup>

The document also contains a carrot and stick approach in response to the federal and state laws. To get termination benefits such as the repurchase of cars and help in disposing of premises, a canceled dealer must give Ford a general release from all liability within fifteen days after Ford tenders these benefits.<sup>465</sup> If Ford is skillful in release drafting, dealers will have great trouble in taking termination benefits and then suing for damages for some act alleged to be in bad faith. As a result, such suits will be a gamble. The dealer must weigh the costs and chances of getting a favorable judgment against the certain termination benefits. Certainly Ford has done all it can to maximize its interests and ward off the effects of the state and federal statutes.

#### IV. THE CHANGES IN THE FRANCHISES AND THE EFFECTS ON THE INTERESTS OF THE PARTIES: THE DEALERS' BENEFITS

The 1956 and 1957 franchises also gave greater recognition to the dealers' interests than was given before, but the manufacturers have not given the dealers all that they want. Dealers want a profitable operation with minimal risks. However, they are still dependent on the company to design and advertise a car so that it will sell. The franchise gives them no significant part in this process. Dealers also are still dependent on the company's policies concerning distribution. Under all of the franchises the dealer submits orders for the models he wants that may or may not be accepted by the manufacturer.<sup>466</sup> Even if these orders are accepted, the manu-

<sup>463</sup> *Id.* § 17(b).

<sup>464</sup> *Id.* § 25.

<sup>465</sup> *Id.* § 23.

<sup>466</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION §§ 3-4 (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 10 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2(i) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 3(c) (1962).



facturers do not promise to deliver these cars. For example, American Motors Corporation's agreement says that it is not liable for failure to deliver because of a long list of circumstances, including American Motors' "allocation of motor vehicles and other products to and among Dealers and other customers on such basis as [American Motors] . . . may determine. . . ." <sup>467</sup> No other factory makes any greater promise to deliver to the dealer the cars he wants within a reasonable time. <sup>468</sup> Yet the new franchises did minimize some risks and shift some expenses from the dealers to the manufacturers. Some manufacturers allow their dealers to return unwanted parts and accessories. <sup>469</sup> All make provision for allowances to help dealers dispose of last year's models when the new models are announced. <sup>470</sup> The manufacturers also assumed a greater amount of the cost of making warranty repairs. <sup>471</sup>

There is somewhat greater protection of the dealer's investment and going business where longer franchises are given which cannot be canceled

<sup>467</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 4 (1962).

<sup>468</sup> CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 10 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 4 (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 3(c) (1962).

<sup>469</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 12 (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 4E (1962).

Ford offered a parts obsolescence plan to its dealers which would have allowed a dealer to return 4 per cent of his parts at the end of every year. The "National Ford Dealer Council unanimously turned it down because the company, in return, demanded that the dealers give up their traditional semi-monthly 2 per cent cash rebate on parts and accessories. GM dealers do not receive this rebate." *Automotive News*, April 1, 1957, p. 52, col. 2.

<sup>470</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 11 (1964); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 13 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 7 (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 3J (1962).

<sup>471</sup> The manufacturers, following General Motors' action, adopted what was called a 100 per cent warranty plan. Previously all manufacturers paid 60 per cent of the labor charge and invoice cost of the parts, plus 10 per cent. Under the mid-1950's plans, the manufacturers paid 100 per cent of the labor charge and the same rate as before for parts. See *Automotive News*, Feb. 20, 1956, p. 1, cols. 2-3; AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 24 (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 19 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 10 (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 14D (1962). It was reported that, in effect, this was a price cut of about \$100 per car without the problems of a price cut. *Automotive News*, Feb. 20, 1956, p. 1, cols. 2-3; *S. Hearings, Marketing Practices, Monroney* 919.

A Dodge-Plymouth dealer said, "This warranty clause is easily the biggest item GM gave its dealers." *Automotive News*, March 19, 1956, p. 82, col. 4. However, since then dealers have been dissatisfied with the close scrutiny and delays in getting reimbursed for warranty claims and with the companies' manner of computing labor charges and paying for parts. See, e.g., *id.*, Aug. 10, 1964, p. 16, cols. 1-3.

at will.<sup>472</sup> Moreover, if the dealer loses his franchise, he may have the blow softened by more generous termination benefits. All four manufacturers provide benefits if they cancel a dealer,<sup>473</sup> but only Ford and American Motors expressly make their benefits applicable to a failure to renew.<sup>474</sup> The benefits can be viewed as a kind of carefully restricted compensation for, in Fuller and Perdue's terms, "essential reliance" loss.<sup>475</sup> The dealer loses any going business value his dealership might have had or anticipated profits. He is given compensation for many of the expenditures he had to make to carry out his duties under the franchise. All manufacturers will buy back "all new, unused and undamaged current model motor vehicles. . . ." But the cars must be of the current model; leftover cars from last year's model are not covered,<sup>476</sup> and this could be a problem if termination comes soon after the new models come out. All manufacturers will repurchase some accessories and parts from the canceled dealer's stock.<sup>477</sup> Ford and Chrysler require that accessories be for use in the current models and purchased within twelve months prior to termination.<sup>478</sup> American Motors shortens the period to six months.<sup>479</sup> General Motors does not require that the accessories be designed for use in the current models.<sup>480</sup> All but American Motors will take parts listed in their current

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<sup>472</sup> See text accompanying note 433 *supra*.

<sup>473</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 28 (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 21 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 21 (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 21 (1962).

<sup>474</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 28 (1962); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 21 (1962).

<sup>475</sup> Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936).

<sup>476</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 28(a) (1) (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 21 (a) (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 21(a) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 21(1) (1962).

<sup>477</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION §§ 28(a) (2)-(3) (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION §§ 21 (b)-(c) (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION §§ 21(b) (i)-(ii) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION §§ 21(2)-(3) (1962).

<sup>478</sup> CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 21(c) (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 21(b) (ii) (1962).

<sup>479</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 28(a) (3) (1962).

<sup>480</sup> GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 21(3) (1962).

catalogues;<sup>481</sup> American Motors Corporation will take parts for the current and the three next preceding models.<sup>482</sup> All will repurchase signs of a type they recommend.<sup>483</sup> All will buy special tools designed for servicing their cars if the tools are of a recommended type and purchased within three years of the termination.<sup>484</sup> All offer help in disposing of the dealer's premises if he is not going to continue in the new- or used-car business.<sup>485</sup> Essentially, all offer to find a purchaser or sublessee or to lease the building themselves from the dealer for one year after termination.<sup>486</sup> This benefit is well-hedged with protections for the manufacturer—for example, the dealer may not refuse reasonable offers.<sup>487</sup>

The new franchises gave the dealers some more freedom to run their businesses independently, but they still are subject to many factory controls. The five-year term offered to many dealers ended the yearly hazing sessions where a dealer was worked over by a manufacturer's sales staff and induced to place heavy orders for cars and trucks, participate in contests, and order advertising material.<sup>488</sup> Dealers were given more power to pass their business on to a successor upon their retirement or death although the manufacturers still retain an important veto power.<sup>489</sup>

<sup>481</sup> CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 21(b) (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 21(b) (i) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 21(2) (1962).

<sup>482</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 28(a) (2) (1962).

<sup>483</sup> *Id.* § 28(a) (4); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 21(d) (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 21(c) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 21(4) (1962).

<sup>484</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 28(a) (5) (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 21(e) (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 21(d) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 21(5) (1962).

<sup>485</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 30 (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 23 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 22 (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 22 (1962).

<sup>486</sup> *Ibid.*

<sup>487</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 30(b) (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION § 23(a) (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 22(c) (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 22(a) (1962).

<sup>488</sup> See text accompanying note 50 *supra*.

<sup>489</sup> AMERICAN MOTORS, DEALER FRANCHISE PROVISIONS, AUTOMOTIVE DIVISION § 27 (1962); CHRYSLER CORPORATION, DIRECT DEALER AGREEMENT, DODGE DIVISION §§ 24-25 (1964); FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 20 (1962); GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 20 (1962).

Possibly all of these benefits might have been given to the dealers had there been no state statutes, federal hearings, or the Good Faith Act. Yet undoubtedly the legal system speeded up the decision to make these concessions and prompted top management to pay attention to problems of dealer relations. The legal battles also had great influence on the form of the concessions.

### ***E. The Fifth Stage: Application of the Statutes Through Legal and Private Systems***

After the birth of a law some degree of voluntary compliance usually follows, but often one or more of the beneficiaries of the law will be dissatisfied with the nature of that compliance. Courts, administrative agencies, or both, then enter the picture. Their presence may prompt compromise so that individuals are less unhappy, or these agencies may operate formally and issue orders, injunctions, or judgments. Of course, their formal operation usually gives content to the law or withdraws content from it.

Both the federal Good Faith Act and the various state statutes aimed at the manufacturer-dealer relationship have passed through this fifth stage. Some dealers have saved their franchises, obtained settlements, won judgments, and prompted factory officials to lose licenses. Other dealers have failed. These laws have been overturned, expanded, and defined in the process. To appraise the results of the operation of the legal system described to this point, it is necessary to consider as many of the consequences of litigation, administrative proceedings, and construction of the statutes as we can.

#### **1. THE FEDERAL GOOD FAITH ACT**

In the ten years since the Dealers Day in Court Act was passed, many dealers have sought to recover under the act, and manufacturers have tried both to defend against liability in the particular suits and to have the statute construed in ways favorable to them. First, we will look at the degree of success and failure of those dealers who have tried to use the act, and then we will attempt to explain what happened and point out likely consequences.

##### ***a. The overall picture of success and failure: statistics***

I have discovered 94 cases filed under the Good Faith Act as of February, 1966. My sources are reporters, trade regulation services, and an industry paper, *Automotive News*. While undoubtedly there have been some other cases filed, I think that my total is reasonably accurate. Only one of

the 49 representatives of dealers' trade associations who were interviewed indicated that he knew of a case in his state that I had not found.<sup>490</sup>

In 61 of the 94 cases, I have some information about the results. That information is contained in Table 2.

Several points can be made about this information. The most impressive thing is that the dealers have been highly unsuccessful in recovering money from the manufacturers as a result of filing complaints under this act. In 37 cases, or slightly more than 56 per cent, of the 61 cases where results are known, the dealers received nothing from their Good Faith Act suit. In slightly less than 44 per cent of these cases the dealers did receive something<sup>491</sup> but these cases must be examined in more detail before one can conclude anything about the effectiveness of the act from the standpoint of those dealers who have sued.

The one dealer who received a final judgment as a result of litigation won \$8,800. Willys Motors did not appeal the jury's verdict against it.<sup>522</sup> At the time this is written an \$18,000 judgment against American Motors is not final, and American Motors has indicated it will appeal.<sup>523</sup> *Automotive News* describes most of the out-of-court recoveries as "nuisance settlements."<sup>524</sup> No information is available about many of these settlements; one of the conditions imposed by one manufacturer is that the dealer's attorney not discuss the case.<sup>525</sup> However, it is clear that some settlements are for very small amounts as compared with what the dealers alleged in their complaints. In three of the settlements made by Volkswagen, the dealers received only \$9,000 each, although two of them had alleged damages of over \$1 million and the third had asked for \$300,000.<sup>526</sup> Volkswagen's representative termed the settlement as far cheaper than the cost of defending the suits.<sup>527</sup> One of Chrysler's settlements was for less than \$8,000 in a

<sup>490</sup> Interviews.

For footnotes 491-521 see pp. 210-216.

<sup>522</sup> Childers & Venters, Inc. v. Willys Motors (E.D. Ky. June 6, 1960) in NADA Magazine, Nov. 1962, p. 68. A dealer received a judgment in another case, but it was only for termination benefits. In Walker v. Ford Motor Co., 241 F. Supp. 526, 529 (E.D. Tenn. 1965), the court as trier of fact found that the "plaintiffs were undoubtedly mistreated by the defendant's personnel," but that the conduct of Ford "did not rise to the dignity of coercion." Ford, after terminating, had refused to repurchase parts unless the dealer signed a release. See FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 23 (1962), which purports to give Ford this right. The court, without discussing why § 23 was against public policy and void, awarded the dealer his loss on selling his parts inventory and compensation for his services in selling it. The judgment was for \$36,157.72, which Ford could reduce to \$14,269.72 by repurchasing certain parts within thirty days.

<sup>523</sup> Semke v. American Motors Co. (D. Okla. 1966) in *Automotive News*, Feb. 7, 1966, p. 90, col. 3.

<sup>524</sup> *Automotive News*, Dec. 11, 1961, p. 96, col. 5.

<sup>525</sup> Letter from dealer's attorney.

<sup>526</sup> Cases cited note 511 *supra*.

<sup>527</sup> *Automotive News*, April 20, 1964, p. 2, col. 5, at 8, col. 5.

Table 2. CASES UNDER THE GOOD FAITH ACT

Company	Cases settled	Cases kept from trier of fact	Cases where trier of fact found for manufacturer	Cases where trier of fact found for dealer and where result not set aside by judiciary		Cases where trier of fact found for dealer but where result set aside by judiciary	Cases where result unknown, case still pending, or result other than listed elsewhere in the table		Total cases discovered
General Motors	1 491	6 492	0	0	0	0	2 493	9	
American Motors	3 494	5 495	1 496	1 497	1 498	1 499	6 499	17	
Ford	1 500	5 501	2 502	0	3 503	7 504	7 504	18	
Chrysler	3 505	4*506	3 507	0	0	9 508	9 508	18*	
Subtotals for four major American manufacturers:									
Studebaker	8	20	6	1	4	24	24	62*	
Volkswagen	0	0	0	0	1 509	3 510	3 510	4	
Renault	11 511	2 512	0	0	0	0	0	13	
Willys (now Kaiser Jeep)	2 513	2 514	1 515	0	0	1 516	1 516	6	
Other	0	0	0	1 517	0	1 518	1 518	3	
	2 519	1 520	0	0	0	3 521	3 521	6	
Total	23	25	7	2	5	33	33	94*	

\* One case was settled, pending appeal, after the manufacturer had won a directed verdict, and thus it is entered twice in the table (once as a settlement and once as a case kept from trier of fact); but it is not counted twice in the total of 94 cases. (For footnotes 491-521 to this table, see Appendix B, pp. 210-216.)

Effective date: February 1, 1966

suit for \$480,000.<sup>528</sup> One of the American Motors settlements was for \$3,000 in a case where \$100,000 had been demanded.<sup>529</sup>

On the other hand, a few settlements have been for slightly higher amounts. In *Jim Kelly, Inc. v. Chrysler Corp.*, the dealer sued for \$600,000 but settled for \$15,000.<sup>530</sup> In letters to me, attorneys for three dealers have described their settlements as "substantial,"<sup>531</sup> "about 60% of the damages I thought I could prove,"<sup>532</sup> and "the final outcome of the . . . case was a settlement which both sides were unhappy about, and hence was probably a fair settlement."<sup>533</sup> Nonetheless, one can conclude that in no more than a few cases was the dealer able to collect a significant amount, especially when one thinks of litigation costs, lawyers' fees, and the costs of delay.

The other item of interest in Table 2 is that in those cases where there was no settlement, the dealers were unable to get to the jury in 25 instances (or about 64 per cent of the 39 cases not settled, about which I know the result). Seven dealers won before juries, but five of those seven verdicts were overturned by the judiciary while one was pending on appeal when this manuscript was written. Obviously, the judges have not viewed favorably the evidence the dealers have offered.

This information allows us to guess that those dealers who sued view the Dealers Day in Court Act as totally ineffective—the statute produced little tangible benefit for most of them. However, to assess effectiveness and study the use of the full legal system by an organized group seeking "reform," there are some other questions to be asked. We must consider why these dealers lost and whether or not there remains some deterrent force in the statute to protect other dealers whose situations differ from those who sued.

Some clues as to the answers to these questions might be found by considering a number of factors. At the outset, one must acknowledge the

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<sup>528</sup> McLaren Motors, Inc. v. Chrysler Corp. (N.D. Cal. Dec. 1960) in NADA Magazine, Nov. 1962, p. 68. "A Chrysler attorney in San Francisco said the corporation began seeking a settlement below its appeal costs after the District Court dismissal last year. McLaren accepted the proffered offer after notice of appeal was filed to the Ninth Court of Appeals [sic] in San Francisco, but before briefs were submitted or prepared." Automotive News, Oct. 16, 1961, p. 4, col. 5.

<sup>529</sup> Carl Price v. American Motors Sales Corp. (N.D. Ala.) in Automotive News, March 13, 1961, p. 3, cols. 3-4.

<sup>530</sup> (E.D. Mich. March 30, 1959) in NADA Magazine, Nov. 1962, p. 68. Material in NADA files indicates that the settlement was reached during the taking of depositions of Chrysler executives.

<sup>531</sup> Letter from dealer's attorney.

<sup>532</sup> *Ibid.*

<sup>533</sup> *Ibid.*

possibility that most of the 62 dealers were incompetent and undeserving. Certainly 62 is a very small percentage of the some 30,000 automobile dealers in this country, and one would expect some dealers to be below average. Litigation comes at the end of an elaborate filtering process designed to screen out any dealers with worthy cases: all of the 62 failed to obtain satisfaction from the internal review systems of their manufacturers. Of course, these internal review systems might operate in bad faith, as a mere cover for arbitrary and unfair actions by the manufacturers' local personnel. However, it is difficult to see why it would be in the long-term interest of a manufacturer to allow this to happen. If the internal review systems fail to screen out a worthy dealer's case, it is unlikely that the failure is a product of bad faith. Rather it is likely that the internal review system will be applying different values from those applied by the decision maker (judge, jury, trade association, or disinterested academicians) who deems the dealer's case worthy.

This leads us to the cases to discover the criteria to which a manufacturer's conduct must conform. For if the courts and the manufacturers agree on those criteria, we may have explained the dealers' lack of success in using the statute. Those dealers who sued may have been complaining about perfectly permissible actions. Whether a dealer is deserving of relief will turn on the values the Good Faith Act is made to serve by its judicial construction. That construction, in turn, is a product of the relative positions of the parties, their tactics, and the persuasiveness of the legal arguments they can marshal.

*b. Judicial construction of the Good Faith Act: positions, tactics, arguments, results, and consequences*

*i. RESOURCES AND STRATEGY*

After the statute was enacted, the manufacturers were in a much better position to litigate than were individual dealers. In late 1956 and for several years thereafter, a dealer's lawyer who considered bringing suit faced the prospect of a difficult and time-consuming task. First, he could see a discouraging array of legal issues embedded in the language that emerged from the legislative compromises. Probably most significant from the standpoint of a dealer's chances of success was whether the act gave a dealer a cause of action where a jury found that a manufacturer had failed to "act in a fair and equitable manner" toward the dealer, or whether the act was limited to protecting a dealer against "coercion, intimidation, or threats of coercion or intimidation." Either reading was plausible.<sup>534</sup> The conse-

<sup>534</sup> See Note, 70 HARV. L. REV. 1239, 1246-50 (1957). This note, published before any of the cases were decided, suggested the possibilities.



quences of the alternatives could differ importantly. On one hand, a general fairness test might allow a jury to review all of a manufacturer's decisions concerning a dealer to see if they coincided with the jurors' views of such things as "ethical" sales methods, fair allocations of scarce merchandise, loyalty through hard times, and personal problems of a dealer which affected his business. Typically, this review would tend to favor dealers. On the other hand, a coercion-only interpretation would be more restrictive and favor manufacturers. As long as a manufacturer was not coercive, it could abide by its own standards of fairness without being subject to review in a Good Faith Act suit.

Another issue existed if the courts limited the statute to coercion. Then the definition of that far from precise term would be critical. Coercion, in the context of this statute, connotes pressure to induce action that would not otherwise be taken and pressure which is illegitimate. But what constitutes pressure? How does one distinguish good pressure from bad? Finally, a dealer's attorney would have to be prepared to argue about remedies. The act speaks of "damages" without defining the term. Does this mean "contract"—expectation—damages or only "tort"—reliance—damages? What about doctrines such as certainty of proof and mitigation?

While the dealer's attorney could foresee a difficult job of persuading the court about the law to apply, he also had to consider his chances of success before a jury. Of course, the facts of his case were very important, but what would be the general reaction of a jury to his client? Attorneys who have represented dealers have written that there is general jury sympathy for the individual dealer who is fighting a giant corporation.<sup>535</sup> However, several have indicated some important qualifications. Automobile dealers may not have as favorable a public image as manufacturers,<sup>536</sup> and some "conservative" people on juries view the Good Faith Act as an interference with free enterprise.<sup>537</sup>

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<sup>535</sup> Letters were sent to nineteen lawyers who had tried Good Faith Act cases for dealers. The lawyers were those whose identity could be determined from the available material and whose addresses could be found. Ten replied.

<sup>536</sup> Again, the dealer is in a disadvantageous position. The manufacturer occupies a highly respected position in the public eye. The administrations of Presidents Franklin D. Roosevelt, Truman, Eisenhower, Kennedy, and Johnson have selected top automobile executives for highly publicized key posts. The public image of the dealer is generally only poor to fair. Many dealers, although desirous of conducting their business on a high plane, find they must stoop to the level of the disreputable operators or fail commercially.

Letter from attorney.

<sup>537</sup> Letter from attorney. The attorney also asserted that the federal judges in his area share this view.

The complaining dealer's resources may affect the decisions to sue and to settle, and they may influence the dealer's success in the case. Most of the dealers who wanted to sue had lost their franchises,<sup>538</sup> and often one factor was their lack of sales and profit. These dealers were short of cash,<sup>539</sup> and their lawyers often had to take their cases on a contingent fee basis<sup>540</sup>—in effect, the lawyers had to gamble on their winning a case in order to get paid. Several attorneys have stressed that their Good Faith Act cases had been extremely time consuming. One attorney said his office no longer will accept Good Faith Act cases for dealers. Another commented:

The lawyers who represent the defense of these antitrust cases, including those under the "Day in Court" act, find that if they have a very wealthy client who is disposed to spend any amount for defense and nothing for tribute they can make a career out of the defense of one of these cases. When one of these cases is brought against Ford or Chrysler or General Motors, a senior member of one of the big firms takes over the defense and then he has one or two juniors assigned to him who make it a full-time job to pursue extensive discovery and other procedures to give the plaintiff a bad time. They get orders for inspection of all the plaintiff's documents and then take interminable depositions revolving around these documents on the theory that it may lead to the discovery of relevant evidence or may affect damages. *No attorney in his right mind will take one of these cases in this area for the plaintiff on a contingency basis*, and I would say that the plaintiff should be prepared to spend at least \$50,000 if he wants to take on the manufacturer. (Emphasis added.)

Other attorneys have indicated that they would take cases on a contingent fee basis. Most of the estimates for attorneys' fees were far lower. Most letters spoke of fees of from \$5,000 to \$10,000. Some dealers thought that the National Automobile Dealers Association should solve all of the problems of contingent fee litigation, where a major question of statutory interpretation was involved, by financing and handling several test cases to seek favorable constructions of the Good Faith Act.<sup>541</sup> NADA's officers thought

<sup>538</sup> Almost all of the Good Faith Act cases involve termination or nonrenewal of a franchise. In *Bateman v. Ford Motor Co.*, 202 F. Supp. 595 (E.D. Pa. 1962), the dealer sued to enjoin termination. The most notable exception is *Zarbock v. Chrysler Corp.*, TRADE REG. REP. (1965 Trade Cas.) ¶ 71361, at 80535 (D. Colo. 1964), where the dealer still had his franchise despite the suit.

<sup>539</sup> A dealer who has an immediate need for money will be disappointed by the results of many law suits. For example, the Milos case began on October 15, 1958, and ended when certiorari was denied on October 28, 1963. Appendix for Appellant, p. 1a, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963). See also *Automotive News*, Aug. 7, 1961, p. 3, cols. 3-5.

<sup>540</sup> Letters from attorneys.

<sup>541</sup> See *Automotive News*, March 6, 1961, p. 62, cols. 1-5.

otherwise. They perhaps agreed with the manufacturers' interpretation of the act. NADA planned to enter one early case as an *amicus curiae* on an appeal,<sup>542</sup> but the dealer settled the case.<sup>543</sup> It has yet to find a case it wants to back, and its decision not to pursue a test case strategy has been criticized by others who represent dealers.<sup>544</sup>

While an individual dealer faced a host of legal issues if he wanted to use the act, the manufacturers faced a problem of uncertainty in running their relationships with dealers. They could not be sure how far they could push dealers to operate efficiently and sell as many cars, trucks, parts, and accessories as possible. Clearly, they had an interest in having the statute construed to provide standards for their field men's conduct. Moreover, they had resources to devote to the battle. The amount of money involved might be major to a canceled dealer, but few, if any, cases involved a risk of significant liability to the manufacturers even if the dealer won.<sup>545</sup> Thus the manufacturers could afford to fight as long as necessary to get favorable interpretations to set guidelines for the future. While dealers' attorneys might have to work on a contingent fee, the manufacturers already had their own large and competent legal staffs and could afford to hire trial and appellate specialists. Assuming dealers' and manufacturers' attorneys to be equally competent,<sup>546</sup> an attorney on a contingent fee can afford to invest only so much time on a particular case.<sup>547</sup> Since the manufacturers were interested in guidelines for the future, they could afford to invest, for example, \$40,000 worth of attorneys' time in a case they could have settled for \$10,000.<sup>548</sup> Moreover, there was the factor of experience. A dealer's attorney usually started without any background in arguing a case under the Good Faith Act. On the other hand, a manufacturer's legal staff became expert in arguing such a case as it faced a series of these suits. It

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<sup>542</sup> *Id.*, May 8, 1961, p. 1, col. 1, at 4, col. 5.

<sup>543</sup> *Id.*, Oct. 16, 1961, p. 4, col. 5.

<sup>544</sup> Interviews.

<sup>545</sup> This is not to say that the dealers did not demand very large sums of money in their complaints. They did, but the probability of proving substantial damages was small.

<sup>546</sup> I have read the briefs and records in all the appellate cases decided under the act except those in the Fifth Circuit, which were unavailable. The attorneys for the dealers appear to range from highly competent to minimally competent.

<sup>547</sup> Of course, sometimes a lawyer working on a contingent fee will invest a great deal of time in research and brief writing. He may get interested in the case or feel that he must win in order to recoup something for his time. Some of the dealers' attorneys in the Good Faith Act cases obviously invested a great deal of time in the cases, but others did not.

<sup>548</sup> Letter from an attorney for a dealer in a Good Faith Act case, asserting that this was true in his case.

could polish its basic brief in case after case<sup>549</sup> and even influence the company's business practices—such as record keeping—so that it would be ready for any suit.<sup>550</sup>

Clearly, the manufacturers were in a favorable position. They used several tactics to promote their interests. Primarily they wanted both certainty and maximum freedom of action. Thus they wanted courts to narrow the statute's coverage to coercion, and, in turn, to restrict the meaning of that concept. A number of dealers' representatives have said that the manufacturers used a test case strategy to aid in getting such interpretations.<sup>551</sup> Ideally, one approaches a court seeking a particular construction of a statute in a case where the facts in the record almost demand that construction—where the construction leads to a result in the particular case that makes sense and the alternative interpretation does not. The facts in a test case give the judge some data about the consequences of some of the alternatives open to him. He can see vividly the impact on people in positions similar to those of the parties in the case before him. While individual dealers decide whether or not to file a complaint, the manufacturer, as any

<sup>549</sup> See, e.g., the following briefs for the Ford Motor Co.: Brief for Appellee, pp. 12-20, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Brief for Appellee, pp. 16-17, 30-34, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Brief for Appellant, pp. 32-36, *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962). See also Brief for Defendant, p. 166, *Milos v. Ford Motor Co.*, 206 F. Supp. 86 (W.D. Pa. 1962), *aff'd*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>550</sup> A Ford franchise, for example, requires the use of an elaborate form on which are recorded the comparisons between a dealer's performance and those of other dealers. See Exhibit Y, Dealer Comparison Chart, reprinted in Brief for Appellant, p. 44, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965). Each Ford road man files a Dealer Contact Report on each meeting with a dealer. See Appendix for Appellee, pp. 139b, 141b, 143b, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963). A chronological summary of all these reports makes an impressive summary of the relationship from the manufacturer's point of view. See *id.* at 145b-53b. Moreover, the manufacturers often prepare charts comparing a dealer's sales with those of his zone and district. These, too, are useful in litigation. See *id.* at 235b-39b.

<sup>551</sup> Interviews. See also *Automotive News*, March 6, 1961, p. 62, cols. 1-5.

"Actually," Hammond [a canceled Ford dealer who also is a graduate of the Columbia Law School] said, "there has been nothing of any significance decided by any court. The real damage and danger lies in the dealers'—and factories'—attitude that the law is not effective to achieve what Congress, NADA and the dealers all proudly assumed it would accomplish."

He contended that the factories are building this attitude by avoiding or settling the strong cases before they can be adjudicated in court and become a part of "case law." The few cases which have resulted in opinions thus far have been weak factually, he said.

"In this way they [the factories] have actively and consciously aided the shaping of the case law in a manner most favorable to them," Hammond continued, "while at the same time creating and fostering the impression among dealers that the good-faith law has failed to be effective to safeguard the dealers' interests."

*Id.* at col. 2.

fairly wealthy defendant facing a series of related cases, could control the kinds of cases coming before the courts in which the Good Faith Act would be construed. It could defend and bring appeals in those cases where the facts are unfavorable to the dealer, and it could settle any where the facts favor the dealer. Since individual dealers were more interested in money than establishing precedents and NADA did not act, the manufacturers in this way were free to control the cases the court would see.

The net effect of whatever forces were at work was to prompt a sequence of cases favorable to the manufacturers. The first cases in which the act was construed involved dealers who *appeared* to be incompetent and undeserving. In the first reported case construing the act,<sup>552</sup> the dealer "left the conduct of its business to his twenty-one-year-old daughter and nineteen-year-old son and one mechanic" and failed to file monthly financial reports with the company as required by his franchise. In the second reported case<sup>553</sup> decided on the merits, the dealer's sales were far below those of other Ford dealers. He claimed his sales were poor because his neighborhood had deteriorated as a result of an influx of members of low-income groups. Yet the dealer stipulated that in a test of the area it was found that over 500 Fords had been sold to residents during a year but that the dealer had sold only 19 per cent of them. In another case that prompted a precedent-setting appellate opinion,<sup>554</sup> the dealer promised to obtain or build better facilities within two years in order to induce Ford to give him the franchise. He failed to carry out his promise because he was content<sup>555</sup> to run a profitable<sup>556</sup> low-volume operation<sup>557</sup> from his small building originally con-

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<sup>552</sup> *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F. Supp. 378 (D.N.J. 1959). *Automotive News* reports that the court's restrictive construction of the Good Faith Act in this case was welcomed by the manufacturers. They had been fearful "that a loose application of the statute would encourage featherbedding and goldbricking among franchised dealers." *Automotive News*, Feb. 23, 1959, p. 1, cols. 2-4, at 8, col. 1.

<sup>553</sup> *Leach v. Ford Motor Co.*, 189 F. Supp. 349 (N.D. Cal. 1960). It should be noted that Leach said that the methods used by other dealers in selling to members of lower income groups were unethical; however, he was unable to press this point effectively. *Automotive News*, Oct. 31, 1960, p. 3, cols. 1-2. If Leach was right that he was being compared with dealers who prey on lower income groups, the decisions of the Ford Motor Company and the court are reprehensible; there is no indication that the court considered this issue.

<sup>554</sup> *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>555</sup> Milos' position was that there was a recession in his area of Pittsburgh, and so he could not afford to go into debt at the end of the two-year period. Appendix for Appellant, pp. 38a-39a, *Milos v. Ford Motor Co.*, *supra* note 554.

<sup>556</sup> In 1956, Milos' profit on the dealership was \$16,134 in addition to his salary. This was \$291 per car and truck sold. Appendix for Appellee, p. 141b, *Milos v. Ford Motor Co.*, *supra* note 554.

<sup>557</sup> Milos sold 116 cars in 1956, and his market potential was 228 cars; 227 Fords were sold by all dealers in his area during that year. *Id.* at 39b-40b.

structed to house a Tucker dealership.<sup>558</sup> No case to date has involved a clear picture of the kind of abuses described in the Senate hearings in 1955 and 1956.

The manufacturers had another interest. They wanted to discourage suits to minimize both the risk of adverse judgments and unrewarding litigation costs where the case was unlikely to yield a useful precedent. We have already seen that a dealer's attorney, probably working on a contingent fee, faced a discouraging series of issues inherent in the language of the act. Some manufacturers further discouraged dealers' attorneys by challenging the jurisdiction of the court over the manufacturer<sup>559</sup> and raising a lengthy cluster of arguments about the constitutionality of the Good Faith Act.<sup>560</sup> In one instance, Ford adopted another sometimes effective tactic: counterattack. It filed a counterclaim charging a conspiracy and asking for \$5 million in damages. It asserted that the dealer had run his dealership in such a manner as to force the company to let him run a "windfall operation" or to cancel him out and face a suit. The dealer "is an articulate

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<sup>558</sup> A road man's Dealer Contact Report tells of a meeting with Milos:

Dealer claims his present facilities are adequate for present sales volume. However when asked what his plans are to secure sales potential Dealer states he cannot handle more volume with present facilities. When confronted with these inconsistencies, Mr. Milos stated he had no intention of spending 30 to \$40,000 for improvements nor did he care what place he was in sales-wise or how much of the market he was getting. When asked if he had changed his thinking since accepting the Ford franchise, Mr. Milos stated he never intended to go in debt just to get a sales potential.

*Id.* at 143b.

<sup>559</sup> See, e.g., Appendix for Appellant, p. 20a, *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), cert. denied, 371 U.S. 829 (1962).

<sup>560</sup> See, e.g., *id.* at 19a-20a:

The defendant, without waiving any of the other matters available to it in defense of this action as brought or alleged, shows that the statute relied upon in Paragraph 5 of Count One [the Good Faith Act] is unconstitutional and void and of no force and effect for . . . , among other defects, it constitutes a deprivation of due process of law, an unreasonable interference with freedom of contract, it is vague, indefinite and uncertain, constitutes class legislation, it is so indefinite as not to give notice of the conduct necessary to avoid its penalty, it attempts an illegal delegation of legislative powers, it is not uniformly enforceable, it denies freedom of contract with whom, when and how a party wishes, it denies newcomers the opportunity to contract or attempt to contract with "automobile manufacturers," it imposes duties and burdens upon automobile manufacturers which are not imposed upon other manufacturers whose products are sold in the same manner, it imposes no requirement of mutuality between the parties to specified contracts, nor any requirement that the parties act in good faith with the consuming public, it propagates and stirs up and engenders litigation, and for each of these grounds and otherwise is in violation of the Constitution of the United States of America and the Amendments thereto.

Of course, these may be perfectly good constitutional arguments, but this does not lessen their tactical significance. The void-for-vagueness argument is one of the most difficult of all constitutional problems to deal with. See Note, 109 U. PA. L. REV. 67 (1960). Not many canceled dealers can afford to pay for adequate research into such subtleties.

lawyer who worked his way through Columbia University's law school by selling used cars at his father's lot. He has espoused his beefs against Ford throughout New York auto rows, to the extent that the company wants him enjoined by the court from acting as counsel for other ex-Ford dealers in another good-faith action."<sup>561</sup> *Automotive News* reports that "The factory's aims are twofold: To serve as a warning to other dealers of like mind and to lay the groundwork for a vigorous contest in the Hammond case."<sup>562</sup> The case is still pending.

## ii. STATUTORY CONSTRUCTION

So much for resources and tactics. Now it is time to look at the arguments presented to the courts, what the courts said and did, and what difference it makes. The principal issues for decision—whether the act is limited to coercion, the meaning of coercion, and the appropriate remedies—have already been indicated and will be considered in turn. After this discussion the reasons for the dealers' lack of success in suits under the act should be fairly clear.

(a.) *Does the statute require coercion or only failure to act in a fair and equitable manner?* Most of the debate concerning the Good Faith Act has turned on whether the statute protects a dealer from *any* failure of a manufacturer to act in a fair and equitable manner or whether it protects a dealer *only* from coercion or intimidation.<sup>563</sup> This is not surprising. Dealers would have a much easier time winning if they could claim unfairness because of a manufacturer's failure to consider such things as how badly their business would be hurt by its policies, personal excuses for inability to sell cars, and the like. They want to implement values other than purely economic ones such as success in selling cars. The manufacturers want to keep decisions more impersonal and centered on business success for *both* dealer *and* manufacturer.

The statute allows both manufacturers and dealers to make a plausible argument. The act allows a dealer to sue for damages suffered by reason of the failure of a manufacturer to "act in good faith."<sup>564</sup> "Good faith" is defined as "the duty of each party . . . to act in a fair and equitable manner . . . so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That

<sup>561</sup> *Automotive News*, May 22, 1961, p. 4, cols. 3, 4.

<sup>562</sup> *Ibid.*

<sup>563</sup> See, e.g., Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 *YALE L.J.* 1, 103-07 (1959).

<sup>564</sup> 15 U.S.C. § 1222 (1964).

recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."<sup>565</sup> The key words are "so as." They could mean "for example," thus indicating that coercion was not necessary. They could mean "in order to," thus limiting the statute to coercion.

Neither manufacturers nor dealers have been content to rest with definitions of the words "so as." The manufacturers have pressed for a construction of the act limited to coercion with two basic arguments. First, they argue legislative intent with a now almost standard set of references to legislative history. The House Report on the bill states:

The term "fair and equitable" as used in the bill is qualified by the term "so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation.<sup>566</sup>

The following colloquy took place on the floor of the House: "Mr. Halleck. In other words, while the words 'fair and equitable' are used, speaking of the relationship between the parties, those words 'fair and equitable' would be limited, as this language is concerned in the bill, to 'coercion and intimidation'? Mr. Celler. That is correct."<sup>567</sup>

On occasion manufacturers also have attempted to trace the process that led to the language in the bill.<sup>568</sup> They point to the original Senate bill's definition of good faith as the duty "to act in a fair . . . manner so as to guarantee the dealer freedom from coercion . . . and in order to preserve and protect all the equities of the automobile dealer which are inherent in the nature of the relationship. . . ."<sup>569</sup> When the "equities" language was

<sup>565</sup> 15 U.S.C. § 1221(e) (1964).

<sup>566</sup> H.R. REP. NO. 2850, 84th Cong., 2d Sess. 9 (1956). This passage is cited in Brief for Appellee, p. 14, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Brief for Appellant, pp. 17-18, *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964); Brief for Appellant, p. 11, *Garvin v. American Motors Sales Corp.*, 318 F.2d 518 (3d Cir. 1963); Brief for Appellee, p. 31, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Brief for Appellant, p. 32, *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

<sup>567</sup> 102 CONG. REC. 14070 (1956). This colloquy is cited in Brief for Appellant, p. 18, *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964); Brief for Appellee, p. 31, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>568</sup> This argument was made in Brief for Appellant, p. 17, *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964); Brief for Appellee, pp. 31-32, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>569</sup> S. 3879, 84th Cong., 2d Sess. § 1(e) (1956); *S. Hearings, Marketing Practices Monroney* 1237.



deleted to meet the objections of the Antitrust Division of the Department of Justice, only coercion was left. A general fairness construction would run afoul of those objections and thus would make the amendment meaningless.

Second, manufacturers bolster their legislative history argument by asserting that courts favor constructions of statutes which avoid difficult constitutional issues, and the manufacturers assert a general fairness interpretation raises serious doubt as to the constitutionality of the act.<sup>570</sup> They point to the following constitutional difficulties if juries were free to determine whether or not manufacturers had failed to act in a fair and equitable manner: (1) such a statute would be unconstitutionally vague and uncertain,<sup>571</sup> (2) it would be an invalid delegation of legislative powers to the judiciary;<sup>572</sup> and (3) it would be an unreasonable interference with the right of contract and conduct of private business.<sup>573</sup>

Third, the manufacturers also have relied on Professor Kessler's articles,<sup>574</sup> especially the second one, which advocates a construction limited to coercion in order to protect competition and consumers.<sup>575</sup> The Kessler articles have been important ammunition for the manufacturers.

The dealers have pressed for a general fairness statute with a greater variety of arguments. They have attempted to make more of the structure of the statute itself. The definition of good faith speaks of acting "in a fair and equitable manner . . . so as to guarantee the one party freedom from coercion. . . ." A construction limited to coercion makes the phrases "good faith" and "fair and equitable manner" meaningless. If the act were to be limited to coercion, why didn't the draftsmen say so directly?<sup>576</sup>

<sup>570</sup> See Brief for Appellee, p. 34, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>571</sup> See Brief for Appellee, p. 22, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Brief for Appellant, pp. 14-16, *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964); Brief for Appellant, p. 35, *Garvin v. American Motors Sales Corp.*, 318 F.2d 518 (3d Cir. 1963); Brief for Appellee, p. 33, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Brief for Appellant, p. 41, *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

<sup>572</sup> Brief for Appellee, p. 33, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>573</sup> *Ibid.*

<sup>574</sup> Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959); Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957).

<sup>575</sup> See Brief for Appellant, p. 18, *Garvin v. American Motors Sales Corp.*, 318 F.2d 518 (3d Cir. 1963); Brief for Appellee, p. 32, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Brief for Appellant, pp. 34-35, *Pierce Motor Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

<sup>576</sup> See Brief for Appellee, p. 10, *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964).

Moreover, the act speaks of the dealer's duty to act in good faith. To define good faith as the absence of coercion makes this provision silly since few, if any, dealers could ever coerce a manufacturer.<sup>577</sup> The dealers have also turned to the House Report but have stressed its general statements of purpose. That report speaks of the inequality of economic power and the abuses found in the Senate hearings. These problems will not be solved by a construction limited to coercion.<sup>578</sup>

What has been the response of the courts to the arguments made by dealers and manufacturers?<sup>579</sup> There has been almost no consideration of the constitutionality of the Good Faith Act.<sup>580</sup> It now appears almost certain that the Good Faith Act will be construed to give a dealer a remedy only where he can prove coercion. In some of the first cases, decided in the late 1950's, two district courts took the opposite approach.<sup>581</sup> But the

<sup>577</sup> See Brief for Appellant, pp. 18-19, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963).

<sup>578</sup> Brief for Appellant, pp. 23-24, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965); Brief for Appellant, pp. 13-14, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963).

<sup>579</sup> For discussions of the cases decided under the Good Faith Act, which differ from the material in this article, see Freed, *A Study of Dealers' Suits Under the Automobile Dealer's Franchise Act*, 41 U. DET. L.J. 245 (1964); Comment, 48 CORNELL L.Q. 711 (1963); Comment, 62 MICH. L. REV. 310 (1963); Comment, 74 YALE L.J. 354, 357-60 (1964).

<sup>580</sup> The constitutionality of the statute was upheld in *Blenke Bros. Co. v. Ford Motor Co.*, 203 F. Supp. 670 (N.D. Ind. 1962). The problem is discussed in Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 228-37 (1957); Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L. J. 1135, 1176-77 (1957); Comment, 48 CORNELL L.Q. 711, 738-41 (1963); Comment, 62 MICH. L. REV. 310, 314-16 (1963).

<sup>581</sup> See Appendix for Appellant, pp. 223a-24a, *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964), where the court said:

The Act provides a remedy in damages for a failure to act in "good faith" in "performing and complying" with the franchise as well as upon termination or failure to renew. Good faith imposes a duty on both parties to the franchise to act in a "fair and equitable manner" toward each other. Although the Act grants a dealer a right of action for bad faith on the part of the manufacturer "so as" to guarantee the dealer freedom from coercion or intimidation, neither the language of the Act nor its purpose requires that it be limited to cases involving force and compulsion. In this case although plaintiff was not coerced or intimidated in the sense of being forced to do something against its will, the evidence clearly presented issues of discrimination, of misrepresentation and intentional misleading, and of an intention to force plaintiff out of business once defendant had found a more desirable outlet for its cars. This court does not believe that Congress intended to limit the application of the Act to situations in which a dealer is forced to bow to arbitrary demands of the manufacturer under the threat of losing his franchise, although the same result can be achieved through the more subtle device of representations and promises which the manufacturer never intends to fulfill.

In *Barney Motor Sales, Inc. v. Cal Sales Inc.*, 178 F. Supp. 172, 174 (S.D. Cal. 1959), the District Judge said by way of dictum:

The extreme vagueness of the concept of good faith or bad faith used by Congress in the provision at hand is testimony to the fact that the intention was to

dealers were unable to hold this initial victory. The United States Courts of Appeals for the Second and Third Circuits construed the act as limited to coercion in several opinions<sup>582</sup> that have been followed in other circuits since then.<sup>583</sup> The Second and Third Circuit opinions largely do no more than adopt the manufacturers' arguments, and there is no attempt to answer those of the dealers. The opinions quote the sentences from the House Report that mention coercion<sup>584</sup> and the colloquy between Representatives Halleck and Celler,<sup>585</sup> and they seem to rely heavily on Professor Kessler's discussion of the statute.<sup>586</sup> Since these decisions in the Second and Third Circuits, the matter does not seem to have been considered in detail in other courts; rather they are content to cite cases and regard the point as settled.<sup>587</sup> Although any of the other circuits could take a different view or the Supreme Court of the United States could consider the point,<sup>588</sup> a dealer who wants to argue for a general fairness statute now has a most difficult burden to carry.

(b.) *The effect of a statute limited to coercion.* The result of this victory of the manufacturers in one respect is easy to state: to win, dealers must prove coercion. Nonetheless, the significance of the victory cannot be assessed

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control the dealer-manufacturer relationship in its essential premises (by allowing the trial court wide discretion in giving specific formulation to the immensely vague term "good faith") and to disregard the traditional legal implications of words which purported to, but in fact could not, signify the mutual intentions of the parties.

<sup>582</sup> *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964); *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962). In an earlier case the Fifth Circuit found it unnecessary to decide the point although the court's opinion indicated that a construction requiring coercion would be favored. *Woodard v. General Motors Corp.*, 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962).

<sup>583</sup> *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); *Zarbock v. Chrysler Corp.*, TRADE REG. REP. (1965 Trade Cas.) ¶ 71361, at 80535 (D. Colo. 1964); *Augusta Rambler Sales Inc. v. American Motors Sales Corp.*, 213 F. Supp. 889 (N.D. Ga. 1963).

<sup>584</sup> *Milos v. Ford Motor Co.*, 317 F.2d 712, 715-16 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425, 430 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

<sup>585</sup> *Milos v. Ford Motor Co.*, *supra* note 584, at 716.

<sup>586</sup> *Ibid.*; *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425, 430 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

<sup>587</sup> See, e.g., *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); *Zarbock v. Chrysler Corp.*, TRADE REG. REP. (1965 Trade Cas.) ¶ 71361, at 80535 (D. Colo. 1964).

<sup>588</sup> In *Kotula v. Ford Motor Co.*, *supra* note 587, *Kotula* asserted that no dealer had recovered in any reported case under the Good Faith Act. He suggested that the situation was like the one that induced the Supreme Court to exercise "stewardship" over cases under the Federal Employers Liability Act. The Supreme Court did not agree and denied certiorari. See BNA ANTITRUST & TRADE REG. REP. A-7, A-8 (Feb. 23, 1965).

until we examine how this not-overly-precise term is defined and what that definition calls for by way of evidence. What is coercion, and how do you prove it?

The briefs of the parties and the courts' opinions are much less explicit on these points than about whether or not coercion is required. The statute uses the term without defining it. The briefs offer definitions from dictionaries,<sup>589</sup> judicial opinions about other issues,<sup>590</sup> and Kessler and Stern.<sup>591</sup> The courts seem to respond<sup>592</sup> to Kessler and Stern, who say:

It is the authors' position that the meaning of "coercion" is as follows: *X coerces Y* means: (1) *X* offers *Y* the choice of doing *X*'s bidding or else being subjected to some sanction; and (2) *X* has the power to exercise the sanction against *Y*; but (3) for *X* to exercise the sanction against *Y* is not lawful, or for *Y* to do as *X* bids would serve an unlawful end of *X*. "Lawful," as used here, refers to the laws of the United States *other than* the Day in Court Act, including criminal, tort, and contract law. That threat to breach a contract constitutes coercion ("economic duress") is amply supported by the authorities which hold that extra compensation extracted to avoid a breach is unsupported by consideration.<sup>593</sup>

In most of the reported cases the court proceeds by citing a statement in the House Report that certain conduct is not coercion and then asks whether or not the facts in the particular case differ from the conduct mentioned in the House Report.<sup>594</sup> The most popular passage in the Report states that the statute

<sup>589</sup> See, e.g., Brief for Appellant, p. 17, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963).

<sup>590</sup> See, e.g., Brief for Appellee, pp. 19-20, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965).

<sup>591</sup> See, e.g., Brief for Appellant, pp. 34-35, *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), cert. denied, 371 U.S. 829 (1962).

<sup>592</sup> See *Milos v. Ford Motor Co.*, 317 F.2d 712, 716 (3d Cir.), cert. denied, 375 U.S. 896 (1963); *Pierce Ford Sales, Inc. v. Ford Motor Co.*, supra note 591, at 430; *Woodard v. General Motors Corp.*, 298 F.2d 121, 126 (5th Cir.), cert. denied, 369 U.S. 887 (1962); *Staten Island Motors Inc. v. American Motors Sales Corp.*, 169 F. Supp. 378, 382 (D.N.J. 1959).

<sup>593</sup> Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 106 n.478 (1959).

<sup>594</sup> H.R. REP. NO. 2850, 84th Cong., 2d Sess. (1956). The report is cited as a take-off for the type of analysis described in the text in *Kotula v. Ford Motor Co.*, 338 F.2d 732, 738-39 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965); *Garvin v. American Motors Sales Corp.*, 318 F.2d 518, 520 (3d Cir. 1963); *Milos v. Ford Motor Co.*, 317 F.2d 712, 716 (3d Cir.), cert. denied, 375 U.S. 896 (1963); *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425, 430 n.4 (2d Cir.), cert. denied, 371 U.S. 829 (1962); *Woodard v. General Motors Corp.*, 298 F.2d 121, 128 (5th Cir.), cert. denied, 369 U.S. 887 (1962); *Augusta Rambler Sales, Inc. v. American Motors Sales Corp.*, 213 F. Supp. 889, 894 (N.D. Ga. 1963); *Leach v. Ford Motor Co.*, 189 F. Supp. 349, 354 (N.D. Cal. 1960); *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F. Supp. 379, 383 (D.N.J. 1959).

. . . does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise.<sup>595</sup>

Of course, both the Kessler and Stern definition and this passage from the House Report are no more than starting points for decision since both use very open-ended concepts, such as "not lawful under contract law" and "adequate representation," "inefficient," and "undesirable." In order to understand what coercion means in the Good Faith Act, one must consider what the courts have done in particular types of cases. Two questions will be considered here. First, to what extent does the statute protect a dealer from a manufacturer's demand that the dealer take unwanted cars, trucks, or accessories or be subject to some sanction? If the draftsmen of the statute had any specific case in mind, it was likely that it was this one. Second, what is the likelihood that a dealer who has lost his franchise can get any relief under a statute limited to coercion? This is the most common situation in the cases brought so far.<sup>596</sup> Does the statute deal adequately with those dealers who are most likely to want to use it?

Let us suppose what looks like the clearest case of forcing unwanted merchandise. A manufacturer's road man tells a dealer he must order a hard-to-sell truck or he will be considered an undesirable dealer and will be canceled. The dealer protests but orders the truck and sells it for a \$125 loss. Has the dealer a cause of action? Perhaps it is surprising, but one cannot be sure. There is no reported case dealing with this problem. In 61 cases out of the 94 I discovered, I know something about the dealers' complaints.<sup>597</sup> In only nine did the dealer allege that he had been forced to take unwanted items,<sup>598</sup> and in at least eight of the nine this was a secondary allegation coupled with a more basic complaint.<sup>599</sup>

<sup>595</sup> H.R. REP. NO. 2850, 84th Cong., 2d Sess. 9 (1956).

<sup>596</sup> See note 538 *supra*.

<sup>597</sup> In the 33 instances where I have no knowledge of the nature of the actual dispute, the newspaper report says no more than that the dealer sued for wrongful termination or that the reported case deals with a procedural matter.

The most common complaints in the cases where information is available are as follows: (1) The responsibility of the manufacturer for the dealer's inadequate sales was asserted in 25 cases. (2) The forcing of unwanted items was asserted in 9 cases. (3) Problems with finding a successor and getting a manufacturer's approval of the sale were asserted in 7 cases. (4) The failure to reimburse for warranty claims was asserted in 3 cases.

<sup>598</sup> *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); *Bateman v. Ford Motor Co.*, 202 F. Supp. 595 (E.D.Pa.), *rev'd and remanded*, 302 F.2d 63 (3d Cir.); 204 F. Supp. 357 (E.D. Pa.), *rev'd and remanded*, 310 F.2d 805

*Continued on next page*

What would a court do in the example just given? A manufacturer could argue there was no coercion involved within the meaning of the act. Kessler and Stern say a threat is illegitimate when "for *X* to exercise the sanction against *Y* is not lawful. . . ." <sup>600</sup> A manufacturer has a right under the selling agreement to terminate a dealer who fails to "promote vigorously and aggressively the sale of VEHICLES . . . and the sale of other COMPANY PRODUCTS, in the DEALER'S LOCALITY . . . and . . . develop energetically and satisfactorily the potentiality for such sales and obtain a reasonable share thereof. . . ." <sup>601</sup> It could argue that the dealer has a duty to promote the sale of *all* vehicles made by the company and that satisfactory development of the potential for sales means selling both the good- and poor-selling models. A manufacturer must plan far in advance and run the risks of making more of an item than the public is eager to buy. When the manufacturer's planning is good the dealer has an opportunity to share in the benefits. Thus it is fair for a manufacturer to insist that a dealer likewise share in some of the losses caused by mistaken advance planning by helping to dispose of the inventory that had to be built far in advance of information about actual sales. No dealer could expect to be allowed to be only an order taker for the best-selling models and not to be required to help dispose of the others. Moreover, the manufacturer can point to the ever-handly House Report's statement that forcing a dealer to take unwanted cars "*may in appropriate instances constitute coercion. . . .*" <sup>602</sup> This means that in other instances, forcing does not constitute coercion, for the implication is

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(3d Cir. 1962); 214 F. Supp. 222 (E.D. Pa. 1963); *Hammond Ford, Inc. v. Ford Motor Co.*, 1962 Trade Cas. 76227 (S.D.N.Y.); *Loesch Motor Co. v. Ford Motor Co.* (N.D. Ohio 1964) in *Automotive News*, July 20, 1964, p. 85, col. 1; *Yonce Motors, Inc. v. American Motors Sales Corp.* (D.S.C.) in *Automotive News*, July 6, 1964, p. 4, cols. 3-4; *Armstrong v. Ford Motor Co.* (W.D. Pa.) in *Automotive News*, March 30, 1964, p. 4, col. 1; *Husak Bros. v. American Motors Sales Corp.* (E.D. Mich.) in *Automotive News*, April 8, 1963, p. 4, col. 1; *id.*, June 8, 1964, p. 6, col. 2; *Harvey Motors, Inc. v. Chrysler Corp.* (N.D. Cal. 1958) in *Automotive News*, Oct. 16, 1961, p. 61, col. 3; *id.*, Feb. 13, 1961, p. 8, col. 2; *McLaren Motors, Inc. v. Chrysler Corp.* (N.D. Cal. Dec. 1960) in *NADA Magazine*, Nov. 1962, p. 68.

<sup>599</sup> In *Armstrong v. Ford Motor Co.*, *supra* note 598, a former Ford-Edsel dealer whose franchise had been terminated sued. One court was a private antitrust action and the other was a Good Faith Act claim for coercion to take unwanted products. One could consider the coercion count a basic complaint, but arguably it was a secondary one tacked on to the antitrust suit. If it was a secondary allegation, the text should be changed to read that in all nine cases involving coercion it is likely that no suit would have been brought if the coercion was the dealer's only grievance.

<sup>600</sup> Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 106 n. 478 (1959).

<sup>601</sup> FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2(a) (i) (1962). Other franchises have similar provisions.

<sup>602</sup> H.R. REP. NO. 2850, 84th Cong., 2d Sess. 9 (1956). (Emphasis added.)

clearly that not all forcing is coercive. Thus the demand was for performance of the contract and not unlawful.

Of course, the argument presented assumes that the complaining dealer had not already done his part to share the loss caused by hard-to-sell items before the demand was made.<sup>603</sup> If the argument were accepted as valid, the area of protection from forcing would be limited to only those dealers who could show some taking of losses to offset their gains from selling hot models. Even if it were not accepted and a court ultimately found that the manufacturer had no such contract right and had made a "not lawful" demand, the position probably has enough plausibility to require argument before one or more courts in order for the dealer to win. Moreover, a dealer will face even greater difficulties if the threat is not so clear. Suppose the road man says to the dealer, "you should order this truck," and does not expressly threaten to impose a sanction if the dealer fails to do it. The dealer would have difficulty establishing that the road man's statement conveyed a tacit threat and was not merely "recommendation, endorsement, exposition, persuasion, urging or argument [which] shall not be deemed to constitute a lack of good faith."<sup>604</sup> Suppose the dealer understands the road man to be saying, "you should order this truck [and you will lose your franchise if you don't]." Do we apply an objective theory to see if the dealer was reasonable in so understanding the statement and if the road man was responsible for creating such an impression? The House Report says that "the existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of action."<sup>605</sup> Obviously, one can make threats without spelling things out in detail. Yet the line between such a tacit threat and "recommendation, endorsement, exposition, persuasion, urging or argument" is a hard one to see. A dealer would face real difficulty in such a case.

Finally, there is another potential problem. Some selling agreements can be terminated at will, and those that cannot, expire by their terms at the end of either one or five years.<sup>606</sup> Suppose a road man says to a dealer, "you must order this truck or we will not renew your franchise when it ex-

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<sup>603</sup> Whether a dealer had done his part to share the loss presents a difficult question of degree—how much of any loss must a dealer help absorb? Should it be based on gains the dealer has made in previous years, an equal loss sharing formula designed to spread the burden over all dealers, or the ability of each dealer to get rid of the poor-selling merchandise? These questions may be sufficiently difficult to influence a court to reject the argument suggested here.

<sup>604</sup> 15 U.S.C. § 1221(c) (1964).

<sup>605</sup> H.R. REP. NO. 2850, 84th Cong., 2d Sess. 9 (1956).

<sup>606</sup> See text accompanying notes 426-31 *supra*.

pires in six months." In Kessler and Stern's terms it would be lawful for the manufacturer to exercise this sanction against the dealer, except in the few states that require all terminations and nonrenewals to be for cause.<sup>607</sup> Since a manufacturer has a right to cancel at will or not renew, why cannot it impose any condition it pleases on its decision not to exercise its right? In other words, the greater right (to cancel at will or not to renew) includes the lesser one (to impose any conditions on not exercising the right).<sup>608</sup>

All three reported cases involving American Motors<sup>609</sup> present this problem because American Motors gives most of its dealers only a one-year franchise and typically ends relationships by failing to renew. In at least one of the cases involving Ford, the factory also could have raised the point since the dealer's franchise was terminable at will on 120 days' notice.<sup>610</sup> But only one court even mentioned the problem,<sup>611</sup> and it brushed the matter aside in dictum by quoting a passage from the House Report: "Thus, where a dealer's resistance to manufacturer pressure is related to cancellation or *nonrenewal of his franchise* a cause of action would arise."<sup>612</sup> This result may be essential if the act is to have any meaning; otherwise, coercion could be avoided by setting up short-term franchises and using nonrenewal as a lever to induce dealers to do anything the manufacturer desired. Yet the issue may still cause trouble to a dealer who wants to use the statute.

Joined with a dealer's considerable legal problems in convincing a court that forcing unwanted cars is coercive are several practical factors which may undercut the protection of the statute. Forcing unwanted items is not likely to cause great damage to the dealer since he usually can sell these items at prices at or slightly below his cost. Few cars or trucks are so bad that they cannot be sold at such prices. Thus a dealer would face a poten-

<sup>607</sup> KY. REV. STAT. § 190.040(1) (m) (1962); LA. REV. STAT. § 32:1254(A) (4) (c) (1963); NEB. REV. STAT. § 60-1412(13) (1960); OKLA. STAT. ANN. tit. 47, § 565(j) (3) (1962); TENN. CODE ANN. § 59-1714(h) (4) (Supp. 1963); WIS. STAT. § 218.01(3) (a) (17) (1963).

<sup>608</sup> Of course, this is the old unconstitutional conditions argument in a different setting. It is no more persuasive here than in the constitutional area. The argument is not logically necessary. See French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 236-37 (1961).

<sup>609</sup> *Garvin v. American Motors Sales Corp.*, 318 F.2d 518 (3d Cir. 1963); *Augusta Rambler Sales, Inc. v. American Motors Sales Corp.*, 213 F. Supp. 889 (N.D. Ga. 1963); *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F. Supp. 378 (D.N.J. 1959).

<sup>610</sup> Record, Vol. II, p. 470, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965).

<sup>611</sup> *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F. Supp. 378, 383 (D.N.J. 1959) (dictum).

<sup>612</sup> H.R. REP. NO. 2850, 84th Cong., 2d Sess. 9 (1956). (Emphasis added.)



tially difficult lawsuit to recover a relatively small amount of damages.<sup>613</sup> The effort often will not be justified by the potential gain. Furthermore, a dealer who still has his franchise is not likely to sue because he may fear that such a suit would injure his relationship with the manufacturer—at the least, he would expect few favors.<sup>614</sup>

Therefore the statute is unlikely to be of great benefit to a dealer who has been forced to take unwanted cars, trucks, parts, or accessories unless the case was flagrant and involved an unusually large loss—for example, one where the forcing went on for several years and involved many items. Yet the act may serve some deterrent function. Forcing unwanted items can be coercion, and the law brands coercion as wrongful. Losing several cases based on this theory could cost a manufacturer some of its dealers' good will and leave it vulnerable in another congressional hearing concerned with the "abuses of big business." If this type of consideration has force, the uncertainty about the meaning of the act might cut both ways. In addition to presenting a dealer with a problem, it might induce a manufacturer to adopt a policy requiring its road men to do nothing that could be construed as a threat in order to push slow-selling items.

The second kind of case in which the meaning of coercion has been tested is the most common one.<sup>615</sup> Here the dealer's franchise has been canceled or not renewed, and he is unwilling to take the manufacturer's offer of termination benefits and just fade away. He wants a large sum of damages and perhaps a little vengeance as well. What does a statute limited to coercion offer him? The table listing the won-and-lost record indicates that the statute may not offer him much help. That conclusion becomes stronger when one considers what such a dealer would have to prove to establish coercion and a cause of action.<sup>616</sup> First, he would have to prove a threat to

<sup>613</sup> For example, in *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965), the dealer's loss on an unwanted truck was only \$125. A number of unwanted items could add up over time, but the Good Faith Act has only a three-year statute of limitations. 15 U.S.C. § 1223 (1964).

<sup>614</sup> But see *Zarbock v. Chrysler Corp.*, TRADE REG. REP. (1965 Trade Cas.) ¶ 71361, at 80539 (D. Colo. 1964), where a dealer who still held a franchise sued for losses caused by Chrysler's poor distribution system. Zarbock also was given a Valiant franchise after the commencement of the action. Chrysler's representatives testified that Zarbock's "reputation . . . was good, and that he was a good salesman with a high turn-over for the size of his dealership." Perhaps such a dealer feels more free to sue, or perhaps Zarbock thought that since he was receiving no cooperation from the factory he had nothing to lose.

<sup>615</sup> See notes 538, 597 *supra*.

<sup>616</sup> Appellee [Ford Motor Company] acknowledges that under certain circumstances threats of termination may constitute a violation of the Act, but in order to constitute such a violation the threats must be coercive or intimidating. They must be made to wrongfully force someone, against his will, to do something he has a legal right not to do. Brief for Appellee, p. 25, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

terminate unless some action were taken. Second, he would have to convince a court that that threat was illegitimate—that terminating was “not lawful” under Kessler and Stern’s definition. Finally, he would have to show that “by reason of” the coercion he suffered damage of a type covered by the statute.

In most of the reported opinions there has been no discussion of whether or not there was a threat to impose a sanction unless the dealer acted.<sup>617</sup> The point is assumed.<sup>618</sup> The selling agreement itself contains demands and threats. It states that a manufacturer may cancel if, for example, the dealer fails to sell enough cars, to have adequate facilities and capital, or to make satisfactory repairs. Moreover, the standard procedure of most manufacturers seems to be for the road man first to call defaults to the attention of the dealer and then, if no action is taken, to warn him that he will be canceled unless he acts within a certain time.

Thus the dealer should have little trouble showing a “threat.” So far the real problem has been in taking the next step and showing that the threat is illegitimate. Suppose a dealer refuses to do warranty service on the cars he has sold and tells customers to take their new cars that need service to another dealer on the other side of town. The selling agreement requires the dealer to do this work and says that the manufacturer may cancel if the dealer fails to do it. The manufacturer points this out to the dealer and then demands that the work be done. The dealer refuses and is canceled. The dealer may have been threatened, but was the threat “not lawful”? It is hard to believe that he would be surprised by the requirement in the selling agreement since it is so typically part of the new-car business. If it is relevant, the clause would probably be deemed reasonable by most people, especially those consumers who tend to worry about the quality of a deal-

<sup>617</sup> In *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F. Supp. 378, 383 (D.N.J. 1959), the court said, “It is uncontradicted that during the last half of 1957 defendant’s representatives never saw or were able to communicate with DePaolo personally on his premises. Under such circumstances they could hardly have threatened to coerce or intimidate him.” This is true, but the franchise itself could contain a packaged threat which would be coercive if it were not legitimate.

<sup>618</sup> See the argument of the Ford Motor Company:

The basic contract rights of the manufacturers are not lost or vitiated by the Act. Their rights to “enforce” the contract through “threats” to terminate or fail to renew, if you will, have *not* been taken from them.

Manifestly, a party who has failed to perform a contractual obligation that is not contrary to public policy or otherwise is not coerced or intimidated in the legal sense if the other party exercises or threatens to exercise his contract rights to obtain performance.

Brief for Appellee, pp. 35-36, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

er's service. One would probably conclude that the manufacturer had a contract right to cancel for failure to perform this duty, hence that its demand was legitimate and not coercive. Moreover, assuming the manufacturer has such a right, it seems desirable to encourage it to make this type of "threat." The dealer is warned that the manufacturer intends to enforce its rights and can plan his conduct accordingly.

Conversely, one can easily think of an illegitimate threat. Suppose a manufacturer demanded a political contribution as the price of keeping a franchise. Since there is no right to cancel for failing to make such contributions, this would be "not lawful" and coercive. However, the dealers who have sued have had to take much more difficult positions. They have had to argue that: (1) although the manufacturer asserts a contract right to terminate because of a dealer's default, (2) in fact there was no default, and (3) hence that its demand is illegitimate.<sup>619</sup> Such an argument can be based

<sup>619</sup> Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 106 n.478 (1959), say, "That threat to breach a contract constitutes coercion ('economic duress') is amply supported by the authorities which hold that extra compensation extracted to avoid a breach is unsupported by consideration. . . ." Things may not be this easy. The lack of consideration necessarily means only that promises made under this kind of economic duress are unenforceable. However, the lack of consideration is not much help when no promise is involved. Then the aggrieved party needs the doctrine of duress in order to bring to bear all of the restitutionary remedies which give back benefits conferred. Yet he will be faced with the great reluctance of the courts to categorize as duress a threat to breach a contract. See DAWSON & PALMER, *CASES ON RESTITUTION* 979-99 (1958). Suppose a manufacturer's representative threatens to breach the selling agreement by terminating the franchise unless a dealer takes specific action. The dealer takes the action and loses a great deal of money. Consideration is not much help since there is no promise. A threat to breach a contract typically has not been enough for duress. Does this mean that the demand is not coercive? Of course, the concept of economic duress is growing and may expand to cover threats to breach a promise. See *Wolf v. Marlton Corp.*, 57 N.J. Super. 278, 154 A.2d 625 (1959), where a threat to exercise a constitutional right to sell a house to an "undesirable" was held to be duress.

Assuming that one accepts Kessler and Stern's position and concludes that a clear threat to breach the franchise would be coercive, there are still some unsettled problems in the manufacturer-dealer situation. Suppose a dealer's sales are neither clearly satisfactory nor clearly unsatisfactory. A manufacturer's representative threatens to cancel the franchise unless sales improve. Assume that a court would find that this was a threat to breach the contract because sales were just barely satisfactory. Now the consideration doctrine probably will not serve to categorize the threat as coercive. A compromise of a claim asserted in good faith where the claim was reasonable is supported by consideration although in fact a court would later find the claim to be invalid. 1 CORBIN, *CONTRACTS* § 140 (1963).

A threat to cancel under these circumstances probably would not be a repudiation for purposes of anticipatory breach:

[T]he making of a demand upon the other party to a contract that he shall perform in accordance with an interpretation that is not justified by the law is not in itself a repudiation; such a demand, however, does not require much by way of accompanying expressions in order to justify the other party in understanding that no performance other than that demanded will be accepted.

4 CORBIN, *CONTRACTS* § 973 (1951). See also UNIFORM COMMERCIAL CODE § 2-610, Comment 2. One is free to negotiate about uncertainty in the definition of performance before

on a claim that the clause in the selling agreement which states the duty is invalid; that the dealer is not, in fact, in default; that his default is excused; or that the default does not give rise to a right to cancel. In other words, the dealer must build his argument that coercion has been used on many of the defenses which are traditionally classified as a part of the law of contracts. The courts have indicated that they will review terminations for alleged failures to perform duties imposed by the franchise. Thus they recognize the possibility, if not the likelihood, that a dealer could be coerced by a demand to perform an invalid duty written in the franchise, to perform more than his duties under the franchise, or to perform where he is excused. The courts have indicated they will review the franchise as written and as administered.<sup>620</sup>

Opinions in Good Faith Act cases have applauded most of the important clauses in the standard franchises, calling them "eminently reasonable, objective and non-discriminatory,"<sup>621</sup> "in the ordinary course and dictated by sound business practice,"<sup>622</sup> and "not inherently unfair or arbitrary."<sup>623</sup> The provisions which have been so approved include (1) the definition of a dealer's sales obligations and the market potential system of further defining that obligation,<sup>624</sup> (2) the requirement that a dealer submit regular financial reports,<sup>625</sup> (3) the requirements that a dealer have adequate facili-

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that performance is due. However, the virtues of free speech and maintenance of economic relationships by compromise are balanced by the value of security and the right to rely on performance. If the negotiations tacitly communicate that the one asserting the claim is not going to perform, then the interest in security becomes paramount.

While the threat to cancel unless sales are increased to the point where they are adequate within the definition in the selling agreement may not itself be an anticipatory breach and may not run afoul the consideration doctrine, it is a threat to breach the contract in the future. Once the time for performance arrives, one can assert his interpretation as a justification for his actions, but he must be right; if he is wrong he has breached, and his good faith goes only to whether the breach is total or partial. See RESTATEMENT, CONTRACTS §§ 275, 314, 318 (1932). If a court would categorize a threat to breach a contract as duress, then a threat to terminate made in the mistaken belief that the manufacturer had a right under the contract to do this would be "not lawful" and thus coercive within the Kessler and Stern definition. Such a view is troublesome. Is the Good Faith Act intended to protect dealers from threats of termination where there is a reasonable doubt about the adequacy of performance? So far, none of the cases has come close to this problem.

<sup>620</sup> See, e.g., *Milos v. Ford Motor Co.*, 317 F.2d 712, 717 (3d Cir.), cert. denied, 375 U.S. 896 (1963).

<sup>621</sup> *Ibid.*

<sup>622</sup> *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F. Supp. 378, 382 (D.N.J. 1959).

<sup>623</sup> *Leach v. Ford Motor Co.*, 189 F. Supp. 349, 352 (N.D. Cal. 1960).

<sup>624</sup> *Ibid.*; *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963).

<sup>625</sup> *Garvin v. American Motors Sales Corp.*, 318 F.2d 518, (3d Cir. 1963).

ties<sup>626</sup> and capital,<sup>627</sup> and (4) the requirement that the manufacturer approve any buyer of a dealer's business and give the buyer a franchise as a new dealer.<sup>628</sup>

Although one cannot be certain, the courts apparently are saying that if a manufacturer demanded that a dealer comply with a clause that was "eminently [un]reasonable, [not] objective and . . . discriminatory,"<sup>629</sup> this would be coercion.<sup>630</sup> Of course, this would be inconsistent with the idea that the parties are the best judge of the fairness of their bargain. The courts may be rejecting the argument that the manufacturer obtained a contract right even to unreasonable clauses when the dealer signed the selling agreement. They may be taking the position that this standardized contract of adhesion is to be reviewed for fairness. The terms used by the courts point to a review designed to carry out the likely expectations of a reasonable dealer—that he be treated equally with other dealers in a like position, that he not be subject to the whims and idiosyncrasies of road men and their supervisors, and that his obligations be based on economically rational business standards. This looking behind a printed, take-it-or-leave-it document would be consistent with a number of recent developments in contract law such as the unconscionability provisions of the Uniform Commercial Code.<sup>631</sup>

To what extent will the courts' review of the provisions in the franchises help the dealers? Probably not much. It is not surprising that the courts have found that the provisions in the franchises reviewed so far bear the stamp of sweet reasonableness. After all, the General Motors franchise was drafted to pacify a Senate investigating committee as well as to relieve

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<sup>626</sup> *Woodard v. General Motors Corp.*, 298 F.2d 121, 128 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962).

<sup>627</sup> *Augusta Rambler Sales, Inc. v. American Motors Sales Corp.*, 213 F. Supp. 889, 892 (N.D. Ga. 1963).

<sup>628</sup> *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425, 430 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

<sup>629</sup> The quoted language is from *Milos v. Ford Motor Co.*, 317 F.2d 712, 717 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>630</sup> The argument would be: (1) an unreasonable clause is not part of the contract and cannot give the manufacturer a contract right; (2) a threat to cancel for failure to comply with such a clause is thus a threat to breach a contract; (3) a threat to breach is duress, "not lawful" within Kessler and Stern's definition, and thus coercive. See note 619 *supra* for some of the problems with this argument.

<sup>631</sup> UNIFORM COMMERCIAL CODE § 2-302. Compare the developing English doctrine of "fundamental breach" whereby judicial enforcement of clauses limiting liability is denied when enforcement would be inconsistent with the "core" or primary purposes and obligations of the contract. For an excellent discussion, see Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964). See also *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

strains in the relationship between General Motors and its dealers.<sup>632</sup> The other manufacturers followed this lead. Ford, for example, goes to unusual lengths to explain why it imposes certain duties on dealers.<sup>633</sup> The one major objection that dealers might make to the present franchises is that often provisions are vague or leave a great deal to the discretion of the manufacturers' field representatives.<sup>634</sup> There is a somewhat amusing parallel between the manufacturers' complaints that both the federal and state statutes are unconstitutionally vague and the imprecise way the manufacturers drafted the provisions in their own franchises. However, this point has not been considered by a court, and if it were raised, a judge might well find that most of the uncertain provisions have been clarified by practices of the manufacturer. It is unlikely that any clause in a current franchise will be overturned in a Good Faith Act case. The courts' review for reasonableness as written will not help dealers who try to invoke the statute in a termination case. At best, this review will be one more sanction pressing the manufacturers toward reasonableness when they redraft franchises in the future.<sup>635</sup>

Most courts in Good Faith Act cases, after observing that a clause in the selling agreement is reasonable as written, turn to consider whether or not the franchise was administered legitimately.<sup>636</sup> On one hand, there is the possibility of bad faith and plotting by a manufacturer's field men. On the other hand, even absent bad faith, it is possible that a manufacturer might threaten cancellation when it did not have the right to do so and thus exert coercion.<sup>637</sup>

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<sup>632</sup> See text accompanying note 296 *supra*.

<sup>633</sup> See text accompanying notes 457-59 *supra*.

<sup>634</sup> See text accompanying notes 434-49 *supra*.

<sup>635</sup> The Industry Relations Committee of NADA included in its dealer-factory program for 1965, revisions of the standard franchises to grant more rights to the dealers. *Automotive News*, April 5, 1965, p. 1, cols. 2-3, at 76, cols. 3-4. However, no major changes were made in General Motors franchises when they were renewed that year. *Id.*, Sept. 6, 1965, p. 3, cols. 3-4. Apparently, NADA was unsuccessful, but no added burdens were imposed on the dealers by the new language. However, the refranchising of some General Motors dealers was contingent upon their agreeing to expand their facilities. *Ibid.*

<sup>636</sup> See, e.g., *Milos v. Ford Motor Co.*, 317 F.2d 712, 717 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); *Garvin v. American Motors Sales Corp.*, 318 F.2d 518, 520-21 (3d Cir. 1963).

<sup>637</sup> The court in *Walker v. Ford Motor Co.*, 241 F. Supp. 526, 529-30 (E.D. Tenn. 1965), may disagree:

The plaintiffs were undoubtedly mistreated by the defendant's personnel. It was insisted by the defendant that they employ salesmen and mechanics which they did not need; that they keep their doors open needlessly; and they were chastised on the basis of unsound quota analyses. Nonetheless, the "advice" given the plaintiffs by the personnel of the defendant did not rise to the dignity of coercion or intimidat-

In all organizations there is the chance that people will dislike each other. Some people use their official power to carry out this dislike by punishing others or seeking revenge. Manufacturers' personnel who see dealers and make decisions about the quality of their performance have some discretion, and discretion can be abused. For example, dealers' sales are measured by an elaborate formula. The dealer is assigned a "market potential"—an estimate by the manufacturer of what the dealer can sell in his area. The dealer's actual sales will be a percentage of this potential. This percentage is compared with the percentages of other dealers in comparable areas.<sup>638</sup> Assume that the potential for a particular dealer was 100 cars but that only 70 were sold. Five comparable dealers sold 80 per cent of their potentials. Clearly, judgment was involved in deciding that the potential for the dealer's area was 100 cars, and it would be involved in deciding that 70 per cent achievement when others achieved 80 per cent warranted termination. It is possible that each of these choices could be made in bad faith to get rid of a dealer who was not liked by the official making the decision. Nonetheless, while a plot is conceivable, in most companies it would not be easy to "get" a dealer. Decisions must be reviewed by tiers of superiors. They would have to be conspirators, too, or be misled by the official who was plotting the overthrow of the dealer. There is a tendency to require a pattern of default by the dealer over time, and so the plotter would have to be patient. Finally, the plotter's desire for revenge would have to be strong enough to warrant taking the risks of getting caught.

To what extent does the Good Faith Act protect dealers from plots by revenge-seeking personnel of the manufacturers? The answer is that the protection supplied by the act is more apparent than real. It is likely that if a dealer proved a plot, he would have established that any threats made were illegitimate and coercive.<sup>639</sup> The threatened alternative to doing the

tion, and the Court must reluctantly find and conclude that the defendant's action in terminating the plaintiff's franchise was not an unlawful exercise of its business judgment.

None of the facts is given in the opinion, but it appears that the case rejects the definition of coercion proposed by Kessler and Stern. See note 619 *supra*. The conduct of the Ford personnel appears to have been of the sort covered by the consideration doctrine relied on by Kessler and Stern.

<sup>638</sup> A market potential is not a requirement that a dealer sell a given number of cars in any event. Rather it is a percentage factor of one dealer's share of sales by many dealers in an area. Although it is based at the beginning of any year upon "expected" sales during that year, it is subject to correction during the year by reference to "actual" sales made by all dealers in the area. Only if the percentage factor for any one dealer is out of line could he be prejudiced by the so-called market potential formula.

*Leach v. Ford Motor Co.*, 189 F. Supp. 349, 352 (N.D. Cal. 1960).

<sup>639</sup> See note 619 *supra*. The plot would be a threat to breach a contract which would come under Kessler and Stern's consideration-as-economic-duress theory.

manufacturer's bidding would be termination and the manufacturer would have had no right to cancel if the decision that, say, the dealer's sales were not satisfactory was based primarily on a desire for revenge rather than on a good faith appraisal of the dealer's performance. On the other hand, a manufacturer's official could dislike a dealer intensely but still do no more than smile with malicious pleasure as the dealer put his neck in the noose by his own failures. For example, a Ford dealer with a market potential of 100 cars might sell only 10, while comparable dealers sold 80 per cent of their potential and while the Chevrolet dealer in his area sold 200 cars. One could not call a Ford representative's recommendation that the dealer be terminated an abuse of discretion even if making the recommendation gave the representative great pleasure. Hence there would be no coercion and no cause of action under the statute.

The distinction just suggested spells trouble for dealers who think they have been victims of a plot. They must prove a plot existed, and they often will not be able to find adequate evidence to establish this. In *Kotula v. Ford Motor Co.*,<sup>640</sup> the dealer offered about as good evidence of a plot as a dealer is ever likely to have,<sup>641</sup> absent a confession by the plotter, and he convinced a jury. However, the trial judge granted Ford's motion for judgment notwithstanding the verdict, and the Eighth Circuit affirmed. In May of 1959, Kotula, a Ford dealer in Albany, Minnesota, was told by a Ford representative to order a two-ton truck. "If you don't want that truck, you don't want to be a Ford dealer."<sup>642</sup> Kotula refused to take the truck. He then found he was unable to get delivery of the cars he had on order for customers. He called Ford's main office in Dearborn, Michigan, and complained. Two days later the district manager for the Twin Cities district and the general field manager visited him and were angry because he had gone over their heads. They asked him to resign as a Ford dealer, but he refused. He finally ordered the truck, got his cars which were on order and then sold the truck at a \$125 loss.

In February of 1960, nine months after the truck incident, the same general field manager told Kotula, "Look, Kotula, if it's the last thing I ever do, it will be to make you wish you were never a Ford dealer in your life. . . . Don't ever forget it, Mr. Kotula, that I will get you yet." In May of 1961, about two years after the original truck incident, the district sales

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<sup>640</sup> 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

<sup>641</sup> The facts stated in the text are Kotula's version of what happened, since the jury believed him.

<sup>642</sup> The Ford representative testified, "I didn't force him to take a truck. I insisted that he take a truck. . . . I had no way of terminating anybody." Record, Vol. II, p. 348, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).



manager recommended termination. He sent on a file containing reports of Kotula's alleged deficient sales and bad practices and attempts to aid him remedy the defects. Kotula showed that one of the reports talked of a visit to the dealership during business hours but said the meeting took place on a date which was a Sunday when the business was closed. Another report in the file was written on a form that had not yet been printed at the time it supposedly was written. He said this indicated that the termination file had been falsely compiled in order to support the plotter's recommendation rather than as an accurate record of what had happened.

Kotula claimed that the decision to terminate for unsatisfactory sales performance was based on false or misleading information in his termination file. He said that Ford set market potentials for him based on what it assumed were the total sales of Fords, Chevrolets, and Plymouths in his area. His sales were far below these potentials for several years. However, the local Chevrolet dealer frequently sold cars to residents of the nearest metropolitan area but registered the cars as bought by people in his city, thus increasing the apparent total of sales in the town. Kotula complained that as a result those who set market potentials for Ford were operating on false assumptions, but nothing was done.<sup>643</sup> Since Kotula's yearly potential was only about 25 cars, even a small overstatement of it worked greatly to his disadvantage when his sales were translated into a percentage of that potential.

The termination file also contained a comparison of Kotula's percentage of potential for three years with those of five other Ford dealers. He complained that in "selecting towns to compare with the Albany sales record, Ford skipped over adjoining towns whose average distance from Albany was 24.0 miles, and selected five towns for comparison whose average distance from Albany was 45.2 miles."<sup>644</sup> Two of the dealers were exceptionally good performers. One sold 226 per cent of his objective in 1959 and 160 per cent in 1960.<sup>645</sup> The other, who was not in the same sales zone as Kotula's dealership, sold 190 per cent of his objective in 1959 and 117 per cent in 1960.<sup>646</sup>

However, the undisputed evidence showed some facts favorable to Ford. Kotula sold only 39 per cent of all the Fords purchased by people living in his area in 1957, 45 per cent in 1958, 59 per cent in 1959, and 71 per cent in

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<sup>643</sup> Brief for Appellant, pp. 38-45, *Kotula v. Ford Motor Co.*, *supra* note 642.

<sup>644</sup> Brief for Appellant, p. 49, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

<sup>645</sup> Record, Vol. II, p. 274, *Kotula v. Ford Motor Co.*, *supra* note 644.

<sup>646</sup> *Id.* at 274-75.

1960.<sup>647</sup> In other words, many potential customers preferred to buy Fords from a dealer in another town for some reason. There were no statistics comparing this invasion factor with the experience of other dealers. Also the Chevrolet dealer in Albany was more effective against Kotula than most Chevrolet dealers were against most Ford dealers in the zone. In 1959, Kotula sold 22 Fords while the Chevrolet dealer sold 26 cars in the area.<sup>648</sup> In the zone the percentage of Fords sold to the percentage of Chevrolets was 114 per cent,<sup>649</sup> as Ford outsold Chevrolet that year. In 1960, Kotula sold 12 Fords; the Chevrolet dealer 22 cars.<sup>650</sup> In the zone, Ford's percentage to Chevrolet's was 76 per cent.<sup>651</sup>

The two courts thought that Kotula had not proved his case. The district judge said:

Certainly, if the District officials intended to get rid of plaintiff as a dealer by reason of any personal ill will, spite, or revenge, as plaintiff contends, it seems inconceivable that they would have waited some two and one-half years to carry out their designs when the contract could have been canceled by the defendant at will without any cause on 120 days' notice.

. . . [T]here were valid reasons for concluding that Kotula was a submarginal dealer as a Ford representative. . . .

The Court does not deem it necessary to determine whether the jury was justified in deciding that plaintiff had established by the greater weight of the evidence that the contract was terminated on insufficient grounds.<sup>652</sup>

The Eighth Circuit affirmed, saying, "The difficulty with plaintiff's premised theory is that the favorable evidence . . . wholly fails to establish any causal connection between the coercive conduct relied upon, and the termination of this agreement."<sup>653</sup> In other words, Kotula's evidence could be

<sup>647</sup> Exhibit Y, Dealer Comparison Chart, reprinted in Brief for Appellant, p. 44, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

<sup>648</sup> *Ibid.*

<sup>649</sup> *Ibid.*

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid.*

<sup>652</sup> Record, Vol. II, pp. 470, 471, 472, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965). The argument based on the power to terminate at will is unpersuasive; the District officials did not have this power themselves but would have had to convince their superiors that its exercise was justified.

<sup>653</sup> *Kotula v. Ford Motor Co.*, *supra* note 652. In this case Ford made an effective policy argument:

Moreover, to permit recovery on the evidence offered in this case leads to only one conclusion—an automobile manufacturer cannot, without liability, exercise its right to terminate a dealer for failure to perform the obligations of the Sales Agreement if that dealer, despite his failure to perform, can show some personal animosity between himself and one or more of the manufacturer's field personnel. Such a conclusion not only offends the purpose and the legislative history of the

Act, but also would place an intolerable burden upon Appellee's business, which necessarily involves personal contact between thousands of employees and its seven thousand (7,000) dealers.

In order to guard against just such personal animosity as has been alleged in this case, the Ford Motor Company has established, and employed in this case, an elaborate and objective system of review by levels of the Company other than the District Sales Office. As a final measure of protection against arbitrary action by its sales personnel review of dealer terminations by the Dealer Policy Board is utilized. Brief for Appellee, p. 36, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965). The Eighth Circuit responded with a sweeping ruling that may have far-reaching significance:

One additional and vital phase of the case requires comment. The termination procedures provide that the notice of termination shall advise the dealer of his right to appeal to the Dealer Policy Board. This requirement was met—the notice informed plaintiff of his right to request a conference with the Dealer Policy Board, which was made up of top level officials of Ford. At plaintiff's request, the Board gave him a hearing, and thereafter considered his complaints and objections, including his insistence that the termination was founded upon baseless and groundless charges. The Board also conducted an extensive and independent investigation which among other things developed the true number of vehicles sold by competing dealers to residents of their franchise territories. Based upon this investigation the Board ultimately decided that the franchise should be terminated. It communicated its findings to plaintiff, "outlining just where we had come out on our analysis of the registration information he had given us, and concluded that his performance was so unsatisfactory that the Company's notice of termination was proper and should be confirmed."

Thus, even if we assumed, which we do not, that there was sufficient evidence to warrant the finding that the termination file depicted a distorted and groundless record of inefficiency and that the causes alleged were a mere pretext for defendant's arbitrary or capricious action, we would be required to go one step further and hold that the evidence was also adequate to warrant a finding that the Dealer Policy Board was a party to the wrongful scheme, and that it too acted in bad faith in its review, investigation and determination. To so hold would require resort to the rankest kind of speculation and conjecture.

*Kotula v. Ford Motor Co.*, *supra* at 739. The major problem with the court's position is that the investigation of the Dealer Policy Board was not very independent of the Ford officials accused of plotting. A member of the Board testified:

Q. And you did not make such an investigation, did you?

A. Well, we looked into the question of registrations, we felt, very thoroughly. I knew what he had told us about the excise tax situation and he had thought that was a problem with the District, and I couldn't agree with him on that. I had read the file with respect to the report on the truck incident and also read what Norton had to say about him at later dates, and it didn't seem to me that he had the problems quite to the extent that merited or would necessitate our coming out there to enable us to conclude the matter.

Q. What is your answer, no? A. No.

Q. You say, "we made an investigation of these registrations." You mean that the Twin City District office made an investigation, do you not? A. I mean we asked basically the Division to arrange with the Twin City District office to check these out and give us a full and complete report on their check-out, so that we could determine what they had done and determine if we thought it was accurate.

Q. When you say "we made the investigation," you don't mean to suggest to the Court and jury that the Dealer Policy Board itself made the investigation?

A. No. We caused it to be made.

Q. And actually, it was made through the Twin City District office? A. That's right. Record, Vol. II, p. 388, *Kotula v. Ford Motor Co.*, *supra*.

The court's opinion can and should be limited to instances of a truly independent investigation. Moreover, the entire position is doubtful. The Dealer Policy Board can make mistakes. It is not an independent governmental agency entitled to judicial deference. The Good Faith Act seems designed to give a dealer more than a right to a fair procedure within the manufacturer's organization.

explained by alternative hypotheses: (1) there was a plot that caused his termination, or (2) the local representatives disliked Kotula, and perhaps took some steps to get rid of him, but Kotula was a sufficiently bad dealer that a good faith judgment by the local representatives' superiors was made to cancel him. The local representatives may have been happy to see Kotula go, but others made the judgment in good faith upon at least plausible grounds.

Since plotters are not likely to confess, and since few would bother to plot against a clearly outstanding dealer because of the difficulty of success, it seems probable that dealers are not going to be able to do much better than Kotula in establishing that they were victims of a bad faith abuse of discretion. Unless another circuit were to decide that *Kotula v. Ford Motor Co.* was wrong and the inference of a bad-faith abuse of discretion could have been drawn, the Good Faith Act will offer little help to those in his position. Of course, the chance that another circuit would take a different view might afford a little deterrence. Even if a manufacturer were likely to win all such cases, the chance of having one's conduct reviewed in the litigation process might cause a manufacturer's official to bend over backwards. Few are eager for such an exacting review of their decisions by important superiors. Still the statute does not seem nearly so important either as an aid to the canceled dealer or as a deterrent force, as do the manufacturers' own internal review procedures.

Assuming it will be this difficult to prove bad faith, can the dealer show coercion by proving that although the manufacturer acted in good faith, it had no right to cancel, and that its threat, in consequence, was illegitimate? The first possibility is to challenge the manufacturer's assertion that the dealer failed to perform the particular duty in question. If the manufacturer threatened to cancel unless the dealer, for example, obtained adequate capital to run his business, and, in fact, the dealer had adequate capital, the threat might be coercive under Kessler and Stern's definition since the manufacturer would have had no legal right to cancel.<sup>654</sup> However, the problem is complicated by the fact that performance of a dealer's duties is not a yes-or-no matter but a question of judgment. The dealer's sales are to be "satisfactory" to the manufacturer; the dealer's capital and facilities "adequate."<sup>655</sup> Thus the courts could take one of three positions: (1) if the manufacturer's judgment is not proved to have been in bad faith, then it is

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<sup>654</sup> This assumes that a threat to breach a contract, made in the good faith belief that it is a threat to assert rights granted by the contract, is duress, thus "not lawful" and thus coercive. For the difficulties with this argument see note 619 *supra*.

<sup>655</sup> See text accompanying notes 434-49 *supra*.

final and there is no breach even if the judgment is thought to be wrong;<sup>656</sup> (2) if the manufacturer's judgment is unreasonable, then there is a breach although the judgment is not shown to have been in bad faith; or (3) if the manufacturer's judgment is found to have been wrong by the trier of fact, then although it is not shown to be unreasonable or in bad faith, there is a breach.

There has been little discussion of "satisfaction" and "adequacy" in the briefs filed in the cases so far.<sup>657</sup> The Ford Motor Company, in arguing that the statute was unconstitutional, indicated its fear of the third possibility:

The real issue in the case at bar is whether the defendant, both for its own survival in a highly competitive industry and in the interests of the car-buying public in a given locality, safely may terminate its sales agreement with an inefficient dealer—here a dealer who had effectively ceased selling automotive products—without being subject to a long and expensive trial under the amorphous concepts of the Act.

Is a jury now to review the defendant's (Ford's) distribution of automobiles to all its dealers over a three-year period and decide how many of each model should have been allotted to the plaintiff . . . in relation to the other dealers in the country, both from a point of view of a sales quota in times of plenty and a production allocation in times of shortage? . . . If during one of these years, there was a shortage of station wagons, how does the jury decide how the manufacturer should have allocated station wagons to dealers? If there were two dealers in [a particular town] . . . upon what basis will the jury determine that the defendant should have made allotments to each?<sup>658</sup>

The manufacturers could make several arguments against allowing a jury to determine whether or not a manufacturer was right in determining that

<sup>656</sup> The draftsmen of the Ford franchise have attempted to reach this result by contract: "Any determination to be made, opinion to be formed, or discretion to be exercised by the Company in connection with any provision of this agreement shall be made, formed or exercised by the Company alone and shall be final, conclusive, and binding upon the parties hereto." FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 31 (1962). One can wonder whether or not the courts would give effect to this clause. Suppose a determination were made in bad faith. In any event, it provides one more argument a dealer's attorney must meet.

<sup>657</sup> In the *Milos* case Ford argued that the dealer was in fact "woefully inadequate" in his sales performance, Brief for Appellee, pp. 11-26, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963), but it also asserted that "the jury may not substitute its criteria for those established by the agreement of the parties or second-guess Ford in the establishment of sales objectives." *Id.* at 22. In the *Kotula* case Ford argued that the dealer's "effort to vindicate his sales performance at best does no more than to challenge the business judgment of Appellee in terminating the contract for poor performance. It does not in any way serve to establish coercion." Brief for Appellee, p. 32, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965). In both arguments Ford assumes it can make a wrong determination and still not be coercive.

<sup>658</sup> *Automotive News*, Nov. 13, 1961, p. 2, col. 3, at 42, col. 3.

the dealer's performance was unsatisfactory or inadequate. Many are implicit in Ford's constitutional argument—a jury's bias in favor of a "small" dealer could color its view, a jury would lack experience needed to make these judgments, and the manufacturer could not act without running the risk that a jury would disagree. Moreover, insofar as the contract calls for satisfactory performance this means performance which satisfies the company—not a jury. A dealer could counter that in most contracts one accuses the other of being in default at his peril. The Company said "satisfactory" but not "satisfactory to the manufacturer" or "adequate in the manufacturer's opinion." If the dealer succeeded with such an argument, the expanded definition of coercion would encompass most of the benefits to dealers provided by the rejected "fair and equitable" reading of the act. Juries could review manufacturer decisions for correctness. To date few cases have dealt with the point even by implication. The trial court in the *Kotula* case assumed that there would be no cause of action under the act although the jury found "the contract was terminated on insufficient grounds."<sup>659</sup> Other cases have commented on the manufacturer's decision as being reasonable or its "honest belief."<sup>660</sup> It seems unlikely that the courts would accept this theory, yet the possibility remains.

If the courts decide that the manufacturer need not be right in its decision to cancel in the eyes of a jury, must it be reasonable or is lack of proof of bad faith enough to block a cause of action for coercion? Again there is little argument in the briefs about this question. Professor Kessler argues:

[S]ome of the dealer's obligations are not anchored in objective criteria. Many use "adequate" or "sufficient" performance as a yardstick. Judicial consideration of these provisions should not be patterned on the treatment of personal satisfaction clauses. The manufacturer should be denied absolute discretion. In weighing a dealer's argument that he substantially complied and that the manufacturer insisted on an unreasonable standard of performance, courts should consider the New York experience with architects' certificates in the building industry. The New York courts, when determining whether the absence of a required architect's certificate barred contractual recovery, have taken the position that a certificate was unnecessary where the architect had denied it unreasonably.<sup>661</sup>

<sup>659</sup> Record, Vol. II, p. 472, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965).

<sup>660</sup> See, e.g., *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425, 430 (2d Cir.), cert. denied, 371 U.S. 829 (1962).

<sup>661</sup> Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1183 (1957). Compare "the business judgment rule" as applied to corporate officers and directors in suits by shareholders. See FEUER, PERSONAL LIABILITIES OF CORPORATE OFFICERS AND DIRECTORS 13-23 (1961).

Kessler does not say why the courts should follow the New York architects' certificate view, but presumably he bases his conclusion on the policies of the statute and on the fact that the franchise is a contract of adhesion drafted by the manufacturer. Dealers could argue that their legitimate expectations are that the manufacturers will not only exercise good faith but will make reasonable business judgments as to the adequacy of the performances of dealers. Otherwise all of the effort that went into the revised selling agreements of the 1950's would be meaningless, and the definitions of dealers' duties and provisions for cancellation for cause would add up to little more than a right to cancel at will. On the other hand, if a jury is to review the reasonableness of a manufacturer's determinations that sales were unsatisfactory and capital and facilities were inadequate, manufacturers could object that many of the problems of a jury review of the correctness of a manufacturer's judgments would be present here too. In theory one can see a distinction between being required to be right and to make a reasonable judgment; in application, the difference may not be so great.<sup>662</sup>

The reported opinions once again are not too helpful. They are full of language describing as "reasonable" a manufacturer's decision that a dealer is not performing his duties.<sup>663</sup> However, the manufacturer's conduct has always been found to be reasonable. Therefore, it has not been necessary to indicate what would happen if a judgment about the adequacy of performance were found to be unreasonable but not proved to have been made in bad faith. The judges could be taken to have held no more than that since the manufacturers' judgments have not been shown to be incorrect, unreasonable, or in bad faith, there has been no need to decide the point.

The discussion of whether the franchise terms "adequacy" and "satisfaction" require good faith, reasonableness, or accuracy is very tentative and assumes that the matter is not settled. It is possible to argue that the question is not open. All of the franchises provide that they are to be governed by Michigan law. At least two Michigan decisions talk of a test of honesty and good faith as a limitation on a satisfaction clause but state that the jury cannot pass on the reasonableness of an asserted dissatisfaction.<sup>664</sup> However, the cases are fairly old, and, given the present trend of policing con-

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<sup>662</sup> See 1 CORBIN CONTRACTS § 140 (1963).

<sup>663</sup> See, e.g., *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645, 649 (3d Cir. 1964) ("reasonable"); *Garvin v. American Motors Sales Corp.*, 318 F.2d 518, 520, 521 (3d Cir. 1963) ("there is nothing arbitrary or unreasonable about this requirement . . . " "the decision not to renew was based on sound business judgment. . .").

<sup>664</sup> See *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912). The point is conceded by the dealer's attorney in *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N.W. 539 (1918).

tracts of adhesion, one cannot be sure that a Michigan court would honor a view that stems from an appraisal of a manufacturer-sales representative relationship made in 1912.<sup>665</sup> Furthermore, it is not clear that courts in states other than Michigan would apply Michigan law to interpret a dealer franchise. The choice-of-law clauses are part of classic examples of contracts of adhesion; rather than bargained-for choices of law, they represent the exercise of great bargaining power by manufacturers and acquiescence by dealers.<sup>666</sup> Their application could lead to results against the policy of many states by unduly favoring the manufacturers.<sup>667</sup> Moreover, since the interpretation of the franchise is crucial to the efficacy of a federal statute, perhaps this is an appropriate case for the application of what has been called federal common law.<sup>668</sup> Of course, exceedingly difficult legal issues such as these only add to the problems already faced by a dealer's attorney with limited time for research.

Even if a manufacturer's judgment is correct, reasonable, and in good faith, the courts have indicated that perhaps more is required to justify termination and make it free from coercion. The selling agreements say that a manufacturer has a right to cancel if a dealer defaults. In *Woodard v. General Motors Corp.*,<sup>669</sup> the Fifth Circuit's opinion contains a passage that has been quoted in two other decisions,<sup>670</sup> which may indicate that an expanded "material breach" approach may be taken under the Good Faith Act. The passage reads:

We do not think that the good faith requirement, whether viewed in or outside of the context of coercion, prevents a manufacturer from terminating a contract with a dealer where the dealer has, over a long period of time, violated a valid and material clause of the contract and

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<sup>665</sup> In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Supreme Court apparently demanded a critical appraisal of old state decisions rather than a mechanical approach which would assume that all early decisions would still be followed by a court today. See Wright, *FEDERAL COURTS* § 58 (1963).

<sup>666</sup> "To be sure there must be an agreement fairly made, and what Llewellyn calls 'jug-handled' standard forms will often and properly receive disrespectful treatment in court, regardless of a choice-of-law clause." Braucher, *Impromptu Remarks*, 76 HARV. L. REV. 1718, 1719 (1963).

<sup>667</sup> This might be true in any state with a statute designed to protect dealers from manufacturers or in states where this is a judicially established policy. See, e.g., *Gaines W. Harrison & Sons, Inc. v. J. I. Case Co.*, 180 F. Supp. 243 (D.S.C. 1960).

<sup>668</sup> See, e.g., *Friendly, In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-21 (1964).

<sup>669</sup> 298 F.2d 121 (5th Cir.), cert. denied, 369 U.S. 887 (1962).

<sup>670</sup> The passage is quoted in *Kotula v. Ford Motor Co.*, 338 F.2d 732, 739 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965); *Augusta Rambler Sales, Inc. v. American Motors Sales Corp.*, 213 F. Supp. 889, 894 (N.D. Ga. 1963).



has failed to comply with the continuing insistence of the manufacturer upon performance. And it is shown, we think, by the quoted portions of the House Report, that there was no legislative intent that the prohibited coercion should include a threat of cancellation if there should be a prolonged failure on the part of the dealer to heed the recommendations or yield to the persuasion of the manufacturer that the dealer make a bona fide effort to comply with its undertakings.<sup>671</sup>

At least four requirements for noncoercive behavior are present in this paragraph: (1) the clause must be valid, (2) the dealer must have violated it, (3) the default must be significant to the manufacturer in that the violated clause is material and the violation is over a long period of time,<sup>672</sup> and (4) the manufacturer's demand is for a bona fide effort to comply and the dealer's failure to respond is prolonged. Again, since no manufacturer has failed to pass this test, all we can say is that a manufacturer is safe if it meets all four conditions. However, imposing this test probably would implement the sense of the transaction between manufacturer and dealer.<sup>673</sup> One can say that manufacturers are responsible for leading dealers to believe that termination for cause will not be for minor and easily cured defaults or for occasional lapses. This likely understanding and the practices of the courts in dealing with most contracts make it clear that a manufacturer would have a difficult time arguing for a right to apply its franchise literally. For example, all franchises require the dealer to display a sign of an approved type. All allow the manufacturer to cancel for failure to perform this duty. Could it expect to be able to cancel a dealer with a good sales record whose sign had been blown down in a storm and who had not replaced it a day later? If such a dealer were threatened with termination, it would be a threat to impose a sanction which the manufacturer did not have a right to impose, and this threat would be classified as coercion.

The good faith, reasonableness, or correctness test and the material breach approach of the *Woodard* case probably will never help the canceled dealer. He would be helped if the judiciary adopted a reasonableness or correctness rule and allowed juries freely to substitute their judgment for that of the manufacturer. However, the language used in the opinions to date looks in the opposite direction. Likewise, the material breach approach has not been applied to allow jurors great freedom to "fight the giant

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<sup>671</sup> *Woodard v. General Motors Corp.*, 298 F.2d 121, 128 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962).

<sup>672</sup> *Cf.* RESTATEMENT, CONTRACTS §§ 275, 276 (1932).

<sup>673</sup> See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1182 (1957).

corporation.”<sup>674</sup> A review of the records in the cases before the courts of appeal discloses that the manufacturers have not allowed close questions of judgment as to adequacy or materiality to come to the courts. The internal review systems and the practice of giving “second chances” to dealers serve to screen out most clearly questionable decisions. The most significant function of these inchoate and vague doctrines may be to reinforce the manufacturers’ own policies of economically rational treatment of dealers. At best, the doctrines may serve slightly to shift the decisions in the close cases before the internal review systems in favor of the dealers. There is now one more reason for a manufacturer’s personnel to make a record that cannot be questioned.

Once a canceled dealer proves a threat, and if he is able to establish that the threat is to impose an illegitimate sanction, he faces the final problems. He must show that, in the language of the Good Faith Act, “by reason of” the coercion he suffered “damages” of a type covered by the statute.<sup>675</sup> Suppose a dealer is told he must hire more salesmen and cut prices to achieve his market potential or lose his franchise. The dealer has sold 85 per cent of his potential while other comparable dealers have sold between 88 per cent and 90 per cent of theirs; this is the first year that the dealer has been below the average of comparable dealers. A court and jury later decide that had the company canceled when the threat was made it would have breached the selling agreement because the judgment of unsatisfactory sales

<sup>674</sup> In the *Garvin* case the district judge commented on the reasons for the jury’s verdict for the dealer:

Reduced to its simplest aspects, plaintiff was a dealer who, for more than thirteen years, faithfully represented the defendant and its predecessor companies, having developed a regular clientele who would purchase new cars from him as occasion would permit, extending his every effort to make his business a success within his limitations. He was the chief executive officer, head salesman and repairman, enlisting regular customers to act as part-time salesmen who, in turn, would bring their friends to the dealership. He devotedly tried to comply with the modernization requirements of the defendant, employing bookkeepers or so-called accountants to formulate reports that were required, but was unable to meet the technical and detailed directives and exigencies of this mushrooming automobile manufacturer.

Substantial reasonable inferences may be drawn from the evidence that the non-renewal of the plaintiff’s franchise was due to the fact that, for reasons personal to the defendant, it did not desire a small-town dealer such as the plaintiff to continue to represent this modernized and up-to-date company, that in the stampede for success defendant intimidated and coerced the plaintiff into complying with its then newly formulated directives while, had the defendant applied a persuasive and understanding approach to the problems of the plaintiff, he undoubtedly would still remain as a representative of the defendant company.

*Garvin v. American Motors Sales Corp.*, 202 F. Supp. 667, 671-72 (W.D. Pa. 1962). However, the Court of Appeals reversed, 318 F.2d 518 (3d Cir. 1963), on the ground that American Motors’ demands were reasonable and thus not coercive. The Third Circuit’s opinion did not consider the test of the *Woodard* case discussed in the text.

<sup>675</sup> 15 U.S.C. § 1222 (1964).

performance was unreasonable and the default was not material. Thus arguably the threat was to impose a "not lawful" sanction and was coercive.<sup>676</sup> However, assume that after the threat is made, the dealer refuses to hire the salesman and cut prices and is canceled. As a result, he loses \$50,000 worth of investment in signs, automobiles, parts and accessories on hand, advertising contracts, and similar essential reliance expenditures. He claims he also lost \$10,000 a year net profit for the next five years. The manufacturer offers the dealer \$45,000 in termination benefits. The dealer rejects this and sues under the Good Faith Act. How much, if anything, can he recover?

It is possible to argue that the dealer suffered no loss "by reason of" the coercion since he was not successfully coerced, but refused to act. The dealer was not injured by the threat itself as he would have been had he cut prices and lost money. He was hurt by the termination rather than the threat to terminate. However, the act also allows recovery for "threats of coercion" as well as "coercion." One might read this to mean that a "threat of coercion" is the initial threat, while the coercion itself is the imposition of the illegitimate sanction which in the case posed caused the injury. Alternatively, one could say in the case that *but for* the threat (if the threat is the coercion), the termination which caused the losses would not have followed, and thus the losses were caused by the threat. No case has mentioned this minor difficulty. Undoubtedly the draftsmen of the act were more concerned with the dealer who gives in and does what is demanded since this was the case discussed in the hearings. When one attempts to apply the statute to the dealer who was terminated for refusing to give in, it does not fit neatly. If a court were to adopt the suggested narrow reading of the phrase "by reason of" in the statute, practically it would mean that the act could not be used in a termination case but only as a basis for recovery of losses caused by attempts to avoid termination—that is, by compliance with the threats. Since this would mean no recovery for one who proved a bad faith plot to cancel him, a narrow reading is unlikely. However, it is one more possibly troublesome point before a judge who reads statutes very literally.

Even if the "by reason of" phrase proves trouble-free, the final hurdle is presented by the word "damages." What can a dealer who lost his franchise because of coercion recover? The statute does not define the word "damages"<sup>677</sup> and the legislative history is of little direct help. A recent comment in the *Yale Law Journal*<sup>678</sup> outlines some of the many problems.

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<sup>676</sup> See note 619 *supra*.

<sup>677</sup> 15 U.S.C. § 1222 (1964).

<sup>678</sup> Comment, 74 *YALE L.J.* 354 (1964).

The statute could be limited to compensation for certain out-of-pocket losses—parts, inventory, premises—caused by the termination,<sup>679</sup> or it could cover the profits the dealer would have made if the coercion leading to termination had not occurred. In either event, a major problem is certainty of proof. If a dealer seeks to recover the loss on a showroom he built a year before the coercion, which has a useful life of twenty-five years, how can he establish that had the coercion not taken place he would have recouped his investment? The dealer might have suffered a sales setback within five years and given the manufacturer cause to cancel. He might have died and thus ended the franchise. He might have sold at a loss to move to a warmer climate in his old age. To some extent, these were all risks he took in building. Should coercion shift all of them to the manufacturer? If the dealer seeks his lost profits in the future, again one cannot be sure he would have kept the franchise or have operated profitably. Professor Kessler has suggested the problem might be avoided by awarding the dealer the difference between what the dealer could have sold his business for before termination and what he could sell it for after.<sup>680</sup> However, the *Yale Law Journal* comment points out several difficulties with this,<sup>681</sup> turning on the fact that dealers cannot sell their businesses without manufacturer approval of the new dealer. Moreover, this approval will probably be withheld if the new dealer is paying too much for "good will." Thus the before and after figures are also highly speculative.

Those courts that have passed on the problem have done so without much discussion of why they are taking the approach they take. In *Garvin v. American Motors Sales Corp.*, the district judge instructed the jury to

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<sup>679</sup> In the *Milos* case Ford argued that the act did not provide for recovery of expectation damages:

The Act's legislative history reveals that its purpose, with reference to a bad faith termination situation, is simply to protect the dealer's *investment*, not his future profit expectation. Protection of their investment was all that the dealers sought. 84th Cong., 2d Sess. House, Committee on the Judiciary, Antitrust Subcommittee, *Hearings . . . on H.R. 11360 and S. 3879* at 519 (1956).

There is no indication in the Act or its legislative history of a Congressional intent to provide for the recovery of loss of profits by a terminated dealer. On the contrary, the legislative history shows an intent not to guarantee in any way a dealer's future profits. For example, the original reference in the Bill to the "equities" of the dealer was deleted primarily because it might have been interpreted as a guarantee of anticipated profits. House Hearings, *supra*, at pages 20, 263. The fact that the Statute treats the termination of a franchise in precisely the same way that it deals with a failure to renew one buttresses the conclusion that expectancy damages by a terminated dealer are not recoverable under the Act.

Brief for Appellee, p. 49, *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

<sup>680</sup> Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 *YALE L.J.* 1135, 1188-89 (1957).

<sup>681</sup> Comment, 74 *YALE L.J.* 354, 375-77 (1964).

assess the damages suffered by failure to renew for one year and those "the plaintiff sustained from March 2, 1960, into the future as long as you find this plaintiff would have continued to work and represent this defendant and earn money as a result of his business operations."<sup>682</sup> He continued:

Now you can't speculate on this thing. You can't say he might have had a profit from the business. You take into consideration the type of product that the manufacturer had; you take into consideration the facilities that the plaintiff had; you take into consideration his attitude toward his business, how he applied himself. Did he or did he not make money before? If he did make money before, how much did he make? What did the future hold for him? Did he have the facilities to carry on this business? What was the stage setting that he had in order to make himself money out of this franchise if it had been renewed and renewed from time to time into the period of his future that you find he would have continued to carry on and operate this business? Damages cannot be assessed or awarded upon guess, speculation, sympathy or conjecture.<sup>683</sup>

The judge also discussed considering the dealer's health and life expectancy,<sup>684</sup> but he said nothing about the manufacturer's right to cancel<sup>685</sup> and refused to instruct on mitigation.<sup>686</sup>

The district judge in *Kotula v. Ford Motor Co.* was even more loose in the instructions and evidence of loss he allowed to go to the jury:

You have heard the testimony given by Mr. Kotula. He has expressed an opinion that his business, as I remember it, was worth some \$42,000 in round figures.

Now, what did he have there? He had a Ford agency subject to termination on 120 days' notice. He had tools and equipment. He had a going business. He had some good will, undoubtedly. Whatever good will may have attached to his business is a matter for one to consider in determining what his business was worth. He says that including good will, his business was worth some \$42,000.

Well, is that a reasonable figure? That, of course, is for you to determine.

You certainly have a right to take into consideration what he made out of this business. It would seem to me that is an important factor in determining what his business is worth. If a business doesn't produce adequate profits, of course, that has an effect upon the value of the business.

<sup>682</sup> Appendix for Appellant, p. 182a, *Garvin v. American Motors Sales Corp.*, 202 F. Supp. 667 (W.D. Pa. 1962), *rev'd*, 318 F.2d 518 (3d Cir. 1963).

<sup>683</sup> *Id.* at 182a-83a.

<sup>684</sup> *Id.* at 181a.

<sup>685</sup> *Id.* at 145a.

<sup>686</sup> *Id.* at 148a-49a.

According to Mr. Kotula, his best year was 1959, and his net earnings were about \$5,637.50. In 1960, his earnings were \$3,434.70. In 1961, I have a figure of \$4,715.87. . . . So you see, his net income in 1959, which was his best year, would be about \$4,500 or \$4,600. In 1960, his income would be about \$2,400 or \$2,500, and in 1961, if my figures are right, his income from the Ford business would be about \$3,700.

Well, you understand that he did salvage, so to speak, some of his assets and contends his net loss was about \$16,600. Obviously, if that is a sound figure, you would have to first determine what the reasonable value of his business was in light of all the circumstances, and then determine what he obtained by way of selling out. He contends that he had some Ford tools on hand and that he has had difficulty in selling them, and contends they are worth about \$500, as I remember it, which I suppose would be another deduction that should be considered.<sup>687</sup>

The Court: Counsel have called to my attention a little slip I made and I am glad to correct it. I wasn't aware of it. I told you that Mr. Kotula said that his business was reasonably worth \$42,000 and that he recovered some \$16,000 by way of sale of various items, and they tell me I said he claimed \$16,000 by way of damages. That isn't correct. He is claiming some \$25,000 by way of damages, because the difference between \$42,000 and \$16,000 leaves \$25,000 in round figures. I think the exact figure is \$25,925 that he claims.<sup>688</sup>

Kotula's opinion of the value of his business was the primary evidence supporting the \$42,000 amount. He included an item of \$15,000 for good will in his computation without much supporting argument.<sup>689</sup> The jury awarded Kotula \$12,500 but the judge ruled that the jury's verdict was wrong as a matter of law because of his interpretation of the Good Faith Act. He directed judgment to be entered for Ford, and the decision was affirmed on appeal.<sup>690</sup>

There are significant potential problems when a dealer attempts to prove losses with reasonable certainty. However, the two cases discussed indicate that the courts have not given the matter much attention or have concluded that the policy of deterring coercion calls for great generosity in making assumptions to aid the dealer. If such generosity is not given in future cases, the act will offer even less protection to a dealer who has lost his

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<sup>687</sup> Record, Vol. II, pp. 447-48, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

<sup>688</sup> *Id.* at 450-51.

<sup>689</sup> *Id.* Vol. I, at 107-31, 191-93.

<sup>690</sup> *Id.* Vol. II, at 463.

franchise. If he is confined, say, to the profits he would have made for a month or two and only those reliance losses which were not his risks under the selling agreement, the balance over the manufacturer's termination benefits would seldom warrant a suit.<sup>691</sup>

From all of this one can conclude that a dealer who alleges he was forced to take unwanted merchandise may face a number of difficult-to-meet arguments from a manufacturer, and the amount of loss likely to be involved probably will seldom be great enough to warrant suit. A dealer who alleges he resisted threats and lost his franchise as a result clearly faces an almost fantastic array of logical hurdles in front of recovery. Here what such a dealer will view as his loss will probably be a large amount, but he must be prepared to finance a difficult lawsuit, both as to evidence and establishing law. The judicial opinions give guidelines only insofar as they approve common practices of manufacturers on a case-by-case basis. It is difficult to generalize since the courts so frequently reach results without offering a careful justification for their action. To a great degree the approach taken by the courts explains the dealers' poor won-lost record, but the approach poses some potential problems for manufacturers as well.

## 2. THE STATE STATUTES

The state statutes also have been brought into play by dealers who thought the manufacturers were not complying with the requirements of fairness imposed by these acts. Two significant things have happened. First, the manufacturers have attempted to block application of these statutes. They have tried to have courts declare these laws unconstitutional, and they have also attempted to modify their business practices to avoid the impact of the legislation. Second, the statutes have been applied by administrative agencies and courts, and certain informal sanctions have developed. The effectiveness of the state statutes turns on the success of the manufacturers in side-stepping or killing them and on the norms developed in application.

### *a. The manufacturers' efforts to block application of the statutes*

By far the most effective attack on the state legislation has been the manufacturers' challenge to its constitutionality before the courts. The factories

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<sup>691</sup> One dealer who settled his claim out of court said:

"The factory's attorneys came in before the trial and said to us, 'Look, even if we admit every charge you make against us, what are your damages and how are you going to prove them?'

'You can't claim your overhead, because this is an expense you have whether you have the franchise or not. What else is there?'

So we settled."

Automotive News, Feb. 25, 1963, p. 3, cols. 3-5, at 49, cols. 1-2.

assert that the statutes are unconstitutionally vague and uncertain (for example, it is a crime and a ground for revocation of licenses under many of the statutes "to induce . . . any automobile dealer . . . to do any . . . act unfair to said dealer. . ."), that the statutes are an undue burden on interstate commerce, that they are special interest legislation applying only to groups which are not the subject of a reasonable classification by the legislature in the exercise of its police power, and even that these acts constitute bills of attainder and ex post facto laws.<sup>692</sup> The constitutional battles have been approached with great diligence by the companies. Top personnel have testified,<sup>693</sup> and every effort has been made to establish records that showed that the statutes were unreasonable (a reverse "Brandeis brief"). For example, in the Colorado suit a vice-president of General Motors testified that the statute "would have a devastating effect on our business in preventing us from soliciting and promoting our business with the dealers."<sup>694</sup> Moreover, the "big three" manufacturers supported each other's efforts in the various states by amicus curiae briefs.<sup>695</sup>

The Wisconsin administrative-licensing statute withstood this attack in 1955, but it was upheld by only a four-to-three vote, and there was no discussion of the vagueness issue in the majority opinion.<sup>696</sup> However, in 1965, the Supreme Court of Wisconsin upheld a particular provision of the Wisconsin statute against a constitutional attack by Chrysler.<sup>697</sup> The challenged section provided that manufacturers could not add dealers in a city "where the presently enfranchised dealer or dealers have complied with agreed requirements of such manufacturer for adequate representation in such community or territory."<sup>698</sup> The Supreme Court construed the act to prohibit the creation of new dealerships in an area where the existing dealers were selling enough cars so that cancellation of their franchises would not be justified. It then found that the statute so construed would not be unconstitutional as an unreasonable classification, an undue burden on interstate commerce, or an act so vague as to violate the requirements of due process. The decision was unanimous. The opinion suggests that the court has little

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<sup>692</sup> See, e.g., *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S. 444 (1960), where all of these contentions were made.

<sup>693</sup> See, e.g., *Automotive News*, May 28, 1956, p. 4, cols. 4-5; *id.*, Feb. 25, 1957, p. 1, cols. 2-3, at 4, cols. 1-3.

<sup>694</sup> *Automotive News*, May 28, 1956, p. 4, cols. 4-5.

<sup>695</sup> See, e.g., *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S. 444 (1960).

<sup>696</sup> *Kuhl v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420 (1955).

<sup>697</sup> *Forest Home Dodge, Inc. v. Karns*, 29 Wis.2d 78, 138 N.W.2d 214 (1965).

<sup>698</sup> WIS. STAT. § 218.01(3) (f) (1963).



doubt about the constitutionality of the entire administrative-licensing statute; there is no disposition to reopen the 1955 decision upholding it. Moreover, one can argue that by implication the vagueness issue as applied to the provisions on revoking manufacturers' licenses has been put to rest. The Virginia administrative-licensing statute was upheld on federal due process grounds in a 1957 case, although the question of its validity under the state constitution was not reached.<sup>699</sup> In 1960, the Tennessee administrative-licensing act successfully passed a constitutional test, although two of its provisions were found invalid but severable.<sup>700</sup> The Supreme Court of Tennessee overturned the sections that made it illegal and a ground for refusing or revoking a license (1) to induce a dealer to do any act that was unfair to the dealer and (2) not to allow dealers the right to determine the mode of transportation to be used in delivering new cars to them. The court viewed these two sections as arbitrary and capricious, stressing that "inducing" would cover pure salesmanship. The Minnesota penal statute withstood constitutional attack in 1956.<sup>701</sup>

The manufacturers' greatest success came in 1956, when they persuaded courts to overturn completely the administrative-licensing statutes of Colorado<sup>702</sup> and Arkansas.<sup>703</sup> In Colorado apparently the manufacturers won a lasting victory, but it took added effort to preserve that victory after the case was decided. The Colorado Automobile Dealers Association (CADA) tried to start the series of stages over again by proposing a bill to set up an administrative-licensing system which met the objections of the court. General Motors officials told Colorado dealers that passing a constitutional statute would compel General Motors to deal with nonfranchised dealers not covered by the act.<sup>704</sup> After a bill had been introduced, CADA changed its position and joined the manufacturers in opposing it, explaining that there were dangers in extending government control over business.<sup>705</sup>

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<sup>699</sup> *E. L. Bowen & Co. v. American Motors Sales Corp.*, 153 F. Supp. 42 (E.D. Va. 1957).

<sup>700</sup> *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S. 444 (1960).

<sup>701</sup> *Willys Motors, Inc. v. Northeast Kaiser-Willys*, 142 F. Supp. 469 (D. Minn. 1956).

<sup>702</sup> *General Motors Corp. v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956).

<sup>703</sup> *Rebsamen Motor Co. v. Phillips*, 226 Ark. 146, 289 S.W.2d 170 (1956). In *Best Motor & Implement Co. v. International Harvester Co.*, 252 F.2d 278, 281 (5th Cir. 1958), the court said, "substantial questions . . . might exist as to its [the Louisiana administrative-licensing statute] validity." *But see Louisiana Motor Vehicle Comm'n v. Wheeling Frenchman*, 235 La. 332, 103 So. 2d 464 (1958).

<sup>704</sup> *Automotive News*, March 4, 1957, p. 3, cols. 3-4.

<sup>705</sup> *Id.*, March 11, 1957, p. 1, col. 4.

In Arkansas, the manufacturers' success before the court in 1956 was only one victory in a much longer war. The court declared the entire act invalid because it licensed franchised dealers but not used-car dealers—an arbitrary classification in the view of the court.<sup>706</sup> The dealers prevailed on the legislature in 1957 to pass another statute,<sup>707</sup> but in 1958 the Arkansas court found this one equally defective.<sup>708</sup> Still undaunted, the dealers went back to the legislature for another statute and were successful.<sup>709</sup> Apparently the manufacturers tired of the game and changed their tactics to win a more final victory. Signatures were obtained to put the manufacturer-dealer-licensing statute on the ballot for a decision by the voters, and the statute was defeated in the 1961 election by better than a five-to-one margin.<sup>710</sup> It has been said that the campaign against the statute was financed and run by General Motors, Ford, and Chrysler, and that these firms formed an alliance with the state's used-car dealers who would have been barred from selling new cars by the legislation. There was a thorough advertising campaign built around the theme that a vote for the manufacturer-dealer-licensing statute was a vote for paying higher prices for new automobiles. The Arkansas Legislature can read the election returns, and the franchised dealers would have trouble if they attempted to have a fourth statute passed.

Where the manufacturers have not been able to overthrow the statutes on constitutional grounds, they have attempted to blunt the impact on their ways of doing business. At one time many manufacturers switched from indefinite duration franchises to one-year franchises.<sup>711</sup> Thus they would seldom have to cancel a dealer and have their action subject to the requirement that their cancellations be fair, with due regard to the equities of the dealer and with just provocation. Rather than cancel, all a company had to do was to await the end of the year and fail to renew the franchise. Some dealer associations counterattacked to meet this device. The Wisconsin

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<sup>706</sup> *Rebsamen Motor Co. v. Phillips*, 226 Ark. 146, 289 S.W.2d 170 (1956). Raymond Rebsamen, a Little Rock Ford dealer, led the opposition to enactment of the statute. He published a three-column advertisement in the *Arkansas Gazette* asserting that an administrative-licensing law would cause higher prices and was an interference with the natural laws of business. *Automotive News*, March 21, 1955, p. 3, cols. 3-5. Rebsamen was the formal complaining party in the suit attacking the constitutionality of the 1955 statute.

<sup>707</sup> Ark. Acts 1957, No. 530, § 5.

<sup>708</sup> *Clinton v. General Motors Corp.*, 229 Ark. 805, 318 S.W.2d 577 (1958).

<sup>709</sup> Ark. Acts 1961, No. 199.

<sup>710</sup> ARK. STAT. ANN. § 75-1501-07 (Supp. 1963) states that the statute was defeated by referendum on November 6, 1962.

<sup>711</sup> See BUSINESS RELATIONS INSTITUTE, *AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY DEALER RELATIONS* 23 (1948).

statute was amended to add the following: "The nonrenewal of a franchise or selling agreement without just provocation or cause shall be deemed an evasion of this section and shall constitute an unfair cancellation."<sup>712</sup> Many of the statutes passed during the early 1950's have similar limitations on nonrenewal and impose a similar kind of compulsory contract.<sup>713</sup>

Some representatives of dealer associations have charged that the manufacturers have used and still use another tactic to blunt the effect of the state statutes. If a dealer could not be canceled, he could be induced to put on a high-pressure sales campaign or to give up and resign his franchise "voluntarily" by adding another franchised dealer selling his make in his area—a so-called stimulator dealer. The Wisconsin Automotive Trades Association reacted to this device by successfully proposing an amendment to the Wisconsin legislation. It provided that "The licensor shall deny the dealer application of a manufacturer in any community or territory where the presently enfranchised dealer or dealers have complied with agreed requirements of such manufacturer for adequate representation in such community or territory."<sup>714</sup> Dealer associations in other states may push for similar provisions<sup>715</sup> now that it has been declared constitutional by the Supreme Court of Wisconsin;<sup>716</sup> manufacturers view it with horror.

*b. Application of the state statutes and the consequences*

There are several types of state statutes which affect manufacturer-dealer relations. The most significant create either a licensing system administered by a specialized agency charged with enforcement or define crimes to be enforced by the local prosecutor system.<sup>717</sup> An official of an automobile manufacturer has said that there are serious risks "involved in attempting to determine in advance conduct that could be interpreted to violate the vague and imprecise terms commonly found in these statutes. . . ."<sup>718</sup> Moreover, manufacturers question the uses to which these statutes can be put.<sup>719</sup> They worry that the definitions of prohibited conduct are sufficiently vague to serve to mask a "dealer always wins" approach in administration. Many are administered by a group of dealers serving as a state commission. Even where the statute is applied by an independent agency, the dealers'

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<sup>712</sup> WIS. STAT. § 218.01(3) (a) (17) (1963).

<sup>713</sup> See note 607 *supra*.

<sup>714</sup> WIS. STAT. § 218.01(3) (f) (1963).

<sup>715</sup> Interviews.

<sup>716</sup> See note 697 *supra*.

<sup>717</sup> See text accompanying notes 120-22 *supra*.

<sup>718</sup> Letter.

<sup>719</sup> *Ibid.*

lobby and state legislators representing dealers who are constituents can exert pressure. Dealer representatives assert the statutes have been applied only to clearly unfair actions.<sup>720</sup> Judgment of the merit of these evaluations must rest on partial and perhaps distorted evidence, since it is so difficult to get information about formal state administrative practice and even harder to discover the informal practices. However, I have been able to develop some information through letters, from interviews, by examining the records of an agency, and by reading an industry newspaper.

*Table 3. FORMAL PROCEEDINGS UNDER ADMINISTRATIVE-LICENSING STATUTES*

State and year passed	Number of proceedings	Action taken
1) Iowa (1937)	Unknown	Hearings in 1940's to deny licenses to dealers allegedly replacing dealers who were canceled unfairly; results unknown.
2) Nebraska (1957)	Three	In one case Board found dealer unfairly canceled; settled pending appeal to courts. In one case Board found charge of coercion by manufacturer not proved. Another case is pending. <sup>721</sup>
3) Oklahoma (1953)	One	Manufacturer's representative's license canceled for coercion; reinstated while case pending on appeal; appeal dropped.
4) Rhode Island (1950)	One	Three manufacturers' representatives' licenses revoked for unfair cancellation of dealer.
5) Tennessee (1955)	Two	In one case Board found manufacturer's termination to be fair. In one case Board found unfair cancellation. Manufacturer's license to do business in a particular county suspended for ninety days.
6) Wisconsin (1937)	Seven	In all cases Commissioner found termination with provocation and regard for the equities of dealer and so upheld manufacturers' actions.
7) Florida (1941)	None	
8) Kentucky (1956)	None	
9) Louisiana (1954)	None	
10) Mississippi (1954)	None	
11) North Carolina (1955)	None	
12) Utah (1965)	None	
13) Virginia (1944)	None	

<sup>720</sup> Interviews.

<sup>721</sup> See *Automotive News*, Feb. 14, 1966, p. 37, col. 1; *id.*, Dec. 13, 1965, p. 4, col. 3; *id.*, Dec. 6, 1965, p. 6, col. 1.

## i. ACTION UNDER THE ADMINISTRATIVE-LICENSING STATUTES

The administrative-licensing statutes require manufacturers and their representatives to be licensed. Formal procedures are created for denying, suspending, or revoking licenses because of coercion, canceling a franchise "unfairly, without due regard to the equities of said dealer and without just provocation . . ." and the like. In several states, informal procedures have developed to mediate disputes. The available data about what has been done are presented in tabular form and specific cases are discussed to illustrate the consequences of these statutes.

Table 3 indicates the information I have about the formal use of all of the state licensing statutes.<sup>722</sup> The information was supplied by state officials and dealer trade association representatives. It is not absolutely complete, since some state officials did not answer, some trade association officials did not have complete information because they had not held their jobs for the entire life of the statute in their state, and some may have supplied erroneous information.

Formal hearings have been held in six of the thirteen states with this type of statute, and manufacturers or their representatives have prevailed in nine cases and lost licenses in four. While a road man's lost license gives the dealer little more than vengeance, in two of the cases the company's defeat aided the dealer more substantially. In one, the dealer received a substantial settlement, and in another, the manufacturer stopped termination proceedings and the dealer's franchise was saved.<sup>723</sup>

<sup>722</sup> For citations of the state statutes, see Notes to Table 1, pp. 208-209.

<sup>723</sup> Interviews. The license revocation procedure was perhaps not so effective in one case in Tennessee. Ford terminated the franchise of Cocke County Motor Company in 1958. The dealer took the case to the Tennessee Motor Vehicle Commission, and Ford challenged the constitutionality of the Tennessee administrative-licensing statute. It obtained an injunction prohibiting a hearing while the constitutionality of the statute was being determined. *Automotive News*, June 30, 1958, p. 4, col. 1. A chancellor declared the law unconstitutional, stating that "limiting the right of manufacturers to weed out inefficient dealers and those who fail to offer proper service to customers would certainly harm the public." *Id.*, Nov. 2, 1959, p. 2, col. 2. The Supreme Court of Tennessee disagreed and found all but two sections of the law constitutional. *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S. 444 (1960). The Tennessee Motor Vehicle Commission then held a hearing. The primary subject was the adequacy of Cocke County Motor Company's sales. *Automotive News*, Nov. 13, 1961, p. 42, cols. 4-5. The Commission found that the termination was not for cause and without due regard to the equities of the dealer. It suspended Ford Motor Company's license to do business in Newport, Tennessee, for 90 days. It felt that to take Ford's license to do business in the state would unfairly punish dealers outside Cocke County. There was no appeal because the suspension would be over before a hearing was possible. "Most observers agreed that the suspension was a 'slap on the wrist,' aimed at Ford's policy of exhorting its dealers to outsell rival Chevrolet dealers." *Id.*, July 9, 1962, p. 1, cols. 4-5. In this case the Commission could not take the local Ford representative's license because he had been transferred by Ford from Tennessee to Pennsylvania. *Id.*, Nov. 13, 1961, p. 42, cols. 4-5.

*Continued on next page*

Almost all of this legislation provides that coercion to take unwanted cars, trucks, parts, and accessories is a ground for revoking the manufacturer's or its representative's license. The story of one license revocation hearing<sup>724</sup> may indicate that the state administrators will follow the approach most favorable to dealers. This approach is the one I have previously described in discussing the federal Good Faith Act. A demand to take action or lose a franchise will be coercive if the dealer has not given the manufacturer cause to cancel as defined by the provisions of the franchise. Moreover, the manufacturer's judgments involved in determining cause will be reviewed for reasonableness. In this case, a Ford dealer who held franchises in several cities including Tulsa, Oklahoma, complained to the Oklahoma Motor Vehicle Commission. He asserted that a Ford district sales manager in Oklahoma City had attempted to coerce him to order more cars "by threatening to cancel" his franchise to sell Fords in Tulsa. The dealer's story was as follows: There were two Ford dealers in Tulsa and three Chevrolet dealers. Under Ford's marketing plan, the complaining dealer was responsible for 40 per cent of the sales in the city and the other Ford dealer was responsible for 60 per cent. In February of 1961, the district sales manager met with the dealer in a Tulsa hotel room. Slides and charts concerning the dealer's Tulsa operation and Chevrolet sales in the city were presented; the district sales manager said they showed the dealer was performing poorly. He said that the dealer needed 24 instead of 12 salesmen and objected to \$10,000 worth of purchases of parts from non-Ford sources. He demanded that the dealer increase sales 20 per cent to come up to the level of the Chevrolet dealer in Tulsa with the least sales. The dealer testified that the representative impliedly threatened to review the dealer's operation in Bartlesville, Oklahoma, if Tulsa sales did not increase. The dealer objected to the sales data and the demands, calling them "asinine." The Ford representative said that a replacement dealer or an additional

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The dealer had been terminated in 1958, but had continued to operate as a Ford agency without a franchise until May of 1961 when the challenge to constitutionality became final. In 1964 the dealer brought a Good Faith Act suit, but the court ruled that the act's three-year statute of limitations had run. *Walker v. Ford Motor Co.*, 241 F. Supp. 526 (E.D. Tenn. 1965).

While the dealer lost a franchise that had been held by his family for over thirty-five years, he did get to operate for an extra three years and make the profits he could during that time.

<sup>724</sup> The discussion in the text is based on detailed reports in an industry paper. See *Automotive News*, Sept. 18, 1961, p. 1, cols. 4-5, at 4, cols. 1-2; *id.*, Sept. 25, 1961, p. 3, cols. 3-4, at 57, cols. 1-3; *id.*, Nov. 13, 1961, p. 3, col. 3; *id.*, Feb. 12, 1962, p. 1, col. 1, at 34-35, cols. 1-5; *id.*, Feb. 19, 1962, p. 3, col. 5, at 41, cols. 1-3; *id.*, March 12, 1962, p. 1, cols. 1-2, at 40, cols. 3-5; *id.*, July 16, 1962, p. 3, cols. 4-5, at 65, col. 1; *id.*, Nov. 18, 1963, p. 3, col. 5.

dealer in Tulsa would be considered unless this dealership got a better share of the market.

On two occasions the district sales manager demanded that the complaining dealer order enough cars to have sufficient inventory to meet his monthly sales quota. This quota had been based on Ford's estimate of a 6,500,000 car sales year in 1961, although only 5,500,000 cars were sold in that year. The dealer refused to order, and the Ford representative said the dealer could be canceled for inadequate sales. The dealer asserted that both Tulsa Ford dealers would have to be canceled since his sales were so close to the other Tulsa dealer. At another meeting, the following conversation took place: "[Dealer]: If you're here to try to force me to order more cars, you're wasting your time. [Ford man]: Damn you . . . you haven't tried to cooperate with me. I'm going to cancel you if it is the last thing I do."<sup>725</sup> The Ford representative later recommended that the dealer be terminated, and this recommendation was approved by one superior but disapproved by another once the Commission's hearing started.

The Commission next listened to the complaints of five former Ford dealers whom this district sales manager had recommended for termination. All said that he had demanded they catch the sales of Chevrolet in their area but had refused to consider why this was impossible in the short run because of their local situations. One dealer's profits were eighth among the 187 Ford dealers in Oklahoma although he was 135th in volume. Another dealer had represented Ford from 1923 to 1959. The district sales manager had told him to "beat Chevrolet—no matter how."<sup>726</sup> His successors were complying by "giving 'em away."<sup>727</sup>

The Ford district sales representative answered these charges. He claimed he "did nothing but follow the rules of procedure established by his superiors."<sup>728</sup> He reviewed the poor sales of the five former dealers but admitted they were all up against competition from areas other than their own. Finally, he turned to the complaining dealer's sales record. The dealer's master plan called for sales of 104 cars and 34 trucks a month in 1961, but his sales averaged 60 cars and 34 trucks a month for the first part of that year. He did not sell as many cars as the poorest Chevrolet dealer in Tulsa. He had been included in Ford's Penetration Improvement Program in 1956 and 1958. The district sales representative described this as the "ten worst dealers in Oklahoma" program, aimed at dealers who were

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<sup>725</sup> *Id.*, Feb. 12, 1962, p. 1, col. 1, at 34, col. 3.

<sup>726</sup> *Id.*, Feb. 12, 1962, p. 1, col. 1, at 35, col. 3.

<sup>727</sup> *Ibid.*

<sup>728</sup> *Id.*, Feb. 12, 1962, p. 1, col. 1.

most outsold by Chevrolet. He denied that any threat had been made or coercion used; rather the dealer had been warned that Ford was not satisfied.

The dealer then replied. While he conceded his 1961 sales were down, he said that the district sales representative had given little consideration to the reasons for this. The dealer said he had a great many unsold 1960 models which had been carried over into the 1961 model year. There was a business recession in Tulsa in 1961. He had to change managers at his Tulsa dealership since Ford gave his previous manager a loan to open a dealership in another city. In May of 1961, half his salesmen attended a Ford merchandising school at Ford's request. Moreover, the dealer claimed that his 1961 sales were only 42 cars and 11 trucks below those of the other Ford dealer who was supposed to share the Tulsa market 60 per cent-40 per cent with the complaining dealer. The other dealer had also been on the Penetration Improvement Program. The other dealer had not been recommended for termination.

The Oklahoma Motor Vehicle Commission decided to revoke the license of the district sales manager. The Commission chairman stated, "There wasn't any doubt about it. [He] . . . very definitely overstepped the bounds of propriety in dealing with some of the dealers."<sup>729</sup> Ford called the decision unjustified and appealed to the Oklahoma District Court, challenging the constitutionality of the Oklahoma statute as well as the propriety of the findings.

In the end, everyone won a little. Over eighteen months later the appeal was dropped. The district sales manager was given a 1963 Oklahoma license,<sup>730</sup> but he was transferred out of Oklahoma by Ford. The dealer continued his Tulsa Ford franchise and still had it in 1965.<sup>731</sup> The Commission avoided a constitutional challenge, Ford's representative received a license and some vindication, the representative left the area to satisfy the dealers, and the complaining dealer saved his business.

The significance of the administrative-licensing approach becomes clearer when the Oklahoma proceeding is contrasted with a dealer's difficulties in getting an effective remedy for coercion under the federal Good Faith Act. First, as I have noted, we cannot be sure that the federal courts will adopt Kessler and Stern's view that any threat to breach a franchise contract is coercive: the federal courts could demand that the threat be one fitting more neatly into orthodox duress concepts, which, in turn, require more than

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<sup>729</sup> *Id.*, March 12, 1962, p. 1, cols. 1-2.

<sup>730</sup> *Id.*, Nov. 18, 1962, p. 3, col. 5.

<sup>731</sup> Interview.



a threat to breach a contract. It is unlikely that a state administrator would feel bound by the technical requirements of the traditional law of duress. Indeed, the Oklahoma Commission apparently viewed the term "coercion" as requiring no more than a showing of a threat to breach a contract—perhaps it required no more than a threat to act in an unreasonable manner.

We must speculate as to the Commission's interpretation of the term "coercion" since there was no opinion defining it. However, taking the facts most strongly for the dealer—since the Commission believed the dealer and not Ford's people—the Oklahoma case is a strong one for the dealer under the threat-to-breach-a-contract-equals-coercion position. The Ford man told the complaining dealer that he must meet a Chevrolet dealer's sales or be canceled. Also he was told that he ought to order enough cars to have sufficient inventory to meet his monthly quotas or he might be canceled for inadequate sales. Under the tests suggested in the discussion of the federal cases, the question then would be whether or not Ford had a legal right to cancel under these circumstances. If it did not, then the threat was to impose a "not lawful" sanction and was coercive. Would Ford have had a right to cancel? The Ford Sales Agreement requires a dealer to "develop energetically and satisfactorily the potentiality for . . . sales and obtain a reasonable share thereof. . . ." <sup>732</sup> The criteria for satisfactory performance are a series of relationships: (1) the dealer's sales as compared with registrations of Fords in his locality, (2) the dealer's sales as compared with "the fair and reasonable retail sales objectives" for sales in the locality set by Ford, (3) the dealer's sales as compared with the sales of competitive vehicles in the locality, (4) the dealer's performance on the first three criteria as compared with the performance of at least three comparable Ford dealers on these same criteria, and (5) the dealer's performance on the first three criteria as compared with the average of all Ford dealers in the zone, district, region, and nation. <sup>733</sup> The clause also provides, "In applying any criteria referred to in this sub-paragraph . . . consideration shall be given to the history of the Dealer's sales performance . . . and special local conditions that might affect the Dealer's sales performance." <sup>734</sup> Arguably, the Ford district sales manager misapplied this provision in the case of the complaining dealer and some of the five other dealers who testified. He apparently stressed only a few of the relevant ratios and gave little weight to or ignored all the others. He was concerned almost entirely with the ratio of Ford to Chevrolet sales and the ratio of dealer sales to sales objectives.

<sup>732</sup> FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2 (a) (i) (1962).

<sup>733</sup> *Ibid.*

<sup>734</sup> *Ibid.* (Emphasis added.)

He told dealers to beat Chevrolet or be canceled (or his remarks could be so interpreted); but in the first eight months of 1961, Ford's percentage of Chevrolet sales nationally was only 84.2 per cent.<sup>735</sup> Apparently, few Ford dealers were beating Chevrolet that year. He demanded that the complaining dealer meet his monthly sales quotas, but they were based on the erroneous assumption that 1961 would be a 6,500,000 car year instead of a 5,500,000 car year as it was. He did not compare the complaining dealer's sales with other comparable dealers—most notably the other Tulsa Ford dealer. Finally, in all his actions he apparently ignored the franchise's direction to consider "special local conditions that might affect the Dealer's sales performance."<sup>736</sup> Therefore a decision to terminate would appear to be wrong or unreasonable. The representative's threats were to impose a sanction the company had no right to impose under its own contract; thus there was coercion.<sup>737</sup>

Of course, as always there is a counterargument. Unless Ford could show a history of poor performance as compared with comparable dealers including the other Tulsa Ford agency, Ford's best argument would be that there was no showing of bad faith. It would argue that it had a contract right to make a judgment about the adequacy of the complaining dealer's sales, giving any weight it desired to each of the factors listed in the franchise. Thus the threats and demands were coupled with lawful sanctions and not coercive. Ford argued there were no threats at all, but apparently the Commission accepted the dealer's stories. Here Ford was not helped by the proviso of the federal act which expressly allows "recommendation" and "argument"<sup>738</sup> because no such qualification appears in the state statutes.

One should contrast the position of the dealer in *Kotula v. Ford Motor Co.*,<sup>739</sup> a case brought under the federal act where similar merchandise forcing was proved. The dealer had a number of advantages in the Oklahoma license revocation proceedings. He was not seeking damages, for the losses he could prove could be traced to coercion; he was attacking the

<sup>735</sup> Exhibit Y, Dealer Comparison Chart, reprinted in Brief for Appellant, p. 44, *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

<sup>736</sup> See note 734 *supra*.

<sup>737</sup> See note 638 *supra*.

<sup>738</sup> 15 U.S.C. § 1221(e) (1964) provides:

The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

<sup>739</sup> See pp. 120-126 *supra*.

Ford representative's license. This gave him far more leverage than a claim under the federal act for a relatively small amount of loss caused by forcing. The dealer could bring in five other dealers for a total picture of how the Ford representative acted. The commissioners understood the business and brought to bear their own informed ideas about the proper conduct of road men. The dealer gained more leverage from the open hearing which was attended by many Oklahoma Ford dealers; Ford had to be concerned with the reaction of its entire state dealer force to its policies.<sup>740</sup> The complaining dealer saved his franchise. One cannot tell whether or not the Ford internal review system would have made this judgment if the heat had not been on.

If the analysis offered is based on accurate factual assumptions,<sup>741</sup> a manufacturer cannot complain about the "bias" of the Oklahoma Motor Vehicle Commission which is composed of automobile dealers. Nor does it have much worry about guidelines for day-to-day operations. Field men can be told not to threaten to terminate when the major cause for dissatisfaction is that a Ford dealer's sales trail a rival Chevrolet dealer's sales in a year when Ford is trailing Chevrolet nationally. To give such warnings, the Ford road man must be sure that the dealer trails his Chevrolet competitor significantly more than comparable dealers trail their competition. Moreover, field men can be told not to regard threats to terminate as normal devices for applying pressure to dealers but as real warnings where there is an intention to follow through and as warnings in the context of a good faith rehabilitation program. On the other hand, the facts available about this case are not completely clear. If the complaining Ford dealer were clearly in default on his franchise duties as fairly applied, one would have to reexamine the Oklahoma case. It could mean a road man cannot demand that a dealer comply except in the context of a rehabilitation program. It could mean that a road man can never demand that a dealer stock cars even if they are needed to satisfy a market potential. It could mean that to demand that a dealer "beat Chevrolet or else" is not permitted even if the dealer is in default. It could mean that dealers who are profitable cannot be threatened with termination although they have a very low sales volume. It could mean that licenses will be taken away where road men swear at dealers. It could mean that important Oklahoma dealers<sup>742</sup> will be taken

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<sup>740</sup> *Automotive News*, Feb. 12, 1962, p. 34, col. 1.

<sup>741</sup> The reason for the qualification is that the analysis is based on reports in *Automotive News*. See note 724 *supra*. While the reports probably are accurate, they may not include all the facts presented at the hearing.

<sup>742</sup> *Automotive News*, Sept. 25, 1961, p. 3, col. 3, at 57, col. 3. The dealer was Democratic National Committeeman from Oklahoma for eight years and was a candidate for governor in 1958.

care of by their friends on the Motor Vehicle Commission. However, the case appears to be one where an overeager road man took over and pushed too hard too fast. Significantly, the complaining dealer still represents Ford in Tulsa. If he were as poor as Ford's road man alleged, one wonders why he has not given the factory a clear-cut case for termination in the past four years. Moreover, the dealer represented Ford in several Oklahoma cities. If he were such a poor dealer as to warrant cancellation, one wonders why the Ford representative's predecessors made such bad errors in giving him all these franchises in the first place.

The state administrative-licensing legislation also allows the licensing agency to suspend or revoke a manufacturer or its representative's license for canceling a franchise "unfairly, without due regard to the equities of said dealer and without just provocation. . . ." <sup>743</sup> This requisite goes a good deal beyond the provisions of the federal Good Faith Act as it has been construed. The standard in the state statutes could have quite broad application and give a dealer real "job security." However, it is very difficult to determine how the standard has been or will be applied. Manufacturers might well fear the chance of unfair decisions under this language, and only a course of administration could set guidelines.

Textual analysis indicates some of the possibilities. The first requirement for a valid termination is that it be for "just provocation." Can a manufacturer assert that it has complied if it cancels only for a dealer's failure to perform his duties as written in the franchise? Perhaps, but the phrase connotes more than "legal cause." At the least the franchise duty probably would have to be reasonable as written and as applied, and the violation probably would have to be material. For example, it seems unlikely that a good-faith but unreasonable determination that sales were inadequate would be enough—the manufacturer might be provoked but would its provocation be "just"?

Although there is "just provocation" under these statutes, that is not enough. The termination must also be with "due regard to the equities of said dealer. . . ." On one hand, this could mean that a manufacturer must take into account factors personal to the dealer and not related to the mutual profit of manufacturer and dealer. Why did the dealer default? What will the impact of cancellation be on him? Does the past conduct of the dealer give him a right to a greater period of default and more "second chances"? For example, suppose a dealer had a good service record and

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<sup>743</sup> See, e.g., WIS. STAT. § 218.01(3) (a) (17) (1963).

had managed to stay in business selling a manufacturer's cars when they were unpopular nationally. The dealer has a heart attack and his sales fall off drastically because he cannot supervise the business as before. Cancellation will hurt him physically and psychologically as well as financially. Are these his "equities"? Or, on the other hand, are the "equities of said dealer" who has given a manufacturer just provocation financial only? The phrase may give him no more than a right to reasonable termination benefits, such as the repurchase of cars, parts, signs, and the like and help in disposing of the premises. While today all manufacturers grant such benefits in their franchises, when the first of the state statutes was drafted much less was offered.

While one can speculate,<sup>744</sup> these questions can be answered only by considering the practices of the various state agencies. However, the available information is no more than suggestive since relatively few cases have reached the formal stage under these statutes. One case in Tennessee and one in Rhode Island could be explained as involving decisions that the terminations were without "just provocation." In the Tennessee case, a Ford dealer had been terminated for failure to outsell a rival Chevrolet dealer. As we have seen, the Ford franchise as written requires the manu-

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<sup>744</sup> The need for speculation was unsuccessfully asserted by Ford in an argument that the Wisconsin administrative-licensing statute was unconstitutionally vague:

What terms could be more vague, indefinite, and uncertain in meaning than "unfairly, without due regard to the equities of said dealer and without just provocation"? Does the statute mean that in applying these general and vague standards we consider a cancellation only from the dealer's standpoint, *i.e.*, as it affects him, or, are we entitled to take into consideration the factors which prompted the manufacturer? Does the phrase "without just provocation" refer only to a consideration of factors emanating from the dealer's side, or may it also include factors wholly foreign to the particular manufacturer-dealer relationship which may have prompted the cancellation?

Brief of Respondent, pp. 43-44, *Kuhl v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420 (1955).

It would seem that the legislature was not using the word "equities" as synonymous with "unfair" because the word "unfairly" precedes the term "without due regard to the equities of said dealer." Nor has the legislature attempted to define "unfair" or "without just provocation." The manufacturer has absolutely no standard to guide its actions in determining whether to continue or discontinue a dealership contract. For example, if a manufacturer were to have surveyed a certain area and concluded that its sales distribution system could be substantially improved by the elimination of a particular dealer or the replacement with another dealer, would such a termination be within the meaning of the statute? Does the statute contemplate only a consideration of the termination from the dealer's personal standpoint or does it contemplate a consideration also of the factors which motivated the manufacturer?

Respondent submits that the language used by the legislature is obviously so general that it constitutes an invalid limitation upon the constitutional rights of freedom of contract.

Respondent's Brief on Rehearing, pp. 49-50, *Kuhl v. Ford Motor Co.*, 270 Wis. 503a, 71 N.W.2d 428 (1955).

facturer to consider much more than this to find sales unsatisfactory.<sup>745</sup> In the Rhode Island case, the licenses of four Lincoln-Mercury representatives were revoked.

When the representative from the attorney-general's department sought to determine if Ford had given consideration to a not-too-healthy economic situation in Woonsocket as a reason for the slow sale of cars, [the New England District Sales Manager for Lincoln-Mercury] . . . contended that *good management could overcome any economic condition*.<sup>746</sup>

Under the franchises in effect at this time, there was no mention of considering local conditions. Apparently, the Rhode Island commission insisted that, in practice, it be added to the definition of satisfactory sales for provocation to be just. Today Ford and all other manufacturers seem to agree as all franchises require consideration of local conditions.<sup>747</sup> Obviously, the New England district sales manager's statement was nonsense. Ford's real position was that a dealer assumed the risk of a local recession, and it is just this objective impersonal approach that the state statutes were designed to overturn.

My information on the "equities" language comes from a review of the transcripts of all of the formal hearings before the Wisconsin Department of Motor Vehicles.<sup>748</sup> In no case that went this far were the "equities" of the dealer a major factor. In all of them the commissioner viewed the provocation as "just" and very clear. Apparently, the commissioners have assumed that as the degree of provocation increases, the equities of the dealer decrease and do not present a problem. For example, suppose a dealer was canceled for intentionally defrauding the manufacturer and his customers out of large amounts of money. The dealer's past loyal service and the impact of cancellation on his health as well as any worry about his lost re-

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<sup>745</sup> See note 733 *supra*. In this case a United States District Court later stated: "The plaintiffs were undoubtedly mistreated by the defendant's personnel. It was insisted by the defendant that they employ salesmen and mechanics they did not need; that they keep their doors open needlessly; and they were chastised on the basis of unsound quota analyses." *Walker v. Ford Motor Co.*, 241 F. Supp. 526, 529 (E.D. Tenn. 1965).

<sup>746</sup> *Automotive News*, June 13, 1955, p. 2, col. 5, at 6, col. 1. (Emphasis added.)

<sup>747</sup> See, e.g., "In applying any criteria referred to in this subparagraph 2(a), consideration shall be given to the history of the Dealer's sales performance, the availability of COMPANY PRODUCTS to the Dealer and special local conditions that might affect the Dealer's sales performance." FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2(a) (i) (1962).

<sup>748</sup> Mr. Thomas Travers, a student in a seminar I offered, read transcripts of all hearings held by the Wisconsin Department of Motor Vehicles in proceedings to deny, suspend, or revoke licenses of manufacturers or their representatives because of alleged wrongful conduct.

liance expenses will not weigh much now. The case the manufacturers have said they fear—the nice but inefficient dealer who will be terribly hurt by cancellation and who cannot be canceled for his lifetime—does not appear in the Department's hearing files.

Up to this point, *formal* proceedings under the state administrative-licensing legislation have been described. However, in many states the existence of the formal licensing system has prompted *informal* systems to develop. And, indeed, one would expect effective regulation to prompt compliance or pressures for compromise and settlement rather than formal hearings and judicial review. A detailed description of the practices in Wisconsin will be given and then there will be a report about what is known of similar practices elsewhere.

The life history of a dispute in Wisconsin involves an elaborate filtering process designed to screen out worthy cases and settle them.<sup>749</sup> Suppose a manufacturer is dissatisfied with a Wisconsin dealer's sales and is convinced that efforts to correct bad practices will be unsuccessful. In some cases, the manufacturer may take one of two steps. It may call the Department of Motor Vehicles and ask to discuss how to cancel the dealer and still keep its license in Wisconsin. At this stage the Department will not discuss specific cases, but it will give general advice, stressing that it wants a detailed file on the dealer with clear evidence of poor performance.

Alternatively, the manufacturer's representatives will talk with Louis Milan, executive vice-president of the Wisconsin Automotive Trades Association (WATA) and the man most responsible for the existence of the Wisconsin administrative-licensing legislation. The factory will give him a detailed report on the dealer's shortcomings. Often Mr. Milan will know the dealer's side of the story because of his continuing contacts with the members of his association. He will tell the factory representative whether or not he thinks it has a case for cancellation that complies with the Wisconsin statute. In many instances he has agreed that the manufacturer has good reason to cancel. If the dealer's sales are not in line with the sales of other dealers selling the same car in his zone (the immediate area of the state near the dealer), Mr. Milan believes that unless the dealer can prove that there is some good explanation, the factory has a right to cancel. The comparison with zone sales has been used as a standard for so long that it is customary and generally accepted by the dealers. However, Mr. Milan qualifies his acceptance of the zone-performance standard by insisting that the manufacturer consider why the particular dealer's sales fell behind those of dealers in his area. Two cases are common and both should excuse the

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<sup>749</sup> The discussion that follows is based on interviews.

dealer. A local industry may close, putting a substantial number of people out of work; or a drought or crop failure in a farm area may limit the income of a dealer's customers. Not only will people in the area put off purchasing new cars; some may default on time sales and the dealer may have to pay the finance company the unpaid balance on repossessions of cars he sold during the previous two years. Second, a dealer's below-average sales should be excused where flaws in the manufacturer's distribution system are responsible for a large part of the trouble. At the beginning of the model year, metropolitan dealers tend to get many more of the best-selling models than the small town or rural dealers. Moreover, special orders can be delayed and customers may cancel. The factory should not be able to set a high quota, offer little cooperation in getting cars to a dealer when he can sell them, and then blame the dealer for poor performance. Mr. Milan is not so ready to accept comparisons of a dealer's sales with those in his district or region (usually his state and an area like the Great Lakes States) since those ratios ignore all of the local factors.

Mr. Milan does not think the "due regard for the equities of said dealer" language of the statute gives the dealer help where his poor sales over a period of time are caused by ill health or where cancellation will have an unusually adverse effect on the dealer. If a dealer can get a fair allocation of cars and there are no circumstances that make potential customers unable to buy, a dealer must produce sales. If a dealer is sick, he must get a good manager or sell out. The equities of a dealer require consideration of the economic facts of his particular case and fair termination benefits or help in selling out to a replacement dealer. Mr. Milan strongly believes that a dealer must perform a contract if there is "mutuality." The sales requirement in a franchise is one example; performing commitments is another. If a dealer has been given a second chance on condition that he will do things over and above the franchise, he must meet these commitments or he has no remedy. He said that one must read the statutory language in light of the indefinite standards imposed by the franchises of the 1930's and 1940's, and in light of the absence of termination benefits then. At that time dealers' sales were judged by generalized formulas such as the national average requirement (if Buick sold 8 per cent of the cars in the nation, the Buick dealer in Stoughton, Wisconsin, had to sell 8 per cent of the cars sold there) which did not take into account particular factors such as local conditions or the factory's own part in a dealer's poor sales.

If Mr. Milan thinks that the factory's evidence is inadequate, the manufacturer may drop the matter, do a better job of gathering evidence, or urge the dealer to get out of business voluntarily and find a buyer for the dealer-



ship who will make a tempting offer. If Mr. Milan thinks that the factory has a case for cancellation, then it is free to proceed. At a minimum, it will not face a formal or informal *amicus curiae* brief from WATA before the department in a license-revocation proceeding. Also the manufacturer may benefit from the chance to make the first presentation to Mr. Milan; the one making a charge has some advantage in persuasion.<sup>750</sup> Of course, a manufacturer can choose not to seek advice from the department or Mr. Milan, and begin termination proceedings within its organization as it would in any other state.

Once the manufacturer's local personnel give the dealer notice that termination has been recommended to their superiors in the company, or even earlier if the dealer discovers what is likely to happen, the dealer usually will take some action. Most frequently he will meet with Mr. Milan. If Mr. Milan has seen the manufacturer's file, if the dealer's story does not add new facts, and if Mr. Milan thinks the cancellation is justified, he will advise the dealer to accept the inevitable. He will tell the dealer he has no case and advise him how to get the best settlement on termination benefits. This advice will usually end the matter because the dealers view Mr. Milan as the authority on the statute. However, if Mr. Milan disagrees with the factory's decision to terminate, often he will telephone the appropriate factory officials and discuss the case with them. Frequently, he can obtain at least a second chance for the dealer to improve. He has known many of these officials for years, and he can avoid bureaucratic channels and talk directly to the man with authority. Undoubtedly a great deal of his power comes from such personal relationships. He is willing to listen to the manufacturer's side and the factory official may change Mr. Milan's view about the merits of the dealer's case. If Mr. Milan cannot obtain relief by personal contact and he still thinks the dealer's case is worthy, he will advise the dealer how to pursue his legal rights. One important item of information given the dealer will be the names of attorneys with experience in dealer termination cases. If the case presents an issue of significance to WATA, it will enter the case as an *amicus curiae*; this has been done frequently, especially where the manufacturer has pressed for a restrictive construction of the statute or challenged its constitutionality.

Dealers may talk with officials of the Wisconsin Department of Motor Vehicles. The officials will describe its procedures for a license suspension or revocation and tell the dealer about his right to file a complaint. They will also stress that the Department itself cannot give the dealer any relief

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<sup>750</sup> See Lana, *Three Theoretical Interpretations of Order Effects in Persuasive Communications*, 61 *PSYCHOLOGICAL BULL.* 314-20 (1964).

but can only take licenses away or deny new ones to a dealer who has been selected to replace him. The dealer probably will know that this may be leverage enough to give him bargaining power in his negotiations with the manufacturer. While the dealer will be told of his right to file a complaint, department officials will suggest an informal approach first. The Department does not view its major function as holding formal hearings and suspending or revoking licenses. Rather it is proud of its informal mediating activities which "both bring about better solutions and save the taxpayers' money." (Under the statute the state, rather than the losing party, pays the cost of formal hearings.)<sup>751</sup> A Department official will write to the manufacturer stating the facts as alleged, that the case is likely to go to a formal hearing if nothing is done, but that the Department would be glad to lend its good offices if the manufacturer wishes to come in and talk to the dealer. The manufacturers almost always accept the invitation; the Department has a good deal of opportunity to make things difficult for an uncooperative factory, and all factories need the Department's cooperation in many different kinds of matters.

Then the Department will hold what is called a "prehearing conference," for which authority has been found in the Wisconsin Administrative Procedure Act.<sup>752</sup> Usually the manufacturer will send to the meeting officials from Detroit with authority to make decisions, one or more lawyers from its Detroit staff, and sometimes the local representative who made the decisions the dealer is complaining about. The dealer and his lawyer will be present. Thus the dealer will be able to break out of the factory's chain of command and be represented by a lawyer fairly early in the decision-making process. Often these informal meetings become heated. Yet frequently communication between manufacturer and dealer is reestablished because these arguments take place before representatives of the Department who can and do ask searching questions which must be answered. The combatants are forced to deal with each other's arguments; the Department officials can deflate untenable stands; and they can force both sides to make concessions. After an hour or two usually the parties will ask for a recess, leave the meeting room, and work out a settlement. The dealer may get another chance or he may be offered enough to prompt a "voluntary involuntary" termination. Usually this ends the matter. However, if the Department were to think that a violation which was against the public

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<sup>751</sup> WIS. STAT. § 218.01 (5) (b) (1963).

<sup>752</sup> WIS. STAT. §§ 227.018, .06, .07 (1963). It is clear that the draftsmen of the Wisconsin administrative-licensing act did not contemplate this development since the Wisconsin Administrative Procedure Act was passed in 1943, about six years after the manufacturer-licensing provisions were enacted in 1937. See Wis. Laws 1943, ch. 375, at 670.

interest had occurred, it would continue the case through a formal hearing although the dealer might have no interest in pursuing the matter. Obviously, the Department could not do this too often without seriously impairing its mediation function.

What standards will the Department apply in this mediation process? "The key question is what did the dealer agree to do when you look at the contract."<sup>753</sup> Accordingly, the Department has looked primarily for "just provocation" rather than at "the equities of the dealer." While "just provocation" means cause under the terms of the franchise, the Department also insists that a manufacturer's judgments be reasonable and the dealer's default material. "A dealer must be more than barely below the passing mark before termination is justified—you do not take away a man's life work unless the failure is clear, if the dealer is trying hard to perform."<sup>754</sup> The Department accepts as evidence of inadequate sales a comparison between a dealer's percentage of his sales objective and the percentage of all dealers in his zone and between a dealer's percentage of the sales of a competing make and that of the other dealers selling his make. It is careful to see that the comparisons are meaningful. Sometimes a factory representative says, "We just can't work with that dealer." This is not enough; the manufacturer must show a specific cause.

The "equities of the dealer" concept enters in several ways. The Department presses manufacturers to work to rehabilitate dealers and give them an opportunity to succeed. Moreover, it considers long and faithful service and attempts to induce a manufacturer to give it some weight. However, this factor is persuasive only where there is a chance that a dealer can perform if given another year or two. It does not serve to protect a dealer from the requirement that he sell the percentages of his sales objective which most comparable dealers attain; it serves only to give him slightly more time to meet this standard where he has a chance of success.

If the Department's prehearing conference does not produce a settlement satisfactory to the dealer, there will be a formal hearing on revocation or suspension of the licenses of the manufacturer, its representative, or both. It is not surprising that there have been so few formal hearings so far and that no formal hearing has resulted in a suspension or revocation. One would expect the manufacturer to have a strong hand at this stage: any case that gets this far probably has failed to be settled by Mr. Milan of WATA, the Department's informal procedures, and any internal review of the manufacturer which took place.

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<sup>753</sup> Interview with Department official.

<sup>754</sup> *Ibid.*

These informal procedures, which likely exist only because of the potential exercise of the formal license revocation system, give Wisconsin dealers a great deal more bargaining power in settlement negotiations than dealers have in states where similar informal procedures do not exist. Moreover, one would expect that the existence of the informal process also acts to some degree as a deterrent; one would expect manufacturers to decide more close cases in favor of dealers in Wisconsin than elsewhere. Since the manufacturer has no clear line as to what is and is not permitted, the safe course is to do nothing that might be questionable. Unfortunately, this may be inconsistent with demanding the utmost efficiency from dealers and pushing them hard to get it.

Apparently the elaborate informal system found in Wisconsin is the most highly developed one existing. However, most of the states with administrative-licensing statutes have some similar practices. Table 4<sup>755</sup> shows what might be called the formal informal settlement systems which exist in states with these statutes—these are the informal procedures of the state officials who administer the acts.

Letters from administrative officials in several states also indicate the effect of their statutes: "While . . . it is not the intention that the Board shall be an arbitration body . . . in practice in many cases it works out that way, as many cases are resolved in the course of investigation or informal hearing."<sup>756</sup> "In all of these cases the Commission informally interceded along the same line of procedure as used in Wisconsin. . . ."<sup>757</sup> "The absence of formal complaints . . . may be attributed to efforts on the part of our field investigators and other parties concerned resulting in voluntary settlement and thus eliminating the possibility of a formal hearing."<sup>758</sup> Of course, in some states the administrative-licensing statute is not enforced formally or informally and is a dead letter. In one such state, administration of the act was given to a state agency which is grossly understaffed and already charged with enforcing many statutes of clear importance. The legislature has never been willing to appropriate enough money to provide for enforcement.<sup>759</sup> The legislation thus has no more than some vague deterrent force—the statute is dormant today, but too gross a case might create the incentive to enforce the act.

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<sup>755</sup> The information in the table was obtained by letter and interview.

<sup>756</sup> Letter.

<sup>757</sup> *Ibid.*

<sup>758</sup> *Ibid.*

<sup>759</sup> Interview with the dealers' trade association manager in the state.

Table 4. INFORMAL PROCEEDINGS

State	Number of proceedings	Action taken
1) Florida	One	Dealer received settlement for termination benefits at a time when not provided for in the franchise.
2) Louisiana	Approximately five cases went to hearing stage. (Also field investigators make informal contact with dealers and manufacturers' representatives and promote discussion.)	In four cases, there were settlements favorable to the dealer. In one case, the dealer could not prove allegations and case was withdrawn.
3) Nebraska	One	Case settled before hearings begun but after complaint.
4) North Carolina	"A few cases"	Statutory rights used in negotiations resulting in settlements.
5) Oklahoma	Approximately ten cases	Cases settled after complaints filed but before hearings.
6) Rhode Island	"A few cases"	Statutory rights used in negotiations resulting in settlements.
7) Virginia	No estimate possible. (Also field investigators make informal contact with dealers and manufacturers' representatives and promote discussion.)	Statutory rights used in negotiations resulting in settlements.
8) Wisconsin	From 12 to 18 cases per year.	Settlements.

In few of the states with administrative-licensing laws do the trade association managers play a role similar to Mr. Milan's in Wisconsin.<sup>760</sup> Some make telephone calls to factory officials; others help a dealer get a lawyer or assist the dealer in making a presentation before a factory's internal review system. One reason for the difference is that in many states the law is

<sup>760</sup> Interviews. The nearest practice to that found in Wisconsin was described by a dealers' trade association manager in another state with an administrative-licensing statute:

Our Association does participate in solving problems between a dealer and his manufacturer. I have sat in on conferences. The Association has a committee of three of the most respected dealers. If there is a difficult situation between a dealer and the factory, the committee gets in touch with the factory and asks it to send a representative to talk with them. The factory and the dealer sit down and try to work things out. In three or four cases involving two different factories, things were settled to the satisfaction of both parties. Of course, the fact that the state has an administrative-licensing statute is influential in these settlements. This is a club over the head of the manufacturers, and the dealers know that they have protection. The dealers can get their story across.

Interview.

administered by a group of dealers who sit as the state commission. They can handle informal negotiations very effectively since they have an official position as well as personal contacts with the manufacturers.<sup>761</sup>

The manufacturers ought to have few serious complaints about the meaning of the Wisconsin statute as it has evolved through both the formal and informal procedures. Since failure to perform either the franchise commitments or promises beyond the franchise requirements is recognized as "just provocation" if those requisites are administered particularistically, one has fairly good guidelines and good evidence that no "dealer always wins" policy is being applied. In fact, one could even raise the opposite question. Have the formal and informal systems in Wisconsin fairly followed the language of the statute and fully considered all of the equities of the low-volume dealer? Perhaps he has an interest in "special interest" protectionist policies that is not being carried out by either the state agency or his trade association. While one who values the virtues of volume selling cannot feel too sympathetic toward him, the possibility of such an argument indicates that there have been no facts discovered in Wisconsin to indicate that manufacturers are being greatly harmed. However, the available information on practices in other states is not sufficient to rule out the possibility of protectionist policies prevailing over notions of due process, performance of commitments, and efficiency,<sup>762</sup> and to assure us that the manufacturers have reasonably clear guidelines.

## ii. ACTION UNDER THE PENAL STATUTES

Several states have attempted to avoid the expense of creating an administrative agency to enforce a licensing measure but have made certain conduct by manufacturers against dealers criminal.<sup>763</sup> The enforcement has

<sup>761</sup> This is the explanation given by a trade association manager in a state with an administrative-licensing statute which is administered by a commission composed of new-car dealers.

<sup>762</sup> One dealer trade association manager in a state with an administrative-licensing law described in one case the action of the agency administering that law as follows:

The agency made a finding that the manufacturer had acted in bad faith. There was an injunction but things were settled quite quickly after that. The agency had a very poor case and the dealer knew it. It gave a quick and rather partisan decision for the dealer to help him out as much as it could in bargaining for a settlement. I doubt that the decision would hold up in court.

Interview. This was the only instance of this kind of favoritism that I discovered. Of course, it does emphasize that a "dealer always wins" policy is possible.

<sup>763</sup> The states are Minnesota, North Dakota, South Dakota, and Wyoming. See text accompanying notes 131, 134, 136, 144 *supra*. Most of the administrative-licensing statutes also make coercion, terminating a franchise unjustly without provocation and without due regard to the equities of the dealer, and the like criminal. See, e.g., WIS. STAT. §§ 218.01(8) (a), (d) (1963). One can ask whether § 218.01(8) (d) is the exclusive penalty, or whether § 218.01(8) (a) also is applicable. The discussion in the text applies to the criminal aspects of these statutes as well.

been entrusted to the state's generalized agencies—the local prosecutors. There is no evidence that the penal provisions of these statutes which outlaw coercion, unfair termination, or other practices have ever been applied against a manufacturer or his representatives. The attorneys general of several states with this kind of legislation wrote that they could discover no instance of their statute's being enforced.<sup>764</sup> A violation of any of these statutes would not affect large numbers of people or offend strongly and widely held notions of morality. Therefore, a prosecutor is not likely to act on his own. A dealer is not likely to complain to a prosecutor, although in some cities a prosecutor might be willing to help a local dealer by arresting a road man. While arrest might give the dealer some revenge, it would be hard to translate it into leverage for keeping a franchise or getting a good settlement. Once the complaint is made and the manufacturer's representative arrested, the dealer might have real difficulty in bargaining to drop the matter for a price. There are a number of legal sanctions to inhibit this kind of bargaining, and the effect on the manufacturer's officials might be to cause them to close ranks behind their wrongly imprisoned road man and to fight for principle. They might not treat the one responsible for the outrage kindly. Of course, the possibility of a prosecution is always present and counsel for a manufacturer cannot advise his sales staff with complete confidence.

iii. PRIVATE CIVIL ACTIONS BASED ON ANY OF THE VARIOUS TYPES OF DEALER-MANUFACTURER STATUTES

In several states dealers, in suits against manufacturers, have successfully asserted causes of action based on administrative-licensing, penal, or other types of statutes dealing with coercion and wrongful termination. The statutes do not provide for a private remedy but speak only of criminal penalties or revocation of licenses; the courts have "amended" the legislation to broaden the remedies available.

In *Kuhl v. Ford Motor Co.*,<sup>765</sup> the Supreme Court of Wisconsin broadened the state's administrative-licensing statute to allow not only a private right to sue but a right to an injunction against termination as well. In the *Kuhl* case, the dealer's franchise was canceled because of his death. His estate sued for an injunction against termination, asserting the rights recognized by the legislature in the licensing statute. The trial court sustained Ford's demurrer, apparently on the theory that revocation or suspension of licenses was the sole remedy available. The supreme court reversed, finding

<sup>764</sup> Letters. Two said they assumed that their statute was effective as a deterrent.

<sup>765</sup> 270 Wis. 488, 71 N.W.2d 420 (1955).

a private cause of action to enforce the statutory right. The case was remanded for trial. The problems of writing a viable injunction against termination were avoided when the case was settled a year later.<sup>766</sup> Ford helped Kuhl Motor Company find a buyer for the dealership. The buyer was a Ford official.<sup>767</sup> Seven years later Ford bought out the dealership and closed it because there was an insufficient rate of return on the investment at the location.<sup>768</sup> The dealer's estate received more than termination benefits, but Ford had to keep alive an unprofitable location for two years while the litigation was pending.

The Minnesota penal statute has been similarly broadened by judicial action. It makes unlawful such things as coercion and canceling or failing to renew a franchise "without just cause," but there is no provision for civil remedies. Minnesota trial courts have recognized a private cause of action in two cases, and dealers recovered damages in both.<sup>769</sup> In *Dahlberg Bros., Inc. v. Ford Motor Co.*,<sup>770</sup> a dealer sought an injunction against termination. The dealer alleged that its sales objectives were improperly increased in 1962 and that if there were a default, no opportunity to cure it was given before termination as is required by the *Ford Selling Agreement*. The trial court granted a preliminary injunction. Ford asked the Minnesota Supreme Court to overturn the preliminary injunction as an abuse of discretion. It argued that under the selling agreement it had a right to terminate, and the injunction gave the dealer more than his rights under the franchise. Moreover, the Minnesota statute was a penal one and gave no authority to the courts to issue injunctions. The Ford brief also stressed the problem of continuing supervision. The Minnesota Supreme Court affirmed the trial court's order.<sup>771</sup>

Private civil actions give a dealer in a state with an effective administrative-licensing statute a useful but not essential weapon. In the states with penal statutes, private civil actions probably are essential if the legislation is to have anything but a remote deterrent effect since these are crimes

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<sup>766</sup> Comment, 74 YALE L.J. 354, 362 n.33 (1964), states, "In at least one state case a final injunction has been granted. *Kuhl Motor Co. v. Ford Motor Co.* . . . No information has been secured concerning how the court resolved problems of formulation and supervision there." The writer of the Comment was mistaken about the result of the *Kuhl* case.

<sup>767</sup> *Automotive News*, Oct. 1, 1956, p. 53, cols. 5-6.

<sup>768</sup> *Id.*, Aug. 26, 1963, p. 6, col. 5.

<sup>769</sup> Interview. See *Willys Motors v. Northeast Kaiser-Willys*, 142 F. Supp. 469 (D. Minn. 1956).

<sup>770</sup> 137 N.W.2d 314 (Minn. Sept. 10, 1965).

<sup>771</sup> *Ibid.*



which seldom will be prosecuted. However, an injunction is another matter. Of course, this is the best remedy of all from the dealer's standpoint. He keeps his dealership, and the manufacturer's conduct is supervised by a court of equity. Yet there are difficulties. On one hand, manufacturers do have a legitimate interest in maximizing sales, and this kind of judicial supervision takes off much of the pressure on a dealer to strive to sell as many cars as he can. In theory, the injunction tells the manufacturer only to perform the contract; in practice, the potential sanctions against the manufacturer for nonperformance have been increased greatly. If it made a mistake about its rights and duties, it would be in contempt of court. On the other hand, the task given the court is not easy. The performances of both parties are not simple acts that either are or are not in compliance with the contract. There is a continuing relationship and the intervention of the court might remove much of the give and take normally involved since any alleged default can be referred to a judge. Yet damages are probably very inadequate, and arguably an injunction is the best of several bad alternatives.

One can draw several conclusions about these state statutes. Originally they were aimed at practices of the manufacturer which can best be described as the high-pressure, rule-from-the-top-downward system of management. The dealers' obligations were not spelled out with any precision, and thus it was hard to tell whether or not a particular dealer's performance was satisfactory. This helped to create insecurity so that all dealers could be kept under pressure for renewed efforts. Dealers were told that they must sell their make's national average in their community. The dealer took the risk of recessions; he was told in effect to make every effort for there were no excuses. Finally, the risks of the major economic losses of termination were placed on him since the manufacturer offered little help if it canceled. All of this is most rational under a theory of management based on constant pressure and fear.

In passing statutes and pressing for enforcement, the dealers have made two kinds of demands. The first is reflected by Mr. Milan's views. The manufacturer must consider performance in terms of the individual situation—outside forces can cause poor sales and the manufacturer's own poor distribution can be responsible too. If there are no excuses of this nature, however, the manufacturer can cancel. While this demand for particularity is consistent with maximizing the profit of both manufacturer and dealer, it runs counter to the pressure system of driving dealers. The second kind of demand implicit in these statutes is for protection against requiring performance that maximizes the profit of *both* parties. It stresses the virtues of

the profitable small business and a certain ethic of merchandising.<sup>772</sup> The "reputable businessman" stresses service and loyalty, not price cutting and high-volume merchandising.<sup>773</sup> The statutes may contain some elements of legislation against the retailing revolution exemplified by the discount house. Like the family farm, the family automobile dealership may claim a right to be defended through the political process; "inefficiency" is the price of achieving other values and a way of life.

Today the manufacturers do not attempt to run a pure pressure system. Their revised franchises and practices set standards for judgment of the adequacy of performance which take some account of particular factors, and they have eased the burdens of cancellation by offering termination benefits. Their published position is not far from the particularistic approach taken by Mr. Milan of the Wisconsin Automotive Trades Association—a dealer must perform, but one must be sure his nonperformance is not due to facts beyond his control. Both take positions that exclude the interests of the profitable low-volume dealer who does not want to cut prices and set volume records. Yet one can never be sure that a commission's or jury's decision does not contain some reflection of this protectionism or bias for the small businessman although there is no evidence that this factor has predominated.

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<sup>772</sup> Of course, one does not want to overlook the fact that even Mr. Milan's statute contains these elements. For example, Wis. STAT. § 218.01(3) (f) (1963) says, "The licensor shall deny the dealer application of a manufacturer in any community or territory where the presently enfranchised dealer or dealers have complied with agreed requirements of such manufacturer for adequate representation in such community or territory." On one hand, this can be defended in terms of contract. If the present dealers have performed their contracts, a new dealer in the area takes away sales and hurts the established ones. Yet the statute also serves to protect some dealers from a kind of price competition which might be expected as the result of the efforts of a new, additional dealer to establish himself. It is at least theoretically possible that a third dealer is justified in a city which has two dealers selling the same make who have met agreed requirements. It is one thing to sell just enough to avoid termination; it is another thing to sell all the cars which reasonably can be sold.

<sup>773</sup> In 1961, the Indiana dealers passed a resolution asking for reforms in the franchise. They called for an end to the system requiring dealers to sell about the same percentage of a planning potential as other dealers, a voluntary limitation on production by the manufacturers and the relocation of stimulator dealers who had recently been placed in areas to compete against existing dealers. *Automotive News*, July 3, 1961, p. 3, cols. 3-5.

Local dealer organizations often attempt to stabilize prices. This is usually justified on some moral grounds of a "fair" price. It is hard to imagine a dealer meeting during which some mention of profits, margins, and prices is not made. It is clear that city dealers, as a group, have more of an incentive to arrive at some form of price agreement. . . . It is also evident that dealers in the larger markets are less able to fix and maintain prices. Not that they do not try, they do. In many instances, the large-volume dealers do not become members of the local dealer associations. They wish to operate their dealerships on low margins in order to obtain volume. Hence, they have less interest in maintaining margins. Apparently, there

This then is the fifth stage under the state and federal legislation. The impact of the federal act is subtle at best and the impact of the state statutes has been far greater than has generally been assumed. In the federal litigation the manufacturers held most of the cards because of their resources and their successes in the third stage when the legislation was being debated and passed. In the states with legislation the dealers fared better, and their strength before formal agencies has spawned informal systems that are most important in the total picture. However, the manufacturers still can fight in the states with constitutional weapons; the war may be resumed.

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are important differences in cost structure among dealerships. Hence, price agreements are that much more difficult to execute.

PASHIGIAN, BEDRO PETER, *THE DISTRIBUTION OF AUTOMOBILES, AN ECONOMIC ANALYSIS OF THE FRANCHISE SYSTEM* 65 (1961). Reprinted with the permission of the publisher, Prentice-Hall, Inc., Englewood Cliffs, N. J.

## **4. The Consequences of the Dealers' Appeal to the Legal System**

Hearings have been held; statutes have been passed, construed, and administered; and the manufacturers have created their own internal "due process" systems. What difference has it made? The answer involves assessing gains and costs, and the balance may look different from the position of dealers, manufacturers, and consumers of motor vehicles. Even these categories may be too crude; the balance of gains to costs may differ for metropolitan and rural dealers, for General Motors and American Motors, and for law professors who trade in cars every five to ten years and the Hertz car rental system.

### ***A. The Dealers' Costs and Gains***

This study has listed an array of changes flowing from the use of the legal system which were supposed to benefit dealers. To what extent did the dealers actually benefit and at what cost? Have the problems that existed up to the 1950's and which prompted the hearings, statutes, and cases been solved, and are there means for solving newer problems?

The old problems were coercion to take unwanted items, unreasonable and offensive pressure for sales, "bootlegging," and cross selling into the "territory" of other dealers. The evidence indicates that these problems have been solved, changed, or are no longer viewed as real problems.<sup>774</sup> However, there are new difficulties. Trade association representatives in 48 states<sup>775</sup> were interviewed. They were asked to compare the present relationship between manufacturer and dealer with that existing in the early 1950's before the federal hearings. Their replies were:

Relationship	States With Statutes Affecting Relationship	States Without Such Statutes In Effect	Total
(1) Better	12	22	34
(2) Little change	0	3	3
(3) Worse	0	0	0
(4) Better after hearings and passage of Good Faith Act but almost the same now as before	2	3	5
(5) No answer or unclear answer <sup>776</sup>	4	3	7
	18	31	49 <sup>777</sup>

Many dealer association managers volunteered comments about what has happened. A number talked about coercion to take unwanted items and said:

	States With Statutes Affecting Relationship	States Without Such Statutes In Effect	Total
(1) No real coercion today as in early 1950's	8	11	19
(2) Some coercion	2	1	3
	10	12	22

<sup>774</sup> One qualification should be made. These problems still are significant in the relationship between foreign car dealers and American distributors of these cars. Interviews.

<sup>775</sup> The directory Mr. Milan of WATA gave me lists no associations in Alaska and Hawaii but several in California. California has no statewide group, but there are associations representing northern and southern California as well as Long Beach and San Diego dealers.

<sup>776</sup> In a few instances I was not able to ask all of my questions because the trade association manager did not want to talk to me. One thought I was working for one of the automobile manufacturers despite my assurances to the contrary. One tape recorded our conversation. Several had an assistant telephone Mr. Milan while I talked with the association manager. In a few instances an answer was unclear despite my efforts to reframe my question. In this kind of interview situation, one can go only so far in pressing for an answer.

<sup>777</sup> See note 775 *supra*.

Others talked about pressure to sell cars, a frequent complaint before the Senate hearings. They said:

	States With Statutes Affecting Relationship	States Without Such Statutes in Effect	Total
(1) Sales pressure exists today but is less obnoxious	1	9	10
(2) Unreasonable sales pressure exists today	0	1	1
	<hr/> 1	<hr/> 10	<hr/> 11

While these replies give the impression that most dealer trade association managers see real advances, the managers' comments are more accurately reflected in words than in numbers. The position of the majority who were satisfied is reflected by the following two comments:

The relationship between the manufacturer and the dealers is greatly improved, and this is due to the efforts of NADA. There still is a great deal of pressure to sell cars, but it is applied much differently. Today you don't get the hard beating over the head you used to get. Of course, all factories want volume and that's a good thing.<sup>778</sup>

The relationship between manufacturers and dealers is better than it was in the early 1950's. The attitude of the factory has changed. They are not as dominating and the dealer has more say about what kinds of cars and accessories he'll take. The relationship is much more of a partnership than it was at that time. There is not as much pressure to sell quotas, but the field men will do their best to push the dealer. The dealers, however, now feel they are in a position to talk back because they are more sure of themselves. There are not as many threats or cancellations as there were in the earlier time either, and [the association official] . . . thinks that the number of cancellations has leveled off and will stay at its present low level. The only threats come in the most obvious cases of dealers who are not doing their job. The dealers do not complain about cancellations and this problem. In the 1950's the dealers were told that they must do certain things and they were given orders. Now the attitude is much more that of a discussion with a partner. The five-year term in the new franchises has helped a great deal.<sup>779</sup>

<sup>778</sup> Interview. The material paraphrased in the text is from my notes of the interview. Immediately after each conversation with a trade association manager I dictated the responses to my questions, trying to use the manager's own words as far as possible. I think the notes accurately reflect both what was said and how it was said.

<sup>779</sup> *Ibid.*

Five managers thought that after an initial improvement, the relationship was again deteriorating. One expressed his concern as follows:

It is clear that the federal Good Faith Act helps the dealers. At the time it was enacted and for several years afterwards, the manufacturer's representatives were much more reasonable. However, today we are coming back to the same position as we were in at the time the statute was enacted. The manufacturers fear government regulation. When there is a threat of increased government regulation, they will change things. But the pressures are starting back now. It looks like something must be done again. We are getting the demands to do particular things and statements that if you don't do these things, something will have to be done about it. Impliedly, of course, the manufacturer is saying he will cancel a franchise. [The association official] . . . does not believe that this is top management thinking, but top management puts sales quotas on the regional managers, and they have to produce and they are not too concerned about the means.<sup>780</sup>

One problem in [our state] . . . is sales promotions. For example, [the association official] . . . today talked with a Chevrolet dealer who was pushed into a . . . promotion on parts even though a strike has been on and he can't get any parts to sell. He bought about 100 charm bracelets [to give to customers] hoping to get away with that small order. He was called and told that he'd have to buy 150 more, and he'd better get his check in fast. He knew that if he didn't cooperate this would go in his file and he would have a rougher time getting new cars when distribution came back again. The manufacturer's representatives today are a little more careful. You don't get things in writing; all is done by telephone. The association tells its dealers to try to take things down and record the statement made by the representative, . . . [but if you do this,] he starts talking about trust and good faith.<sup>781</sup>

Those few who thought there was little change were expressing a judgment that while there had been a change in form there was little gain in substance. Many other representatives would agree with the following comments of one who thought there was little change, but they conclude that these indirect sanctions are preferable to the very direct ones used in the 1950's:

Terminations are not as much of a problem as people being forced to do things because they are afraid. The factory has many, many ways of getting back at a dealer who doesn't cooperate. For example, Ford has its Mustang and LTD models. Both are hot. If you cooperate and are known as a factory dealer, you can get more of these models. If not,

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<sup>780</sup> *Ibid.*

<sup>781</sup> *Ibid.*

you get the minimum. When the new cars come out, do you get a good bunch to take care of the people that come in at that time, or do you just get one or two and the ability to promise people you'll order one for them? The factory can just make it rough on you, and you must go along.

[The association official] . . . hasn't heard of many involuntary terminations recently. There's not much of this going on in his opinion. The factory gets its way by making a nuisance of itself; the dealer gets mad and is ready to quit, and the factory gets him a buyer and gets rid of the man. They don't write formal termination notices; they just get rid of the dealer. They can come in and badger him on his sales volume, criticize his service facilities, set goals that are just a little bit unreasonable on the high side. If they're just a little bit unreasonable and the criticism sounds all right under one interpretation, they won't get in trouble with the Good Faith Act. Moreover, they can mess around with the distribution when they don't get what they call co-operation. The dealer will get two Mustangs when he's entitled to six.<sup>782</sup>

The *Automotive News* reflects this mixed view of what has happened in the past and the present situation. In 1957<sup>783</sup> and 1958, it reported that the manufacturers' field men "walked on eggs."<sup>784</sup> In 1963, the Iowa dealers asked their legislature to make it unlawful for manufacturers to coerce dealers to stock more cars than they want; and in 1965, Utah dealers had an administrative-licensing act passed<sup>785</sup> to the surprise of factory executives.<sup>786</sup> On one hand, the Utah legislation reflects the reemergence of the old problems. *Automotive News*, commenting on that act, said, "Many dealers complain that factory men again are using arrogant, rough-shod tactics."<sup>787</sup> On the other hand, the passage of this statute and the renewed

<sup>782</sup> *Ibid.*

<sup>783</sup> *Automotive News*, Feb. 11, 1957, p. 3, col. 1, at 8, col. 1.

<sup>784</sup> Finlay, *Dealer Forum*, *id.*, Aug. 11, 1958, p. 3, cols. 1-2.

<sup>785</sup> Laws of Utah 1965, ch. 81, at 228.

<sup>786</sup> *Automotive News*, March 22, 1965, p. 12, cols. 1-2.

<sup>787</sup> Finlay, *Dealer Forum*, *id.*, July 19, 1965, p. 3, cols. 1-2. See also the following comments by Finlay, the editorial director of *Automotive News*:

Out in Utah, the push behind the new law, which takes effect in July, started with stories like these:

Two Ford dealers, both in fast-growing communities, were called in and told not to spend too much on modernizing facilities because "we're going to have to eliminate one of these deals." The dealers felt they were far enough apart so that this prospective action was not necessary.

Another Ford dealer was told not to spend much because he was going to be moved to another area.

In neither case was there any indication that part of the burden of these moves would be borne by the factory.



attempts to pass administrative-licensing legislation in other states also reflect newer problems.

What are the newer problems?<sup>788</sup> The first is a variation of an older one. All manufacturers want a larger share of the market, and they want their

At Chrysler, most of the fears started among Dodge dealers. Some were told that in the near future they would no longer handle trucks beyond pickups. These would go through a new truck center.

While many city dealers might be happy to be relieved of responsibility for sales of heavy trucks, country dealers often find their bread and butter in these units.

One Dodge dealer is said to feel that he is now a target for reprisal. He has two deals and he feels that pressure is on him to give up one. He had been promised the truck center and has been told to forget it.

Such activity has caused Utah dealers to rally behind the maker-licensing bill now, under the theory that if they don't they are going to be exposed to further reprisal.

A Chevrolet dealer in a fine installation has been told to prepare to move to a more open area where he will have several acres of land available.

Buick, Pontiac and Chevrolet dealers say they have been subjected to pressure for more volume. A Buick dealer said that while he has tried unsuccessfully to get more cars from the factory, he received an undiplomatic letter scolding him for not holding up Buick's position on registrations.

Fear in man is a mighty lever for action.

*Id.*, March 29, 1965, p. 3, cols. 1-2. Another editor of *Automotive News* said:

Why weren't auto makers successful in thwarting passage of the Utah bill licensing and regulating motor-vehicle manufacturers? Here's how Elias Strong, executive vice-president of Utah association, views it: "Manufacturers burned up the telephone wires in an effort to defeat this bill. Their efforts were in vain because pressures from (factory) sales departments during the previous few days had riled up dealers to the point where they literally swamped members of the Legislature with requests to do something about curtailing manufacturer demands. Dealers brought so much pressure on House members that the bill was passed on a unanimous vote" . . . Must be a lesson here somewhere. . . .

Wernhoff, *On The House*, *id.*, March 22, 1965, p. 3, cols. 4-5.

<sup>788</sup> The managers of state dealer trade associations were asked to name current problems between manufacturer and dealer in addition to unfair terminations and forcing unwanted cars. Their answers were as follows:

	States With Statutes Affecting the Relationship	States Without Such Statutes In Effect	Total Mentioning Problem
1. Different discounts (or markups) on compact and regular sized cars hurt dealers.	9	15	24
2. Compensation for warranty work inadequate.	9	13	22
3. Factory sales to leasing companies hurt dealers.	5	7	12
4. Factories injured dealers by setting up factory-controlled dealerships to compete with them.	4	6	10
5. Dealers' profits too low as compared with manufacturers'.	2	7	9
6. Distribution favors particular dealers who get unfair share of best models.	5	3	8

dealers to sell as many units as possible. Ford has set market potentials for its dealers which are ambitious and has pushed for a higher percentage of achievement. It has urged dealers to "beat Chevrolet." Dealers are constantly reminded of these goals, and Ford's field men seek to persuade dealers to hold inventories sufficient to meet them and to operate on a high-volume, low-profit-per-unit basis. Some of its dealers object to placing this emphasis on volume and say there is insufficient concern for the dealer's profit.<sup>789</sup> Chrysler has expanded the number of its dealerships, both to get representation in communities where it had no dealer and to increase the number of its dealerships in metropolitan areas.<sup>790</sup> Often it has supplied most of the money for the new dealership and hired a manager or made larger loans to the new dealer. The existing dealers are displeased by the added, and what they deem unfair, competition. The added dealers have

<sup>789</sup> Interviews.

<sup>790</sup> Townsend's [Chrysler's president, who was appointed in 1961] toughest problem was with dealers. Before he could help them, he had to have them. In the 1960-61 period, Chrysler had lost around 900 dealers, dropping its total to a low of some 5,800. "We found we didn't even have national distribution any more," recalls Townsend.

Wherever Chrysler still had dealers, they were often in old locations where car buyers rarely went any more. In some areas, for example, competitors had moved to the suburbs along with their customers, but Chrysler dealers were still scraping along downtown. In other cases Chrysler had too many dealers for one line in one market. Right at home in Detroit, for example, 60 Plymouth dealers fought tooth and nail for sales, while 25 Chevrolet dealers blanketed the city perfectly. Altogether, substandard dealers and lack of dealers were costing Chrysler, according to Townsend, some 300,000 units a year.

Forbes Magazine, Sept. 15, 1965, p. 22, col. 3.

One of the problems Boyd's [the official in charge of changing Chrysler's dealer force] group ran into right away was the difficulty of luring dealers away from competitors. Both GM and Ford will do almost anything to keep good dealers whom they have nourished and who have nourished them over the years.

To get dealers, Chrysler has invested heavily in its Dealer Enterprise Program, which provides capital for financing new dealers, expanding existing dealer facilities and relocating others. Basically it is similar to a plan Alfred P. Sloan put to work for GM more than 30 years ago and which Ford later copied.

"What we generally do through the program," says Boyd, "is put up about 75% of the \$200,000 or so to set up an average dealership. If he's a good man who knows the business, he has the option of buying our share out and eventually can average at least a 25% return on his investment. If he is going into it strictly as an investment, he had better have a good general manager on hand who knows the business. Otherwise he will probably lose his shirt."

*Id.* at 23, col. 1.

Pashigian has asserted that "the tendency for the profit rates of automobile dealers to surpass the profit rates of the retail trade sector persistently indicates that automobile manufacturers have not been able to impose an 'all or nothing' bargain on their dealers successfully. Thus, dealer economic profits have persisted." PASHIGIAN, *op. cit. supra* note 773, at 34. He then asks why the manufacturers have not granted franchises to others to cut dealer profits and increase volume. He concludes that there are a number of answers but that "the automobile companies have not been too successful in overcoming the bargaining position of their established dealers. There is no reason to believe they would be more successful with newly placed dealers." *Id.* at 35.

newer facilities in good locations. It is charged that they are more willing to adopt a high-volume, low-profit strategy since they are doing business on the factory's money and can take a lower rate of return on investment.<sup>791</sup> Both Chrysler and General Motors also have split many franchises that formerly were for two makes—Dodge-Plymouth or Chevrolet-Buick, for example. To some extent, this creates competition. The former Dodge-Plymouth dealer who keeps Dodge now must sell against a Plymouth dealer. Moreover, it creates an incentive for a high-volume strategy since it is more difficult to sell for higher prices and remain profitable at lower volume.<sup>792</sup> Of course, it is difficult to measure the significance of the high-volume strategy problem. While some dealers complain loudly, automobile sales generally are very good and the pressure for this strategy does not rub against as many dealers as it might in poorer years.

The second problem concerning the relationship between manufacturer and dealers involves the manufacturers' desire that there be changes in the places where cars are sold. Most manufacturers, and especially General Motors, have plans which call for many small-town and rural dealerships to be closed.<sup>793</sup> As the owners retire or die, they are not replaced. Many

<sup>791</sup> Interviews. Trade association representatives conceded that under some circumstances Chrysler had a legitimate interest in financing new dealers and adding to the number in a particular area. See also *Automotive News*, March 26, 1962, p. 6, cols. 1-2. Chrysler has taken steps to make its dealers happier by increasing the amount of money a dealer must put into a "Dealer Enterprise" franchise. See *N.Y. Times*, Feb. 3, 1965, p. 43, col. 6, at 50, cols. 7-8.

<sup>792</sup> The Dodge-Plymouth dealership could rely on sales of both Dodges and Plymouths to those who would buy these makes because of product loyalty. After the Plymouth franchise was taken away, the dealer would have a smaller base of old loyal customers. He would have to sell more Dodges to new people and engage in price competition.

<sup>793</sup> Another related problem is the distribution of automobiles to smaller dealers. These dealers claim that they get few cars when the new models are introduced and few of the best-selling models at any time. See *Automotive News*, Nov. 7, 1960, p. 3, cols. 1-2, at 49, cols. 4-5. One dealer tried to get relief under the Good Faith Act but failed. See *Zarbock v. Chrysler Corp.*, *TRADE REG. REP.* (1965 Trade Cas.) ¶ 71361, at 80538-39 (D. Colo. 1964):

[T]he record fails to establish that plaintiff's treatment . . . was any worse than other small dealers throughout the country. The ways and wiles of big business may indeed seem harsh, but this Act does not purport to provide a remedy against uniformly distasteful national policies by automobile manufacturers to their dealers.

The record does not show . . . that defendant consistently refused to fill plaintiff's orders. The history of events reflects great hardships placed upon plaintiff, but it does not show "lack of good faith" as to constitute an action under the Automobile Dealer's Day in Court Act.

Others have induced their trade associations to push for sections of administrative-licensing acts to offer some protection against poor distribution and discrimination of the large-city, high-volume dealers. See, e.g., *OKLA. STAT. ANN.* tit. 47, § 565(j) (1) (1962), which gives as a ground for revoking or suspending a license, "Being a Manufacturer . . . who: (1) Has refused to deliver to any Motor Vehicle Dealer having a franchise . . . any motor vehicle, publicly advertised for immediate delivery, within sixty (60) days after such dealer's order shall have been received. . . ."

small towns and their surrounding rural areas are losing population. These dealerships have a potential of relatively few sales a year. The complexity of modern cars makes it important to have trained mechanics, but they are hard to find in these areas. Nonetheless, some small-town dealerships are old, established family businesses, and none of these arguments is persuasive to a son who wants to continue the dealership his grandfather started.

Dealers in larger cities also are expected to change their place of business or improve it.<sup>794</sup> Most simply, as the population grows and more families buy two cars, the manufacturers expect business to increase. This calls for dealerships with more capital and larger facilities for sales and service, or for more dealers in an area. Moreover, as the population of a city moves to the suburbs and its downtown decays, some older dealerships lose their customers and find themselves in undesirable locations. The solution is obvious and expensive: move the location of the dealership and build new facilities. There is little dispute between manufacturers and dealers about the need for expansion or relocation in appropriate cases. The disagreement comes as to when this is to be done and how much must be spent. The manufacturers want changes at a faster pace than some dealers. This is especially true when the dealer is older and nearing retirement; such a dealer may wish to leave this problem to his successor.<sup>795</sup>

The changes in factory policies which were produced by the hearings and the federal and state legislation have affected the conduct of the manufac-

<sup>794</sup> See, e.g., *Automotive News*, Oct. 8, 1956, p. 1, cols. 4-5, at 51, col. 1; *id.*, Feb. 17, 1958, p. 3, cols. 4-5.

<sup>795</sup> Interviews. See the following letter from Herman Schaefer, executive vice-president, Automobile Dealers Association of Indiana:

The sudden surge of factory terminations is rapidly becoming the focal point of concern of many dealers. If age of physical facilities or length of time a firm has held a selling agreement or the age of the dealership's principals are to be, or are to become, the important factors for factory terminations, many more dealers will soon be in trouble.

Under such circumstances can a dealer approaching or slightly over his 50s seriously consider going into long-term indebtedness for new or expanded facilities that have little or no utility for any other business? And even if they would have, is there any assurance that there would be tenants readily available at the time of termination?

This is not to denounce or impugn the desirability of new facilities. Sure, they are nice and they may be a bit more efficient, but is it fair to a dealer with older but well-kept and adequate housing facilities to have someone rake through his operations with a fine-tooth comb, seeking only to create reasons to justify termination?

If dealers' equities are not protected under the federal good-faith law then perhaps we should amend the good-faith law to make it read as it was originally written and introduced, which protected dealers' basic equities. Dealers' 1955 and 1956 experience indicates that Congress will listen to small business when its cause is just!

*Automotive News*, Sept. 7, 1964, p. 10, cols. 4-5.

turers which the dealers dislike and the dealers' response to these problems. The manufacturers want volume and new facilities, but they must seek them differently today. Termination is no longer as effective a sanction since it is not as credible or as disastrous. If pressure to sell to avoid termination is to be a successful strategy, a dealer must have a sufficiently bad record so that a road man's recommendation might be followed by his superiors.<sup>796</sup> The evaluation of the dealer's record will be based on criteria that are more particularized and favorable to the dealer than in the early 1950's: local conditions affecting sales, availability of product, and comparisons with comparable dealers. In states with effective administrative-licensing legislation, and perhaps in all states under one view of the federal statute,<sup>797</sup> the factory cannot cancel without a real effort at rehabilitation over time. Finally, as termination benefits have improved, the impact of termination has been eased somewhat. I do not want to go too far and argue that fear of termination has no force as a sanction, but more dealers are free to argue and bargain about quotas and inventories. The manufacturers' field men now attempt to gain power by using rewards—allocations of hot models, quick delivery of specially ordered cars, and cooperation in dealing with the factory bureaucracy. This, too, helps to create a give-and-take relationship. Nonetheless, freedom to bargain does not necessarily lead to success in bargaining. A dealer who does not want to run a high-volume operation, expand or move his facilities, or face competition fostered by his factory will have a difficult time since he has little to bargain with in negotiations about these subjects with manufacturer representatives.

Dealers also can communicate with the top management of the manufacturers. If any of the factory policies offends enough of the dealers, either the manufacturers' dealer councils or the NADA Industry Relations Committee presents a means of bringing a challenge to the attention of those in authority. One NADA official thinks that this ability to communicate is the most important gain from the whole process of hearings, legislation, and cases—"Now they will talk with us and listen to what we say."<sup>798</sup> Finally,

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<sup>796</sup> Although dealers have not been successful in collecting under the [Good Faith] act . . . some felt it has helped to equalize their bargaining position.

The fact that factory coercion or intimidation of a dealer can result in a lawsuit tends to prevent such action by overzealous factory representatives, they feel.

One dealer explained: "If a factory guy calls me and starts telling me how to run my business, I ask him to hold on while I switch on a recorder so that I can get all his 'suggestions.' This changes the tone of the conversation considerably." Automotive News, Feb. 25, 1963, p. 3, col. 5.

<sup>797</sup> See text accompanying notes 678-82 *supra*.

<sup>798</sup> Interview.

by seeking legislation the dealers can force top management to review how policies are carried out in the field. Passage of the Utah statute shocked and annoyed those in command of the manufacturers, and probably will prompt some examination of the daily practices of field men and district offices.<sup>799</sup> There is now a pattern set by the Wisconsin and Oklahoma acts and dealers know about it. However, in order to use either the communications system or the lobbying approach effectively, a dealer who is unhappy must convince enough other dealers that action is called for. Individuals who cannot prompt collective action must take their chances within the manufacturer's internal system. In summary, the dealers have made real gains and the climate is far better, but that does not mean that all, or even most, dealers are satisfied completely.

These gains have cost most dealers very little. Occasionally, manufacturers say that the use of the legal system made the relationship more legalistic and formal and less personal and based on trust. "Our business requires close cooperation, and too often legislation . . . tends to make us work at arm's length."<sup>800</sup> Yet few dealers see advantages to them in a personal relationship in which they must scramble for favors from all-powerful field men. Undoubtedly manufacturers keep more careful records on each dealer's performance than before the legal system intruded, but this may actually encourage trust. If personal whim cannot operate, if relatively equal treatment is given equals, and if it is necessary for manufacturers to explain their goals and persuade (rather than order) dealers to share them, this should tend to promote cooperative relationships.

Where administrative-licensing statutes have been passed, control of the manufacturers may come at the price of control of some dealers. Typically, these statutes also license dealers and serve to limit some types of competition and trade practices.<sup>801</sup> Yet since dealer lobbies write these laws, only the deviants from accepted practices are likely to be hit. Some dealer representatives have said that the federal Good Faith Act has been used by manufacturers as a justification for not forcing some dealers to cease misleading trade practices.<sup>802</sup> Perhaps passage of this statute cost some dealers a legislative solution to other problems. Since Congress had given the dealers something, the pressure the dealers could exert for different statutes was diluted. Some dealers wanted protected territories to end competition from

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<sup>799</sup> See *Automotive News*, March 22, 1965, p. 12, cols. 1-2.

<sup>800</sup> The statement was made by Virgil E. Boyd, group vice-president in charge of domestic automotive divisions of the Chrysler Corporation. See Finlay, *Dealer Forum*, *Automotive News*, July 19, 1965, p. 3, cols. 1-2, at col. 2.

<sup>801</sup> See, e.g., WIS. STAT. § 218.01(3) (a) (1963).

<sup>802</sup> Interviews.

other dealers selling the same make;<sup>803</sup> passage of the Good Faith Act may have cost them such legislation.<sup>804</sup> Finally, it is possible that such problems as Chrysler's company-financed dealerships occurred as a result of ending the older techniques for pushing dealers. After the "reform management" took power in 1961, Chrysler wanted to regain what it thought was its share of the market quickly and felt it must do more than politely ask existing dealers if they would please try a little harder.<sup>805</sup>

### **B. The Manufacturers' Costs and Gains**

Many of the costs to the manufacturers of the dealers' campaign to alter the balance of power in their relationship are fairly obvious. First, the manufacturers incurred costs in attempting to defend their position before the various legislative, judicial, and administrative agencies. Lawyers and executives devoted time to meeting the dealers' attacks. The manufacturers created internal review systems that had to be staffed, and they channeled practices within their organizations so that they would be prepared to defend their actions. Second, the imprecise nature of the formal legal control and informal sanctions which were created also had costs. These pressures did not provide clear guidelines, and the possibility of a mistake could have serious consequences under some circumstances. As a result, the manufacturers could not be sure what they could demand from their dealers. They either had to bend over backwards or take calculated risks. Conversely, that which the law made certain added to the manufacturers' burdens. They were forced to justify terminations, and they could not demand that a dealer order certain cars which he did not want. Thus a burden of keeping careful records about each dealer was added. Also manufacturers had to create better systems to minimize production of unwanted models of their products since they could not push the costs of errors on the dealers.

While these all are costs, the key disadvantage predicted as the consequence of the legislative efforts of the dealers was that the manufacturers would have to tolerate something less than maximum performance from their dealers and thus would not sell as many cars as possible.<sup>806</sup> In other words, if one were to give dealers grades on their performance as one gives students grades, the manufacturers would have to tolerate the C-minus dealer and could only cancel the D and F dealers. Moreover, they would have lost one means of changing a C-minus dealer into a B or A performer

<sup>803</sup> See, *e.g.*, *Automotive News*, Feb. 7, 1955, p. 1, cols. 3-5.

<sup>804</sup> However, territorial security measures faced a presidential veto. See, *e.g.*, *id.* at 48, col. 3. This alone may have been enough to block such legislation.

<sup>805</sup> See note 790 *supra*.

<sup>806</sup> See, *e.g.*, note 367 *supra*.

since the kinds of pressure possible would have been curtailed. To what extent was this prediction accurate? Unfortunately, this question cannot be answered very well with the information that is available. Apparently, manufacturers retain a great deal of power to induce dealers to maximize sales. A dealer's sales quota can be increased as market surveys show an increase in his opportunities to make sales. Dealers whose sales fall significantly below their potential can be canceled.<sup>807</sup> While this power may not be used often, its existence probably still supplies some spur to hard work. Some dealers may be induced to work harder by the chance of getting extra allocations of the best-selling models. Also some manufacturers have added dealers in metropolitan areas. The existing dealers selling the car in question must share the market with the newcomer. He is likely to sell to some people who would have bought a car from the existing dealers had he not obtained a franchise. Thus the existing dealers must increase their efforts significantly just to stay where they were. Of course, the manufacturer hopes that the existing dealers and the newcomer will increase the total number of sales of its car in the area by selling to people who formerly bought competing makes or who have never owned cars.<sup>808</sup>

Not only have the manufacturers retained these powers, but they also have sold record numbers of cars in the past few years.<sup>809</sup> There are a number of possible explanations: the manufacturers may have used all of their rewards and punishments skillfully; there may be few or no C-minus or worse dealers who need such attention; or the demand for cars may be so overwhelming that even a C-minus dealer can do a good job. Of course, American Motors Corporation's sales have been declining despite the

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<sup>807</sup> On January 1, 1955, before the Senate hearings or the passage of the Good Faith Act, there were approximately 40,000 new-car dealers in the United States. On January 1, 1965, there were only approximately 31,000. *Automotive News 1965 Almanac*, April 26, 1965, § 2, p. 93. See PASHIGIAN, *op. cit. supra* note 773, at 78-79, for a discussion of the reasons for the decline in the number of dealers.

<sup>808</sup> See the following comment:

A second dealer cannot be placed in the market area until the total sales in the market area are large enough so that both dealerships can operate in the market area without their per unit costs differing significantly. Suppose two dealerships were placed in the market area, even though total sales were only large enough to support one dealership. Over time, both could not persist. One would tend to grow and, in the process of growth, realize further cost economies. The other dealership would be subjected to continuous price competition and would, therefore, be more likely to fail. Hence, it is in the interest of the manufacturer to allow the existing dealer to grow and realize the economies from increasing size.

PASHIGIAN, *op. cit. supra* note 773, at 151-52. "The automobile companies appear to act with considerable restraint. There may be some excess of dealerships in the East, relative to the number placed in the West in markets with comparable sales. However, on the whole, the companies do not saturate a market area with an excess of dealerships." *Id.* at 160. Pashigian notes that some dealers would disagree with his conclusion. *Id.* at 160 n.23.

<sup>809</sup> *Automotive News 1965 Almanac*, April 26, 1965, § 2, p. 44.



general trend of the industry.<sup>810</sup> One of its officials said that a factor in this decline was the poor performance of some Rambler dealers.<sup>811</sup> However, there is no indication that American Motors has been significantly hampered in its attempts to deal with the problem by either the Good Faith Act or the state legislation.

It is possible that if the manufacturers still had all of their powers of the early 1950's, they would have just as many or more C-minus performers as they have now. One psychologist, Rensis Likert,<sup>812</sup> would say that the net effect of the hearings, legislation, and cases of the past ten to twenty years has been an unanticipated benefit to the manufacturers. He would predict that the manufacturers have fewer C-minus performers now than they would have had if they had retained the practices of the early 1950's. To explain this, we must recall that many dealers viewed the pre-1956 management methods as a system involving obnoxious orders from superiors and punishment for noncompliance. For example, at that time the national average system was widely used to measure sales performance. If 8 per cent of all cars sold nationally were Buicks, a Buick dealer had to sell 8 per cent in his area. Little consideration was given to a dealer's own circumstances. Items arrived unordered and unwanted, and a dealer had to accept them. Field men harassed dealers to cut prices and move a large volume of cars. Assuming such a punitive-pressure system exists, what are the dealer's options? First, he can comply with the demands as best he can and suffer in silence. This is easier to do if the dealer thinks the demands may be profitable to himself. The dealer may, on the other hand, suffer in silence when his poor record makes his standing with the factory precarious. Second, a dealer can comply in form but not in substance. He can sell his quota by "bootlegging" cars to used-car dealers in other states—a practice not in the interest of the manufacturer since it may cost sales in the other states where the "bootlegged" cars are sent. Also he can sell his quota by adopting practices on the borders of fraud, by slighting the preparation of new cars, and by skimping on warranty work. Third, a dealer subject to high pressure can surrender and give up his franchise. Fourth, a dealer in this system can defy it and counterattack. He can push his trade association for militant action to ease the pressure, and, for example, a state administrative-

<sup>810</sup> *Ibid.*

<sup>811</sup> Finlay, *Dealer Forum*, *Automotive News*, Sept. 6, 1965, p. 3, cols. 1-2, at 4, cols. 3-4.

<sup>812</sup> See, e.g., LIKERT, *NEW PATTERNS OF MANAGEMENT* (1961); Likert, *A Motivational Approach to a Modified Theory of Organization and Management*, in HAIRE, *MODERN ORGANIZATION THEORY* 184 (1959); Likert, *Measuring Organizational Performance*, *Harv. Bus. Rev.*, March-April 1958, p. 41. See also Guest's study of managerial succession reported in BLAU & SCOTT, *FORMAL ORGANIZATION* 239-40 (1962).

licensing statute may result. The first two responses to a punitive-pressure system are likely to produce fast but short-run gains in sales. In the long run this system will not work. On one hand, the pressure must be applied constantly or effort will fall off. On the other hand, pressure will either prompt tactics which cost customer good will or prompt a counterattack to end the pressure.

Professor Likert says that there is substantial evidence that a "modified theory" of management which stresses motivation will yield better long-run results than a punitive-pressure system. His "modified theory" starts from the idea that people must be motivated to carry out an organization's goals. Initially, the organization must avoid motivating conduct which undercuts these goals by prompting people to do as little as possible just to get by. Not surprisingly, he argues, subordinates react favorably to experiences they see as supportive and negatively to those they see as threatening their sense of importance and personal worth. Economic rewards can only partially overcome the negative impact of threats and pressure. Suppose a dealer long has run a relatively low-volume, high-profit-per-unit operation. A manufacturer's field man harasses the dealer to sell more cars in order to benefit the manufacturer, and threatens termination for poor performance if the demands are not met. Probably the dealer will make some changes in his sales strategy if he views the threat as credible. In all likelihood, however, the field man has only succeeded in giving the dealer every incentive to do as little as possible to move toward a higher-volume operation. One could predict that the dealer will do what he must, but no more.

According to Professor Likert, not only must an organization avoid creating negative incentives, it must also create positive ones. It must create effective work groups with a common goal of high performance—in this case, a relationship between field man and dealer conducive to maximum sales over the long run. The manufacturer's goal of high sales volume must be compatible with the dealer's goals of profit and (in many cases) running a respectable business. The manufacturer's decisions concerning goals must not only influence the dealer, they must be influenced by him as well. And, Likert adds, effective organizations are characterized by an extraordinary capacity to deal constructively with conflict and to resolve it. They have the organizational machinery and personnel to deal with it, and there is high confidence and trust among the members of the organization in each other.

The hearings and legislation of the mid-1950's prompted the manufacturers to move more toward Likert's model of management. Field representatives were limited in the degree to which they could issue orders and punish noncompliance. While often they still cannot be called "supportive"

to a dealer who is not selling enough cars,<sup>813</sup> there is indication that they are much less threatening and harassing than during the early 1950's. The factories have taken steps to hear the views of dealers and to resolve conflicts in a manner which appears fair to dealers. Such groups as the Ford Dealer Policy Board in its consultant role provide one channel of upward communication; elected dealer councils provide another; and the manufacturers' cooperation with the NADA Industry Relations Committee provides still another. In some companies there has been an attempt to give dealers a voice in setting market strategies, and in all there are organizational structures designed to resolve conflict. Top management of the manufacturers talks about the importance of trust and close cooperation; at least this is accepted ideology. While the systems of the automobile manufacturers in practice often are far from what Likert has in mind, still there has been great movement toward his model and away from pure pressure and punishment as the managing devices for controlling dealers. If Likert is right that a positive motivational system produces greater long-term results, some of the recent automotive sales success may have been caused in part by the changes which were prompted by the dealers' legal strategy. Clearly, whenever the manufacturers seriously head back toward a punitive-pressure system or seek to impose their goals on dealers when the goals are incompatible with the dealers' interests, the factories pay a price since the dealers seek relief and now have means to get it. In some areas in the past few years, the factories damaged the sense of trust and mutual sharing of goals by pushing more expansion and more volume faster than many dealers were ready for, by financing competitive dealers in metropolitan areas, and by programs to retire older dealers. As a result, the manufacturers "chased the dealers to the legislature."<sup>814</sup> In summary, it is likely that the Senate hearings and federal and state statutes produced as an unexpected by-product a more efficient and productive system of managing relations with dealers. Of course, the gains may flow primarily from the skills of the managers of these large business organizations, but they have been prompted to devote their energies to dealer affairs by the threat of drastic governmental regulation.

Finally, one should note a possible public interest in the manufacturers' balance of gains and costs from laws governing the relationship with

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<sup>813</sup> Of course, there are limits on how supportive an organization's representative can be while acting to achieve the organization's goals. Perhaps the most supportive approach would be to tell a failing dealer that the manufacturer will not penalize his failures. Likert does not suggest that an organization can never use penalties or must abandon its goals to keep its subordinates happy.

<sup>814</sup> Finlay, *Dealer Forum*, *Automotive News*, July 19, 1965, p. 3, cols. 1-2.

dealers. If the formal and informal operations of the legal system ever seriously affected a manufacturer's ability to operate profitably or stay in business, many would be hurt. Obviously, the officers and stockholders would suffer, but an automobile manufacturer affects the interests of its employees and the cities and states in which it operates. For example, the health of American Motors Corporation significantly affects the health of the economy of the city of Kenosha (where Ramblers are produced) and the state of Wisconsin. AMC employees buy goods and services in Kenosha; AMC also buys many items from a group of satellite industries in the area. In addition, AMC is one of the largest taxpayers in the state. If American Motors could not induce its dealers to sell enough cars to support its present scale of operations because of the laws discussed in this book, then they would produce another kind of cost which would have to be considered. Although one can state the question, it is almost impossible to answer it. American Motors sales have declined, but what part has been played by restrictions on the corporation's power to induce dealers to exert greater efforts?

### **C. The Consumers' Cost and Gains**

The dealers have obtained some protection from manufacturer pressure tactics and the manufacturers may have both lost and gained as a result. But in many ways the test of the desirability of increasing the dealers' "countervailing power" is its impact on those who buy automobiles. Automobile consumers are not an organized interest group, and they could be the ones to pay the price of some types of accommodation between dealers and manufacturers in the form of higher prices, poorer products, and less reliable service.

Have the manufacturer-dealer laws and the changes made in response to the Senate hearings increased automobile prices? Perhaps. The effect of the laws and practices is to curb the power of a manufacturer's field personnel to demand that a dealer achieve high volume and take hard-to-sell products and dispose of them. A dealer's high volume as compared with other dealers is the result of many factors but primarily of price cutting.<sup>815</sup> Almost all dealers offer some discount from the manufacturer's list price,<sup>816</sup> but the

<sup>815</sup> "In general, prices were reduced least for those cars that were selling well in 1960 and most for those whose sales needed stimulation. Despite so-called administered list prices, at the retail level there was substantial adaptation of prices to market demand in order to sell cars in desired volume." Jung, *Impact of the Compact Cars on New-Car Prices*, 34 J. of Bus. 167 (1961).

<sup>816</sup> Dealers "complain that even though consumers are spending big sums for fancy cars, the haggling over price is fierce." *Wall Street Journal*, May 14, 1965, p. 1, col. 6, at 12, col. 2.

discounts vary greatly from dealer to dealer and city to city.<sup>817</sup> For example, one study showed that in 1959 in Chicago, Ford dealers discounted a \$3,000 car from \$150 to \$539, with an average discount of \$444.<sup>818</sup> Other studies indicated that in San Francisco, Pittsburgh, and Boston, dealers offer much smaller discounts than those in Chicago.<sup>819</sup> The average price paid in Pittsburgh, for example, was \$105 more than that in Chicago.<sup>820</sup> One might assume that if the factories could *force* dealers to make all possible efforts to maximize sales, they would use their power to induce dealers to sell for as low a price as possible.<sup>821</sup> If the federal Good Faith Act had not been passed, one might expect the discounts offered to car buyers in Chicago to come closer to the \$539 maximum reduction from the \$3,000 list price than they did at the time of the study. Also one might expect that dealers in cities such as Pittsburgh would be pushed to offer prices comparable to those available in Chicago. However, these studies of car prices do not establish that higher car prices are caused by the limitation of the manufacturers' powers imposed by the Good Faith Act. It seems likely that factors other than the statute also influence the prices quoted to

<sup>817</sup> "Some big-volume dealers constantly play up low prices to win customers. Most dealers, however, say they only discount to meet competition." *Id.*, Jan. 29, 1965, p. 4, cols. 3-4, at col. 4.

<sup>818</sup> Jung, *Price Variations Among Automobile Dealers in Chicago, Illinois*, 32 J. OF BUS. 315, 318 (1959).

<sup>819</sup> Jung, *Prices of Falcon and Corvair Cars in Chicago and Selected Cities*, 33 J. OF BUS. 121 (1960); Jung, *Compact-Car Prices in Major Cities*, *id.* at 252, 253.

<sup>820</sup> *Ibid.*

<sup>821</sup> Dealers, of course, have overhead which limits the discount that can be offered if they are to stay in business. Pashigian argues:

To what extent have the manufacturers used their potentially dominant position to "force" autos on dealers? Suppose the manufacturers do in fact have a dominant bargaining position and exploit this position to the fullest. One would expect the dealers' profit rates to be no more than the competitive rate. However dealer profit rates have not been that low. . . . To insure comparability, the total return rate (profits plus officers' compensation) of automobile dealers was compared with the total return rate in retail trade. In general, the total return rate of automobile dealers has exceeded the total return rate in retail trade. Also, it appears that the profit rates of General Motors and Ford dealers have exceeded the profit rates of retail firms. Granting the inadequacies of the data, the best estimate seems to be that dealer earnings have tended to be higher than the earnings of other businesses in retail trade.

The existence and persistence of the earnings differential is not consistent with the full use of "forcing" by the manufacturers. Hence, there is some support for the contention that the companies, if they have a dominant bargaining position, have not used it as effectively as they might. This does not mean there has been no "forcing." It just means that the manufacturer could have engaged in this practice to an even greater extent.

PASHIGIAN, *op. cit. supra* note 773, at 58-59. Since Pashigian's findings cover many years before the passage of the federal Good Faith Act, they tend to refute the argument that the manufacturers would use their power to force dealers to lower prices if they still had that power.

customers. For example, the statute's curb on the manufacturers has not caused Chicago prices to increase to the levels found in Pittsburgh.

Second, if factories can no longer force dealers to take unwanted cars, there may be fewer bargains available. If one were willing to drive a pink Buick Wildcat which did not have an automatic transmission or power steering, he might be able to buy such a rolling manufacturing error at dealer cost or even less. Moreover, not only could the absence of pressure take away a dealer's incentive to discount greatly and the absence of coercion reduce the number of bargains, but such a loss of power could raise the "list" prices of cars as well. Automobile manufacturing is a high-volume business with costs and profits spread over many vehicles. If the loss of power caused volume to fall significantly, the price of each vehicle must be increased ultimately to maintain desired profit margins. Again, all that can be said is that there is no evidence that this has happened. Rather, between 1960 and 1966 prices were fairly stable.

While we are speculating about the possible effects of the dealers' and manufacturers' accommodation of the past ten years, we must also consider some important factors that work to minimize the price buyers pay for cars. Most important, each dealer faces some competition. His potential customers can buy a used car, or buy from another dealer selling his make or a competitive one. The potential customers usually can delay purchase if they think prices are too high. Even if a dealer were willing to settle for an "acceptable profit" on fewer sales rather than attempt to maximize volume, he must make real efforts to remain competitive so that his pricing policy does not yield an unacceptable loss. While dealers in some areas manage to avoid real price wars, few could survive if they tried to sell too close to list price, except under conditions where demand greatly exceeded supply. Also the manufacturers' power to push dealers has only been curbed and not destroyed. The dealer must at least perform adequately, if not outstandingly, or he can be terminated. Moreover, the manufacturer in most states<sup>822</sup> is probably free to create more competition in an area by establishing new dealerships.

To what degree has the dealers' use of the legal system increased the price a consumer must pay for a new car? The data are delightfully inconclusive since, although car prices have increased from 1950 to 1966, the causes are impossible to determine. Ideally, one might compare car prices in similar cities in Illinois, Minnesota, and Wisconsin to get some information about the impact of the state laws since Illinois has no law affecting manufacturer-dealer relationships, Minnesota has a penal statute, and Wisconsin has an

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<sup>822</sup> See notes 714-16 *supra*.

administrative-licensing act. Unfortunately, this information is not readily available<sup>823</sup> and cannot be obtained except at a very high cost.<sup>824</sup>

One can do little more with the impact of the federal hearings, the Good Faith Act of 1956, and the price sticker law of 1958. New-car sales dropped and prices increased in the three years following the hearings and the Good Faith Act. It is impossible to determine if the hearings and laws caused this, but it seems unlikely. In 1955, new-car sales reached a record 7,100,000 units,<sup>825</sup> and the Consumer Price Index for new-car prices reached the lowest point which had been or would be reached from 1953 to 1965.<sup>826</sup> This was the year, dealers complained, that marked the high point of pressure for sales and forcing of unwanted cars. The O'Mahoney hearings took place at the end of the year, and the Good Faith Act was passed in mid-1956. Dealers reported a marked decrease in pressure for sales from field men beginning sometime in 1956. Sales of new cars dropped to 5,900,000 units both in 1956<sup>827</sup> and 1957<sup>828</sup> and to only 4,600,000 in 1958.<sup>829</sup> Prices increased: manufacturers' list prices jumped significantly during these three years. For example, a comparable Ford with the same extra equipment had the following list prices:<sup>830</sup>

<sup>823</sup> The Bureau of Labor Statistics of the United States Department of Labor collects new-car prices as quoted by dealers in 46 cities for its Consumer Price Index. For a comment on the method by which these prices are gathered, see Jung, *Indexes of Retail Prices of New Cars—Consumer Price Index*, 34 J. OF BUS. 490 (1961). Prices have been collected in Minneapolis and St. Paul, Minnesota, Madison, Wisconsin, and Chicago, Illinois. U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, BULL. NO. 1351, PRICES: A CHART-BOOK—1953-62, at 33 (1962).

I telephoned an official of the Bureau in charge of collecting prices for new cars. She said that the prices cannot be given out since secrecy must be preserved so that the dealers will continue to give accurate reports of actual selling prices. She said it was her impression that prices did not differ significantly between Wisconsin and Illinois. She thought that it was very unlikely that the presence of an administrative-licensing or penal statute concerning manufacturer-dealer relationships had any impact on car prices. Prices are traditionally higher on the west coast and in the mountain states. They are higher in remote cities and smaller communities. Volume of sales and competition are the major variables.

<sup>824</sup> See Jung, *Indexes of Retail Prices of New Cars—Consumer Price Index*, 34 J. OF BUS. 490 (1961).

<sup>825</sup> Automotive News 1965 Almanac, April 26, 1965, § 2, p. 44.

<sup>826</sup> U.S. BUREAU OF LABOR STATISTICS, *op. cit. supra* note 823, at 132.

<sup>827</sup> Automotive News 1965 Almanac, April 26, 1965, § 2, p. 44.

<sup>828</sup> *Ibid.*

<sup>829</sup> *Ibid.*

<sup>830</sup> The car priced was a V-8 with a 292 cubic inch engine displacement, except for the 1955 model which was offered with a 272 cubic inch displacement. The car was equipped with automatic transmission and power steering. Of course, whether or not any 1955 Ford is properly compared with any 1958 Ford is a difficult question. *Consumer Reports* for these years mentioned no drastic mechanical improvement. See 23 CONSUMER REPORTS 205-06 (1958); 22 CONSUMER REPORTS 184 (1957); 21 CONSUMER REPORTS 171, 179

The Consumer Price Index predictably reflected these increases too. From 1959 to 1965, sales climbed to new record levels<sup>835</sup> but prices at least leveled off if not declined.<sup>836</sup>

What caused the jump in prices and the decrease in sales almost immediately after the federal hearings and legislation? If one could offer no explanation other than the dealers' successes in lobbying, he might conclude that the correlation reflected cause. Unfortunately for purposes of answering this question, one can offer many other explanations. One writer

(1956); 20 CONSUMER REPORTS 221, 235 (1955). I see no significant difference in the appearance of the cars. However, others may think that Ford offered far more car for the money in some of these years than others.

Year	List Price	Yearly Amount of Increase
1955	\$2,418 <sup>831</sup>	--
1956	2,535 <sup>832</sup>	\$117
1957	2,721 <sup>833</sup>	186
1958	2,897 <sup>834</sup>	176

<sup>831</sup> 20 CONSUMER REPORTS 221 (1955).

<sup>832</sup> 21 CONSUMER REPORTS 171 (1956).

<sup>833</sup> 22 CONSUMER REPORTS 181 (1957).

<sup>834</sup> 23 CONSUMER REPORTS 197 (1958).

<sup>835</sup> Automotive News 1965 Almanac, April 26, 1965, § 2, p. 44.

<sup>836</sup> Our same Ford V-8 with automatic transmission and power steering had the following list prices from 1959 to 1965:

Year	Price	Amount of Increase or Decrease
1959	\$2,988	\$+ 91
1960	2,843	-145
1961	2,893	+ 50
1962	2,888	- 5
1963	2,888	0
1964	2,800	- 88
1965	2,811	+ 11

See 30 CONSUMER REPORTS 205 (1965); 29 CONSUMER REPORTS 193 (1964); 28 CONSUMER REPORTS 184 (1963); 27 CONSUMER REPORTS 200 (1962); 26 CONSUMER REPORTS 197-98 (1961); 25 CONSUMER REPORTS 198 (1960); 24 CONSUMER REPORTS 177, 190 (1959).

Clearly, there is a substantial difference in size and appearance between a 1955 and 1965 Ford. Perhaps one is getting a great deal more car for his \$2,811 in 1965 than he received for his \$2,418 in 1955. One can name a number of mechanical improvements ranging from a newer design in the engine to a design that requires less lubrication. Arguably, the 1955 full-sized Ford should be compared with Ford's 1963, 1964, and 1965 "Fairlane" or intermediate sized car. A similarly equipped Fairlane has been priced \$2,600, \$2,610, and \$2,650 in those years. See 30 CONSUMER REPORTS 200 (1965); 29 CONSUMER REPORTS 178, 188 (1964); 28 CONSUMER REPORTS 163, 179 (1963). If this is a proper comparison, the increase of less than \$200 over ten years is remarkable. Of course, to complete the picture one should consider the purchasing power of a dollar over this period.

See Wall Street Journal, Oct. 5, 1965, p. 16, cols. 4-5, on the government reaction to the increase in prices of the 1966 models.



attributes the increase in list prices to drastically increased costs of the annual model change.<sup>837</sup> Moreover, the wages of automobile workers were increasing during these years,<sup>838</sup> and the price of steel also increased.<sup>839</sup> Comparisons with 1955 sales figures may be misleading. Another writer asserts that the high sales of 1955 were prompted by

. . . a unique influence at that time that may hardly ever be repeated: Installment credit maturities were lengthened substantially. While in 1953 it was difficult to finance a new car for more than twenty-four months, by 1955 financing over thirty-six months became quite common. Lengthening of the financing period results in a reduction of the amount of monthly payments. Since the ability to make monthly payments out of income represents a crucial consideration in car buying, many people were in a position to buy cars in 1955 who could not have done so earlier.<sup>840</sup>

Also sales in 1955, to some extent, may have cost sales in the three following years. Many of the 7,100,000, 1955 car buyers<sup>841</sup> were still paying for the 1955 models in 1957 and 1958. Many people in 1955 traded in cars for new ones after having used them for a much shorter time than usual; in a sense, some who normally would have bought in 1956 and 1957 accelerated their purchase to 1955.<sup>842</sup>

My own guess is that the hearings and legislation probably affected car prices slightly in some areas where competitive forces did not push dealers to a complete "discount house" approach. Yet we have no idea what happened to the total cost of purchasing a new automobile because we have no comparative data on the cost of financing cars from 1955 to 1965.<sup>843</sup>

<sup>837</sup> According to the Ford Motor Company, the dollar cost of major model changeovers increased more than six and a half times between 1948 and 1957, and at an increasing rate: in 1957 these costs were more than three times as high as in 1953. Since sales increased at a much slower rate, the ratio of styling costs to sales (and production costs) increased significantly—doubling between 1948 and 1957. The effect of these cost increases on auto prices was substantial; a standard two-door, six-cylinder Ford which sold to the customer for \$1,522 in 1950 increased in price to \$1,991 by 1957.

Adams, *Consumer Needs and Consumer Sovereignty in the American Economy*, 35 J. OF BUS. 264, 272 (1962).

<sup>838</sup> See *Automotive News 1965 Almanac*, April 26, 1965, § 2, p. 98.

<sup>839</sup> U.S. BUREAU OF LABOR STATISTICS, *op. cit. supra* note 823, at 132.

<sup>840</sup> KATONA, *THE MASS CONSUMPTION SOCIETY* 251-52 (1964).

<sup>841</sup> See note 836 *supra*.

<sup>842</sup> KATONA, *op. cit. supra* note 840, at 252.

<sup>843</sup> See Jung, *Charges for Appliance and Automobile Instalment Credit in Major Cities*, 35 J. OF BUS. 386 (1962). Professor Jung reported the finance charges quoted by new-car dealers in nine major American cities. They ranged from a low rate of 8.8 per cent simple annual interest to a high of 15.8 per cent. The dealer usually resells his commercial paper to various financial agencies, but he ultimately will get a large percentage of the interest paid by the buyer.

Dealers find this part of their business highly profitable, and decreases in the price of the car can be made up in part by increases in rates charged in the time-price differential.<sup>844</sup>

<sup>844</sup> In hearings held at both Federal and state levels, and in a number of court cases, evidence revealing the degree to which auto retailing has become a kind of con game has been accumulating. One of the most recent records was compiled by the dealers themselves, together with their commercial allies, the banks and other lending institutions, at a hearing before California's Corporations Commissioner. The matter under consideration was Sears, Roebuck & Co.'s request for a license to go into the business of making automobile loans.

It was quite a hearing. Banks, small loan companies, industrial loan companies, sales finance companies, independent insurance companies, and auto dealers were all there, as well as Sears, of course. A big pot was at stake. More than 10 per cent of all cars sold—new and used, for cash or credit—are bought in California, where auto sales this year could total as much as \$4 billion. An estimated 70 per cent of that amount will be financed at rates ranging upward of 36 per cent true annual interest to a low of around 8 per cent. These latter terms are the \$4-a-\$100 bank loans made directly to consumers with good credit ratings. Such low-cost loans account for only a fraction of car debt, however, because banks and other lenders make most of their loans through dealers, whose rates are considerably higher. All-state terms, said Sears, would be competitive with low bank rates. Competition on rates, however, was not the only dealer worry, nor was it the worst. What upset auto dealers most was that the Allstate loans, like the low-rate bank loans, would be made directly to car buyers; hence these borrowers would become, so far as dealers were concerned, cash buyers in their salesrooms. And more cash buyers are decidedly *not* what dealers are looking for.

Time and again the cash buyer was discussed at the hearing and always in such terms as in the following testimony from Gil Ashcom, a *Rambler* dealer, who is president of the Northern California Motor Car Dealers Association:

QUESTION: May I ask you one question, Mr. Ashcom? Do you want to sell cars for cash?

ANSWER: I do not want to sell them for cash if I can avoid it.

QUESTION: You would not want to sell the cars you do for a cash price then?

ANSWER: No, sir.

QUESTION: Does this mean that you are not really in the business of selling automobiles?

ANSWER: It does not mean that at all.

QUESTION: But you don't want to sell automobiles for cash?

ANSWER: It means that I want to sell cars for the most profit that I can per car. Finance reserve [dealer's share of the carrying charges] and insurance commissions are part of the profit derived from selling a car on time. . . .

The amount of the profit to be made from selling cars on time depends, in large part, on the opportunities offered for manipulating charges—or "making a package," as they say in the trade. A package consists of trade-in, insurance, and finance rates. "Three ways to skin a cat" is the way one banker at the hearing put it. "We have different rates depending on the risk," said a *Ford* dealer. And in answer to the question "So you adjust the basic price of the car to fit the deal you can make?" another dealer said: "Every automobile dealer in the United States has to adjust the deal to the customer's ability to pay. . . ."

The dealer, however, does not adjust his price as the old-fashioned family doctor did. In auto salesrooms, the charge is an inverse of the ability to pay—the lower the ability, the higher the price. This, too, was freely admitted by the dealers. There was, in fact, a good deal of testimony from both dealers and lenders about the amount of poor-risk credit they extended. Nevertheless, the dealers, in particular, made it plain that they preferred the gamble of extending poor credit to the

The state statutes and the federal hearings and legislation also may have produced some gains for consumers. To some degree these efforts at dealer protection may have helped consumers avoid practices bordering on fraud. Price-packing has been ended by the price sticker law, for today it is difficult to increase both the trade-in appraisal and the asserted list price by the same amount. Each new car has an accurate price tag prominently displayed. Some of the incentive to deceive buyers may have been removed when unlimited factory pressure was curbed. Selling a quota no longer is such a life or death matter "justifying" the use of any means. Moreover, the price of some of the state legislation to protect dealers from manufacturers was more legislation to protect consumers from dealers. For example, the Wisconsin administrative-licensing statute allows the Motor Vehicle Department to revoke or suspend a dealer's license for many deceptive practices, including "having advertised, printed, displayed, published, distributed, broadcast or televised . . . any statement or representation with regard to the sale or financing of motor vehicles which is false, deceptive or misleading."<sup>845</sup>

The curbing of factory pressure for sales may also have allowed dealers to act in ways that are in the car buyer's long-term interest. These are the benefits usually asserted for "fair trade" and related legislation. If a dealer must discount heavily to maximize sales volume, he must rigorously minimize all of his costs to stay in business. He could cut back on preparing cars for delivery and on free repairs which are not covered by warranty but are needed because of defects in the car. He could cut both his inventory of different models of cars and of parts so that he stocks only the faster-moving items. Such a dealer could also profit through his service business by selling unnecessary repairs—minor defects can be turned into major ones

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assurance of selling cars for cash. The gamble, of course, is not great. The car can always be repossessed to serve as a lure to another, and still higher-cost, credit deal. (Loans on used cars earn higher rates than do those on new cars.) Thus the profit possibilities offered by even the poorest credit risks are such that dealers discourage cash buying:

QUESTION: If I went into a dealership and wanted to buy a *Ford* car and I say I want to pay cash for it, am I likely to have to pay a higher price than I would if I wanted to buy it on credit?

ANSWER: Well, I would say in effect you probably are right.

The trouble with the cash buyer, as the dealer sees him, is his interest in price. Furthermore, a cash transaction is usually too straightforward to allow for stratagems to deflect attention away from price. Opportunities to befuddle the credit buyer, on the other hand, are multiple beyond any layman's imagination. 30 CONSUMER REPORTS 258-59 (1965). Reprinted from CONSUMER REPORTS with permission. Copyright 1965 by Consumers Union of U.S., Inc., a nonprofit organization. One industry paper referred to the *Consumer Reports* article as a "smear" but conceded that there was some truth in CU's contentions. Motor News Analysis 2 (May 1965).

<sup>845</sup> WIS. STAT. § 218.01(3) (a) (19) (1963).

when the service department adopts this strategy since few consumers are qualified to challenge the service department's diagnosis.

One can conclude that dealers have made some significant gains at little cost to themselves, that manufacturers have lost some of their power although internal due process may produce some long-run advantages, and that consumers *may* pay slightly more for cars and may receive some benefits in exchange. One can wonder if the gains-to-costs ratios would have produced more startling conclusions had the dealers been able to pass statutes or have them administered to protect the low-volume, high-price-per-unit, profitable dealer and to minimize competition by "territorial security" programs.<sup>846</sup>

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<sup>846</sup> David Riesman asserts:

The effect of limited room for maneuver is most evident on the dealers, who clearly feel caught between the customer who sells himself if he smells prosperity around the corner and the manufacturer who has done his best, three years ahead of time, to prefigure the hundreds of technicolor-and-box-top configurations the customer will want. In their lachrymose outburst to Congressional investigators, these normally Republican free-enterprisers begged for governmental controls and even price support, their love of *laissez-faire*, like that of most businessmen, being quite platonic. If and when the dealers catch up with the unions and secure the equivalent of a guaranteed annual wage, yet another bureaucratizing pressure will have made the reliable anticipation of consumer preference more exigent than ever.

RIESMAN, *Autos in America*, in *ABUNDANCE FOR WHAT?* 279 (1964).

## 5. Some Conclusions and Observations

### **A. The Standards for Decision Making: Efficiency, Due Process, and Performance**

The organized dealers are a "special interest group" which has achieved some success in solving its problems by using the legal system. One usually thinks of special interest legislation as fencing in a group to protect it from competition. For example, this is the effect of many fair trade laws and much occupational licensing.<sup>847</sup> The dealers' efforts may have had some anticompetitive effects; but, as we have seen in the discussion of the construction of the Good Faith Act, the administration of the state statutes, and in the operation of private systems, the impacts of other values such as efficiency, performance of commitments, and due process have been far more important. To what extent can this be explained?

#### **1. EXPLANATIONS AND CONJECTURE**

There are a number of possible explanations for the efficiency, performance of commitments, and due process approach. Some involve the history

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<sup>847</sup> See Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487 (1965).

of the statutes; others involve the tactics used to get them passed; and still others involve the likely reaction of administrators faced with imprecise directions from legislatures. Part of the answer can be found in the legislative history of the state and federal statutes. The first state statute was passed in Wisconsin in 1937 and most of the other state legislation follows the pattern set by this act.<sup>848</sup> However, the story of the Wisconsin statute does not begin with its introduction on March 19, 1937.<sup>849</sup> Rather this was legislation colored by the depression. Nevins and Hill, it will be recalled, reported the great pressure to sell cars exerted by the Ford Motor Company in the early 1930's.<sup>850</sup> There were threats to cancel franchises if sales quotas were not met, and new dealers were franchised to compete with the old ones under the "cross-roads" policy. Given a depression that contracted the market and the demands for increased sales, many dealers adopted marketing strategies based on price competition and consumer deception. They had to sell, and short-run considerations controlled their conduct. Dealers sold below manufacturers' list prices or they increased the trade-in allowances far above the market value of customers' used cars.

Congress passed the National Industrial Recovery Act of 1933,<sup>851</sup> and the automobile dealers were the first group of retailers to establish a Code of Fair Competition.<sup>852</sup> The Wisconsin Legislature passed the Wisconsin Recovery Act<sup>853</sup> in the same year, and Wisconsin dealers established a code modeled closely on the national one.<sup>854</sup> Both codes required dealers to sell for no less than list price and to allow no more than an established average price for trade-ins. The effect was to fix the price of new cars. The National Automobile Dealers Association and the Wisconsin Automotive Trades Association both gathered information about the average prices charged for various models of used cars, and their reports controlled all trade-in allowances. The code approach was defended by the deputy administrator of the Wisconsin code, a Milwaukee dealer who had been the moving force behind its creation. In 1934 he explained:

We had two, as I remember it, cycles. From the beginning of the automobile business up to and including a few years ago dealers

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<sup>848</sup> See text accompanying notes 99-162 *supra*.

<sup>849</sup> See Wis. Senate Bill 206 (1937).

<sup>850</sup> See text accompanying notes 39-40 *supra*.

<sup>851</sup> National Industrial Recovery Act, § 3, 48 Stat. 195, 196 (1933).

<sup>852</sup> Record, p. 79, Gibson Auto Co. v. Finnegan, 217 Wis. 401, 259 N.W. 420 (1935).

<sup>853</sup> Wis. Laws 1933, ch. 476, at 1015.

<sup>854</sup> Record, p. 112, Gibson Auto Co. v. Finnegan, 217 Wis. 401, 259 N.W. 420 (1935). The code is reproduced in Record, p. 58, Henneman v. Finnegan, 217 Wis. 414, 259 N.W. 425 (1935).

seemed to be making some progress and making some profit and building up a business. Then it appeared that trading came into the picture and certain factories were trying to increase their production. They were asking for elaborate places of business and, putting it all together, their sales force, as I could see it, were asking the automobile trade to do more business than the public really wanted to do, the result being that they had to go out and allow the public considerably more than a piece of merchandise was worth—whether it was an automobile or a tractor or what, in order to then and there sell them a new motor car.

During that period there were injected into the business, finance companies, some of them company owned and some independent. As the dealers' capital became depleted the factories came along with these finance companies to help the dealer put more merchandise in his place on these finance companies. Then the final due date would come around on these cars and it was a necessity to get rid of them and again they would go out and make deals that I do not believe under ordinary business conditions they should have done. The interest rates, insurance rates, all the expenses that I mentioned before had to be met and I believe that in the last four years there has been a greater collapse of dealers' profits than at any other time I have noted in the automobile business. Profits and dealers' capital all collapsed. On the whole before the code went into effect the state of the industry was such that from every indication we could get in covering the territory it seems as though the dealers were at a very low ebb from a capital, profit and willingness-to-go-on standpoint. Their banking standing had grown steadily worse in the last five years. I have a great many banker friends over the state and they tell me that the dealer has got into what they term a very bad condition.<sup>855</sup>

When the Wisconsin code was proposed in February of 1934, 650 of the state's 850 new-car dealers favored it.<sup>856</sup> However, about six months later there were stories that many dealers were giving trade-in allowances which were greater than permitted. Some of the largest dealers refused to comply. One said he could not meet the sales quota imposed by Chevrolet if he did not give higher trade-in allowances than were authorized.<sup>857</sup> WATA, the moving force behind the code, decided to press the matter and test the effectiveness of the price-fixing provisions.

Proceedings for violation of the code were brought against six large dealers.<sup>858</sup> On March 5, 1935, the Wisconsin Supreme Court ruled the

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<sup>855</sup> *Id.* at 86-87.

<sup>856</sup> Record, p. 50-51, *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935).

<sup>857</sup> *Id.* at 5.

<sup>858</sup> See *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935); *Henneman v. Finnegan*, 217 Wis. 414, 259 N.W. 425 (1935). (This case involved five large dealers.)

Wisconsin Recovery Act unconstitutional because it involved an undue delegation of legislative power to a private group.<sup>859</sup> Almost three months later, the United States Supreme Court overturned the National Industrial Recovery Act because it made an unconstitutional delegation of power to the executive branch.<sup>860</sup> Private control over price competition through codes of fair competition was dealt a crippling if not fatal blow.<sup>861</sup>

The Wisconsin Automotive Trades Association reacted by seeking a constitutional method of solving the problems of dealers who were faced with a depression, factory pressure, and fraudulent competitive practices. WATA on May 21, 1935, requested legislation to control the competitive practices of dealers and coercion by manufacturers to use particular finance companies.<sup>862</sup> New-car dealers were to be licensed. Licenses could be denied or revoked for "unfitness" or "any unconscionable practice relating to said business" as well as fraudulent practices.<sup>863</sup> Coercion to sell instalment contracts to particular finance companies was made criminal.<sup>864</sup> Thus if prices could not be controlled under a code of fair competition, some of the dealers' problems might be solved by a different approach. Entry into the business was limited to those who were "fit," which would inhibit a cross-roads policy. Some methods of competition were controlled so that ethical dealers would not have to meet the practices of the unethical, and the intrusion of the manufacturer-backed finance company was barred. This approach also had the merit of getting WATA out of the position of trying to run a program against the wishes of a number of large dealers. A further step was taken in 1937 to end the incentives for cutthroat price competition. The first administrative-licensing law governing manufacturers was passed.<sup>865</sup> They had to obtain a license and could lose it for coercion or unjust cancellations. Given the constitutional atmosphere of the mid-1930's, dealing with the pressure for excessive price competition must have seemed a more fruitful approach than another attempt at fixing prices.

Another factor may have influenced the form of the 1937 administrative-licensing statute. WATA's draftsmen faced a difficult, and not uncommon, problem. They could not define precisely the problem they were attempting to solve. The dealers did not want to be pushed around by manufacturers'

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<sup>859</sup> *Gibson Auto. Co. v. Finnegan*, *supra* note 858.

<sup>860</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>861</sup> See Wylie, *The Regulation of Trade Practices by Codes*, 12 WIS. L. REV. 261 (1937).

<sup>862</sup> See Wis. Senate J. 964 (1935).

<sup>863</sup> Wis. Laws 1935, ch. 474, §§ 1(3) (a) (i), (11), at 752.

<sup>864</sup> Wis. Laws 1935, ch. 474, § 1(7), at 755.

<sup>865</sup> See text accompanying notes 99-162 *supra*.



representatives because they wanted to be free to engage in civilized rather than savage competition. But the draftsmen could hardly write a statute prohibiting manufacturers, their representatives, or both from "pushing around" dealers. They could point to many practices which annoyed dealers, but these were little more than symptoms of the disease that the dealers wanted to cure. The draftsmen might have avoided this difficulty by prohibiting manufacturers from attempting to persuade dealers to increase sales by any means or from ever canceling dealers. Yet such a statute would look outrageous and be so hard to sell to a legislature that it might test the organized dealers' political power to its limit. The alternative selected was to specify those practices which the draftsmen were sure they wanted to prohibit (for example, coercion to force a dealer to order unwanted merchandise)<sup>866</sup> and to cover all other practices by an imprecise standard which would be given content in its application (for example, "unfairly, without due regard to the equities of the said dealer, and without just provocation" canceling a franchise).<sup>867</sup> The general standard selected has some connotation of efficiency, contract, and due process: "just provocation" points to reasonable standards based on business success and "fairness" points to notice of those standards and the absence of capricious decisions. The "equities of the dealer" phrase directs attention to the particular case and discourages the formulation of rules which would sacrifice the interests of an individual for the greater good of the manufacturer. "Equities" also may point to termination benefits to protect the reliance interest of the dealer. Of course, other less contractual and more anticompetitive ideas could be found in this language too, but that does not blunt the efficiency, performance of commitments, and due process meanings that are there as well.

Other general and imprecise terms could have been used which would have been more open to an anticompetitive interpretation. The statute could have prohibited cancellation "without due regard to the equities of the said dealer" and said nothing about the manufacturer's right to cancel where there was "just provocation." However, such a position might have raised constitutional questions in an era when economic relief legislation was being frequently overturned by the courts. Also those who ran WATA believed that the manufacturer ought to be able to terminate some kinds of dealers. They had no desire to protect the dealers who were unethical or the

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<sup>866</sup> WIS. STAT. § 218.01(3) (15) (1963).

<sup>867</sup> WIS. STAT. § 218.01(3) (17) (1963). See also WIS. STAT. § 218.01(3) (16) (1963): "induced . . . any automobile dealer to . . . do any other act unfair to said dealer, by threatening to cancel any franchise. . . ." This section has never been used.

small operators with inadequate service facilities who had been put in business under the cross-roads policy. Moreover, those in control of WATA accepted the idea of success and failure as valid reasons for rewarding some dealers and penalizing others. The dealers and the manufacturers might have different definitions of these concepts, but they shared the same basic ideas.

As a result of all of these factors, the Wisconsin dealer legislation was not openly anticompetitive. The Wisconsin statute later became the model for the others.<sup>868</sup> Dealer lobbyists elsewhere typically offered their legislatures a variation of the Wisconsin act along with several dealer witnesses who told stories about factory pressure and voiced their conclusion that the bill was needed. The manufacturers usually responded in kind by decrying the statutes as un-American and a threat to the franchise system. What did not happen is important. Legislators did not carefully define an alleged problem, investigate to see whether or not the problem existed and warranted legislative solution, define possible solutions to the problem they found, and consider the likely consequences of those solutions.<sup>869</sup> These steps were taken, if at all, outside the legislatures by the dealer trade associations whose conclusions reflected the interests of their dominant members. The state legislative committees generally acted as rubber stamps, approving the Wisconsin pattern offered by the lobbyists or as veto agencies rejecting it. As other states followed the Wisconsin model, its efficiency, performance of commitments, and due process emphasis automatically followed. Of course, the process might not have been so automatic if the Wisconsin model had not appealed to the free enterprise ideology of many state legislators and dealer trade association members or had not promised solutions for what were viewed as real problems in the 1950's.

The federal Good Faith Act is even more Delphian than the state statutes, although it is the product of an extensive data-gathering effort on the part of Congress. Its ambiguity and its legislative history have influenced its construction by the courts. At least two factors prompted the ambiguity. First, all of the effort leading up to the bill was not directed at any clearly defined problem. NADA faced division within its own ranks over which problems legislation ought to solve.<sup>870</sup> Those who profit by selling in the territory of others and by offering low prices do not want territorial security and a fair trade approach; other dealers think of these things as essential. The hearings dealt with dealers' complaints about "bootlegging," terri-

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<sup>868</sup> See text accompanying notes 99-162 *supra*.

<sup>869</sup> See Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318, 349-50, 367-68 (1965).

<sup>870</sup> See text accompanying notes 216-21 *supra*.

torial security, forcing unwanted cars and accessories, arbitrary cancellations, vagueness of franchise provisions, difficulties in communicating dealer problems to top management, price packing, and sales techniques bordering on fraud (which the factories were alleged to have encouraged), as well as the unfairness of the dealers' position at the bottom of the manufacturers' administrative pyramids. The statute as originally drafted was supposed to cover some of these problems by requiring manufacturers to act in "a fair, equitable, and nonarbitrary manner so as to guarantee the dealer freedom from coercion . . . and in order to preserve all the equities of the automobile dealer which are inherent in the nature of the relationship."<sup>871</sup> The amendments in the House reduced this language to requiring manufacturers to act in "a fair and equitable manner . . . so as to guarantee . . . freedom from coercion."<sup>872</sup> The House report on the bill said that some of the problems were not covered but failed to tell an interested reader just which ones were supposed to be solved.<sup>873</sup> This puzzle may have been necessary to satisfy as many NADA members as possible that their interests were protected.

Second, the uncertainty undoubtedly is also the product of the compromises required to get a statute on this subject passed in 1956. The act is a resolution of the clash of several interests—dealers, manufacturers, Democratic senators and representatives, and the Eisenhower Administration. The proponents may have thought that the symbolic victory of passing any statute over the opposition of the manufacturers and the chance of future victories in the courts were worth the indefiniteness. It is striking that in all of the lengthy hearings, debates, and committee reports there is little attempt to define a problem, think of alternative solutions, predict the consequences of each, and make a choice. Chairman Celler was worried about the possibility that the Senate bill might prevent manufacturers from canceling the franchise of an inefficient dealer, and he created a great deal of legislative history which made clear that inefficient dealers could be dropped.<sup>874</sup> But this was action designed to block only one possible undesirable consequence. There was little other effort to predict just what the Good Faith Act would do. Of course, members of the various committee staffs and lobbyists for various interests may have been making such predictions behind the scenes. However, there is little evidence that much hard work was applied to the problem of the likely consequences of the Act.

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<sup>871</sup> See text accompanying notes 323-25 *supra*.

<sup>872</sup> See text accompanying notes 372-74 *supra*.

<sup>873</sup> See H.R. REP. No. 2850, 84th Cong., 2d Sess. (1956).

<sup>874</sup> See pp. 66-71 and notes 367, 379 *supra*.

In light of all this background, it is not surprising that courts and administrators asked whether or not a dealer's duties were fair and whether or not he had performed them. First, the text of the statutes and the legislative history lean slightly in this direction for reasons that have been indicated. Second, due process, efficiency, and performance of commitments are all values with high acceptance in this society. Any standard calling for the protection of a group from the impact of the market, toleration of inefficiency, and excuse of personal failures to perform because of inability would be hard to defend. One would have to find other highly valued concepts to advertise such a norm. While one can speak of the family farm or the small-town merchant as social institutions with romantic claims to being part of the very fabric of our society, the "family automobile dealership" does not evoke similarly strong and positive images. Third, the manufacturers rewrote their franchises in terms of commitments to be judged by relatively objective standards and to be reviewed by elaborate processes within their organizations. They were able to come to court or before an agency asserting that due process, efficiency, and performance *were* the appropriate standards to be applied and that they *had* been applied in the particular case. They were able to counter the dealer's appeal for sympathy by showing that he had been given a fair hearing, that he was not efficient, and that he had not done what he had agreed to do. Faced with this kind of case, many decision makers would find that a position which would protect a dealer from the requirement that he compete effectively would be difficult to rationalize.

Fourth, the legislatures and Congress had made almost no investigation of the consequences of a protectionist standard. Shortly after the Good Faith Act was passed, Kessler and Stern seemed to argue that a construction of that act which looked to general undefined fairness concepts would injure competition and raise automobile prices.<sup>875</sup> This possibility probably bothered some judges and administrators: enforcement agencies do not have the facilities to make good predictions about the consequences of economic regulation; they could not be certain where such a construction might take them.<sup>876</sup>

Finally, concepts of due process and contract are likely to be used to color imprecise statutes which remove an area from generalized contract law. Those concepts are familiar, relevant, far more developed than any

<sup>875</sup> Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 103-14 (1959).

<sup>876</sup> See the comments of Judge Clark in note 74 *supra*. See also Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467, 495-98 (1964).

others, and most people acknowledge that they are good things. Those concepts also simplify the job of the decision maker. It is far easier to determine whether or not a dealer sold enough cars as compared with other dealers than whether or not the manufacturer allowed the dealer a fair return on his investment or recognized all of his other "equities." In short, these norms are accepted and they work.

Not only has the application of the manufacturer-dealer statutes focused on due process and performance of commitments, it has been carried out in a particular fashion. The courts and administrators have demanded that manufacturers consider each dealer's own circumstances rather than uniformly apply a general rule which might make running a large organization easier. To some extent, this particularism reflects General Motors' response to the criticisms which were made at the Senate hearings—now the formal standard for adequate sales requires consideration of "local conditions directly affecting such sales performance."<sup>877</sup> But the criticisms at the hearings reflect a modern concern with treating men as cogs in a large industrial machine. Also particularism has been fostered by the fact that the courts and the administrators have used contract concepts in applying these statutes, and modern contract law is exceedingly particularistic. It has been influenced by the whole movement called legal realism which directs a decision maker to "balance interests" or do almost anything but decide cases deductively from rules.

## 2. NEW SPECIALIZED AREAS AND GENERALIZED CONTRACT LAW

This study describes the long process by which legislatures removed automobile manufacturer-dealer relations from the domain of general contract law and created a new area of law. The removal is highlighted by contrasting the legal approach in analogous areas, such as the relations of manufacturers and dealers of farm equipment.<sup>878</sup> This relationship is still treated as the automobile manufacturer-dealer relationship was treated before the hearings and statutes. In one sense of the term, it is still governed by contract because contract law allows people to agree not to have a legally enforceable contract.<sup>879</sup> This means, in effect, that generalized contract doctrines allow a more powerful organization to give no rights to the

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<sup>877</sup> GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 9 (1962).

<sup>878</sup> Senator Morse introduced a bill on February 27, 1964, which would have expanded the remedies of the Good Faith Act and broadened its coverage to include "tractors, farm equipment, or farm implements. . . ." S. 2572, 88th Cong., 2d Sess. (1964).

<sup>879</sup> See 1 CORBIN, CONTRACTS § 34 (1963).

less powerful. If this is done, the contract lacks mutuality and is unenforceable. As a result, the powerful organization is free to use its power to govern the relationship, controlled only by the antitrust laws which establish broad outer limits within which there is great freedom to exercise other-than-legal sanctions. In other words, paradoxically, the parties are free to contract not to have a contract. However, to a great extent, this freedom has been taken away by the automobile manufacturer-dealer legislation. Now there is a kind of compulsory contract; manufacturers must continue relationships with dealers unless a dealer has in some material way violated a duty under the franchise. The questions of what is a failure to perform a contract duty, whether a failure is a material one, and whether there are any excuses bear a striking resemblance to the problems dealt with by traditional contract law. In this sense of the term, the new law has pushed these transactions from the domain of pure economic power into a contractual relationship where both parties have rights and duties.<sup>880</sup>

This process may affect one's view of the thesis developed by Professor Lawrence Friedman in his challenging book, *Contract Law in America*.<sup>881</sup> His definition of contract law is crucial to his thesis. He limits the term "contract law" to the generalized set of rules which purport to apply to all transactions without regard to the type of case involved. He argues that contract law no longer governs any of the significant economic relationships in the society. Rather it has become the law of leftovers, covering only those transactions not important enough for their own area. Once the lawmakers have created a specialized law of insurance, sales, and labor law and have added occupational licensing, quality regulation, and fair trade laws, there is little left for the old bulwark of the first year of law school—basic contract law. Certainly, my study of the practices of businessmen and lawyers engaged in large-scale manufacturing confirms much of what Friedman says.<sup>882</sup> These people, for the most part, find generalized contract law irrelevant. Nonetheless, it is difficult to create a whole new area of law without drawing on old accepted ideas. Many, but not all, of the ideas which are usually called contract law are likely to be appropriated when a lawmaker seeks to order a particular kind of exchange relationship, such as automobile manufacturer-dealer transactions. The legal system may remove an area from abstract contract doctrine and insist that employers

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<sup>880</sup> See HAVIGHURST, *THE NATURE OF PRIVATE CONTRACT* 103-28 (1961).

<sup>881</sup> FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965).

<sup>882</sup> See Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AMERICAN SOCIOLOGICAL REV.* 55 (1963); Macaulay, *The Use and Nonuse of Contracts in the Manufacturing Industry*, *Prac. Law.*, Nov. 1963, p. 13.

bargain in good faith; that manufacturers not terminate dealers unfairly, without just provocation and without due regard to the equities of the dealer; and that certain services not be sold by one without a license. But it is likely to interpret agreements, police them for fairness, and tailor appropriate remedies for default along the lines worked out in cases usually classified as involving the law of contracts. However, perhaps these doctrines are not really contract doctrines within Professor Friedman's use of the term; they will, after all, take on the nuances of the areas in which they are applied. For example, one cannot determine whether or not a breach is material without considering the particular kind of transaction involved. Moreover, ideas of fairness are not the exclusive property of the law of contract.

Still, the courts have talked as if there were a law applicable to all kinds of transactions dealing with interpretation, fairness, and appropriateness of remedy, and some of this body of thinking has been appropriated into the new area of manufacturer-dealer law. This appropriation may have significance. It is possible to apply these "contract" concepts to support the operation of the market or blunt it, and one can attempt to regulate general practices or make adjustments in particular cases.<sup>883</sup> Yet these ideas do provide a starting place for analysis—one is to ask whether or not a dealer's default is "material" and measure its seriousness by certain factors. This approach has a built-in bias favoring a market-supporting but particularistic approach, since that is the nature of today's general contract law. In this sense, contract law itself may have lost much of its subject matter, but many of its ideas continue to be significant in what may be called the "newly developing nations" of the law.

Moreover, the result of the entire process described in this book may be to give new life to a breach-of-contract approach to the dealers' problems. Many of the franchises drafted after the Senate hearings may be legally enforceable contracts because the manufacturers granted rights to their dealers to placate Senators O'Mahoney and Monroney. Recently in Ohio, a state without a statute limiting terminations of franchises, a dealer obtained a temporary injunction against the cancellation of his franchise.<sup>884</sup> His theory was breach of contract.<sup>885</sup> This is an example of the cycle of five stages starting over again at the point of private lawsuits; this time around, the dealers might be more successful in the early stages.

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<sup>883</sup> See note 4 *supra*.

<sup>884</sup> *Automotive News*, Jan. 10, 1966, p. 3, cols. 3-5.

<sup>885</sup> See Comment, 74 *YALE L.J.* 354, 356 n.10 (1964). See also *Buono Sales Inc. v. Chrysler Motors Corp.*, 363 F. 2d 43 (1966), where seven former De Soto dealers won a breach contract action. But see note 432 *supra*.

### **B. Interest Groups and the Public Interest**

When people face a problem which they think they cannot solve through private action, they can form or mobilize an interest group to appeal to the legal system for a change or they can seek a champion among governmental officials with some power. What does this case study of the dealers' struggle suggest about what the legal system offers to those seeking to use its power? What does it suggest about the protection of the public interest against the efforts of such groups?

#### **1. THE LEGAL SYSTEM AND GROUPS SEEKING CHANGE**

It is clear that the legal system can give great help to those who seek change, yet lack power in the market. Even the potential exercise of legal power can aid or hinder particular groups. When Congress developed an interest in automobile dealers in the mid-1950's, the manufacturers modified some of their practices. After the dealers' victories in the O'Mahoney hearings, even more sweeping changes were made. Some managers of dealer trade associations assert that the manufacturers' good behavior in their states is caused in part by the knowledge that the association could and would have an administrative-licensing law passed by a friendly legislature if there were any trouble.<sup>886</sup> Undoubtedly an interest group which has won some victories in the past will have a more credible deterrent than one which has not.

It is not easy to appropriate the power of the legal system when there is an intelligent and organized opposition. At a minimum, the interest group must be able and willing to pay the cost of the struggle. Lobbying activity is not cheap. Solutions take time and often require patience and a willingness to compromise—two things interest groups that are not old and established often lack. More discouraging is the fact that the American legal system is organized so that it is hard to be sure that a lasting victory has been won over a determined opponent. The dealers struggled long and hard to pass the Good Faith Act, but they had to compromise and allow the manufacturers to write a proviso that undercut much of the impact of their statute. The Arkansas dealers twice passed an administrative-licensing statute only to have it pronounced unconstitutional because of a highly legalistic defect. They passed a third statute only to see it overturned in a referendum which was influenced by an all-out advertising campaign.<sup>887</sup>

<sup>886</sup> Interviews.

<sup>887</sup> See text accompanying notes 706-10 *supra*. This continuing opportunity to fight for power is an example of what Crozier has called the bureaucratic dysfunctions of the American system of organization. CROZIER, *THE BUREAUCRATIC PHENOMENON* 231-36 (1964). "They emerge from the innumerable conflicts that develop between the different centers of decision making." *Id.* at 234.



Even if a group is willing to pay the price in money, time, and effort needed to seek change in this manner, it will find that legal power often is limited. The other-than-legal sanctions held by the economically powerful are hard to control. For example, the dealers could have statutes passed covering a number of practices they disliked; but many dealers would still feel that cooperation with factory demands would produce more favors (such as extra allocations of best-selling models) than would the assertion of their legal rights. Moreover, enforcement may turn on the interest of a prosecutor or of a commission, or on the wealth of an individual dealer who has been canceled. In short, passing a law does not always give a group what it wants.

## 2. WHAT OF THE PUBLIC INTEREST?

Interest groups may ask for legal solutions to their problems which can be said to affect the "public interest" adversely. The public interest is a useful all-purpose term that may mean the interest of the majority, the interest of those who claim to seek what is best for society in the long run,<sup>888</sup> the interest of groups not represented adequately in the process leading to change, or even the interest of anyone who does not like a lobby's proposal. Assuming that the concept is limited to some interest or interests we value, what safeguards are built into the legal system?

We have seen one safeguard already. Viewed one way, cost, delay, and a multiplicity of forums are encumbrances on the law's valuable leverage function; viewed another way, these factors limit capricious and unwise change, particularly where there is an organized and intelligent opposition. For example, if one assumes that laws fixing the prices of cars are not in the public interest, then one can say that the car-buying public was protected from the most clear-cut infringements by decisions of the courts overturning the codes of fair competition. Moreover, the reaction of key legislators who have power is a major control. Representative Celler's views modified the text and the legislative history of the Good Faith Act so that efficiency, performance of commitments, and due process standards were highly likely to be applied by the courts. This was reinforced by the position of the Eisenhower Administration, which was able to exercise another potential source of control.

However, the system is far from perfect. Particularly at the state level, bills may slip through almost unnoticed when they are pushed by some interest groups. Neither courts nor legislatures have very extensive facilities for defining problems, discovering alternatives, predicting consequences,

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<sup>888</sup> For example, professors. See Klein, *The Incidence of the Corporation Income Tax: A Lawyer's View of a Problem in Economics*, 1965 WIS. L. REV. 576, 601-05 (1965).

and making informed choices. The low visibility of the consequences of their proposals gives some interest groups more power in dealing with a legislature harassed by problems of budget and taxation. Furthermore, there are few means of appraising the impact of a statute after it is passed or a common-law rule after the case is decided. Of course, committee staffs, where they exist, can do some of this work. But frequently judges, administrators, and legislators lack the feedback which might improve their work. Their information often is handed to them by partisan advocates. While we count on the clash of adversaries to produce truth in the judicial process, its procedures generally are not geared to produce data on the consequences of the present legal solution or the alternatives being pushed by the opposing parties. For example, none of the briefs in the Good Faith Act cases has more than the most general statement about the very significant consequences of the possible definitions of coercion. The records contain but few facts relevant to this question.<sup>889</sup> To a great extent, the courts have played it by ear and relied on common sense; perhaps that is the best we can expect. In the legislative sphere there is always the danger that important interests will not be represented. Apparently in many states the automobile dealers' lobby can write its own ticket as long as the impact on car buyers is not too blatant.<sup>890</sup> The dealers' lobby may use its power with restraint and with a view toward the public interest as it sees it, but still we must rely on the good faith and judgment of those who control the trade associations.

### **C. Law and Private Systems: Formality and Informality**

Operating in relatively formal and informal ways, the legal system prompted the creation of the other-than-legal, or private, systems which I have described in this book and which have both ordered present-day manufacturer-dealer relationships and dealt with disputes. These private systems continue to be supported by the legal system, and they are largely responsible for whatever impact the lawmaking described in this book has had.

#### **1. THE RELATIONSHIP BETWEEN THE LEGAL AND THE PRIVATE SYSTEMS**

##### *a. The Nature of the Systems*

The legal system can operate in a more or less formal fashion. At one extreme, law can attempt to change or support social situations or relationships by its formal processes. Legislation can be passed. Statutes can be interpreted, and common-law doctrines can be created by courts. Disputes

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<sup>889</sup> See note 546 *supra*.

<sup>890</sup> Interviews.

can be resolved in litigation or administrative proceedings. The manufacturer-dealer story involves all of this legal output; there has even been a referendum to overturn the Arkansas administrative-licensing statute. But the legal system also can operate less formally in ways not so easy to observe in a law library. For example, Senate committees can harass the president of General Motors in an effort to induce him to change corporate policies; if the information media cooperate, this can be most effective.<sup>891</sup> Lawyers counseling their clients can channel conduct. In this way they can give actual or even potential formal legal action widespread effect.<sup>892</sup> If, as is suspected, the manufacturers pursued a test case strategy in approaching the interpretation of the Good Faith Act, their lawyers were giving meaning to the act in many areas by telling the sales staff to abandon many traditional practices—at least temporarily. Also administrators can advise manufacturers and dealers about their rights under state statutes and influence conduct. They can mediate disputes in prehearing conferences without the costs of formal proceedings. For better or worse, all of this less formal legal action affects people and organizations significantly.

Private orderers, too, can operate in a more or less formal fashion. The structure of a relationship can be planned or left to evolve in response to circumstance. The manufacturer-dealer relationship has been codified in selling agreements, and procedures have been created within the manufacturers' organizations for an upward flow of communications and for review

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<sup>891</sup> The publicity hearing appears to be exceedingly effective when applied to the automobile industry. This technique has most recently been applied to the problem of automobile safety. The General Services Administration in July 1965 demanded that vehicles it purchased for the government be equipped with seventeen safety devices. *Wall Street Journal*, July 2, 1965, p. 2, col. 5. Shortly before the top executives of General Motors were to testify before a Senate committee, General Motors announced that six safety devices would be included in all of its 1966 model cars. *Id.*, July 9, 1965, p. 10, col. 2. At the hearing the number was increased to thirteen of the devices demanded by the General Services Administration, and General Motors stated that it would finance a million dollar study of highway safety statistics. *Id.*, July 14, 1965, p. 3, cols. 2-3. The executives were subjected to great criticism for inadequate efforts in the past. *Ibid.* Chrysler executives faced the same criticism when they appeared before the committee. *Id.*, July 15, 1965, p. 7, cols. 2-3. The *Wall Street Journal* commented that "Clearly GM and Chrysler underestimated the opposition and failed to prepare adequately. Moreover, their executives antagonized both subcommittee chairman Ribicoff (D. Conn.) and the even more formidable Sen. Robert Kennedy of New York. Yet the hostile Congressional reaction eventually came as a shocking surprise to the auto magnates." *Id.*, July 20, 1965, p. 14, col. 3.

A similar use of hearings has taken place on the subject of tire safety. See, e.g., *id.*, Oct. 26, 1965, p. 1, col. 6, at 22, cols. 2-5; *id.*, Aug. 13, 1965, p. 1, col. 6.

For a detailed analysis of the propriety of this kind of informal legal action, see Finman & Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966, Wis. L. REV. 632.

<sup>892</sup> See HURST, *THE GROWTH OF AMERICAN LAW—THE LAW MAKERS* 334-38, 342-52 (1950).

of actions taken at the local level. Other formal channels for meeting problems have been created by the manufacturers' recognition of the legitimacy of the National Automobile Dealers Association as a representative of the dealers. Of course, it is one thing to create relatively formal private procedures, and it is another thing to follow them. Often a formal contract is drafted, signed, filed away, and forgotten as businessmen prefer to work things out their own way without regard to rights and duties.<sup>893</sup> We have little information about the degree to which field men insist on enforcing the provisions of franchises and when and to what extent dealers are given leeway to deviate from the formal pattern. We can expect that field men and dealers do not always "follow the book," for few superiors find it profitable to enforce all of the rules all of the time.<sup>894</sup>

Disputes also can be handled more or less formally outside the legal system. At one extreme, General Motors has set up an impartial umpire to consider problems raised by dealers. The retired federal judge who was appointed adopted a procedure similar to that used in court.<sup>895</sup> At the other extreme, field men and dealers settle disagreements privately and informally through negotiation. This is a bargaining process with a minimum of procedures and structure, although it takes place within a context set by the written franchise, the Good Faith Act, and, in many instances, state legislation.

*b. The Impact of the Legal on the Nonlegal Systems*

Both the more and less formal operations of the legal system have influenced the more and less formal operations of the private systems and produced the major part of whatever impact the total effort by the dealers has had. For example, the 1956 revised General Motors franchise, the elected dealer councils, and the impartial umpire were created in response to the Senate hearings. Private negotiations between field man and dealer will be affected to the extent that a manufacturer's legal department tells its sales staff that they must persuade and not order dealers to act. A field man who cannot demand action must bargain. All of these private systems have far more meaning for most dealers than lawsuits for damages under the Good Faith Act or proceedings under administrative-licensing statutes to

<sup>893</sup> See note 882 *supra*.

<sup>894</sup> See BLAU & SCOTT, *FORMAL ORGANIZATIONS* 237-40 (1962). "Formal rules and sanctions and his [a superior's] status prerogatives provide opportunities for obligating subordinates simply by refraining from enforcing or exercising them." *Id.* at 237.

<sup>895</sup> Interview.

Retired United States Supreme Court Justice Charles Whittaker was named as umpire in October, 1965. *Automotive News*, Oct. 25, 1965, p. 4, col. 5. It is not known whether he will retain the procedures of his predecessor; given his background, it seems likely that some similarity to the judicial process will remain.

revoke licenses of factory representatives. The major significance of these formal legal proceedings is that they support the private other-than-legal ways of dealing with the problems. This is why there is general satisfaction with the results of the dealers' use of the legal system, although one can find few reported cases under either the Good Faith Act or the state statutes which favor the dealer who brought the case. The elaborate screening systems designed to catch problem situations generally work. The law prompted most of them and keeps them safe from erosion.

## 2. ADVANTAGES AND DISADVANTAGES OF INFORMALITY AND PRIVATE SYSTEMS

To describe the operation of less formal legal systems and private systems for planning and solving problems is not necessarily to applaud them. Of course, each has important values. First, consider the advantages of informal legal action. For example, a publicity hearing performs an educational function, drawing attention to a problem and creating a climate for action. Unless the hearing exposes conduct which many would criticize, it fails because its findings are not news. It is one of the few techniques by which an individual legislator can initiate action rather than simply recording his vote on proposals made by the executive or the controlling group in the legislature.

Private other-than-legal dispute settlement systems also have virtues. They frequently operate at less cost and greater speed than the courts, keep problems relatively unpublicized, produce compromises instead of victories, and leave the parties happier than they would be if they had engaged in full-scale legal warfare. It seems likely that a dealer would be allowed to continue selling Fords if he won his case before the Dealer Policy Board. One can wonder about his chances of continuing after he won a suit under the Good Faith Act.

Nonetheless, there are costs. First, informal legal systems are classified as informal because they abandon due process and procedural safeguards. It is not news that the publicity hearing can be used to sidestep these inconvenient "legal technicalities" and throw people to the mob. Individuals or organizations may be forced to abandon their rights when the exercise of them is unpopular. Second, private dispute settlement has drawbacks. When two strong organizations get together to resolve differences, the resolution can be at the expense of other unrepresented interests. For example, the manufacturers and those who control dealer associations *could* reach decisions in private negotiations which adversely affected unrepresented dealers or the car-buying public. (This is not to say they have done

so.) It is probably a little harder to do this in a public forum because of the chance of publicity and the usual attempts to give all interests a hearing.

### 3. SIGNIFICANCE FOR LEGAL RESEARCH

These observations should influence legal research which is concerned with the impact of law. For example, most of the articles on manufacturer-dealer problems confidently assert that the state statutes are ineffective<sup>896</sup> and that the Good Faith Act will have or has had little significance.<sup>897</sup> If those articles announced no more than the conclusions of the dealers who have been canceled and have tried to sue, it would be hard to disagree. But the articles purport to pass judgment on the effectiveness of the statutes in carrying out the interests of all dealers, including those who have never been forced to try to use them. They are wrong. Their mistaken appraisal rests on their failure to consider the operation of the less formal parts of the legal system and the private systems of planning and adjustment which were created in response to, and supported by, the legal system.<sup>898</sup>

Gathering reliable data about these things is difficult. Most of my information was based on interviews, letters, or trade papers. I would have pre-

<sup>896</sup> See, e.g., Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 226 (1957) (state statutes "may have resulted in benefits which are illusory at best."); Note, 70 HARV. L. REV. 1239, 1243 (1957) ("remedies appear to be impractical."); Note, 63 HARV. L. REV. 1010, 1020 (1950) (state statutes "are not entirely satisfactory."); Note, 31 IND. L.J. 233, 242 (1956) (state statutes "have been largely unrealistic."); Note, 52 NW. U. L. REV. 253, 257 (1957) (state statutes "have afforded little protection for the dealers."); Comment, 74 YALE L.J. 354, 356 (1964) (state statutes "had proved ineffective.").

To a great degree, these articles assume that the statutes are ineffective because the dealers were not expressly given a private right to sue for damages, because taking away a manufacturer's license would injure all of its other dealers and the car-buying public in the state, and because the statutes could be evaded by granting short-term franchises. Only the last reason has some validity—manufacturers could in some states do this, but by and large they have not. See notes 711-13 *supra*.

The Yale comment states, "Surprisingly, there has been little litigation under the state statutes." Comment, 74 YALE L.J. 354, 356 n.10 (1964). I would be surprised if litigation were often necessary where informal legal systems and all the private systems were operating.

<sup>897</sup> See, e.g., Brown & Conwill, *supra* note 896, at 228; Freed, *A Study of Dealer's Suits Under the Automobile Dealers' Franchise Act*, 41 U. DET. L.J. 245, 256-61 (1964); Comment, 48 CORNELL L.Q. 711, 741-42 (1963).

<sup>898</sup> But see Note, 70 HARV. L. REV. 1239, 1256-57 (1957), which states with good sense:

The primary function of these statutes . . . should be to encourage the parties concerned to reach agreements without burdening the courts. To the extent that the legislation creates a willingness to develop such facilities for the settlement of disputes as arbitration agreements or impartial review boards, it will be successful. . . . Although it would seem to be in the best interests of both manufacturers and dealers to create some institutional system for resolving their differences without litigation, it is difficult to determine how successful the state and federal statutes will be in promoting this objective.

Little more could have been said in 1957 without studying the Wisconsin system in operation.

ferred to observe each process described in action, but one can hardly expect to be invited, say, to participate in and report the discussions held by a manufacturer about how to respond to a dealer's Good Faith Act suit.<sup>899</sup> As is so often the case, my research touched areas where secrecy is thought to be important. Had I been allowed to participate and observe, my presence probably would have changed the process. Thus I was forced to rely on information that may or may not be totally reliable. Moreover, there are many questions left unanswered. For example, exactly how do the internal dispute settlement systems of the manufacturers operate? Do those in command consider past service, the impact of cancellation on a dealer, and his other "equities," or do they apply strictly economic criteria? To what extent do those in command rely on the record compiled by local representatives who have been accused of wrongdoing, and to what extent are their investigations independent? To what extent can the small number of Good Faith Act cases brought against General Motors be attributed to its impartial umpire? What are the expectations of the majority of the dealers for which the manufacturers are responsible, and to what extent do the results reached by the courts, administrative agencies, and private arbitrators and mediators carry out those expectations? What has been the actual cost of the state and federal statutes to the manufacturers, and to what extent has this been passed on to the consumer? Even if one were given access to the people and records needed to provide answers, they would not be obtained without great difficulty and expense. Certainly this study does not preempt the field of manufacturer-dealer relations.

Nonetheless, despite the difficulties in gathering reliable data, relatively informal legal systems and private systems exist and can produce important consequences for people and organizations. They can be prompted, supported, or hindered by legal action. If these matters are ignored, an evaluation of the consequences of a law is simply shooting in the dark. Data are hard to get, but informal legal systems and private systems for planning relationships and settling disputes will not just go away. It may be that legal research can do little more than speculate, use common sense, and rely on whatever facts can be found concerning these matters. Yet this seems preferable to ignoring them.

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<sup>899</sup> Professor Melville Dalton used participant observation to its fullest. He was an employee of a company he studied. He talked with his friends, some of whom were unaware of his research interests. He persuaded secretaries to give him access to the files and data on managerial salaries. See Dalton, *Men Who Manage*, in *SOCIOLOGISTS AT WORK* 50 (Hammond ed. 1964).

Some might question the ethics of this covert or 'undercover' research. See BLAU, *THE DYNAMICS OF BUREAUCRACY* 285-86 (2d ed. 1963). See Dalton's reply in Dalton, *supra* at 59-62. In any event, it is a most time-consuming and difficult way to produce rewarding information and insights.

## Appendix A: Notes to Table 1

<sup>125</sup> See Automotive News, March 1, 1965, p. 12, cols. 2-5.

<sup>126</sup> See NATIONAL AUTOMOBILE DEALERS ASSOCIATION, THE FRANCHISED NEW CAR & TRUCK DEALER STORY 23 (1964).

<sup>127</sup> WIS. STAT. § 218.01 (1963) (Wis. Laws 1937, ch. 377, at 602, ch. 378, at 603, ch. 417, at 688).

<sup>128</sup> IOWA CODE ANN. §§ 322.1-16 (1950) (Iowa Laws 1937, ch. 135, § 6, at 311).

<sup>129</sup> Automotive News, May 6, 1963, p. 1, col. 2.

<sup>130</sup> 1965 Iowa Legislative Service 376.

<sup>131</sup> N.D. CENT. CODE, §§ 51-07-01 to -03 (Supp. 1963) (N.D. Laws 1937, ch. 125, at 238).

<sup>132</sup> FLA. STAT. ANN. §§ 320.64-70 (1958) (Fla. Laws 1941, ch. 20236, §§ 5-11, at 105).

<sup>133</sup> VA. CODE ANN. §§ 46.1-546 to -547 (1958) (Va. Laws 1944, ch. 406, § 20, at 645).

<sup>134</sup> WYO. STAT. ANN. §§ 40-39 to -40 (1957) (Wyo. Laws 1949, ch. 138, §§ 1-2, at 225).

<sup>135</sup> R.I. GEN. LAWS ANN. 31-5-23 (1956) (R.I. Laws 1950, ch. 2595, Art. 8, at 523).

<sup>136</sup> S.D. CODE § 54.1103 (Supp. 1960) (S.D. Laws 1951, ch. 262, §§ 1-2, at 277).

<sup>137</sup> OKLA. STAT. ANN. tit. 47, § 563 (1962) (Okla. Laws 1953, tit. 47, § 5, at 182).

<sup>138</sup> MISS. CODE ANN. § 8071.3 (1956) (Miss. Laws 1954, ch. 332, §§ 1-2, at 456). Section 8072 of the Mississippi Code was passed in 1935. This provision calls for approval of manufacturer-dealer contracts by the attorney general and arbitration of disputes. The statute "has never been used according to the knowledge and records of this office and the office of the Secretary of State." Letter from R. Hugo Newcomb, Sr., Assistant Attorney General, State of Mississippi, Dec. 9, 1964.



"I am glad you brought it to my attention. As Revisor of Statutes, I shall recommend to the next session of the legislature that provisions be made for its enforcement or that it be repealed." *Ibid.*

<sup>139</sup> LA. REV. STAT. §§ 32:1251-:1258 (1963) (La. Acts 1954, No. 350, § 4, at 666).

<sup>140</sup> Ark. Acts 1955, No. 182, at 416.

<sup>141</sup> Colo. Laws 1955, ch. 77, at 198.

<sup>142</sup> TENN. CODE ANN. §§ 59-1701 to -1720 (Supp. 1963) (Tenn. Acts 1955, ch. 79, § 5, at 235).

<sup>143</sup> N.C. GEN. STAT. §§ 20-304 to -305 (Supp. 1964) (N.C. Laws 1955, ch. 1243, §§ 20-21, at 1288).

<sup>144</sup> MINN. STAT. ANN. § 168.27(14) (1960) (Minn. Laws 1955, ch. 626, at 956).

<sup>145</sup> KY. REV. STAT. §§ 190.040-.070 (1962) (Ky. Laws 1956, ch. 161, §§ 3,6, at 320).

<sup>146</sup> N.Y. GEN. BUS. LAWS §§ 195-98 (N.Y. Sess. Laws 1956, ch. 900, at 1921).

<sup>147</sup> N.Y. Times, Jan. 21, 1949, p. 17, col. 3.

<sup>148</sup> NEB. REV. STAT. §§ 60-320, 60-1401 to -1419 (1960) (Neb. Laws 1957, ch. 280, at 1011).

<sup>149</sup> Utah Senate Bill 149-3 (1965).

<sup>150</sup> *Id.*, Feb. 28, 1955, p. 4, cols. 1-2.

<sup>151</sup> *Id.*, June 28, 1965, p. 3, cols. 4-5.

<sup>152</sup> Interview.

<sup>153</sup> Automotive News, Feb. 28, 1955, p. 4, cols. 1-2.

<sup>154</sup> *Ibid.*

<sup>155</sup> Interview.

<sup>156</sup> Cal. Senate Bill 1073 (1963). This bill was opposed by the northern and southern California dealers' associations. It was initiated by a dealer who had lost his franchise. Letter.

<sup>157</sup> Interview.

<sup>158</sup> Automotive News, March 12, 1956, p. 3, cols. 4-5.

<sup>159</sup> *Id.*, March 2, 1964, p. 4, col. 4; *id.*, March 9, 1964, p. 6, col. 5.

<sup>160</sup> Interview.

<sup>161</sup> Interviews.

<sup>162</sup> It was reported that "changes in dealer licensing law are contemplated by Washington State association; members are being asked to vote on such items as 'anti-coercion' rules for factory representatives, requirements for dealer licenses and proposed licensing of salesmen." Automotive News, May 10, 1965, p. 3, cols. 4-5.

## Appendix B: Notes to Table 2

<sup>491</sup> B. A. Dario v. General Motors Corp. (D.R.I. March 14, 1961) in NADA Magazine, Nov. 1962, pp. 24, 68 (Buick dealer sued for wrongful termination of his franchise in 1958. Consent judgment for defendant).

<sup>492</sup> Woodard v. General Motors Corp., 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962) (Chevrolet dealer moved dealership to different building without written consent and franchise was terminated for inadequate facilities. Summary judgment for General Motors affirmed); General Motors Corp. v. Mac Co. (D. Colo. 1965) in Automotive News, Nov. 22, 1965, p. 47, col. 1 (Two Chevrolet dealers sued for failure to renew their franchises. Summary judgment for General Motors granted because there was insufficient proof of bad faith); Johnson Chevrolet Co. v. General Motors Corp. (W.D.N.Y. June 14, 1962) in Automotive News, June 25, 1962, p. 57, col. 2 (dealership terminated. General Motors failed to find a buyer as dealer alleged had been agreed. Complaint dismissed after dealer's case presented to jury); Bergstrom v. General Motors Corp. (E.D. Mich. Sept. 22, 1961) in NADA Magazine, Nov. 1962, p. 67 (manager and investor in Pontiac dealership put out of business when General Motors, exercising its power as majority stockholder, closed dealership. Manager alleged he was promised another Pontiac dealership but did not get it. Summary judgment for General Motors affirmed); Harwood-Dewey Oldsmobile Co. v. General Motors Corp. (W.D. Mich. March 7, 1960) in NADA Magazine, Nov. 1962, p. 68 (dealership terminated. Case dismissed with prejudice).

<sup>493</sup> White Rose Motors, Inc. v. General Motors Corp. (M.D. Pa. 1965) in Automotive News, Aug. 9, 1965, p. 8, col. 2 (Cadillac dealer sued General Motors to enjoin failure to renew franchise. Case pending); Colonial Capital Co. v. General Motors Corp. (D. Conn. 1960) in NADA Magazine, Nov. 1962, p. 68 (Cadillac dealer alleged con-

spiracy to drive him out of business by misallocation of cars in order to favor a competing Cadillac dealer who was the son of a top General Motors executive. Case withdrawn when plaintiff suffered heart attack and received medical advice that he had to terminate the action).

<sup>494</sup> Roseville Rambler v. American Motors Sales Corp. (E.D. Mich.) in *Automotive News*, June 8, 1964, p. 6, cols. 1-2; *id.*, Sept. 7, 1964, p. 4, col. 5 (dealer alleged he was induced to open business in a location by American Motors, which then opened a company-owned dealership in competition with him. American Motors purchased dealership to settle); Carl Price v. American Motors Sales Corp. (N.D. Ala.) in *Automotive News*, March 13, 1961, p. 3, cols. 3-4 (Mercury dealer added the Rambler franchise; then Mercury produced the Comet, a competing compact car. American Motors would not allow dealer to sell both Comet and Rambler and canceled franchise. Case settled for \$3,000); Don Reeves Rambler v. American Motors Sales Corp. (W.D. Pa.) in *Automotive News*, Dec. 2, 1963, p. 2, cols. 1-2 (dealer in business only two months when franchise terminated. Alleged conspiracy with another Rambler dealer five miles away to end undue competition. Case settled after jury selected).

<sup>495</sup> Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889 (N.D. Ga. 1963) (dealer alleged unfair cancellation. American Motors canceled for inadequate capitalization which led to poor sales. Summary judgment for American Motors); Diamond Motors v. American Motors Sales Corp. (E.D. Pa.) in *Automotive News*, Feb. 8, 1965, p. 2, col. 4 (dealership terminated for poor sales. Dealer alleged a promise that he was to have an exclusive franchise in Wilmington, Delaware, and breach caused poor sales. Directed verdict for American Motors); Novotny's, Inc. v. American Motors Sales Corp. (*NADA Magazine* lists this case in the Southern District of Ohio, while *Automotive News* reports it as a Los Angeles case. *Automotive News* is probably correct) in *NADA Magazine*, Nov. 1962, p. 68; *Automotive News*, March 13, 1961, p. 3, col. 3; *id.*, March 6, 1961, p. 62, col. 3 (dealer's franchise was not renewed. Directed verdict for American Motors in March 1961); Millville Motors, Inc. v. American Motors Sales Corp. (S.D. Ohio 1961) in *NADA Magazine*, Nov. 1962, p. 68 (dealer sued company for terminating his franchise when he refused to expand his facilities and move to another city. Case dismissed); Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378 (D.N.J. 1959) (dealer's franchise not renewed for failure to manage his business properly. Directed verdict for American Motors).

<sup>496</sup> Pepper Motors, Inc. v. American Motors Sales Corp. (E.D.N.Y. 1961) in *NADA Magazine*, Nov. 1962, p. 68 (dealer sued for nonrenewal of his franchise, alleging an oral agreement to renew. Judgment for American Motors).

<sup>497</sup> Semke v. American Motors Corp. (D. Okla. 1966) in *Automotive News*, Feb. 7, 1966, p. 90, col. 3. (Rambler dealer resigned franchise and sued because AMC failed to comply with its obligations. Jury awarded ex-dealer \$18,000. Motion for new trial pending.)

<sup>498</sup> Garvin v. American Motors Sales Corp., 202 F. Supp. 667 (W.D. Pa. 1962), *rev'd*, 318 F.2d 518 (3d Cir. 1963) (dealer sued for nonrenewal of his franchise. American Motors' last renewal was conditioned on accurate business records being kept and the hiring of a full-time salesman. Jury verdict for \$20,000 for dealer reversed on appeal as coercion not established).

<sup>499</sup> Aubrey, Orval and Mac Rambler Sales, Inc. v. American Motors Sales Corp. (S.D. Tex.) in *Automotive News*, March 15, 1965, p. 55, col. 1 (American Motors attempted to cancel franchise as a result of a dispute over sales territory and the location of the dealership's sales headquarters. Temporary injunction granted against termination; dealership seeking permanent injunction); Regal Motors, Inc. v. American Motors

Sales Corp. (N.D. Ohio) in Supplement, NADA Magazine, Nov. 1962 (unpublished mimeo. 1964) [hereinafter cited as NADA Supp.] (dealer sued for termination of franchise which he had held for twenty-eight years); Yonce Motors, Inc. v. American Motors Sales Corp. (D.S.C.) in Automotive News, July 6, 1964, p. 4, cols. 3-4 (dealer sued for wrongful termination. Franchise canceled after dealer won a trip to Spain in a sales contest. American Motors asserts dealer failed to carry an adequate inventory. Case presently pending); Husak Bros. v. American Motors Sales Corp. (E.D. Mich.) in Automotive News, April 8, 1963, p. 4, col. 1; *id.*, June 8, 1964, p. 6, col. 2 (dealer sued for wrongful termination of franchise, alleging that American Motors financed a rival dealer, failed twice to deliver new models until after the introduction period, and threatened to cancel the franchise unless slow-selling models were ordered); Ted Doba Auto Sales, Inc. v. American Motors, Inc. (N.D. Ind.) in NADA Magazine, Nov. 1962, p. 69 (dealer alleged unfair termination in a suit filed in 1959); Bergen Rambler, Inc. v. American Motors Sales Corp., 1962 Trade Cas. 76359 (D.N.J.) (dealer's franchise terminated. Alleged favoritism to other dealers. Reported case deals with dealer's interrogatories).

<sup>500</sup> Bateman v. Ford Motor Co., 202 F. Supp. 595 (E.D. Pa.), *rev'd and remanded*, 302 F.2d 63 (3d Cir.); 204 F. Supp. (E.D. Pa.), *rev'd and remanded*, 310 F.2d 805 (3d Cir. 1962); 214 F. Supp. 222 (E.D. Pa. 1963) (dealer sued for injunction against termination. Circuit court decided injunction was an available remedy under the act, but the district court refused to issue a temporary one as this was not a "clear" case. The dealer alleged pressure to take unwanted cars and to sell out. A letter from one of the dealer's attorneys indicates that the case was settled).

<sup>501</sup> Jim Barnett Motors, Inc. v. Ford Motor Co. BNA Antitrust & Trade Reg. Rep. No. 239, A-14 (5th Cir. 1966) (dealer alleged decision not to produce Edsel a violation of statute. Summary judgment for Ford affirmed); Goss v. Ford Motor Co. (E.D. Ky. 1964) in Automotive News, June 22, 1964, p. 14, col. 5 (dealer sued for wrongful termination of franchise, alleging Ford set unreasonable quotas. Dealer failed to submit accurate reports. Directed verdict for Ford as no evidence of coercion presented); Loesch Motor Co. v. Ford Motor Co. (N.D. Ohio 1964) in Automotive News, July 20, 1964, p. 85, col. 1 (dealer sued for wrongful termination of franchise, alleging coercion to purchase too much inventory and to expand facilities. Suit dismissed as no issue between parties); Blenke Brothers Co. v. Ford Motor Co., 203 F. Supp. 670 (N.D. Ind. 1962); 217 F. Supp. 459 (N.D. Ind. 1963) in Automotive News, Aug. 19, 1963, p. 6, col. 5 (Mercury dealer's franchise terminated in 1958 for poor business practices, and he sued. Court held that the statute was constitutional and that failure to report complaint to Dealer Policy Board did not bar suit, despite franchise provision to this effect. Suit dismissed with prejudice and dealer had to pay costs); Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D. Cal. 1960) (dealer sued for wrongful termination of franchise. Ford determined by a survey that its assigned sales quotas in dealer's neighborhood were reasonable and demanded certain procedures to increase sales, which the dealer refused to adopt. Motion to dismiss after plaintiff's case granted).

<sup>502</sup> Walker v. Ford Motor Co., 241 F. Supp. 526 (E.D. Tenn. April 17, 1965) (dealer canceled and proceeded under Tennessee administrative-licensing act and then sued under federal act. District court found (1) the statute of limitations had run since it had not been tolled by the state proceedings and (2) while Ford representatives set an unsound sales quota and insisted upon unrealistic business hours and the employment of unneeded salesmen and mechanics, "the 'advice' given the 'dealer' did not rise to the dignity of coercion"); Lavett Motors, Inc. v. Ford Motor Co. (D. Miss. 1962) in Automotive News, Nov. 4, 1963, p. 2, col. 1 (dealer sued for wrongful termination of franchise in 1959, and jury found for Ford).

<sup>503</sup> Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (April 26, 1965) (dealer's franchise terminated. He sued, alleging reprisals because he

refused to take a truck and had taken the matter to the head office of the company. Jury award of \$12,500 for dealer, but trial court granted judgment n.o.v., affirmed on appeal); *Milos v. Ford Motor Co.*, 206 F. Supp. 86 (W.D. Pa. 1962), *aff'd*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963) (dealer sued for wrongful termination of franchise, alleging Ford had set unreasonable sales quotas. Ford stressed dealer had promised to build better facilities within two years of receiving franchise and had failed to do so. Jury awarded dealer \$95,000 but trial court granted judgment n.o.v., which was affirmed); *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962) (Ford refused to approve buyer of dealership if he paid the agreed price. Jury awarded dealer \$23,850 but reversed on appeal).

<sup>504</sup> *Armstrong v. Ford Motor Co.* (W.D. Pa.) in *Automotive News*, March 30, 1964, p. 4, col. 1 (dealer sued for coercion to take unwanted material); *Reynolds Sales, Inc. v. Ford Motor Co.* (N.D. Ohio) in *NADA Supp.* 6 (dealer sued in 1964 for wrongful termination of franchise, alleging he was given arbitrary and capricious sales quotas. Case presently pending); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965) (manager of factory-controlled dealership, who was forced out, sued in 1963. The Seventh Circuit held that the manager of a dealership owned by Ford was a "dealer" within the meaning of the Act); *Hammond Ford, Inc. v. Ford Motor Co.*, 1962 Trade Cas. 76227 (S.D.N.Y.) (dealer sued for wrongful termination, alleging that he was forced to take unwanted cars and equipment and that Ford wanted him to use unethical sales tactics. Ford asserted dealer had inadequate facilities and made misrepresentations as to the ownership of the dealership. Ford counterclaimed for a conspiracy to create a Good Faith Act case. See *Automotive News*, July 31, 1961, p. 3, cols. 2-4 (case decided that Ford's release signed by dealer was not a bar to the suit. Presently the case is proceeding through pretrial, and there is pending a motion for summary judgment by Hammond. The motion concerns an alleged violation of the antitrust laws as a result of tie-in sales by Ford of radios with Ford automobiles); *John P. Nielsen & Sons Co. v. Ford Motor Co.* (D. Conn. 1962) in *Automotive News*, Oct. 15, 1962, p. 4, col. 3 (dealer sought injunction against termination of franchise which was denied. However, court refused to dismiss the case. The dealer, who had held a Ford franchise twenty-three years, asserted that Ford's sales quotas were unfair); *Bill Cottrills, Inc. v. Ford Motor Co.* (E.D. Mich.) in *Automotive News*, May 8, 1961, p. 4, col. 5 (dealer's franchise terminated after five years of operation. He alleged Ford's refusal to reimburse on warranty claims made his business unprofitable); *Leslie & Sons, Inc. v. Ford Motor Co.* (E.D. Mich.) in *Automotive News*, May 8, 1961, p. 4, col. 5 (dealer alleged he was forced out of business by Ford's failure to pay warranty claims).

<sup>505</sup> *Sam Goldfarb Plymouth, Inc. v. Chrysler Corp.*, 1962 Trade Cas. 76715 (E.D. Mich.) (dealer whose franchise was terminated sued, alleging Chrysler's dissatisfaction with his sales was based on his foreign-car franchise and his leadership of a committee to fight competition by factory-owned and -controlled dealerships. The case reports a denial of a temporary injunction against termination. A letter from the dealer's attorney reports the settlement); *Jim Kelly, Inc. v. Chrysler Corp.* (E.D. Mich. March 30, 1959) in *NADA Magazine*, Nov. 1962, p. 68 (dealership terminated and dealer sued, alleging competitors selling the same make were favored because of their association with the management of Chrysler. A motion to dismiss on ground Good Faith Act was unconstitutional was denied. The case was settled for \$15,000); *McLaren Motors, Inc. v. Chrysler Corp.* (N.D. Cal. Dec. 1960) in *NADA Magazine*, Nov. 1962, p. 68 (dealership terminated and dealer sued, alleging Chrysler failed to fill orders, favored competitors, and forced unwanted cars. Directed verdict for Chrysler. Case settled for \$8,000 pending appeal).

<sup>506</sup> *Abbott-Stansell Motors Co. v. Chrysler Motors Corp.*, 333 F.2d 322 (5th Cir. 1964) (directed verdict for Chrysler affirmed per curiam); *Bob Hooper Motor Co. v.*

Chrysler Corp. (N.D. Tex. 1964) in *Automotive News*, June 15, 1964, p. 3, cols. 3-4 (dealer's suit dismissed when he failed to appear); *Harvey Motors, Inc. v. Chrysler Corp.* (N.D. Cal. 1958) in *Automotive News*, Oct. 16, 1961, p. 61, col. 3; *id.*, Feb. 13, 1961, p. 8, col. 2 (dealer's franchise terminated and he sued, alleging that he was forced to take slow-selling models to get best-selling ones and that competitors were favored in distribution. Directed verdict for Chrysler); *McLaren Motors, Inc. v. Chrysler Corp.*, *supra* note 505.

<sup>507</sup> *Zarbock v. Chrysler Corp.*, *TRADE REG. REP.* (1965 Trade Cas.) ¶ 71361, at 80535 (D. Colo. 1964) (dealer who still has franchise sued for losses caused by Chrysler's poor distribution to dealers in smaller cities. Judgment for Chrysler); *Blenke Bros. Motors, Inc. v. Chrysler Corp.*, 189 F. Supp. 420 (N.D. Ill. 1960) (dealer's franchise terminated and he sued. Case holds that coercion can be accomplished by indirect means and that interrogatories about dealers in surrounding area were proper. A jury found for Chrysler. See *Automotive News*, Dec. 10, 1962, p. 2, col. 5); *Pinney & Topliff v. Chrysler Corp.*, 176 F. Supp. 801 (S.D. Cal. 1959) (court held that dealer had resigned his franchise voluntarily and that Chrysler had not promised to find a buyer. The court decided there was no coercion and gave judgment for Chrysler).

<sup>508</sup> *Mt. Lebanon Motors, Inc. v. Chrysler Corp.* (W.D. Pa.) in *Automotive News*, Feb. 15, 1965, p. 6, col. 4 (a dealer led a protest against factory-controlled dealerships competing with established dealers, and alleged his quota was doubled in response. Suit filed in December 1964); *Barton Motor Co. v. Chrysler Corp.* (W.D. Pa.) in *Automotive News*, Feb. 15, 1965, p. 6, col. 4 (dealer's franchise terminated January 17, 1964, because he could not compete with factory-controlled dealership); *Dewald v. Chrysler Corp.* in *Motor News Analysis* 2-3 (Dec. 1964) (factory promised help in selling out but put in a competing dealership selling same make); *H. D. Maggio, Inc. v. Chrysler Corp.* (N.D. Ill.) in *Automotive News*, Sept. 21, 1964, p. 101, col. 4 (dealer's franchise terminated and he sued. He alleged Chrysler insisted he give up Plymouth in 1959 in order to handle the Dodge Dart. When he refused, Chrysler set up three Plymouth outlets in 1961 within a one and one-half-mile radius of his dealership. The Dodge franchise was terminated in 1961, and he was replaced by a factory-controlled dealership); *Gib Bergstrom, Inc. v. Chrysler Corp.* (E.D. Mich.) in *Automotive News*, June 22, 1964, p. 4, col. 2 (dealer's franchise terminated and he sued, alleging he was given only six months to prove himself and that no cars were delivered in the first two months); *Victory Motors, Inc. v. Chrysler Motors Corp.* (S.D. Ga.) in *NADA Supp.* 5 (dealer's Chrysler-Imperial franchise terminated and he sued, alleging an agreement that he would not be required to meet sales quotas until his business was built up); *America Dodge, Inc. v. Chrysler Corp.* (D. Conn. 1963) in *Automotive News*, Jan. 20, 1964, p. 6, col. 4 (dealer's franchise terminated in 1962. Case involved a motion for more specific statement of claims); *Dayton & Edwards, Inc. v. Chrysler Corp.* (D. Conn.) in *Automotive News*, Jan. 20, 1964, p. 6, col. 4 (dealer's franchise terminated November 1, 1960, and he sued); *Mead v. Chrysler Corp.* (D. Ore.) in *Automotive News*, Oct. 5, 1959, p. 3, col. 1 (dealer brought suit for an injunction under the Good Faith Act).

<sup>509</sup> *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964) (dealer sued, alleging he was forced to go out of business because Studebaker would not supply Mercedes-Benz automobiles as it had orally agreed. The jury awarded the dealer \$35,000 but the case was reversed by the circuit court, which applied the parol evidence rule to limit the dealer to the written franchise).

<sup>510</sup> *Bisceglia Motors Sales, Inc. v. Studebaker-Packard Corp.* (E.D. Mich.) in *Automotive News*, Sept. 24, 1962, p. 3, col. 3 (dealer's franchise terminated and he sued, alleging misrepresentations that the franchise would be renewed. See also 367 Mich. 472, 116 N.W.2d 884 (1962)); *Arlington v. Studebaker-Packard Corp.* (S.D. Tex.) in *Auto-*

motive News, May 22, 1961, p. 6, col. 3 (dealer held Lark franchise for four months in 1960. He asserted he was promised he would remain the exclusive Lark dealer in a three-county area, but other dealerships were created); Erny & J. & B. Motors v. Studebaker-Packard Corp. in Automotive News, Jan. 18, 1960, p. 50, col. 3 (dealer alleged that manufacturer made unreasonable demands, gave unfair quotas, and arbitrarily terminated franchise).

<sup>511</sup> Automotive News, April 20, 1964, p. 2, col. 5, p. 8, col. 5, reports that nine Volkswagen dealers in New Jersey, Illinois, and Iowa settled their Good Faith Act suits for \$9,000 each. The report adds that there were also settlements in the following cases: Reliable Volkswagen Sales & Service, Inc. v. World-Wide Auto. Corp., 182 F. Supp. 412 (D.N.J. 1960) (case decided that the dealer could not sue under the act since it had no written franchise. There was a \$9,000 settlement); Wagner v. World-Wide Auto. Corp., 201 F. Supp. 22 (W.D.N.Y. 1961) (case decided that the absence of a written franchise did not prevent an action under the act. There was a substantial settlement before the case went to the jury. Automotive News, Jan. 6, 1964, p. 4, col. 3).

<sup>512</sup> Tolm Motors, Inc. v. World-Wide Auto. Corp. (S.D.N.Y. Nov. 21, 1960) in NADA Magazine, Nov. 1962, p. 68 (dealer sued for wrongful termination of franchise. Motion for summary judgment denied on May 22, 1958. Order entered in 1960 dismissing for lack of prosecution); R. J. Schnabel v. Volkswagon America, Inc., 185 F. Supp. 122 (N.D. Iowa 1960) (dismissed on jurisdictional grounds).

<sup>513</sup> S. H. Arnolt, Inc. v. Renault, Inc. (N.D. Ill.) in NADA Magazine, Nov. 1962, p. 67 (suit for wrongful termination of distributorship in 1958. Settled during trial in 1960); Brondes Motor Sales v. Renault, Inc. (N.D. Ohio) in NADA Magazine, Nov. 1962, pp. 67-68 (suit for wrongful termination of dealership dismissed by stipulation on April 17, 1962).

<sup>514</sup> European Motor Cars Co. v. Renault, Inc. (D. Minn. 1962) in NADA Magazine, Nov. 1962, p. 68 (dealer's case dismissed and judgment for Renault of \$2,000 on its counterclaim for unpaid bills); Ray Caldwell v. Lake States Imports, Inc. (N.D. Ohio 1961) in NADA Magazine, Nov. 1962, p. 68 (canceled Renault dealer sued. Case dismissed with prejudice).

<sup>515</sup> Auto-Imports, Ltd. v. Peugeot, Inc., 1964 Trade Cas. 79335 (S.D.N.Y.) (suit against codefendant Renault, Inc., was dismissed. Only the branch of the case against Renault involved the Dealer's Day in Court Act).

<sup>516</sup> Gimbel Motors, Inc. v. Renault, Inc. (D. Conn.) in NADA Magazine, Nov. 1962, p. 69 (suit filed in 1958. Many motions made but not on trial list in 1961).

<sup>517</sup> Childers & Venters, Inc. v. Willys Motors (E.D. Ky. June 6, 1960) in NADA Magazine, Nov. 1962, p. 68 (dealer sued for \$350,000, alleging wrongful termination of franchise and refusal to buy back parts as provided in selling agreement. Judgment on a jury verdict for \$8,800 and costs).

<sup>518</sup> Alfieri v. Willys Motors, Inc., 227 F. Supp. 627 (E.D. Pa. 1964) (dealer sued for wrongful termination, alleging *inter alia*, an oral agreement that he was to be the only Willys dealer in the area. The court granted summary judgment for defendant on the obligations of the oral agreement, but denied summary judgment on the allegations of bad faith in withholding deliveries and canceling the franchise); Andres v. Willys Motors, Inc. (N.D. Ohio) in NADA Magazine, Nov. 1962, p. 68 (dealer sued for wrongful termination of franchise in 1958. Willys filed a motion for summary judgment on August 17, 1962).

<sup>519</sup> Fiat Motor Co. v. Alabama Imported Cars, Inc., 292 F.2d 745 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 898 (1963) (facts unknown. Reported opinions concern service of

process. A letter from the dealer's attorney says that the case was settled); *J. R. Townsend Co. v. White Motor Co.*, (S.D. Cal.) in *NADA Magazine*, Nov. 1962, p. 68 (dealer sued in 1957 for termination of franchise. Settled).

<sup>520</sup> *Waco Motors, Inc. v. Porsche, Inc.*, (S.D. Fla. Jan. 1961) in *NADA Magazine*, Nov. 1962, p. 68 (dealer-distributor sued for wrongful termination of franchise. Suit dismissed).

<sup>521</sup> *Wakeman Corp. v. F. W. D. Corp.* (S.D. Fla.) in *NADA Magazine*, Nov. 1962, p. 69 (dealer sued for wrongful termination in 1962); *Synder v. Volvo Western Distributors, Inc.* (S.D. Cal.) in *Automotive News*, Oct. 16, 1961, p. 61, col. 4 (dealer's franchise terminated and he sued, alleging pressure to stock more cars and increase facilities and that his sales were sufficient to comply with the contract); *Barney Motor Sales, Inc. v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal. 1959) (Standard-Triumph dealer sued distributor for wrongful termination. Reported opinion concerns whether distributor is a manufacturer under the provisions of the Good Faith Act).



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