

AUTOMOBILE DEALER FRANCHISES: VERTICAL  
INTEGRATION BY CONTRACT

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AMERICAN business has developed three kinds of retail sales outlets. At one end of the scale is the independent retailer, exemplified by the general store or the corner grocery store. His independence is safeguarded: the manufacturer or wholesaler from whom he buys is only one of many possible sources supplying him with the goods he needs for resale. At the other end of the scale is the agent who may be a branch or subsidiary of the manufacturer. The franchised dealer occupies a position between the two extremes.<sup>1</sup> Under the franchise system, distribution of the product is limited to chosen retailers in each community.<sup>2</sup>

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\*The following materials used frequently throughout the Article will be cited in the form indicated in parenthesis: HEWITT, *AUTOMOBILE DEALER FRANCHISES* (1956) (HEWITT); PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* (1955) (PALAMOUNTAIN); *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess. (1956) (*H.R. Hearings, Dealer Franchises*); *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. (1955) (*H.R. Hearings, Marketing Legislation*); *Hearings Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. (1956) (*S. Hearings, Marketing Practices*); *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. (1955) (*S. Hearings, General Motors*); *Staff Report of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. (1956) (G.M. REP.); FTC, *REPORT ON MOTOR VEHICLE INDUSTRY* (1939) (1939 FTC REP.); FTC, *REPORT ON DISTRIBUTION METHODS AND COSTS* pt. IV (1944) (1944 FTC REP.).

1. Under modern case law, franchises are neither pure sales contracts nor pure agency contracts. *Bendix Home Appliances, Inc. v. Radio Accessories Co.*, 129 F.2d 177, 181 (8th Cir. 1942); *Marrinan Medical Supply, Inc. v. Ft. Dodge Serum Co.*, 47 F.2d 458, 460 (8th Cir. 1931); *Laveson v. Warner Mfg. Co.*, 117 F. Supp. 124, 125-26 (D.N.J. 1953); *Kane v. Chrysler Corp.*, 80 F. Supp. 360, 363 (D. Del. 1948); *Mantell v. International Plastic Harmonica Corp.*, 141 N.J. Eq. 379, 388-89, 55 A.2d 250, 256 (Ct. Err. & App. 1947); 4 WILLISTON, *CONTRACTS* § 1027A (rev. ed. 1936); HEWITT 189-206; Note, *Dealer Franchise Agreements*, 63 HARV. L. REV. 1010, 1015-16 (1950). The difficulties in fitting the relationship into established categories are discussed in Note, *"Mutuality" in Exclusive Sales Agency Agreements*, 31 COLUM. L. REV. 830 (1931); Comment, *The Necessity for "Mutuality" and the Right of Termination in Sales Agencies*, 28 ILL. L. REV. 800 (1934).

2. *Davisson, Automobiles*, in *MARKETING CHANNELS FOR MANUFACTURED PRODUCTS* 83, 104-06 (Clewett ed. 1954); Scott, *Selected Distribution Defined and Described*, in

The unique advantage of franchising for the manufacturer lies in the considerable control over the process of distribution he may exercise without exposure to the burdens and responsibilities of an agency relationship.<sup>3</sup> Ideally, the dealers are carefully chosen from among those of proven ability. Selected dealers, experience has shown, tend to be more aggressive in cultivating a market and servicing the product. They are generally "co-operative" in carrying out the manufacturer's suggested program of selling. And the franchises of dealers who do not prove their worth may be eliminated by cancellation or non-renewal.

In return, the franchised dealer receives from the manufacturer added capacity to build and maintain a strong retail organization. Restriction of outlets tends to protect the dealer's inventory and plant investment. Moreover, the nature of the relationship fosters mutual dependence, and the dealer can expect the manufacturer to assist him in effective merchandising. The dealer also gains increased prestige through affiliation with a large organization, frequently of national extension.

Finally, the consumer, we are told, gets better service under the franchise system and is assured that the retailer carries a complete stock of the manufacturer's products.

However great these advantages, the franchise system is not free from shortcomings and frictions. The manufacturer may suffer because the dealer, sheltered by the restriction of outlets, does not exert his "best efforts." The "un-co-operative" dealer may lose his franchise and, to the extent it is built around exclusive representation, his business. Again, due to lack of outlet competition the consumer may suffer from a high price level or be at the mercy of a dealer whose services are inadequate.

Retail distribution through franchise arrangements has grown significantly during the last forty years. It has become the principal market channel for such products as automobiles, electrical appliances, farm implements, radios, television, tires and wall paper.<sup>4</sup> Because of the nature of the commodity involved, the franchise system has had its most spectacular development in the automobile industry.<sup>5</sup> As the system exists today, the manufactured product is channelled through the manufacturer's own sales organization directly to selected retailers.<sup>6</sup> With the industry's development of its own decentralized

READINGS IN MARKETING 300, 313-16 (2d ed., McNair & Hansen 1956); Note, *Dealer Franchise Agreements*, 63 HARV. L. REV. 1010 (1950).

3. For discussion of the advantages and disadvantages of the franchise system for manufacturer, retailer and consumer, see Scott, *supra* note 2; N.Y.U. BUREAU OF BUSINESS RESEARCH, *THE EXCLUSIVE AGENCY* (1923); *Case Study, The Use of Exclusive Retail Agencies*, 3 HARV. BUS. REV. 485 (1925).

4. Note, *Dealer Franchise Agreements*, 63 HARV. L. REV. 1010 (1950).

5. For a description of the history of the industry, see SELTZER, *A FINANCIAL HISTORY OF THE AMERICAN AUTOMOBILE INDUSTRY* (1928). For a discussion of the development of the franchise system in the automobile industry, see HEWITT 23-89; PALAMOUNTAIN 107-09; EPSTEIN, *THE AUTOMOBILE INDUSTRY* 132-61 (1928); 1939 FTC REP. 106-14.

6. Davison, *supra* note 2, at 100-03.

assembly plants, the independent distributor-wholesaler, once important in the distribution process, has largely disappeared, except in low-volume lines.<sup>7</sup> Large manufacturers usually regard the distributor as an economic luxury.<sup>8</sup> And direct sales by manufacturers to the consumer, always small in number, are limited to fleet vehicles or those that require special design or finish.<sup>9</sup>

The economic significance of the franchise system in the automobile industry is illustrated by the following figures: in 1954, the industry turned out a total of 9,177,919 cars and trucks. Its investment amounted to 7½ billions of dollars; 780,000 persons were employed in the process of production. Distribution was handled by 42,000 franchised dealers, whose total investment amounted to nearly 5 billion dollars. The investment of the average dealer amounted to \$118,000. The dealers in turn employed 660,800 persons or 9.7% of all employees engaged in retail selling.<sup>10</sup> Thus, the cost of distributing cars, in labor and capital, is almost as great as the cost of manufacturing them.<sup>11</sup>

#### THE AUTOMOBILE FRANCHISE AND THE EVOLUTION OF ITS TERMS

The franchise system would seem eminently suited to the distribution of automobiles; in this field, each party obviously has a substantial interest in the other's conduct. President Harlow Curtice of General Motors, says of the dealer:

"Legally he is not the agent of the manufacturer. Yet, in his community he is looked upon as the manufacturer's representative. The degree of business success he is able to earn in his community depends importantly upon the quality and value of the product with which the manufacturer has provided him.

"Conversely, the success the manufacturer enjoys in all markets, throughout the country, is determined in substantial degree by how well his 'representatives' the dealers—perform their functions. An unusual mutuality of interests exists between the automobile manufacturer and the dealer."<sup>12</sup>

Although the franchise system had many staunch supporters among dealers even before recent modifications, it has been a source of conflicts and tensions.<sup>13</sup>

7. For a discussion of the early history of automobile merchandising and the function of the wholesaler, see Davisson, *supra* note 2, at 93-95; Griffin, *Wholesale Organization in the Automobile Industry*, 3 HARV. BUS. REV. 424 (1925); 1939 FTC REP. 106; H.R. Hearings, *Dealer Franchises* 152.

8. Davisson, *supra* note 2, at 84. American Motors, with no decentralized assembly plants, still relies on the distributor system. H.R. Hearings, *Marketing Legislation* 288, 295. General Motors uses the system only for its Cadillac line. *Id.* at 170. See also 1944 FTC REP. 91.

9. *Ibid.*

10. 1 S. Hearings, *Marketing Practices* 1119. Comparable later figures are unavailable.

11. See statement of Charles C. Freed, President of the National Automobile Dealers Association, *Hearings Before the House Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. 35 (1954) (dealers in 1951 employed more labor and capital than manufacturers).

12. 1 S. Hearings, *Marketing Practices* 685.

13. H.R. Hearings, *Dealer Franchises* 153; 7 S. Hearings, *General Motors* 3193; Note, 63 HARV. L. REV. 1010, 1012 (1950). For a summary of dealer complaints,

The number of law suits brought by franchised dealers against manufacturers,<sup>14</sup> the 1939 Federal Trade Commission *Report on Motor Vehicle Industry*,<sup>15</sup> recent congressional hearings culminating in federal legislation<sup>16</sup> and the great number of state statutes reflecting dealer displeasure<sup>17</sup> all demonstrate that the supposed mutuality of interests between manufacturers and franchised dealers did not prevent the franchise system from causing dissatisfaction. Its actual operation, the dealers complained, precluded them from attaining an independence as full as that of most merchants.<sup>18</sup> In reality, the argument runs, automobile dealers have been in large measure the manufacturers' agents.<sup>19</sup> Through their dominant economic position, the manufacturers have employed the franchise, a "one-sided document which is neither contract, license or agreement,"<sup>20</sup> to gain maximum control over the management of the dealers' business without corresponding "legal" responsibility. Under the terms of the franchise, the factories "give the orders while the dealer takes the losses."<sup>21</sup>

The modern franchise indeed enables the manufacturer to wield great "vertical power" in the form of supervisory control over retail operations.<sup>22</sup> The franchise is embodied in a detailed standardized contract presented by the manufacturer to the dealer. The master contract<sup>23</sup> is frequently accompanied by printed

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see McHugh, *The Automobile Dealer Franchise Act of 1956*, 2 ANTITRUST BULL. 353-56 (1957).

14. See notes 99-135 *infra* and accompanying text.

15. See notes 241-45 *infra* and accompanying text.

16. See notes 251-52 *infra* and accompanying text.

17. See notes 224-37 *infra* and accompanying text.

18. A dealership, the industry insists, is the result of individual bargaining. *H.R. Hearings, Dealer Franchises* 168. But the bargain is not one of economic equality. Many relatively small buyers are confronted by a few very large sellers. *Id.* at 150.

19. "Although every dealer is an independent business man, the supervision and control exercised by GMAC and GMSC over his business operations is almost as complete as if the dealer were an agent in all respects. Every dealer also acquires a substantial investment in buildings, cars, parts and accessories, and builds up good will in his community. Consequently a cancelled dealership leaves the appellants with one less retail outlet which can be replaced readily, but leaves the disenfranchised dealer without a business and burdened with his substantial investment in the liquidation of which he is likely to sustain a heavy loss."

*United States v. General Motors Corp.*, 121 F.2d 376, 398 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941). See also S. REP. No. 2073, 84th Cong., 2d Sess. 2 (1956).

20. Statement by the Monmouth County Auto Dealers Ass'n of N.J., 8 S. *Hearings, General Motors* 4104. The statement, in very glowing terms, describes the old days when dealers, because of competition among manufacturers who were large in numbers and small in size, were able to get terms reflecting individual bargaining. See also Note, 70 HARV. L. REV. 1239, 1240 (1957). "An examination of the various dealer franchises revealed that while bilateral in form they were unilateral in fact." McHugh, *supra* note 13, at 355.

21. Senator O'Mahoney (Wyo.), 7 S. *Hearings, General Motors* 3193.

22. PALAMOUNTAIN 107.

23. See AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 14 (Bus. Rel. Inst. ed. 1948). Some sample franchise agreements have been published in

addenda concerning such matters as capital requirements and succession.<sup>24</sup> Modern franchise contracts show great similarity;<sup>25</sup> the absence of complete uniformity may be ascribed to the competition for dealers among the five remaining manufacturers.<sup>26</sup> This high degree of standardization is best illustrated by the "entire agreement" clauses. Patterned after provisions frequently found in insurance policies,<sup>27</sup> the modern franchise states that it supersedes all prior agreements, that it constitutes the "entire agreement of the parties" and that only certain executives of the manufacturer, usually the Vice-President or Sales Manager, have authority to alter the written contract.<sup>28</sup>

The terms of the franchise contract, however elaborate, do not give a complete picture of the dealership as an institution. "[They] do not show [that] 'priceless ingredient' of prime importance—namely, the manner in which

the record of congressional hearings. See, e.g., 1956 American Motors (Nash) Dealer Franchise Provisions, *H.R. Hearings, Dealer Franchises* 90-97; various (1949-55) Ford Sales Agreements, *id.* 291-375; 1955 General Motors (Chevrolet) Dealer Selling Agreement, 8 *S. Hearings, General Motors* 4425-49; 1956 General Motors (Pontiac) Dealer Selling Agreement (with supplements), *H.R. Hearings, Marketing Legislation* 180-224.

24. See, e.g., 1955 Ford Assignment Agreement, *H.R. Hearings, Dealer Franchises* 346-50; 1956 General Motors (Pontiac) Widows Financial Participation Addendum, *H.R. Hearings, Marketing Legislation* 223; General Motors, Motors Holding Division, Option and Bonus Agreement, 8 *S. Hearings, General Motors* 4450-54.

25. See charts comparing the various franchise clauses in AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 14-15 (Bus. Rel. Inst. ed. 1948); *Automotive News*, April 29, 1957, p. 1, cols. 3-5.

26. See *H.R. Hearings, Dealer Franchises* 237, 378.

27. *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001, 1003 (4th Cir. 1933) (express comparison with insurance law).

28. The Preamble of the 1957 Ford Sales Agreement furnishes an excellent illustration:

"D. This agreement shall bind the Company when it bears the facsimile signature of the Vice President and General Manager or the General Manager of the Ford Division of the Company, and is countersigned by the General Sales Manager or a Regional Sales Manager or a District Sales Manager of the Ford Division of the Company, and is delivered to the Dealer. The Company may deliver this agreement to the Dealer by placing the Dealer's copy thereof in the United States mail, duly stamped and addressed to the Dealer at his principal place of business, or by delivery to such place of business or to the Dealer in person.

"E. The Dealer acknowledges notice that (i) this agreement may be executed only in the manner provided therefor in paragraph D hereof, (ii) no one except the Vice President and General Manager or the General Manager or the General Sales Manager of the Ford Division of the Company, or the Secretary or an Assistant Secretary of the Company, is authorized to make or execute any other agreement relating to the subject matter hereof on behalf of the Company, or in any manner to enlarge, vary or modify the terms of this agreement, and they only by an instrument in writing, and (iii) no one except the Vice President and General Manager or the General Manager of the Ford Division of the Company, or the Secretary or an Assistant Secretary of the Company is authorized to terminate this agreement on behalf of the Company, and they only by an instrument in writing."

See also 1956 General Motors (Pontiac) Dealer Selling Agreement §§ 32, 34.

the contract is administered."<sup>29</sup> The policies and practices of the manufacturer may be made relevant with the help of skillfully drafted clauses in the franchise agreement. But often the dealer must comply simply because of the economic power of the manufacturer.<sup>30</sup> A prospective dealer, to be sure, is free to accept or reject a dealer franchise. Once he has committed his capital and entered the business, however, the power of the manufacturer comes into operation.<sup>31</sup> The dealer must, on pain of cancellation or non-renewal, accede to the demands which the manufacturer, in the interest of market penetration, deems necessary and reasonable.<sup>32</sup> Thus the manufacturer has an assured market in his dealers.<sup>33</sup> Of course, his power to terminate or not to renew is tempered by considerations of enlightened self-interest. The manufacturer gains nothing by destroying a valuable member of a sales organization developed over the years with his own assistance and financial contribution. On the other hand, cancellation or non-renewal are valuable means of replacing inefficient dealers with new ones, selected from the waiting list prepared by field representatives.<sup>34</sup> This practice is common among the Big Three of the five major automobile manufacturers.

The franchise clauses and manufacturer practices about which dealers have most strongly complained are not of recent origin. In the earliest stages of the automotive industry's development, the manufacturers' principal concern was building enough machines to supply a constantly widening market. Expansion of plant facilities was, therefore, often regarded as more important than the development of a centrally controlled sales organization.<sup>35</sup> But early in the history of car marketing, the relationship between dealer and manufacturer took on aspects of supervision and control. While the dealer between 1900 and 1920 did assume increasing responsibilities and perform successively greater functions, he did not become an independent merchant.<sup>36</sup> Although manufacturers realized that labelling the dealer an "exclusive agent" might burden them with responsibilities they were unwilling to assume and ceased using that term, the dealer's position remained unchanged.<sup>37</sup> Other methods of control

29. 1939 FTC REP. 139. See *H.R. Hearings, Dealer Franchises* 69, 164; 7 *S. Hearings, General Motors* 3194.

30. 1939 FTC REP. 139-46.

31. PALAMOUNTAIN 110-11.

32. S. REP. No. 3791, 84th Cong., 2d Sess. 3-4 (1956). See, e.g., *United States v. General Motors Corp.*, 121 F.2d 376, 401-03 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941) (complementary financing arrangements).

33. A famous abuse of this assured market occurred in 1920, when Henry Ford unloaded 30,000 Model Ts on his dealers in order buy out certain minority shareholders. See PALAMOUNTAIN 118-19.

34. See *United States v. General Motors Corp.*, 121 F.2d 376, 398 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941); 1939 FTC REP. 148; *H.R. Hearings, Dealer Franchises* 381.

35. 1939 FTC REP. 106.

36. PALAMOUNTAIN 108; 1939 FTC REP. 106-08. Dealers were recruited largely from those groups of small merchants who were best able to service cars. A dealer's capital investment often included no more than a single demonstration auto. See *Banker Bros. Co. v. Pennsylvania*, 222 U.S. 210 (1911) (1905 Pierce franchise); *HEWITT* 18-22.

37. The dealer was called an exclusive agent in early dealer franchises. See, e.g., *Illsley v. Peerless Motor Car Co.*, 195 Ill. App. 572 (1915) (1903 franchise); *Garfield v.*

already present in early franchise contracts, such as the much-litigated Peerless franchise dating back to 1902, could, with the help of freedom of contract, be refined to such a degree that resort to agency structure was unnecessary.<sup>38</sup>

The movement toward greater control received strong impetus in the waning of the first seller's market in the 1920's. From then on, manufacturers were compelled to pay increasing attention to retailing problems.<sup>39</sup> They learned that the dealer is a "principal competitive weapon." For through the dealer the manufacturer has contact with the public, and upon the sales of the dealer "rests the success or failure of the whole manufacturing process." And "since automobile sales usually require considerable service, demonstration, and post-sale service, manufacturers check on the performance of these tasks."<sup>40</sup>

With the gradual development of the terms of the franchise, several unique features have become apparent. Today the dealer is required to develop his territory to the satisfaction of the manufacturer, a requirement buttressed by a host of ancillary provisions. Termination clauses are designed to assure adequate performance<sup>41</sup> and attempt to insulate the manufacturer from liability. But franchises do not compensate the franchised dealer by giving him "territorial security," a protected sales area. Small wonder dealers complained that the modern franchise is "one-sided," "neither contract, license or agreement."<sup>42</sup> In response to dealer complaints, adverse public opinion and new federal legislation, the terms of franchises have recently been considerably changed in the dealers' favor.<sup>43</sup> A brief historical survey of the most important clauses, their changes and development is necessary to an understanding of the present franchise system.

#### *Control over Dealer's Operations*

Early in the history of automobile marketing, the manufacturer attempted to assure adequate territory development by the dealer, at that time called an

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Peerless Motor Car Co., 189 Mass. 395, 75 N.E. 695 (1905) (same). The change took place about 1910. 7 S. Hearings, *General Motors* 3194; 1939 FTC REP. 107. Manufacturers were no longer willing to assume the responsibilities inherent in an agency system. *United States v. General Motors Corp.*, 121 F.2d 376, 399-400 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941); H.R. Hearings, *Dealer Franchises* 69 (statement by Hewitt). Modern franchises expressly disclaim an agency relationship. 1957 Ford Sales Agreement § 13; 1956 General Motors (Pontiac) Dealer Selling Agreement § 28. The non-agency clauses have been honored by most courts. See Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 220 n.5 (1957).

38. See *Illsley v. Peerless Motor Car Co.*, 177 Ill. App. 459 (1913), *modified*, 195 Ill. App. 572 (1915); *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 99 N.E. 221 (1912); *Garfield v. Peerless Motor Car Co.*, *supra* note 37.

39. 1939 FTC REP. 109-10; PALAMOUNTAIN 108.

40. PALAMOUNTAIN 108; 1939 FTC REP. 110-14; Brown & Conwill, *supra* note 37, at 220-21.

41. PALAMOUNTAIN 109.

42. See notes 20-21 *supra* and accompanying text.

43. See *Business Week*, Feb. 2, 1957, p. 25; *Automotive News*, April 29, 1957, p. 1, col. 1. See also notes 80-83 *infra* and accompanying text.

exclusive agent.<sup>44</sup> Two clauses were the subject of experiment: one imposed upon the dealer a duty to take a minimum number of cars,<sup>45</sup> the other a duty to use his best efforts in the development of his territory.<sup>46</sup> The first type was soon abandoned; it made for inelasticity and the manufacturer realized that the second type could provide sufficient protection.<sup>47</sup> In fact the latter has proved to be of great importance, particularly since the dealer's efforts were tested by the manufacturer's "satisfaction."<sup>48</sup>

Until recently, no objective criteria measuring satisfaction were provided.<sup>49</sup> The manufacturer alone had discretion to determine the meaning of adequate development of territory: in substance the term means quotas. Telegrams sent out by factory representatives to dealers and later submitted in evidence at recent congressional hearings indicate that the manufacturer measured performance in terms of "percentages of price class" and "national average."<sup>50</sup> Protected by satisfaction clauses, manufacturers pressured dealers for orders until these tests were met.<sup>51</sup> In recently amending its development of territory clause, General Motors has made a beginning in spelling out objective criteria of satisfaction.<sup>52</sup>

44. See *H.R. Hearings, Marketing Legislation 94* (statement by Hewitt).

45. See the franchises discussed in *Illsley v. Peerless Motor Car Co.*, 177 Ill. App. 459 (1913), *modified*, 195 Ill. App. 572 (1915); *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 99 N.E. 221. (1912).

46. See, *e.g.*, *Randall v. Peerless Motor Car Co.*, *supra* note 45; *Garfield v. Peerless Motor Car Co.*, 189 Mass. 395, 75 N.E. 695 (1905).

47. "The agreement between the manufacturer and the franchise holder sets forth the conditions governing the purchase at wholesale of automobiles by the dealer. However, it does not include provisions regarding maximum and minimum quantities of merchandise to be furnished or purchased. In a mass production industry such as the automobile industry, provisions of this kind would be burdensome, and extremely hazardous for both manufacturer and dealer—much more so for the dealer. Few, if any, dealers have available the information and data (other than such as pertain to their local situations) to make a reasonably accurate estimate of their requirements, a year in advance—or even 3 months in advance as is necessary in the automobile industry. They rely to a great extent on the manufacturer."

*H.R. Hearings, Marketing Legislation 225* (statement by Curtice).

48. The satisfaction clause first appeared in the 1907 contract litigated in *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912). See also S. REP. No. 2791, 84th Cong., 2d Sess. 6 (1956).

49. "Another thing we have done is to simplify the language of the contract. It no longer contains such ambiguous and all-inclusive phrases relating to dealer obligations as 'to the satisfaction of seller.'" *H.R. Hearings, Marketing Legislation 228* (statement by Curtice).

50. G.M. REP. 83-84. See also *H.R. Hearings, Dealer Franchises 155*.

51. See note 50 *supra*. See also *H.R. Hearings, Dealer Franchises 32*. For analysis of the economic basis of manufacturer-dealer "force-feeding" of unwanted shipments, see S. REP. No. 2791, 84th Cong., 2d Sess. 4 (1956).

52. Section 14 of the 1956 Pontiac franchise reads, in part:

"Dealer shall provide satisfactory sales performance and render satisfactory service to owners in the area described in Paragraph First. Evaluation of Dealer's



Nonetheless, manufacturer control over the meaning of satisfaction clauses remains widespread. This practice points to a basic conflict of interests between manufacturer and dealer. For the dealer, the cost of selling an additional unit may be greater than the revenue derived from its sale. The dealer's operating capacity may be limited; handling extra cars may entail the purchase of new, or the costly crowding of old, facilities. Accordingly, it may be against the dealer's interest to push sales beyond this point. But the unit costs for the manufacturer tend to decrease with increased production.<sup>53</sup> He will therefore pressure the dealer to increase his volume of sales.<sup>54</sup>

To secure the goal of market penetration, franchises commonly contain many other provisions designed to ensure that the dealer performs to the manufacturer's satisfaction. Manufacturer control over the dealer's operation is not limited to supervision of the development of the dealer's territory. The judgment of the manufacturer has supplemented, if not replaced, that of the dealer on retail merchandising operations typically reserved to the retailer's judgment. The General Motors contract of 1955, for example, expressly stipulated that the dealer must devote his full time, attention and energy to the conduct of his business—a provision which was modified, however, in 1956.<sup>55</sup> Similarly, by express provision, Packard and Nash contracts as late as 1948 attempted to make sure that other business interests of the dealer did not interfere with

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sales performance shall be based on the relationship of Dealer's sales of new Pontiac passenger cars in such area, to the sales of other makes of passenger cars directly competitive therewith both in price and in product in such area, as compared to a similar relationship of the sales of new Pontiac passenger cars to other makes of passenger cars directly competitive therewith specifically in the Pontiac Zone area wherein Dealer is located, but not necessarily to the exclusion of the Pontiac Regional area or the National area. Such evaluation shall be based on records generally accepted for such purposes by the automobile industry and shall also take into account other pertinent factors, such as the trend of Dealer's sales performance over a reasonable period of time, the availability and the delivery of Pontiac passenger cars to Dealer, and local conditions directly affecting such sales performance."

53. Notes, 63 HARV. L. REV. 1010, 1011 (1950), 31 IND. L.J. 233, 235 (1956).

54. S. REP. No. 2791, 84th Cong., 2d Sess. 4 (1956). This disparity of interests is reflected in the respective profit figures of manufacturer and dealer. See *H.R. Hearings, Dealer Franchises* 39, 151, 270 (profit figures of the Ford Motor Co. and its dealers). While the average dealer's report displays low profits as a percentage of gross sales, a more accurate indicium of the dealer's financial standing is found in the ratio of profits to investment capital. *H.R. Hearings, Dealer Franchises* 386-87 (statement by the Ford Motor Co.); see also Fulda, *The Automobile Dealer Franchise Act of 1956: A Dissent*, 2 ANTITRUST BULL. 367, 374 n.19 (1957).

The pressure exerted by the manufacturer has been relieved by the inclusion in some franchise agreements of a clause assuring allowances for unsold cars. See 1956 General Motors (Pontiac) Dealer Selling Agreement §§ 6-7; 1957 Ford Sales Agreement § 8.

55. 1955 General Motors (Chevrolet) Dealer Selling Agreement § 11. See also the amusing attitude of one successful dealer with regard to this clause, 7 S. *Hearings, General Motors* 3445-47; cf. 1956 General Motors (Pontiac) Dealer Selling Agreement, General Purposes; 1957 Ford Sales Agreement, Preamble.

his duties under the selling agreement. Furthermore, franchises contain detailed provisions dealing with the "operating requirements" of the dealer.<sup>56</sup> Under this heading fall clauses defining satisfactory location of the dealer's place of business, as well as those regulating sales and servicing facilities, parts, accessory and used car sales, advertising and sales personnel.

In addition, the dealer, in the interest of establishing production schedules and evaluating current market trends, has to submit every month a "three months' estimate of requirements" and a "ten day report showing retail sales of both new and used cars made during said period, new and used car stocks, and unfilled orders on hand at the end of said period."<sup>57</sup> All this information must be supplied on forms furnished by the manufacturer.<sup>58</sup> Furthermore, dealers, however small, must adopt complex and uniform accounting systems.<sup>59</sup> Finally and most important, the franchise contract gives the manufacturer power to determine the dealer's minimum capital requirements.<sup>60</sup>

Although a number of clauses controlling the dealer's activities have disappeared in recent years, the practices these clauses were designed to foster have, in several instances, remained unchanged. Many older franchises expressly required the dealer to stock and use only factory parts and accessories.<sup>61</sup> And, "that priceless ingredient"<sup>62</sup> inherent in all franchises, namely, the administration of the contract, induced dealers to finance their wholesale purchases and retail sales through finance companies chosen by or even affiliated with the manufacturer.<sup>63</sup> While franchises since 1942 no longer contain express provisions tying the dealer to the manufacturer's products, the practice of tying has continued to a substantial degree, as have arrangements for financing

56. AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 14 (Bus. Rel. Inst. ed. 1948).

57. 1956 General Motors (Pontiac) Dealer Selling Agreement § 2B; 1957 Ford Sales Agreement § 2(g). For the reasons underlying such report requirements, see note 47 *supra*. See also 1957 Ford Sales Agreement, Preamble.

58. 1956 General Motors (Pontiac) Dealer Selling Agreement §§ 2 A, B.

59. See, e.g., 1956 General Motors (Pontiac) Dealer Selling Agreement §§ 13, 16; 1957 Ford Sales Agreement §§ 2 (f), (n); G.M. REP. 88. See also Note, 63 HARV. L. REV. 1010, 1018 n.79 (1950) (inspection of dealers' accounts).

60. See, e.g., 1955 General Motors (Chevrolet) Dealer Selling Agreement § 14. This provision was later made more flexible. See 1956 General Motors (Pontiac) Dealer Selling Agreement § 12. For a considerably less restrictive approach to capital structure requirements, see 1957 Ford Sales Agreement § 2(c).

61. See 1939 FTC REP. 260-78, 1062, 1069; PALAMOUNTAIN 113.

62. 1939 FTC REP. 139.

63. The methods used by manufacturers to persuade dealers to co-operate with selected finance companies are described in *United States v. General Motors Corp.*, 121 F.2d 376, 398-99 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

The development of the finance company as an institution in automobile distribution is attributable largely to provisions in manufacturer-dealer contracts requiring immediate cash payment for all purchases. See EPSTEIN, *THE AUTOMOBILE INDUSTRY* 139-42 (1928). See also PALAMOUNTAIN 114-16 (discussion of role of manufacturer-controlled finance companies).

through selected finance companies.<sup>64</sup> Conversely, retail price maintenance clauses, a feature of early franchise contracts, have been completely eliminated.<sup>65</sup>

Until 1956, the manufacturer was able to charge the dealer rail freight from Detroit, even when the automobile was assembled at a point nearer the dealer's place of business or was shipped by cheaper means of transportation. Thus the manufacturer profited from phantom freight charges.<sup>66</sup> In the most recent franchises, the manufacturer still determines the mode of transportation in the interest of a smooth outflow of his products, since warehousing is not available to him.<sup>67</sup> Phantom freight charges, however, were abolished in 1956 but not without price increases.<sup>68</sup>

#### *Duration of Franchises and Cancellation Terms*

Early automobile franchise contracts reflected the seasonal fluctuation in demand for the product.<sup>69</sup> Franchises typically provided for termination at the end of a model year. In addition, the manufacturer could cancel for cause.<sup>70</sup> The growing financial strength of manufacturers was reflected by changes in duration clauses; the contract, though often providing for automatic extension if not cancelled, terminated or superseded by a new agreement<sup>71</sup>—thus giving the semblance of a permanent arrangement—could be terminated by either

64. See G.M. REP. 67-76 (finance and insurance subsidiaries), 97-118 (parts and accessories); text at notes 167-72 *infra*; note 183 *infra*.

The 1957 Ford Sales Agreement, however, expressly negates any duty of exclusive representation. Section 3 provides:

"The Dealer reserves the right to make purchases from others without obligation or liability of any kind to the Company, provided that the Dealer shall not be relieved of any duty, obligation or responsibility assumed by the Dealer under this agreement; and the Company reserves the right to make sales to others (including without limitation other dealers) without obligation or liability of any kind to the Dealer, provided that the Company shall not appoint an additional dealer or additional dealers in vehicles in the Dealer's locality without first having made a survey, analysis or review which, in the opinion of the Company, reveals a need therefor. The Dealer shall be given a reasonable opportunity to discuss with Company representatives the need for the appointment of any such additional dealer or dealers prior to the making of such appointment."

See also 1957 Studebaker-Packard Sales Agreement § 2.

65. See HEWITT 24-89; AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 15 (Bus. Rel. Inst. ed. 1948); Comment, 34 ILL. L. REV. 956, 961 (1940). See also Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 841 & n.47 (1955) (Ford Motor Co.'s attitude towards resale price maintenance).

66. 1944 FTC REP. 93-94; 1939 FTC REP. 108.

67. See G.M. REP. 88; *H.R. Hearings, Marketing Legislation 284*, 317. See also *General Motors Corp. v. Blevins*, 144 F. Supp. 381, 397 (D. Colo. 1956). *But see* 1957 Chrysler (Plymouth) Direct Dealer Agreement § 11 (allowing dealer to designate type of transportation).

68. See *H.R. Hearings, Dealer Franchises 34-35*.

69. See HEWITT 12, 24-41.

70. *Ersine v. Chevrolet Motors Co.*, 185 N.C. 479, 117 S.E. 706 (1923). See also HEWITT 24, 41.

71. 1939 FTC REP. 123.

party on short notice, even without cause.<sup>72</sup> The manufacturer alone profited from such clauses; for the dealer who had to protect his investment, the power to terminate was usually empty.

Over the protests of its dealers, General Motors in 1944 returned to a one-year franchise which could, however, be terminated only for cause.<sup>73</sup> This modification may have been motivated by a desire to escape regulatory provisions enacted by state legislatures prohibiting the manufacturer to cancel "unfairly and without regard to the equities."<sup>74</sup> Whatever its origin, the change enabled the manufacturer to accomplish by nonrenewal what he had been able to do before by cancellation, without fear of court intervention. Under this type of contract, General Motors has hardly ever needed to invoke the cancellation for cause provisions.<sup>75</sup> By 1948, General Motors' example had been followed by three other manufacturers, though not by Ford or Chrysler.<sup>76</sup> Under the pressure of public opinion, General Motors and Ford have recently changed their dealer franchises to run for five years if the dealer so wishes, but the five-year contract still contains a cancellation for cause provision.<sup>77</sup> Most important, the cancellation for cause provision is expressly coupled with the satisfaction clauses.<sup>78</sup> The manufacturer is entitled to cancel if the dealer fails to comply with any of the clauses geared to the manufacturer's satisfaction requirement. Cancellation has thus remained one of the chief sources of the manufacturer's power.<sup>79</sup>

To alleviate the hardship of cancellation or nonrenewal, recent versions of franchises have made several important innovations. Franchises now contain elaborate provisions for the succession of a qualified person—generally the dealer's son-in-law, or a person nominated by the dealer—participation by the dealer's widow, protection of the premises in case of termination and ordinary liquidation and assistance to the estate in the event of death.<sup>80</sup> Recent franchise

72. "Threats or hints" of cancellation "can be equally effective" in exercising control over the dealer's operation. PALAMOUNTAIN 109.

73. 7 *S. Hearings, General Motors* 3693-94.

74. See AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 23-24 (Bus. Rel. Inst. ed. 1948) (statement by Coyle). See also Note, 63 HARV. L. REV. 1010, 1014-15 (1950); note 229 *infra*.

75. 7 *S. Hearings, General Motors* 3693. For termination figures between 1952 and 1954, see *H.R. Hearings, Dealer Franchises* 166-67. See also Note, 63 HARV. L. REV. 1010, 1014 (1950).

76. See AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 14 (Bus. Rel. Inst. ed. 1948).

77. For the origin of the General Motors five-year franchise, see 7 *S. Hearings, General Motors* 3555-56. The contract may be terminated prior to the expiration of the five-year term. *Id.* at 3688-700. See, generally, *Automotive News*, June 18, 1956, p. 2, cols. 1-3.

78. 1956 General Motors (Pontiac) Dealer Selling Agreement § 23.

79. Many dealers complain that mere extension of the franchise to five years is not enough in itself to provide them with the security they need. *H.R. Hearings, Dealer Franchises* 166.

80. See, *e.g.*, 1956 General Motors (Pontiac) Dealer Selling Agreement §§ 24D, 26; 1957 Ford Sales Agreement §§ 20, 21, 22. See also 1 *S. Hearings, Marketing Practices* 688-89.

terms also impose upon the manufacturer a duty to assist the dealer in protecting his investment even in cases of justifiable termination.<sup>81</sup> In the General Motors franchise, for instance, the manufacturer not only must repurchase parts, but must also help the dealer to dispose of real estate, whether owned or leased. The manufacturer may even have a limited duty to purchase or lease the premises "at a fair and reasonable value to be determined by independent appraisal." The negotiations necessary to meeting these obligations must be conducted "with the utmost good faith."<sup>82</sup> However, the dealer's right to claim the benefits of the provision for assistance is conditioned on his compliance with elaborate provisos and releases aimed at protection of the manufacturer. The new Ford franchise has parallel provisions, although seemingly of a more limited nature.<sup>83</sup>

#### *Obligations of the Manufacturer to Deliver and Exculpation Clauses*

Early franchises were either silent or vague on the manufacturer's duty to deliver. By 1908, however, at least one contract contained a clause making the dealer's orders not binding on the manufacturer until accepted, and such a clause had come into general usage by 1939.<sup>84</sup> Formerly, franchise contracts also contained iron-clad provisions relieving the manufacturer from liability in case of nondelivery, however caused.<sup>85</sup> Present franchise contracts relieve the manufacturer from liability for failure or delay in filling orders only if nondelivery arises from reasons beyond his control.<sup>86</sup> But the manufacturer is ultimately protected by clauses which date back as far as 1914 and provide that termination of the franchise contract cancels all unfilled orders.<sup>87</sup>

#### *Exclusive Arrangements*

Although early franchise contracts gave the dealer a large protected territory without requiring him to carry only the manufacturer's product, the development of exclusive representation clauses has limited the dealer's sources of supply.<sup>88</sup> The dealer was originally protected even against raids on his territory

81. See, e.g., 1956 General Motors (Pontiac) Dealer Selling Agreement § 26; 1957 Ford Sales Agreement §§ 21, 22. *But see id.* § 23 (waiver provision).

82. 1956 General Motors (Pontiac) Dealer Selling Agreement § 26 C.

83. 1957 Ford Sales Agreement § 23.

84. See 1939 FTC REP. 133. *Compare* Oakland Motor Car Co. v. Indiana Automobile Co., 201 Fed. 499, 504 (7th Cir. 1912), *with* Chevrolet Motor Co. v. Gladding, 42 F.2d 440 (4th Cir. 1930); Meade v. Poppenberg, 167 App. Div. 411, 153 N.Y. Supp. 182 (4th Dep't 1915). See also 1956 General Motors (Pontiac) Dealer Selling Agreement §§ 2 C, D.

85. See Studebaker Corp. v. Wilson, 247 Fed. 403 (3d Cir. 1918). See also Ford Motor Co. v. Maddox Motor Co., 123 Tex. 608, 73 S.W.2d 517 (Tex. App. 1934); 1939 FTC REP. 142. *But see* Ellis v. Dodge Bros., 246 Fed. 764 (5th Cir. 1917).

86. See, e.g., 1956 General Motors (Pontiac) Dealer Selling Agreement § 20.

87. See, e.g., 1956 General Motors (Pontiac) Dealer Selling Agreement § 24 A, B. See also Ford Motor Co. v. Kirkmyer Motor Co., 65 F.2d 1001 (4th Cir. 1933); Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324 (7th Cir. 1912).

88. See 1939 FTC REP. 117. A variety of exclusive arrangements exist. The term "may have reference to any one of, or combination of, the following situations: (1) re-

by the manufacturer.<sup>89</sup> Gradually, the manufacturer began to reserve for himself the qualified right to sell directly within the dealer's territory. The dealer's territorial security was further diminished by the manufacturer's successful insistence on his right to appoint other dealers within a given territory. Nevertheless, the resulting non-exclusive dealership was protected against raiding by outsiders, cross-selling and bootlegging.<sup>90</sup>

Between 1949 and 1952, the Antitrust Division of the Department of Justice forced the industry to drop both territorial security and exclusive representation clauses as express terms of the contract.<sup>91</sup> The allied provision prohibiting a franchised dealer from selling new cars to anyone but a consumer or another franchised dealer was also dropped.<sup>92</sup> The elimination of this clause may have contributed to bootlegging, about which most dealers complain bitterly.<sup>93</sup>

Thus the dealer lost the benefits of territorial security. He did not, however, cease to be the exclusive representative of the manufacturer. The cost of carrying multiple lines forced him to accept exclusive representation for the benefit of the manufacturer as a matter of hard economic fact.<sup>94</sup>

#### *Dealer Relations Boards*

Recently attempts have been made by industry to answer dealers' grievances through utilization of dealer relations boards, consisting of top manufacturing executives. These efforts have not yet succeeded in solving the plight of the dealer. The boards have been criticized for combining the functions of prosecutor, judge and jury.<sup>95</sup> To counter this criticism, General Motors in 1956 revised its grievance procedure by selecting an umpire chosen on the basis of

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stricted sales area—the dealer may not sell to customers outside of a designated territory without incurring penalties; (2) exclusive agency—the dealer is assured of being the only outlet of the manufacturer within a certain area; (3) exclusive representation—the dealer is required to handle only the products of one manufacturer." Comment, *The Anti-Trust Laws and the Automobile Industry*, 34 *ILL. L. REV.* 956, 959 (1940).

89. 1939 *FTC REP.* 118-21. See also *Meade v. Poppenberg*, 167 *App. Div.* 411, 153 *N.Y. Supp.* 182 (4th Dep't 1915).

90. *HEWITT* 114. The dealer was protected by an elaborate penalty or service charge system provided in the contract. For a description of the various techniques used by manufacturers in operating the system, see 1939 *FTC REP.* 117; *H.R. Hearings, Marketing Legislation* 297. The manufacturers were burdened with considerable administrative difficulties under these plans and, eventually, they were abandoned. See note 149 *infra*.

When a dealer's territory had been invaded by another, the courts often allowed him to enforce his rights under the contract against the violator directly. See *Johnston v. Franklin Kirk Co.*, 83 *Ind. App.* 519, 148 *N.E.* 177 (1925); *McConkey v. Smith-McKay Motor Co.*, 112 *Kan.* 560, 211 *Pac.* 631 (1923); *Kessler v. A. W. Haile Motor Co.*, 127 *Misc.* 413, 217 *N.Y. Supp.* 182 (*Sup. Ct.* 1926). *But cf.* *Doering v. Denison*, 178 *S.W.* 1018 (*Tex. Civ. App.* 1915).

91. See notes 147, 167-69 *infra* and accompanying text.

92. *HEWITT* 232.

93. See 1 *S. Hearings, Marketing Practices* 5.

94. *HEWITT* 232.

95. *McHugh, The Automobile Dealer Franchise Act of 1956*, 2 *ANTITRUST BULL.* 353, 356; *G.M. REP.* 93.

special qualifications and experience.<sup>96</sup> His function is to adjudicate appeals, at which the dealer may be represented by counsel.<sup>97</sup> Moreover, several companies, following another innovation of General Motors, have appointed a vice-president to handle dealer relations.<sup>98</sup>

#### THE FRANCHISE SYSTEM AND COMMON LAW OF CONTRACTS

The case law on automobile dealer franchises, dating from the early history of the industry, dramatically reveals the unending attempts of the dealers to break the vertical power of the manufacturer, exercised through the franchise terms. Indeed, the case law on dealer franchises generally is in large measure composed of suits involving automobile franchises. These suits have been founded on a variety of alleged injuries. Many early cases involved claims for commissions lost through nondelivery or invasion of the dealer's territory by the manufacturer.<sup>99</sup> Others sought return of deposits made by the dealer on cars which the manufacturer never shipped.<sup>100</sup> Today these situations have given way to damage suits by dealers against manufacturers for "wrongful" termination of a franchise contract, failure to deliver cars ordered before the franchise was effectively cancelled or had expired, or failure to deliver in accordance with a separate agreement. In addition, actions have frequently been brought for breach of contracts to give, extend or renew a franchise. Dealers have even sued manufacturers for fraud and deceit in making oral promises which induced them to enter into a contract.<sup>101</sup> The amount of litigation reflects the size of the stakes involved. A terminated dealer frequently is unable to get a franchise from another manufacturer. Since his capital investment is so specialized that it cannot easily be transferred to other kinds of business, termination has often been called an economic death sentence.<sup>102</sup> And many dealers are large retailers, able to afford the cost of fighting this death sentence at the appellate court level.

96. See *H.R. Hearings, Dealer Franchises* 558 (statement of Hufstader); *Automotive News*, June 4, 1956, p. 1, col. 5.

97. See *THE GENERAL MOTORS DEALER RELATIONS UMPIRE PLAN: RULES AND PROCEDURE* (1956).

98. See *Automotive News*, March 12, 1956, p. 1, col. 2.

99. *E.g.*, *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 600, 110 Pac. 460 (1910); *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 99 N.E. 221 (1912); *Garfield v. Peerless Motor Car Co.*, 189 Mass. 395, 75 N.E. 695 (1905); *Dildine v. Ford Motor Co.*, 159 Mo. App. 410, 140 S.W. 627 (1911) (1908 contract); *Fredrickson v. Locomobile Co.*, 78 Neb. 775, 111 N.W. 845 (1907).

100. *E.g.*, *Goodyear v. H. J. Koehler Sporting Goods Co.*, 159 App. Div. 116, 143 N.Y. Supp. 1046 (1st Dep't 1913), *aff'd*, 220 N.Y. 749, 116 N.E. 1047 (1917) (contract held lacking in mutuality). For discussion of the case, see 1 CORBIN, *CONTRACTS* § 168 n.91 (1950).

101. Most damages suits were brought in contract. Only occasionally have dealers sued in tort. See *Cadillac LaSalle Co. v. Claude Nolan, Inc.*, 118 Fla. 250, 158 So. 883 (1935); *Sorensen v. Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754 (1927). For a discussion of private antitrust suits, see notes 200-14 *infra* and accompanying text.

102. See, *e.g.*, *H.R. Hearings, Marketing Legislation* 288.

Manufacturers responded to the challenge of litigation by attempting to draft franchise clauses insulating them from liability and the risk of having a jury determine both liability and measure of damages. Although unsuccessful in eliminating litigation altogether, the draftsmen have prevented the dealers from winning a great percentage of their lawsuits. Like the draftsmen of insurance policies, the authors of dealer franchises have been engaged in a continuous process of rewriting, raising new obstacles to recovery whenever the old are surmounted.

An initial block confronting the dealers lay in the argument that a franchise, marked by the absence or indefiniteness of obligations, was not a valid and enforceable contract. Until recently, the validity issue was continuously raised in franchise litigation,<sup>103</sup> the defendant manufacturer almost invariably arguing that the agreement lacked mutuality of "assent and obligation" and merely set "forth the basis on which orders were to be handled."<sup>104</sup> This strategy arises naturally out of the institutional framework surrounding franchise agreements. After a dealer has committed his capital to a franchise, protection of the manufacturer's interest does not depend on the availability of legal sanctions. In fact, legal invalidity of the franchise, precluding court control, adds to the strength of the manufacturer's nonlegal sanctions.<sup>105</sup>

For many decades, the invalidity argument may have been the most powerful weapon available to manufacturers in defending damage suits by dealers. It was honored by most courts, provided the manufacturer engaged in careful draftsmanship. If the contract gave each party the right to terminate on short notice, with or without cause, or for just cause—the meaning of the term was left open—it was unenforceable either for lack of definiteness or for lack of mutuality.<sup>106</sup> This result followed even more readily when the franchise further

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103. Note, *Options and Consideration in Automobile Dealership Agreements*, 22 VA. L. REV. 324 (1936); 24 VA. L. REV. 680 (1938).

104. In most cases, dealers have understandably argued in favor of the validity of the franchise contract, but occasionally they, rather than the manufacturer, have claimed invalidity. Such has been the case in the rare instances where the dealer has been sued for non-acceptance of cars, see *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324 (7th Cir. 1912), and more importantly in damage suits instituted by dealers for non-delivery in breach of accepted orders. With the help of the invalidity argument, the dealer has here attempted to overcome the manufacturer's defense that under the terms of the franchise nondelivery did not make him liable. See *Myers Motors, Inc. v. Kaiser-Frazer Sales Corp.*, 178 F.2d 291 (8th Cir. 1949).

105. Cf. *H.R. Hearings, Dealer Franchises* 69 (statement by Hewitt).

106. *Huffman v. Paige-Detroit Motor Car Co.*, 262 Fed. 116 (8th Cir. 1919); *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499 (7th Cir. 1912); *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324 (7th Cir. 1912). For a critical discussion of the lack of mutuality and indefiniteness arguments, see *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 F.2d 3 (2d Cir. 1928); *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675, 678 (2d Cir. 1940); Corbin, *The Effect of Options on Consideration*, 34 YALE L.J. 571, 586, 588 (1925); Notes, 37 MICH. L. REV. 132 (1938), 22 VA. L. REV. 324 (1936).



granted the manufacturer the right to change prices or refuse requisitions and freedom from liability in case of cancellation or failure to deliver unaccepted orders.<sup>107</sup> The lack of mutuality defense failed only if the right of the manufacturer to terminate was anchored in objective criteria, such as "violation of any of . . . [the] provisions [of the contract]"<sup>108</sup> or "violation of any of the conditions."<sup>109</sup> Thus General Motors was unsuccessful in arguing lack of mutuality in a suit for profits lost through nondelivery of cars; the "concession to sell" expressly provided for continuation unless cancelled or terminated for reasons spelled out in the contract.<sup>110</sup>

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107. Cf. *Oakland Motor Car Co. v. Indiana Automobile Co.*, *supra* note 106. Some courts overcame the lack of mutuality difficulty by construing the franchise as a continuing offer for a series of bilateral contracts which the dealer accepted by sending in orders. See *Buick Motor Co. v. Thompson*, 138 Ga. 282, 75 S.E. 354 (1912). Or they found a subsequent oral promise to deliver which became binding by the dealer's action in reliance. See *Erskine v. Chevrolet Motors Co.*, 185 N.C. 479, 117 S.E. 706 (1923).

The courts found it "quite manifest" that the Ford franchise contracts, made terminable at will in 1921, "merely furnished a basis for future dealings to be observed no longer than was mutually satisfactory." They did not constitute "hard and fast commitments of either party if he chose to break away." *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001, 1004 (4th Cir. 1933) (collecting authorities). The Ford dealer franchise did not give the dealer territorial security. See 1921 Ford Sales Agreement § 17; cf. *Moon Motor Car Co. v. Moon Motor Car Co.*, *supra* note 106; note 109 *infra*.

108. *Bendix v. Staver Carriage Co.*, 174 Ill. App. 589, 591 (1912), *modified*, 194 Ill. App. 310 (1915). In *Bendix* the franchise, which was called an "exclusive agency contract" and had a fixed expiration date, was regarded as an agreement to deliver as many cars as the dealer might be able to sell within a definite time at a stipulated price per car. Since the dealer had incurred considerable expenditures in relying on the agreement, it was more than a continuing offer which could be withdrawn at any time. The dealer (on his second appeal) was allowed to recover "to the extent of commissions and discounts" on all cars sold by the manufacturer in his territory. See also *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 F.2d 3 (2d Cir. 1928).

109. *Moon Motor Car Co. v. Moon Motor Car Co.*, *supra* note 108, at 4. Dealer, according to the original terms of the contract, promised to buy within a ten-month period nine hundred cars to be chosen from two specified models; in addition, he promised not to sell any other make of car. Manufacturer did not expressly promise to sell dealer these cars, but he did promise not to sell cars to anyone else within the dealer's district. After its execution the contract was extended and the monthly quota removed. The court had no difficulty in overcoming the lack of definiteness argument and in finding consideration for a valid contract. The defendant, in return for the promise to buy, had granted the dealer a monopoly in the form of territorial security.

110. *Chevrolet Motor Co. v. Gladding*, 42 F.2d 440 (4th Cir. 1930). The report sets forth the most important portions of the 1926 Chevrolet contract: it could be cancelled without notice if the dealer became insolvent, upon ten-days notice if he did not exclusively represent the manufacturer and upon sixty-days notice if any question arose which threatened the mutually satisfactory business relationship. Chevrolet had cancelled for violation of the exclusive representation provision. Since the jury found that the dealer had not violated this clause, the cancellation was ineffective to relieve the manufacturer from liability for nondelivery. The manufacturer argued that he was still not liable because another clause of the contract gave him the right to cancel orders without liability; but the majority of the court held that this privilege could not be exercised arbitrarily. The manufacturer was held liable for nondelivery of all the cars to be furnished over the

In the late thirties, the attitude of the courts toward validity began to change, even with regard to franchises terminable at will.<sup>111</sup> While lack of mutuality continued to be used as a defensive weapon, courts viewing franchise contracts found the "provisions and the acts of the parties are consistent only with the existence of a contract imposing some reciprocal conditions and at least binding upon the parties to some extent."<sup>112</sup> Still, dealers were usually unable to recover, since the manufacturer often had legitimately invoked a termination clause or failed to renew. Even when the dealer succeeded in overcoming these obstacles, the manufacturer could escape liability because the damages claimed were not "within the contemplation of the parties" or because he had successfully insulated himself by nonliability clauses.

### *Termination Clauses and Their Abuse*

After the validity of franchise agreements was established, abuse of termination clauses became a central issue. These clauses usually allowed either manufacturer or dealer to terminate at will or permitted the manufacturer to terminate for "cause"—the violation of a duty imposed upon the dealer by the franchise agreement. The relative importance of these alternatives has varied, their development and use geared to judicial decisions. In *Chevrolet Motor Co. v. Gladding*, for example, the manufacturer, claiming that the dealer had violated his duty to give exclusive representation, invoked a ten-days cancellation clause.<sup>113</sup> Upon the decision that the jury should determine whether the dealer had broken his contract, termination clauses were changed to avoid this juridical risk.<sup>114</sup> Provisions were made for termination at will upon

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year, not merely for the cars which he would have had to furnish if the sixty-days cancellation provision had been exercised.

To escape the implications of the *Gladding* case, General Motors in 1937 followed the Ford example and made its franchises terminable both for cause and at will. And in 1944, over the protest of its dealers, General Motors introduced a one-year franchise terminable only for "cause." This change enabled General Motors to avoid litigation by waiting out the expiration date of the franchise. In fact, termination for cause was invoked only in rare instances, such as death or incapacity of the dealer. Also, probably as a result of *Gladding* and similar cases, manufacturers eliminated clauses requiring dealers to take a certain number of cars. Note, 63 HARV. L. REV. 1010, 1010-12 (1950).

111. See *Buggs v. Ford Motor Co.*, 113 F.2d 618 (7th Cir.), *cert. denied*, 311 U.S. 688 (1940); *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940).

112. *Kane v. Chrysler Corp.*, 80 F. Supp. 360, 362 (D. Del. 1948).

113. 42 F.2d 440 (4th Cir. 1930); see note 110 *supra*.

114. The juridical risk which a large manufacturer faces is exemplified in *Hough v. General Motors Sales Corp.*, 63 F. Supp. 708 (S.D. Cal. 1945). Defendant had cancelled the sales agreement when plaintiff became incapacitated by a paralytic stroke. Plaintiff sued for failure to deliver cars and was awarded \$25,000 damages by the jury despite the fact that defendant had been prohibited by the federal government from manufacturing new cars during the period involved. However, the court granted defendant's motion for dismissal *non obstante veredicto*. See also *Biever Motor Car Co. v. Chrysler Corp.*, 108 F. Supp. 948 (D. Conn. 1952), *aff'd* 199 F.2d 758 (2d Cir. 1953), *cert. denied*, 345 U.S. 942 (1952), dismissing an action for \$950,000 damages caused by nondelivery of cars. Chrysler

short notice in addition to the existing clauses allowing termination for cause.<sup>115</sup> For almost two decades following the *Gladding* case, manufacturers severed their relationships with dealers by invoking the former provisions.<sup>116</sup> And courts honored the manufacturer's argument that a good-faith restriction on the termination at will clause was not intended.<sup>117</sup> The dealer gained protection against abuse of the termination privilege only upon the difficult showing that the manufacturer lacked good faith at the time of entering the contract.<sup>118</sup>

### Oral Contracts

Dealers have occasionally recovered for breach of oral contracts to grant franchises.<sup>119</sup> Even suits based on the allegation that the prospective dealer was induced to enter into the contract by oral promises which the manufacturer did not intend to keep have sometimes been successful.<sup>120</sup> However, cases challenging the manufacturer's privilege not to extend or not to renew have rarely arisen; the practice of waiting out the expiration date, accordingly, seems rewarding.<sup>121</sup> And dealers have usually been unsuccessful when claiming, in the name of good faith dealing, that the manufacturer had made a binding promise not to cancel and that they had spent large sums of money at his in-

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invoked a termination at will provision upon death of a top executive of plaintiff. Plaintiff had alleged that such termination was "in absence of good faith, wrongfully, maliciously and without cause." See also Note, 70 HARV. L. REV. 1239, 1249 n.78 (1957).

115. 1939 FTC REP. 123-24 indicates this was true for contracts of all companies in 1938.

116. Thus they avoided the risk of jury determination of cause. Cf. *Brown & Conwill, Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 222 (1957).

117. See notes 134-35 *infra*.

Dealers often attempt to bolster their arguments by using the decision in *J. R. Watkins Co. v. Rich*, 254 Mich. 82, 235 N.W. 845 (1931), particularly since most franchises are Michigan contracts by express provision. *Watkins*, which did not involve an automobile dealer franchise, held that a power to terminate at will in a commercial transaction must be exercised in good faith. Courts considering automobile dealerships have generally restricted the *Watkins* rule to situations where the defendant never intended to extend the benefits of a contract to the dealer. See *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675, 676-77 (2d Cir. 1940); *Busam Motor Sales, Inc. v. Ford Motor Co.*, 104 F. Supp. 639, 641 (S.D. Ohio 1952); *Philadelphia Storage Battery Co. v. Mutual Tire Stores*, 161 S.C. 487, 159 S.E. 825 (1931), 17 CORNELL L.Q. 479 (1932), 45 HARV. L. REV. 378 (1932).

118. *Green Bay Auto Distributors, Inc. v. Willys-Overland Motors, Inc.*, 102 F. Supp. 151 (N.D. Ohio 1951); see note 117 *supra*.

119. *E.g.*, *Wade v. Ford Motor Co.*, 151 Kan. 425, 99 P.2d 775 (1940) (plaintiff recovered damages incurred through expenditures in reliance on defendant's oral promise to grant Ford dealership); *accord*, *Chevrolet Motor Co. v. Morris Auto Co.*, 269 S.W. 872 (Tex. Civ. App. 1924). *Contra*, *Jordan v. Buick Motor Co.*, 75 F.2d 447 (7th Cir. 1935) (oral agreement which failed to fix duration of the agency, prices and numbers of cars to be handled held lacking in certainty and definiteness).

120. See *Erskine v. Chevrolet Motors Co.*, 185 N.C. 479, 117 S.E. 706 (1923).

121. *But see* *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky. 1949) (action for wrongful refusal to renew failed substantively under allegation of antitrust violation and jurisdictionally under breach of implied contract allegation).

sistence without being able to recoup. Manufacturers generally persuaded the courts that the official who made the oral agreement was unauthorized to do so, that the oral agreement was part of the written contract and thus subject to its limitations, or that it was too indefinite to be enforced.<sup>122</sup> Moreover, the dealers have also failed in their attempts to rely on trade custom for establishing a manufacturer's duty to renew.<sup>123</sup> Nevertheless, the manufacturers have sought further insulation from liability by adding to their franchises a provision which typically states that "continuance of sale of products to dealer or any other act of the seller after termination of this agreement shall not be construed as a renewal of this agreement for any further term."<sup>124</sup>

### *Damages and Exculpation Clauses*

So long as franchises were not found binding, a judgment against the dealer was almost inevitable unless he proved breach of a contract independent of the franchise agreement.<sup>125</sup> Despite some initial success, dealers rarely fared better after the validity of the franchise contract was recognized.<sup>126</sup> Manufacturers turned to the exculpation clause which courts were usually unwilling to disregard. The courts honored not only clauses making all orders subject to acceptance,<sup>127</sup> but also provisions expressly excluding liability for nondelivery.<sup>128</sup>

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122. See *Ford Motor Co. v. Maddox Motor Co.*, 3 S.W.2d 911 (Tex. Civ. App. 1928), *aff'd*, 23 S.W.2d 333 (Tex. App. 1930), *retrial aff'd*, 48 S.W.2d 735 (Tex. Civ. App. 1932), *rev'd*, 123 Tex. 608, 73 S.W.2d 517 (Tex. App. 1934). See the protracted litigation in *Busam Motor Sales, Inc. v. Ford Motor Co.*, 85 F. Supp. 790 (S.D. Ohio 1949), *appeal dismissed*, 185 F.2d 531 (6th Cir. 1950), *retrial*, 104 F. Supp. 639 (S.D. Ohio 1952), *rev'd*, 203 F.2d 469 (6th Cir. 1953), *directed verdict for defendant on retrial*, Civil No. 1824, S.D. Ohio, March 22, 1955.

Some franchise cases, however, apply the so-called Missouri doctrine: "an 'agent' who has incurred expense induced by his appointment may recover it if he has not had sufficient opportunity to recoup it from his business—a doctrine seemingly not applicable when the relationship has already endured for some time." *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675, 676 (2d Cir. 1940). See also *Allied Equipment Co. v. Weber Engineered Products, Inc.*, 237 F.2d 879, 882 (4th Cir. 1956); *Beebe v. Columbia Axle Co.*, 233 Mo. App. 212, 229, 117 S.W.2d 624, 635 (1938).

123. See *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 30 F. Supp. 917, 921-22 (E.D.N.Y.), *aff'd*, 116 F.2d 675, 676-77 (2d Cir. 1940).

124. *E.g.*, 1957 Ford Sales Agreement § 29; 1957 Chrysler (Plymouth) Direct Dealer Agreement § 22.

125. See *Dildine v. Ford Motor Co.*, 159 Mo. App. 410, 140 S.W. 627 (1911) (failure to deliver).

126. *E.g.*, *Chevrolet Motor Co. v. Gladding*, 42 F.2d 440 (4th Cir. 1930); *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 F.2d 3 (2d Cir. 1928). Judge Clark's powerful opinion in the *Bushwick-Decatur* case seems to have turned the tide in the manufacturer's favor. See *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940).

127. See *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499 (7th Cir. 1912). To the extent they are honored, such clauses have effectively eliminated the possibility of finding an implied provision to accept reasonable orders. See Note, 63 HARV. L. REV. 1010, 1016 (1950). *But see* *Marrinan Medical Supply, Inc. v. Ft. Dodge Serum Co.*, 47 F.2d 458, 462-63 (8th Cir. 1931), dealing with an approval clause, where the court

The manufacturer also escaped liability where the franchise contract provided that termination cancelled all outstanding orders or gave the manufacturer an option to repurchase in case of termination.<sup>129</sup> In addition, a provision insulating the manufacturer against claims for reimbursement based on "expenditures in preparation for performance or in performance of the dealer's obligation" has been honored.<sup>130</sup> And manufacturers have frequently been successful in arguing either that the lost profits claimed were too speculative<sup>131</sup> or that the reliance damages sought were not causally connected with definite assurances on their part.<sup>132</sup>

### *The Contract of Adhesion*

The case law on automobile franchises reflects a profound belief in freedom of contract, even though the courts are fully aware of the one-sidedness of the terms of the franchise contract and the plight of the dealer. Thus, time and again, the courts have insisted that the dealer's predicament was of his own making. He had voluntarily signed the franchise contract with all its clauses insulating the manufacturer against liability:

"It appears that the plaintiff has been disappointed in its expectations and has been dealt with none too generously by the defendant; but, while we sympathize with its plight, we cannot say from the evidence before us that there has been a breach of binding contract which would enable it to recover damages. While there is a natural impulse to be impatient with a form of contract which places the comparatively helpless dealer at the mercy of the manufacturer, we cannot make contracts for parties or protect them from the provisions of contracts which they have made for themselves. Dealers doubtless accept these one-sided contracts because they think that the right to deal in the product of the manufacturer, even on his terms, is valuable to them; but, after they have made such contracts, relying upon the good faith of the manufacturer for the protection which the contracts do not give, they cannot, when they get into trouble, expect

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stated: ". . . the clause in question did not give [the manufacturer] the right to reject orders arbitrarily. This is shown conclusively by the provision that the plaintiff should not be liable for failure to fill orders when such failure arose from act of God, fire, strikes . . . . Such a provision would have been unnecessary if [the manufacturer] possessed an arbitrary right of refusal to approve orders."

128. *E.g.*, *Myers Motors, Inc. v. Kaiser-Frazer Sales Corp.*, 178 F.2d 291 (8th Cir. 1949). *But see* *Jay Dreher Corp. v. Delco Appliance Corp.*, 93 F.2d 275, 277 (2d Cir. 1937).

129. *See* *Myers Motors, Inc. v. Kaiser-Frazer Sales Corp.*, *supra* note 128. If the manufacturer's draftsman inadvertently creates a conflict in the clauses of the agreement, the ambiguity will be resolved in favor of the dealer. *See, e.g.*, *Jay Dreher Corp. v. Delco Appliance Corp.*, *supra* note 128.

130. *See* *Busam Motor Sales, Inc. v. Ford Motor Co.*, 104 F. Supp. 639, 644 (S.D. Ohio 1952), *rev'd on other grounds*, 203 F.2d 469 (6th Cir. 1953). *See also* *Berry v. Chrysler Corp.*, 150 F.2d 1002 (6th Cir. 1945); *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001, 1005 (4th Cir. 1933).

131. *See* *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912).

132. *See, e.g.*, *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001, 1005 (4th Cir. 1933).

the courts to place in the contracts the protections which they themselves have failed to insert."<sup>133</sup>

This attitude seems unwarranted. While a franchise may originate as the product of free bargaining inasmuch as a prospective dealer can stay out of the automobile merchandising business altogether, it becomes a glaring example of a contract of adhesion at the time of renewal when the dealer has invested heavily in the business. Should the franchise be cancelled, or not renewed, the dealer must wind up his business with a great financial loss; he will also lose whatever benefits of good will he has gained. To say that the dealer's lack of protection is due to the absence of clauses "they themselves have failed to insert" is, therefore, unrealistic.

Similarly, the courts have been reluctant to read into the terms of the franchise a duty on the part of the manufacturer to exercise the power to cancel only in good faith. This attitude departs from the principle that "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."<sup>134</sup> But it may be justified by the fact that courts, unlike commissions, lack facilities for weighing conflicting economic factors. Although such policy considerations seldom appear in the decisions, they are admirably summarized by Judge Clark in *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*:

"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. . . . 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>135</sup>

#### THE IMPACT OF ANTITRUST LAW

While the status of the dealers as independent businessmen is not safeguarded by the common law of contracts, the power relationship between manufacturer

133. *Ford Motor Co. v. Kirkmyer Motor Co.*, *supra* note 132, at 1006. See also *S. B. McMaster, Inc. v. Chevrolet Motor Co.*, 3 F.2d 469, 473 (E.D.S.C. 1925): ". . . they are entirely within their rights in so framing their contract as to carry out their intention. The intentions of the parties in the absence of any ground of public policy must prevail, and their intention must be gathered from the terms of the contract itself."

134. *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933).

135. 116 F.2d 675, 677 (2d Cir. 1940). In the light of existing case law, it is not surprising that the general counsel of General Motors, when testifying before a Senate subcommittee, conceded that his company was able to defeat, on a motion for summary judg-

and dealer might be affected by application of antitrust law.<sup>136</sup> Either the government, in an attempt to achieve more effective competition, or private persons, by suit for injury arising from violation of antitrust law,<sup>137</sup> could provide dealers with relief from onerous franchise arrangements.<sup>138</sup>

### *Government Intervention*

Determining the extent of antitrust violation was one objective of the 1939 Federal Trade Commission investigation of automobile distribution.<sup>139</sup> The report did not conclude that the law was being violated in any particular. Evidence of antitrust violations, the Commission emphasized, could not be determined from the language of the franchise agreements alone. Rather, the practice under these agreements was crucial to determining the extent to which free competition was actually restrained. The Commission did, however, cite several provisions of existing agreements which might "lend themselves to illegal practices."<sup>140</sup> Significantly, clauses prescribing exclusive representation and territorial protection were among the cited provisions.<sup>141</sup>

### *Restrictions Favoring Dealers*

In addition to providing for territorial security, automobile dealer franchises once contained restrictions on wholesale sales designed to prevent bootlegging.<sup>142</sup> Since these clauses limit competition on the dealer level, they were probably drafted by manufacturers attempting to secure a financially strong dealership

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ment, practically any effort by a dealer to recover damages. G.M. REP. 92; McHugh, *supra* note 95, at 356.

136. The relevant sections of the antitrust laws are Sherman Act §§ 1-2, 26 STAT. 209 (1890), 15 U.S.C. §§ 1-2 (1952); Clayton Act § 3, 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952); Federal Trade Commission Act § 5, 38 STAT. 719 (1914), 15 U.S.C. § 45 (1952).

137. Private antitrust suits are authorized by §§ 4, 5 of the Clayton Act, 38 STAT. 731 (1914), 15 U.S.C. §§ 15, 16 (1952). On the private treble damage action generally, see Comment, 61 YALE L.J. 1010 (1952).

138. Cf. Timberg, *Selection of Customers*, in HOW TO COMPLY WITH THE ANTITRUST LAWS 117, 126 (Van Cise & Dunn ed. 1954).

Private suits by former dealers whose franchises have been cancelled could also provide compensation otherwise denied them. S. REP. No. 2073, 84th Cong., 2d Sess. 3 (1956). See 1939 FTC REP. 1.

139. *Ibid.*

140. *Id.* at 136.

141. *Id.* at 136-39. Neither manufacturers nor dealers are united in their thinking on territorial security. A survey of dealers conducted by the Subcommittee on Automobile Market Practices indicates that they are about evenly divided on the territorial security issue. 1 S. Hearings, *Marketing Practices* 5. The Ford Motor Co. is opposed to the practice, H.R. Hearings, *Dealer Franchises* 403, 428, while General Motors favors it, H.R. Hearings, *Marketing Legislation* 231. Chrysler Corp. and American Motors are neutral. *Id.* at 285, 324.

Yet territorial security is viewed with great disfavor by the antitrust authorities. See 2 S. Hearings, *Marketing Practices* 1474-75. For a defense of the institution, claiming that it has no anti-competitive effect, see H.R. Hearings, *Marketing Legislation* 89.

142. See notes 92-93 *supra* and accompanying text.

system.<sup>143</sup> The FTC's warning that such provisions might be illegal was buttressed by antitrust law developments outside the auto industry. Anti-bootlegging restrictions are clearly restraints on alienation which would be void under the rationale of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>144</sup> as reaffirmed in *United States v. Bausch & Lomb Optical Co.*<sup>145</sup> In the latter case, the Supreme Court found a distributor's agreements limiting his wholesalers' resale avenues to licensee retailers, who in turn could sell only to the public, in violation of the Sherman Act. Although both these cases arose in the context of resale price maintenance schemes, their broad language relating to restraints on alienation leaves little doubt of the illegality of anti-bootlegging arrangements.<sup>146</sup> In addition, the Attorney General has advised the industry to drop territorial limitation clauses from its franchise agreements,<sup>147</sup> even though a manufacturer's right to exercise such control has been upheld.<sup>148</sup> But manufacturers are probably uninterested in maintaining territorial security limitations as a matter of practice. For they have proved difficult and costly to administer,<sup>149</sup> and increased competition among dealers has been an effective means of selling more automobiles.

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143. Assured dealer profits also probably eased the task of building a strong dealer force. See *H.R. Hearings, Marketing Legislation* 95 (statement by Hewitt); Comment, 58 *YALE L.J.* 1121, 1122-23 (1949).

144. 220 U.S. 373 (1911).

145. 321 U.S. 707 (1944).

146. The Department of Justice has relied on these cases in challenging the GM proposal to restrict bootlegging. See *H.R. Hearings, Marketing Legislation* 359; 2 *S. Hearings, Marketing Practices* 1474.

147. Statement of Assistant Attorney General Barnes, *H.R. Hearings, Marketing Legislation* 362. The Department of Justice has indicated, however, that territorial security clauses providing merely for compensation for warranty work will not be regarded as violating the antitrust laws. 2 *S. Hearings, Marketing Practices* 1474-75.

148. *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2d Cir.), *rehearing denied*, 130 F.2d 196 (2d Cir. 1942); see Rifkind, *Division of Territories*, in *How to Comply with the Antitrust Laws* 127, 132 (Van Cise & Dunn ed. 1954).

Relying on *Boro Hall*, the Attorney General's National Committee to Study the Antitrust Laws took the following position with regard to the illegality of territorial security clauses: ". . . the Committee concludes that where an exclusive dealership forms part of an attempt to monopolize prohibited by Section 2, or the lesser degree of unreasonable restraint prohibited by Section 1, it should be held a violation. On the other hand, where an exclusive dealership is merely an ancillary restraint, reasonably necessary to protect the parties' main lawful business purposes, such a dealership should be upheld where its effect is not unreasonably to foreclose competition from the dealer's market." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 29 (1955) (hereinafter cited as *ATT'Y GEN. REP.*).

149. Ford Motor Co. has indicated its opposition to reintroduction of territorial security. See *H.R. Hearings, Dealer Franchises* 403. But the president of General Motors indicates his company was of another opinion:

"Selling out of territory, or cross selling, is another practice which adversely affects the product, the customer, the dealer and the manufacturer. I do not know how many dealers favor territory security and how many do not. The statistics



Manufacturers have, on the other hand, shown interest in curtailing bootlegging. In 1954, General Motors proposed new contract clauses which would restrict bootlegging. Together with the National Automobile Dealers Association, it solicited the Department of Justice to waive criminal proceedings if these clauses were inserted in the franchises. The Department declined;<sup>150</sup> and General Motors correspondingly abandoned the proposal.<sup>151</sup> The possibility of treble damage actions by independent dealers whose business benefits from the receipt of bootlegged cars probably contributed to this decision.<sup>152</sup> Similarly, market conditions may militate against use of anti-bootlegging measures. When manufacturers are battling for sales leadership, the dealer organization is their greatest competitive weapon.<sup>153</sup> Each manufacturer will be uninterested in continuing these restrictions. For their absence tends to facilitate better bargains for the consumer and, concomitantly, greater sales volume for the manufacturer. In these instances, the interests of the manufacturer coincide with those of the consuming public, while the interests of the dealer pull in the opposite direction.<sup>154</sup>

### *Restrictions Favoring Manufacturers*

The manufacturer is vitally interested in the success of his dealer organization since it is his sole outlet to the public.<sup>155</sup> Having built up an individual dealer, the manufacturer naturally wants the dealer to concentrate his efforts on selling the manufacturer's products.<sup>156</sup> Understandably, therefore, he requires the dealer to offer products and services approved by him and no others. This requirement of exclusive representation is not confined to automobiles. It extends to other services "available" from the manufacturer to the dealer, such as finance company arrangements, replacement parts and advertising matter.

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vary on this point. However, my position on this subject is very clear and has been expressed on many occasions.

"It was with great reluctance that we removed the clause on territory security in 1949 on advice of counsel. If today it were considered to be legal, such a clause would be incorporated in the revised agreement."

*H.R. Hearings, Marketing Legislation* 231.

150. See exchange of letters between General Motors and the Department of Justice, *H.R. Hearings, Marketing Legislation* 235-38; letters of the President of General Motors to its dealers, *id.* at 238-41.

151. *But see* proviso as to changes, 1956 General Motors (Pontiac) Dealer Selling Agreement § 27.

152. A used car dealer in Hartford, Connecticut has brought a suit of this kind against General Motors, but no decision has yet been issued. *Hathaway Motors, Inc. v. General Motors Corp.*, CCH TRADE REG. REP. (1955 Trade Cas.) ¶¶ 67994-97 (D. Conn.).

153. See *Standard Oil Co. v. United States*, 337 U.S. 293, 321, 323 (1949) (dissenting opinion).

154. 1939 FTC REP. 1073-77; see note 243 *infra* and accompanying text.

155. See *United States v. General Motors Corp.*, 121 F.2d 376, 387 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941); G.M. REP. 77.

156. *United States v. J. I. Case Co.*, 101 F. Supp. 856, 861 (D. Minn. 1951).

*Contract Provisions.* Following publication of the FTC report, the government did not take any immediate steps to challenge restrictive contractual provisions generally.<sup>157</sup> In the area of tie-in sales, however, the FTC brought proceedings against General Motors which culminated, in 1942, in a cease and desist order, compelling GM to eliminate contract provisions requiring dealers to buy only GM or GM approved parts.<sup>158</sup>

The major case law developments on section 3 of the Clayton Act affecting tying and exclusive representation during the decade following the Federal Trade Commission report took place in fields outside automobile distribution. Yet they have cast doubt on the propriety of auto manufacturers' use of such clauses in their franchise contracts. *Standard Oil Co. v. United States (Standard Stations)*, the most significant in this respect, involved exclusive supply contracts limiting independent dealers' purchases of petroleum products and automobile accessories to those sold by Standard Oil of California.<sup>159</sup> Re-emphasizing the theory of prior Clayton Act cases, the Court commented that tying clauses "serve hardly any purpose beyond the suppression of competition."<sup>160</sup> While conceding that weighty economic arguments might be made in defense of arrangements for exclusive representation,<sup>161</sup> the Court reasoned that Congress established the same standard of illegality for both types of restrictions and that proof of violation of the Clayton Act by either consisted of showing that "competition had been foreclosed in a substantial share of the line of commerce affected."<sup>162</sup> The tying and exclusive representation agreements enabled Standard Stations to control sixteen per cent of retail outlets in the area. Declaring both illegal, the Court emphasized that all major suppliers used these agreements and that the relative share of the market obtained by each

157. See 1944 FTC REP. 115-17. This report also indicates that the manufacturers had voluntarily made a few contract changes.

158. General Motors Corp., 34 F.T.C. 58 (1941), *modified*, 34 F.T.C. 84 (1942).

Discussing the cease-and-desist order of the FTC, which also forbade the manufacturer to continue using coercive practices to obtain tie-in sales of "accessories and supplies," a Senate report remarks:

"The effectiveness of the Commission's 1941 cease and desist order against General Motors can only be measured by its applicability and enforceability. It appears that the Commission's order fails both these tests.

"....

"This Subcommittee, other congressional committees . . . have received numerous complaints from automobile parts jobbers, associations of . . . jobbers, and dealers, that General Motors has violated the Commission's order. The tenor of these complaints was that effective relief could not be obtained from the Federal Trade Commission, and that a full scale study of General Motors' role in the sale and distribution of parts, accessories and supplies was necessary to reveal its coercive marketing practices."

G.M. REP. 101-03.

159. 337 U.S. 293 (1949).

160. *Id.* at 305-06.

161. *Id.* at 306-07.

162. *Id.* at 314.

had remained fairly constant, while new entrants were unable to gain a significant position. Therefore, no showing that defendant company dominated the industry was required.<sup>163</sup> Similarly, any of the Big Three automobile manufacturers will fall within the "substantial share" percentage held by Standard of California.<sup>164</sup> Moreover, for the Big Three, just as for the petroleum companies, "the figures show that as a group they have maintained or improved their control of the market."<sup>165</sup> New entrants have not even succeeded in securing "an insignificant portion of the market."<sup>166</sup> Their failure may be attributed at least in part to their inability to secure a dealer force. Influenced by this development in the case law, the Department of Justice in 1948 reportedly warned the auto manufacturers to discontinue utilizing exclusive representation provisions.<sup>167</sup> In response, General Motors eliminated such clauses from its 1949 contracts.<sup>168</sup> And most of the other companies followed General Motors' lead.<sup>169</sup>

*Practices.* Through dealer "loyalty," however, the manufacturer has retained the benefits of exclusive representation without franchise provisions prohibiting dealers from purchasing cars and allied products elsewhere.<sup>170</sup> This "loyalty" may stem from the reluctance of many dealers to incur the increased overhead inherent in carrying a dual line.<sup>171</sup> But the practice of coercing or threatening to cancel a dealer who made purchases from another manufacturer seems an equally possible cause.<sup>172</sup> In any event, the absence of an agreement or understanding not to deal with a competitor's product may preclude a finding of antitrust violation. *Standard Stations* dealt with express contract provisions, not practices. Moreover, section 3 of the Clayton Act and section 1 of the Sherman Act, the two principal weapons available to the government, do not proscribe "restraints of trade as such" but single out restrictions effected by

163. *Id.* at 309.

164. The defendant oil company had exclusive contracts with 16% of the retail outlets in the area and sold through these outlets 6.7% of the total gasoline tonnage. *Id.* at 295. In 1956 the Big Three auto manufacturers had the following percentages of dealers and cars produced respectively: General Motors 30%, 53%; Ford 20%, 29%; Chrysler Corp. 33%, 15%. *Automotive News*, 1957 Almanac Issue, pp. 22, 87.

165. The quotation is from *Standard Oil Co. v. United States*, 337 U.S. 293, 309 n.12 (1949).

166. Quotation from *id.* at 309. The experience of Kaiser-Frazer illustrates the plight of new entrants. Kaiser-Frazer discontinued automobile production sometime in 1956. From the start, one of their largest problems was the lack of experienced dealers. See *Fortune*, July 1951, pp. 74, 158.

167. See *H.R. Hearings, Marketing Legislation* 89 (statement by Hewitt).

168. See *Business Week*, Oct. 1, 1949, p. 52.

169. See *Business Week*, Aug. 27, 1955, pp. 76-80.

170. Competition may be restrained by practices unsupported by express contract provisions. *Cf.* 1939 FTC REP. 136-39.

171. *Cf.* *United States v. J. I. Case Co.*, 101 F. Supp. 856, 862 (D. Minn. 1951).

172. See *United States v. General Motors Corp.*, 121 F.2d 376, 398 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

certain arrangements.<sup>173</sup> To be sure, section 3 of the Clayton Act applies to sales and contracts restricted by certain conditions, agreements or understandings.<sup>174</sup> But the courts have generally maintained that a refusal to deal is not a contract or sale within the meaning of the Clayton Act,<sup>175</sup> and some case law has treated cancellation or nonrenewal as a refusal to deal.<sup>176</sup> Again, section 1 of the Sherman Act requires a contract or conspiracy.<sup>177</sup> Contract provisions for exclusive representation are no longer employed. Conspiracy would have to be inferred, either between manufacturers and dealers or between the manufacturing company and its officers or subsidiaries. Agreements between parent corporation and subsidiaries which have the effect of restraining action of "strangers" have occasionally been successfully attacked.<sup>178</sup>

The difficulties in proving that the practices of automobile manufacturers meet these statutory requirements can be illustrated by two cases. In *United States v. General Motors Corp.*, the government brought a criminal action under section 1 of the Sherman Act, charging that General Motors and its sales subsidiary had conspired with its finance company subsidiary, General Motors Acceptance Corporation, to force dealers to finance through GMAC.<sup>179</sup> However, the contracts between the dealers and General Motors Sales Corporation contained no clauses restricting the dealers' financing.<sup>180</sup> Nevertheless, coercion was found to exist through manufacturer pressure during renewal conferences, cancellation of the franchises of uncooperative dealers and shipment of wrong color or wrong model cars to such dealers.<sup>181</sup> In addition, the court answered defendants' argument that their affiliation precluded a finding of conspiracy seemingly by holding that suffering the antitrust consequences of separate corporate identity was a necessary concomitant of enjoying its benefits.<sup>182</sup> And the challenged restraints affected the freedom of the dealers, who could not be considered members of the affiliated group.<sup>183</sup>

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173. ATT'Y GEN. REP. 30 (referring specifically to Sherman Act § 1, but applicable with equal force to Clayton Act § 3).

174. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952).

175. See *Nelson Radio & Supply Co. v. Motorola Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 860 (1955).

176. See, e.g., *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954). See also HEWITT 188. Attack under Clayton Act § 3 is made more difficult by an apparent retreat from the extreme position of *Standard Stations*. See Sunderland, *Antitrust Developments: A New Era for Competitive Pricing*, 41 A.B.A.J. 113 (1955). See also ATT'Y GEN. REP. 142-45.

177. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952); Barber, *supra* note 175, at 860.

178. See ATT'Y GEN. REP. 30-36.

179. 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

180. *Id.* at 387.

181. *Id.* at 393-97.

182. *Id.* at 404.

183. *Ibid.*

After the successful criminal proceeding against GMAC, the Department of Justice spent many years trying to secure a divestment of GMAC from the manufacturing com-

It has been suggested that *General Motors* "appears more a case of contract than of conspiracy, the ultimate issue being whether motor-car dealers were required, by an unwritten term of their dealership contracts, to use financing facilities supplied by a subsidiary or affiliated finance company."<sup>184</sup> Some language of the court might support this rationale: "[The defendants] made use of their monopoly over the supply of General Motors cars . . . to force GMAC on dealer purchasers . . . in effect tying the GMAC finance condition and restrictions to the wholesale purchase . . . of General Motors cars."<sup>185</sup> Such an expansion of the "contract theory" would enable the government to attack a tying practice not only under section 1 of the Sherman Act but also as an illegal "understanding" under section 3 of the Clayton Act, which has a lesser standard for judging competitive effect.<sup>186</sup>

However, the government's one attempt to use this strategy failed. In a suit against J. I. Case, a farm equipment manufacturer, it sought, under section 1 of the Sherman Act and section 3 of the Clayton Act, an injunction prohibiting Case from requiring exclusive representation from its dealers.<sup>187</sup> It alleged that the Case company had maintained exclusive representation by forcing dealers to drop the competing line on pain of cancellation.<sup>188</sup> Finding that the acts proved by the government did not show a "pattern or policy on the part of Case to obtain an agreement or understanding from its dealers that

pany. Failing to achieve this end, the government finally entered into a consent decree with GM. That decree prohibited GM from requiring dealers to use GMAC by contract provisions or by cancellation. It also prohibited GM from recommending or endorsing the finance company. But the decree allowed GMAC to contract with a GM dealer and to arrange with the dealer an exclusive basis for a reasonable time. With regard to the effectiveness of the GMAC consent decree, a Senate report observes:

"Hence, years of antitrust litigation aimed at freeing the market from monopolistic control resulted in the largest company in the business ending up in a stronger competitive position than it had ever enjoyed. It would appear that these antitrust cases have had little, if any, substantial effect upon the volume of business being obtained by GMAC, or the opening up of the General Motors market to competing finance companies.

"....

"The record clearly shows that in so far as financing is concerned, there is a General Motors market and a non-General Motors market, and that GMAC effectively controls the General Motors market to the exclusion of other finance companies and banks. None of the competing finance companies has been able effectively to operate to any large extent in the General Motors market, either at wholesale or retail."

G.M. REP. 69-70.

184. ATT'Y GEN. REP. 35.

185. 121 F.2d at 402.

186. See *Standard Oil Co. v. United States*, 337 U.S. 293, 297 (1949); Rostow, *Report of the Attorney General's Committee in Perspective*, in ANTITRUST LAW SYMPOSIUM 64, 70 (1956). To the extent that *Standard Stations* represents an extreme position on Clayton Act § 3 from which the Court has retreated, the difference in relevant market standards under the two acts will be less significant. See note 176 *supra*.

187. *United States v. J. I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951).

188. *Id.* at 858.

they will not handle competing lines,"<sup>189</sup> the court explained that cancellation of a dealer who carried dual lines was often merely pursuance of a sound business policy of dealer selection.<sup>190</sup> In addition, the court found the fact that many dealers handled the Case line exclusively not to constitute evidence of an understanding forced upon them, because such practice was frequently a matter of volition.<sup>191</sup> Similar reasoning would seem to make proving an implied arrangement in the automobile industry equally difficult.<sup>192</sup>

The practice of coercing dealers into a program of exclusive representation might conceivably be attacked as an unfair method of competition under section 5 of the Federal Trade Commission Act. Supposedly, the courts also require the existence of a contract or conspiracy under this section,<sup>193</sup> but some precedent indicates that certain practices may be attacked before they develop into full blown agreements.<sup>194</sup> If the government could invoke section 5, it would experience little difficulty in establishing illegality. For the applicable market foreclosure standard would be the "quantitative substantiality" measure of *Standard Stations*.<sup>195</sup>

In summary, the elimination of restrictive franchise clauses favoring dealers and the manufacturers' failure to control competition among dealers as a matter of practice has alerted dealers to the dangers of increased competition and made them increasingly aware of the powerful position of manufacturers. The elimination of restrictive clauses favoring the manufacturer, on the other hand, has to a considerable extent been made nugatory by restrictive practices, which can be maintained, at least in part, as "normal and business-like" or as depending upon dealer "loyalty."<sup>196</sup> Moreover any attempt to force the industry into abandoning the practice of exclusive representation might have serious repercus-

189. *Id.* at 865.

190. *Id.* at 866.

191. *Id.* at 866. This ruling may accord with the rationale of *Standard Stations* as later interpreted by its author. See *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 398, 402 (1953) (dissenting opinion).

The court also found that many Case dealers did in fact carry lines of other manufacturers. *United States v. J. I. Case Co.*, 101 F. Supp. 856, 867 (D. Minn. 1951). In *GMAC*, General Motors attempted to show that many of the dealers did not finance through GMAC, but the court refused to admit this evidence stating: ". . . evidence that [defendants] had not restrained the commerce of some dealers would not . . . disprove the affirmative evidence that they had restrained the trade of many dealers." *United States v. General Motors Corp.*, 121 F.2d 376, 404-05 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

192. The government is, however, pursuing similar litigation in the oil industry. See Austern, *Dealing with Uncertainties*, in *HOW TO COMPLY WITH THE ANTITRUST LAWS* 343, 350 n.23 (Van Cise & Dunn ed. 1954).

193. Barber, *Refusals to Deal*, 3 PRACTICAL LAWYER Jan. 1957, pp. 21, 27.

194. See *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953); *Carter Carburetor Corp. v. FTC*, 112 F.2d 722, 734-36 (8th Cir. 1940); *General Motors Corp.*, 34 F.T.C. 58 (1941). See also ATT'Y GEN. REP. 148 n.78.

195. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 (1953) (dictum); ATT'Y GEN. REP. 148.

196. Cf. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

sions. It might adopt a wholly integrated means of distribution or open many more outlets in each community.<sup>197</sup> Automobile manufacturers are not likely to continue the franchise dealer system, a system of selective distribution, without assurances of effective representation by each selected retail outlet.<sup>198</sup> Thus, the dealer, though subjected to the rigors of competition, has, as he insisted, not obtained market freedom by way of compensation.<sup>199</sup>

#### *Private Antitrust Suits by Dealers*

Dealers with operating franchise agreements are understandably reluctant to attempt to secure independence by suing their suppliers for violating the antitrust laws.<sup>200</sup> Once a dealer has been cancelled, however, his attitude often undergoes radical change; unless he can predict voluntary renewal of his franchise, he has no relationship which bringing suit might jeopardize.<sup>201</sup>

197. Cf. *Standard Oil Co. v. United States*, 337 U.S. 293, 315-21 (1949). See also Dean, *Supervision of Selling*, in *HOW TO COMPLY WITH THE ANTITRUST LAWS* 218, 230-32 (Van Cise & Dunn ed. 1954); Rifkind, *Division of Territories*, *id.* at 127, 137-39.

198. Cf. Scott, *Selected Distribution Defined and Described*, in *READINGS IN MARKETING* 300, 315-16 (2d ed., McNair & Hansen 1956). The courts have recognized that efficiency of the dealer is vital to proper merchandising and that manufacturers are entitled to protect themselves by discontinuing an inefficient outlet. See *United States v. General Motors Corp.*, 121 F.2d 376, 387, 400 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

199. Ordinarily the dealer is willing to tie himself to one supplier only if the supplier reciprocates by giving him a protected resale market. See Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 920-21 (1952).

200. The size and financial power of prospective defendants in the automobile industry and the considerable expense of pursuing such litigation also tend to discourage private suits. See Comment, 61 YALE L.J. 1010, 1043 (1952); Note, 61 YALE L.J. 417, 419 n.9 (1952).

Competitors of the manufacturer who are injured by actions that violate antitrust laws are of course able to bring private suits. The utility of this remedy is diminished by high standards of proof required for damage awards—a factor which may explain why no damage suits have been brought by competitors against car manufacturers. The only reported case of an action by a competitor in this field is a bill brought by a parts manufacturer against General Motors and seeking equitable relief against tying clauses in General Motors franchises. Plaintiff was unable to show that these restrictions violated § 3 of the Clayton Act. The court found no lessening of competition in the sale of replacement parts during the period these provisions were in use and further that these requirements were reasonably designed to preserve the consumer good will of the car manufacturer. *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936). Even if the competitor had been successful, the effectiveness of an equity decree appears questionable in light of the unsuccessful attempts of the government to police franchise practices with cease-and-desist orders or consent decrees. See notes 158, 183 *supra*.

201. The experience of government investigations into the automobile industry demonstrates this change of attitude. Statements were often made that existing dealers were reluctant to testify because of fear of retaliation. Dealers who had already been severed from the manufacturer were the usual source of information for the investigatory agencies. See *H.R. Hearings, Dealer Franchises* 256; 1 *S. Hearings, Marketing Practices* 1120; McHugh, *The Automobile Dealer Franchise Act of 1956*, 2 ANTITRUST BULL. 353, 354-55 (1957). See also *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790, 804 (M.D.N.C. 1957) (reference to "franchise insurance").

Thus, private antitrust case law in the automobile industry is heavily weighted with actions involving cancelled dealers.<sup>202</sup> Although potentially the private antitrust suit may provide protection against "abuses" of cancellation, such actions have had rather minor effect. Since the manufacturer is entitled to deal with whom he pleases and to replace dealers whom he deems inefficient, cancellation and non-renewal do not in themselves constitute violations of the antitrust laws.<sup>203</sup> Further, in addition to proving private injury, a dealer plaintiff must establish that defendant violated the law in a manner which injured the public interest.<sup>204</sup> These are major if not insurmountable obstacles to successful antitrust action in the automobile industry.<sup>205</sup> Thus dealers relying on their own cancellation to prove antitrust violation have been denied remedy by courts noting that the elimination of one dealer has only limited effect on the buying public.<sup>206</sup> Moreover, cancelled dealers invoking section 3 of the Clayton Act, and alleging that cancellation occurred because of their refusal to comply with the manufacturer's insistence on exclusive representation, have been equally unsuccessful.<sup>207</sup> Although the rationale of these decisions is not always convincing,<sup>208</sup> the result seems justified. Even if the challenged arrangements amounted to restraints on competition, the dealer cannot be considered the injured party under section 3 of the Clayton Act.<sup>209</sup> Provisions against exclusive representation and tie-in sales are designed to protect a

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202. Cancelled dealers make the fullest use of antitrust law. Not only do they challenge practices which favor the manufacturer by restricting the dealer, but they also attack provisions restricting competition among dealers. See notes 206-12 *infra*. Because existing dealers are anxious to preserve these latter features in the contract, their natural identity of interest with cancelled dealers under the law of contract is lost in this context.

203. See note 198 *supra*.

204. See *Feddersen Motors, Inc. v. Ward*, 180 F.2d 519 (10th Cir. 1950); *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky. 1949); Comment, 61 YALE L.J. 1010-21 (1952). The dealer must further establish a causal relation between the violation and the injury. *Ibid*.

205. Cf. Note, 70 HARV. L. REV. 1239, 1242 (1957).

206. See *Feddersen Motors, Inc. v. Ward*, 180 F.2d 519 (10th Cir. 1950); *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky. 1949).

207. See *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); see also *Allied Equipment Co. v. Weber Engineered Products, Inc.*, 237 F.2d 879 (4th Cir. 1956) (cancellation of dealer who took on another line in violation of an exclusive arrangement justified on ground that dealer himself was in breach); *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790 (M.D.N.C. 1957) (dealer compelled to purchase satisfactory amount of cars and parts from Ford as condition of keeping franchise).

208. Usually these cases turned on a construction of the Clayton Act holding that a refusal to deal is not a contract within contemplation of § 3. But the courts might have overcome this technicality by recognizing that during the time sales were made to the dealer, an "understanding" that he would not handle the products of another manufacturer existed. See Note, 53 COLUM. L. REV. 874 (1953).

209. ATT'Y GEN. REP. 136 n.28.



manufacturer's competitors, not his own dealers.<sup>210</sup> And cancellation in this situation may not cause public injury; the cancelled dealer is free to take on a competing line.<sup>211</sup> Furthermore, cancellations attributable to persuasion of the manufacturer by a dealer who desires less competition have also not been considered antitrust violations.<sup>212</sup>

The most recent treble damage action initiated by a cancelled dealer illustrates the difficulty of establishing antitrust violation by the manufacturer. Claiming domination amounting to monopolization under section 2 of the Sherman Act, the dealer alleged that the manufacturer did not deliver a proportionate number of cars at the beginning of the new model year, that he shipped more automobiles than the territory could absorb after they had become plentiful, and that he required the dealer to repair defective automobiles without paying the customary charges.<sup>213</sup> These acts, according to the complaint, were designed to force plaintiff to contribute to an advertising fund, to buy his inventory in parts and accessories from defendant and to accede to other demands. And plaintiff's refusal to comply ultimately evoked cancellation. In holding that the complaint failed to state a cause of action, the court relied heavily on the history of recent federal legislation dealing with franchise contracts. "Congress," the opinion states, "evidently did not share [plaintiff's point of] view; it found it necessary to adopt an entirely new statute 'to supplement the anti-trust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers. . . .' Nowhere in the Senate and House reports is it suggested that the dealer has such a remedy as plaintiff seeks to establish. . . ."<sup>214</sup>

#### REFORM MOVEMENT

The dealers, having suffered defeat before the courts in their struggle to attain the status of independent merchants, understandably have resorted to group action for combatting the manufacturer's vertical power and the attendant rigors of competition on the distribution level.<sup>215</sup> Ever since its origin in the days of the depression, this movement has gained momentum. The chief spokesman for dealer demands is the National Automobile Dealers Association (NADA), founded in 1917.<sup>216</sup> Three phases of development can be distin-

210. *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790, 809 (M.D.N.C. 1957); ATT'Y GEN. REP. 136 n.28, 138.

211. See *United States v. J. I. Case Co.*, 101 F. Supp. 856, 866 (D. Minn. 1951).

212. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), reversing 135 F. Supp. 4 (D.D.C. 1955); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956). No discussion of the conflicting lower court opinions is attempted here in light of Handler, *Annual Antitrust Review*, 11 RECORD N.Y.C. BAR ASS'N 367, 369-75 (1956); Barber, *Refusals to Deal*, 3 PRACTICAL LAWYER Jan. 1957, pp. 21, 25-26; Notes, 2 HOWARD L.J. 256 (1956), 40 MINN. L. REV. 853 (1956).

213. *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790 (M.D.N.C. 1957).

214. *Id.* at 810-11.

215. 1939 FTC REP. 312-418; PALAMOUNTAIN 122.

216. 1939 FTC REP. 333; PALAMOUNTAIN 128.

guished: the NRA, the period of state legislation and the phase of federal legislation. Playing an ever-increasing role, the Association has attempted, throughout each of these periods, to obtain better terms for its members by negotiating with the manufacturers. But its efforts to persuade the manufacturer to accept the Equitable Dealer Contract have been unsuccessful.<sup>217</sup> And the manufacturers generally have refused to participate in contract negotiation with the NADA or groups formed by their own dealers.<sup>218</sup>

### *The NRA*

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.<sup>219</sup> Marked by the absence of vigorous competition, the NRA period often has been labelled the golden age of dealers.<sup>220</sup> 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>221</sup>

All other dealer group action has been aimed at mobilizing public opinion and enlisting the help of legislators. Appeals to the legislature were maintained on both state and federal levels. The philosophy behind these movements reflects the attitude of retailers generally in the post-depression era. Without the enactment of "fair trade laws," they argued, their existence as "small business men" is threatened by the evils of "cut-throat" competition and domination by "giant monopolists."<sup>222</sup> Many dealers, the argument continues, have gone into bankruptcy or given up their dealerships. This reduction in dealerships has resulted in a "loss to the public of retail outlets and service facilities, which are essential to the automotive economy."<sup>223</sup>

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217. See AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 10, 49-52 (Bus. Rel. Inst. ed. 1948).

218. PALAMOUNTAIN 126; Note, 31 IND. L.J. 233, 234 (1956). See statements by NADA officials, 8 S. Hearings, General Motors 4060-62; H.R. Hearings, Dealer Franchises 74-75.

219. See HEWITT 93-94; PALAMOUNTAIN 123; 1939 FTC REP. 366.

220. Cf. PALAMOUNTAIN 123. But see dealer complaints due to NRA regulation, H.R. Hearings, Dealer Franchises 143.

221. This phase in the development of dealer group action is fully discussed in Palamountain's admirable work. PALAMOUNTAIN 123-28.

222. See Rahl, *Antitrust Policy in Distribution*, 104 U. PA. L. REV. 185, 186-88 (1955). The NADA assisted in procuring fair trade legislation in many states and also attempted to have this legislation strengthened to improve further the position of automobile dealers. See 1939 FTC REP. 343-44.

223. Preamble, Indiana Senate Resolution, authorizing a committee to study automobile dealer-manufacturer relations, reprinted in Note, 31 IND. L.J. 233, 234 n.3 (1956).

*State Legislation*

Approximately twenty state statutes regulate the distribution of motor vehicles.<sup>224</sup> Some states, for example Mississippi, which enacted the first regulatory statute in 1934, have an approval type of regulation.<sup>225</sup> Like an insurance policy, the franchise contract must be approved by a governmental agency in order to be binding.<sup>226</sup> Other state statutes control competition among dealers; some of this group prohibit non-franchised dealers from selling "new cars."<sup>227</sup> But the bulk of the regulatory statutes are aimed at the elimination of enumerated unfair practices inflicted by the manufacturer on the dealer.<sup>228</sup> Unfair or inequitable termination of the franchise by the manufacturer is the chief target.<sup>229</sup> The sanctions against violation vary greatly.<sup>230</sup> Some legislatures have

224. The following state statutes may have some effect in remedying the dealers' grievances: ARIZ. CODE ANN. §§ 66-1101 to 1114 (Supp. 1954); ARK. STAT. ANN. §§ 75-1501 to -1506 (Supp. 1955); COLO. REV. STAT. ANN. §§ 13-11-1 to 13-11-17, 13-15-1 (Supp. 1955); FLA. STAT. ANN. §§ 320.60-.70 (Supp. 1956); ILL. ANN. STAT. c. 95 ½, § 17a-j (Smith-Hurd Supp. 1956); IOWA CODE ANN. §§ 322.1-.15 (Supp. 1956); Ky. Acts 1956, H. 381; LA. REV. STAT. ANN. §§ 51:661-663, 32:718-719, 32:1251-1259 (Supp. 1956); MICH. STAT. ANN. §§ 9.1948-.49 (Supp. 1955); MINN. STAT. ANN. § 168.27 (Supp. 1956); MISS. CODE ANN. §§ 8071.3-75 (Supp. 1954); NEB. REV. STAT. §§ 60-601 to -619 (Supp. 1955); N.Y. GEN. BUS. LAW §§ 195-98; N.C. GEN. STAT. §§ 20-285 to -308 (Supp. 1955); N.D. REV. CODE §§ 51-0701 to -0708 (Supp. 1949); OHIO REV. CODE ANN. §§ 4517.01-99 (Page Supp. 1956); OKLA. STAT. ANN. tit. 47, §§ 561-68 (Supp. 1956); R.I. Acts 1950, c. 2595, art. VIII; S.D. CODE §§ 44.0211, 54-1103 (Supp. 1952); TENN. CODE ANN. §§ 59-1701 to -1720 (Supp. 1956); VA. CODE ANN. §§ 46-503 to -540 (Supp. 1956); WIS. STAT. §§ 85.02, 218.01 (1955); WYO. COMP. STAT. ANN. §§ 39-422 to -423 (Supp. 1955). For a critical evaluation of these statutes, see Notes, 70 HARV. L. REV. 1239, 1243 (1957), 63 HARV. L. REV. 1010, 1019-21 (1950), 31 IND. L.J. 233 (1956).

See also TEX. REV. CIV. STAT. ANN. art. 7426 (Supp. 1956). This Texas antitrust law has been used to defeat manufacturer attempts at exclusive representation and territorial security. *Ford Motor Co. v. Texas*, 142 Tex. 5, 175 S.W.2d 230 (1943); *Texas v. Willys-Overland, Inc.*, 211 S.W. 609 (Tex. Civ. App. 1919); Note, 63 HARV. L. REV. 1010, 1019 (1950).

225. MISS. CODE ANN. § 8072 (Supp. 1954).

226. *Ibid.* In the event of a breach, the damaged dealer "may have recourse for the liquidation of his damages to a board of arbitration and award . . ." *Ibid.*

Attempts to secure similar legislation in New York have failed. Note, 63 HARV. L. REV. 1010, 1021 (1950). In 1956, however, New York adopted a statute which penalized a manufacturer for terminating a franchise contract "except for cause." N.Y. GEN. BUS. LAW §§ 195-97. See *H.R. Hearings, Dealer Franchises* 31.

227. *E.g.*, ARK. STAT. ANN. §§ 75-1501 to -1506 (Supp. 1956). This statute was held unconstitutional. *Rebsamen Motor Co. v. Phillips*, 289 S.W.2d 170 (Ark. 1956). See also PALAMOUNTAIN 131; 1939 FTC REP. 400-06.

228. See, *e.g.*, WIS. STAT. § 218.01 (1955) (prohibitions against: forcing dealers to accept parts or cars not ordered; making dealership agreements, or doing any act "unfair to" the dealer, under threat of cancellation of the franchise; unfairly cancelling or failing to renew a franchise; forcing dealers to assign sales contracts to particular finance companies).

229. See, *e.g.*, FLA. STAT. ANN. § 320.64(8) (Supp. 1956); IOWA CODE ANN. § 322.3(5) (Supp. 1956); WIS. STAT. § 218.01(3)(a)17 (1955). Several of these statutes provide only for cancellation, leaving manufacturers free to abandon dealers by not renewing existing

relied on the deterrent effect by utilizing penalties such as fines, loss of license or dissolution.<sup>231</sup> Others attempt to give the injured dealer relief in the form of an action for damages or a suit in equity.<sup>232</sup>

Of the state legislation regulating automobile merchandising, the Wisconsin and Colorado statutes are most interesting. The Wisconsin act, which has set a pattern for many state statutes, forbids a manufacturer to use threat of cancellation or non-renewal as a means of forcing dealers to accept delivery of unordered goods. And it forbids cancellation of dealer franchises "unfairly, without due regard to the equities of said dealer" or non-renewal "without just provocation."<sup>233</sup> The statute does not expressly give the injured dealer a private remedy. The only sanctions provided are fines and the denial, suspension or revocation of the license required to do business.<sup>234</sup>

On the other hand, the Colorado statute, while forbidding the practices proscribed by the Wisconsin act, makes express provision for dealer remedies. Cancellation or delayed renewal is not effective unless approved by a court, state or federal. Where the cancellation power has been invoked without such approval, the dealer is given the right to apply for injunctive relief staying the manufacturer's action. Should the court find the dealer injured, he can collect treble damages.<sup>235</sup>

Although the Colorado statute has been declared invalid as an unconstitutional exercise of the police power,<sup>236</sup> the constitutionality of the Wisconsin act has been upheld. Moreover, in interpreting the statute, the Wisconsin

franchises. See, *e.g.*, FLA. STAT. ANN. § 320.64(8) (Supp. 1956); VA. CODE ANN. § 46-534(3) (Supp. 1956).

230. See *H.R. Hearings, Dealer Franchises* 169.

231. See, *e.g.*, N.Y. GEN. BUS. LAW § 198. See, generally, Notes, 70 HARV. L. REV. 1239, 1243 (1957), 63 HARV. L. REV. 1010, 1020-21 (1950).

232. *E.g.*, COLO. REV. STAT. § 13-11-11(4) (Supp. 1955) (treble damage suit) (held unconstitutional on other grounds, *General Motors Corp. v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956)); VA. CODE ANN. § 46-531 (1950) (equitable relief). Other statutes have been construed to give rise to a dealer cause of action. See *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420 (1955). *But cf.* *Buggs v. Ford Motor Co.*, 113 F.2d 618, 619 (7th Cir. 1940) (dictum). See also Note, 70 HARV. L. REV. 1239, 1243-44 (1957).

It has been stated that the Rhode Island statute allows the dealer to appeal his cancellation to an administrative agency which has the power to reinstate him, see BERLE, *THE 20TH CENTURY CAPITALISTIC REVOLUTION* 80 (1954), but the language of the act does not support this conclusion, see R.I. Acts 1950, c. 2595, art. VIII. However, an injured dealer may move the state to deny the manufacturer the required license.

233. WIS. STAT. § 218.01(3)(a)17 (1955).

234. *Id.* § 218.01 (1955), particularly §§ (3)(a)15, 16, 17. Revocation or suspension of the license may, however, be limited to the territory served by the unfairly cancelled dealer. Furthermore, in a "metropolitan area serviced by several dealers, suspension or revocation shall not be applicable to the remaining dealers." *Id.* § 218.01(8)(d). For a list of similar state statutes, see Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 223-27 (1957).

235. COLO. REV. STAT. § 13-11-11 (Supp. 1955).

236. *General Motors Corp. v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956).

Supreme Court has strengthened the rights of the dealer by granting him injunctive relief against violation by the manufacturer.<sup>237</sup>

### *Federal Legislation*

The dealers, acting through their collective body, the NADA, succeeded in obtaining legislation in only three states by 1937.<sup>238</sup> Accordingly, they appealed to the congressmen of these three states for federal aid. Representative Withrow of Wisconsin introduced a resolution which authorized the FTC to investigate the motor vehicle industry.<sup>239</sup> After lengthy hearings, the resolution was passed, authorizing the FTC to make an investigation on a scale far beyond that envisaged by the sponsor.<sup>240</sup> The FTC issued the requested report, consisting of more than one thousand pages, in 1939.<sup>241</sup>

The Commission found "that motor vehicle manufacturers, and, by reason of their great power, especially General Motors Corporation, Chrysler Corporation and Ford Motor Company have been, and still are, imposing on their respective dealers unfair and inequitable conditions of trade."<sup>242</sup> But it also found that:

"Active competition among automobile manufacturers, although some of them have made very large profits, gave to the public improved products, often at substantially reduced prices. In the automobile industry this has been especially true of those manufacturers who are able to obtain large volume of production through competitive improvement in motor-vehicle construction, style, performance, and safety, particularly in the low-priced class. Such competition has been the basis for the remarkable growth of the industry.

"Consumer benefits from competition in the automobile-manufacturing industry have probably been more substantial than in any other large industry studied by the Commission."<sup>243</sup>

Concerning dealer practices, the Commission's report contained the following findings regarding attempts to restrain competition:

"The Commission finds that local associations of motor-vehicle dealers in various parts of the country have engaged in the following practices to fix or maintain prices: (1) Fixing minimum prices on new cars, often by means of uniform maximum discounts from the manufacturer resale prices in transactions where no trade-ins are involved; (2) establishing maximum purchase prices, or allowances, for used cars taken in trade; (3) regulating bidding on used cars taken in trade by means of uniform minimum increases on all bids subsequent to the original bid, or by requiring all bids subsequent to the original bids to be less than the original bid; and (4) adopting published used-car price guides as a basis for maximum

237. *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420 (1955).

238. PALAMOUNTAIN 132-33.

239. *Ibid.*

240. Public Resolution No. 87, 52 STAT. 218 (1938).

241. 1939 FTC REP. The report devotes considerable attention to the history and policies of the Big Three manufacturers.

242. *Id.* at 1075-76.

243. *Id.* at 1074; see PALAMOUNTAIN 136.

allowances for used cars. . . . The Commission found that many local associations operate used-car valuation or appraisal bureaus that are essentially combinations of dealers in particular localities who are bound by agreements to restrict competition in used-car trading."<sup>244</sup>

In light of these findings, it is not surprising that the remedy suggested by the Commission with respect to unfair manufacturer treatment of dealers was rather restrained.

"It is recommended that present unfair practices be abated to the end that dealers have (a) less restriction upon the management of their own enterprises; (b) quota requirements and shipments of cars based upon mutual agreement; (c) equitable liquidation in the event of contract termination by the manufacturer; (d) contracts definite as to the mutual rights and obligations of the manufacturers and the dealers, including specific provision that the contract will be continued for a definite term unless terminated by breach of reasonable conditions recited therein."<sup>245</sup>

Disappointed with the FTC report, the NADA persuaded Congressman Patman to sponsor the Motor Vehicle Bill of 1940.<sup>246</sup> The bill, which was to be administered by the FTC, required franchises to contain certain minimum provisions safeguarding the interests of the dealer.<sup>247</sup> It met with a strange fate; replies to a questionnaire indicated that the majority of dealers was against the bill. This attitude might, at least in part, have stemmed from the dealers' fear that the Patman bill would portend more extensive federal regulation.<sup>248</sup>

Attempts to introduce other federal legislation were interrupted by the outbreak of the war, but the movement was revitalized by the development of a buyer's market and the attendant great increase in dealer competition characterizing the post-war period.<sup>249</sup> In response to demands made by the NADA, a constant flood of bills dealing with automobile merchandising has been introduced in the Congress.<sup>250</sup> These bills led to a broad investigation culminating in hearings conducted by a Senate Subcommittee on Automobile Marketing Practice.<sup>251</sup> The Senate Subcommittee on Antitrust and Monopoly, in examining General Motors, also devoted much study to manufacturer-dealer relations.<sup>252</sup>

The purpose of the many bills introduced—more than thirty during the last session of the Congress<sup>253</sup>—was to secure economic independence for the

244. 1939 FTC REP. 1075; see PALAMOUNTAIN 137.

245. 1939 FTC REP. 1076; see PALAMOUNTAIN 136.

246. See AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 60 (Bus. Rel. Inst. ed. 1948); HEWITT 107; PALAMOUNTAIN 140.

247. AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY-DEALER RELATIONS 60 (Bus. Rel. Inst. ed. 1948); see *H.R. Hearings, Dealer Franchises* 70 (description of the bill).

248. PALAMOUNTAIN 140; see also HEWITT 107.

249. See *Miller Motors v. Ford Motor Co.*, 149 F. Supp. 790, 797 (M.D.N.C. 1957); McHugh, *The Automobile Dealer Franchise Act of 1956*, 2 ANTITRUST BULL. 353, 357-58 (1957).

250. *H.R. Hearings, Dealer Franchises* 70.

251. 1-2 *S. Hearings, Marketing Practices*.

252. 6-8 *S. Hearings, General Motors*.

253. McHugh, *supra* note 249, at 353; cf. *H.R. Hearings, Dealer Franchises* 64.

dealer by protecting him against the coercive power of the manufacturer and against competition from other, particularly non-franchised, dealers. Various schemes were utilized to accomplish this goal. Following the techniques of the Patman bill of 1940 and state regulation of life insurance policies, some bills attempted to correct the unequal bargaining power of the parties to the franchise contract by "legislating the franchise terms"—establishing minimum provisions for all franchise contracts.<sup>254</sup> Other bills exempted clauses and practices concerning territorial security, bootlegging and phantom freight from the reach of the antitrust laws.<sup>255</sup> Still others aimed at "unfair methods of competition and unfair practices."<sup>256</sup> However bills in this group may vary, they share one feature: arbitrary cancellation by the manufacturer is treated as an unfair practice.<sup>257</sup> Finally, a more general approach is employed in the Day in Court Bill.<sup>258</sup> Reasoning from the premise that cancellation was at the heart of the dealer's problem, the sponsors introduced a requirement of good faith dealing into the franchise contract, thus arming the courts with the weapon they had claimed in the past was not at their disposal.<sup>259</sup>

As introduced in the Senate, the bill offered the dealer double damages and recovery of attorney's fees in an action based on "the failure . . . [of an] automobile manufacturer to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or in renewing the franchise. . . ."<sup>260</sup> "Good faith" was defined to impose upon the manufacturer, its officers, employees or agents a duty

"To act in a fair, equitable and non-arbitrary manner so as to guarantee the dealer freedom from coercion, intimidation, or threats of coercion or intimidation, and in order to preserve and to 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>261</sup>

As passed by the Senate, the bill allowed the dealer only compensatory damages and defined good faith to include the actions of both parties. But only the dealer was given a cause of action for violation of the duty to act in good faith. The

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254. *H.R. Hearings, Dealer Franchises* 70; S. 3543, 84th Cong., 2d Sess. (1956); S. 3494, 84th Cong., 2d Sess. (1956); H.R. 10659, 84th Cong., 2d Sess. (1956); H.R. 10583, 84th Cong., 2d Sess. (1956).

255. *E.g.*, H.R. 11761, 84th Cong., 2d Sess. (1956); H.R. 10314, 84th Cong., 2d Sess. (1956). See also 1956 General Motors (Pontiac) Dealers Selling Agreement § 27.

256. *E.g.*, H.R. 11761, 84th Cong., 2d Sess. (1956); H.R. 11519, 84th Cong., 2d Sess. (1956); H.R. 11500, 84th Cong., 2d Sess. (1956).

257. This type of regulation is prominently represented by the so-called Ground Rules Bill, S. 3946, 84th Cong., 2d Sess. (1956), introduced by Senator Monroney (Okla.). For a discussion of the Department of Justice's criticism of the bill, see 2 *S. Hearings, Marketing Practices* 1469-98.

258. S. 3879, 84th Cong., 2d Sess. (1956); H.R. 11360, 84th Cong., 2d Sess. (1956).

259. S. REP. No. 2073, 84th Cong., 2d Sess. 4 (1956).

260. S. 3879, 84th Cong., 2d Sess. § 3 (1956).

261. *Id.* § (1) (e); McHugh, *supra* note 249, at 356.

manufacturer was limited to using lack of good faith as a defensive weapon in suits brought by the dealer.<sup>262</sup>

As finally passed, the bill incorporates further amendments introduced in the House of Representatives.<sup>263</sup> The most important changes are an antitrust savings clause<sup>264</sup> and a rewording of the good-faith provision. The latter reads as follows:

"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, enforcement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."<sup>265</sup>

While the duty of good faith applies to existing franchise agreements, the dealer is given a cause of action only when the manufacturer's breach occurred after the passage of the act.<sup>266</sup>

According to the House report, this legislation was necessary because:

"Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual

262. S. 3879, 84th Cong., 2d Sess. § 2 (1956).

263. H.R. REP. No. 2850, 84th Cong., 2d Sess. (1956); 102 CONG. REC. 12829-39 (daily ed. July 23, 1956) (passed by the House as reported without further amendment).

264. S. 3879, 84th Cong., 2d Sess. § 4 (1956) reads: "No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States." This section is the result of Department of Justice opposition to the Senate version. McHugh, *supra* note 249, at 358. Its addition intends to ensure that a dealer's franchise will not be cancelled for bootlegging. "Any restriction on a dealer's right to sue based on the fact that he is selling to another dealer, franchised or not, for resale to the public . . . or sells at cut rates would contravene the congressional purposes underlying section 4 of this bill . . ." H.R. REP. No. 2850, 84th Cong., 2d Sess. 10 (1956). The Department of Justice took the position that the merits of bootlegging should be tested by the market. *H.R. Hearings, Dealer Franchises* 259.

265. S. 3879, 84th Cong., 2d Sess. § 1(e) (1956) (H.R. version). The passage referring to dealers' equities, see text at note 261 *supra*, was not included in the final act because it was regarded as too far-reaching, see H.R. REP. No. 2850, 84th Cong., 2d Sess. 7-9 (1956). See also, McHugh, *supra* note 249, at 356-57.

266. S. 3879, 84th Cong., 2d Sess. § 2 (1956); H.R. REP. No. 2850, 84th Cong., 2d Sess. 8 (1956).



concepts are no longer adequate to protect the automobile dealers under their franchises."<sup>267</sup>

And recent concessions made by manufacturers were deemed insufficient to overcome the necessity for legislation in the area.

"While it is true these developments in the automobile industry may diminish some of the abuses found to exist, this does not derogate from the necessity for legislation at this time. For one thing, the new General Motors selling agreements afford no guaranty against dealer coercion or intimidation or threats thereof by the manufacturer. Furthermore, what the automobile manufacturers do in response to congressional investigation or in contemplation of pending legislation, they can readily undo. The record before the committee demonstrates that, in the past, gains made by dealers after investigation into market practices of the automobile manufacturers have not always been retained. This bill assures a minimum amount of protection for the dealer under the terms of any automobile franchise."<sup>268</sup>

President Eisenhower, in signing the Day in Court Bill, recognized the existence of serious problems in manufacturer-dealer relations. But his statement indicated reservations on the wisdom of this legislation.

"The legislation represents a serious Congressional effort to deal with abuses Congress found to exist. At best I believe it constitutes only a partial solution to the problem. In addition, it presents legal problems, some of which could be of the most serious character.

"Ordinarily when parties enter into business agreement outside the realm of public utilities, legislative action which qualified their rights to terminate or renew the agreement in the manner provided by this legislation would be considered an unwarranted intrusion by the Federal Government into an area traditionally reserved to private enterprise. Therefore, this bill represents a new departure in the exercise of Federal authority, a point which will undoubtedly come to the attention of the courts. However, in view of the findings of Congress on the special conditions in the automobile industry, which may be of a temporary nature, I am approving the bill. At the same time I am directing the antitrust enforcement agencies of the Government to review the conditions in the industry which brought about the demand for the legislation, to determine whether they continue to exist, to study alternative or different solutions to the problem, and to make recommendations for appropriate action by the next Congress."<sup>269</sup>

#### SOME PROBLEMS UNDER THE ACT

The legislative history demonstrates that implementation of the Day in Court Bill will entail difficult judicial interpretation.<sup>270</sup> The courts will have to solve

267. H.R. REP. No. 2850, 84th Cong., 2d Sess. 3 (1956). This attitude is also mirrored in the preamble to the act. For discussion of the economic background of the act and its relation to the antitrust laws, see McHugh, *supra* note 249, at 362.

268. H.R. REP. No. 2850, 84th Cong., 2d Sess. 6 (1956).

269. CCH TRADE REG. REP., Rpt. ltr. no. 55, p. 6 (Aug. 23, 1956).

The act is reprinted in Appendix pages 1189-90 *infra*.

270. The interrelationship between the act and the several state statutes will not be discussed here. The act specifically indicates no state statutes are invalidated except in

two basic issues: the meaning of good faith and the "nature" of the remedy, including the question of damages. In addition, opponents of the bill will probably challenge its constitutionality.

### *Constitutionality*

Typical of the manufacturers' view on the constitutionality of the act are the arguments of the General Counsel of the Ford Motor Company. They blend the traditional sanctity of contracts and prohibition of class legislation theses with attacks on the vagueness of the statutory criteria.

"We believe that the proposed legislation raises a number of serious constitutional questions . . . These questions include, in addition to those raised by the class aspects of the proposed legislation, the objections that the proposed legislation would:

- (1) vitiate the terms of existing contracts, freely arrived at between private parties, and nullify the rights of the parties under them;
- (2) restrict the right of private parties to contract freely in the future and to choose with whom they will enter into and continue business relationships;
- (3) fail to meet the test of statutory certainty because of the vagueness of its language and the uncertain nature of the duties and obligations that it imposes; and
- (4) involve improper delegation of legislative authority by the Congress to the courts because of the generality and ambiguity of its terms and the lack of definiteness of the new statutory duties imposed upon the parties."<sup>271</sup>

Judged by relevant Supreme Court decisions, these arguments are not convincing. The "class aspect" of the act does not present a serious problem of constitutional law since congressional action under the commerce clause is not limited by the equal protection clause.<sup>272</sup> True, federal legislation has to observe the limitations of the due process clause. But a federal statute will withstand attack on this ground absent a showing that it resulted from arbitrary congressional action—an undertaking which in this context seems doomed to failure.<sup>273</sup>

Similarly, the arguments claiming that the requirement of good faith dealing "vitiates the terms of the existing contracts, freely arrived at between private parties . . . nullifies the rights of the parties under them and restricts the right of private parties to contract freely" appear ineffective in light of Supreme Court rulings. The Court has ruled that "federal regulation of future action based upon rights previously acquired by the person regulated is not pro-

cases of irreconcilable conflict. 70 STAT. 1126, 15 U.S.C.A. § 1225 (Supp. 1956). For discussion of the problem, see Note, 70 HARV. L. REV. 1239, 1252 (1957).

271. *H.R. Hearings, Dealer Franchises* 283-84.

272. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401 (1940); *LaBelle Iron Works v. United States*, 256 U.S. 377, 391-92 (1921).

273. See *Currin v. Wallace*, 306 U.S. 1, 14 (1939); *Steward Machine Co. v. Davis*, 301 U.S. 548, 584-85 (1937). See also *Brown & Conwill*, *supra* note 234, at 233.

hibited by the Constitution."<sup>274</sup> In another opinion, the Court found it "inconceivable" that the exercise of the commerce power "may be hampered or restricted to any extent by contracts previously made between individuals or corporations."<sup>275</sup> The bill also appears to meet the standards of the Fifth Amendment. Regulation designed to protect some public interest can limit the traditional right of freedom of contract. And, over the last two decades, courts almost without exception have accepted the judgment of the legislature on the existence of a public interest.<sup>276</sup> Furthermore, introducing a good faith provision into existing franchises hardly violates the due process requirement, particularly since the dealer is given a cause of action only for those breaches occurring after the act has gone into effect.<sup>277</sup> This conclusion is buttressed by the courts' increasing tendency to read an implied duty of good faith into existing contracts generally.<sup>278</sup> Finally, the challenge of vagueness is equally unconvincing. In distinguishing between coercion, intimidation, or threats of coercion or intimidation on the one hand, and recommendations, enforcement, exposition and persuasion, urging or argument on the other, the statute follows a well-recognized pattern of judicial interpretation.<sup>279</sup>

### *Good Faith*

The good-faith requirement may be challenged as failing to offer a workable means of controlling the dealer-manufacturer relationship. The act's opponents have argued that the franchise has continuously been improved, that the inevitable consequence of the act will be "to encourage the parties to regard themselves as legal antagonists rather than as participants in a business venture" and that the climate of co-operation prevailing until the advent of the new legislation will be replaced by a "litigious atmosphere."<sup>280</sup> Predicting that admini-

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274. *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947).

275. *Louisville & N.R.R. v. Mottley*, 219 U.S. 467, 482 (1911).

276. See *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949); *United States v. Darby*, 312 U.S. 100 (1941). Nor is the act's extension of remedy to only the dealer constitutionally objectionable. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937).

277. See note 266 *supra*.

278. See, *e.g.*, *Parev Products Co. v. I. Rokeach & Sons, Inc.*, 124 F.2d 147 (2d Cir. 1941). *But see* *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940); *Biever Motor Car Co. v. Chrysler Corp.*, 108 F. Supp. 948 (D. Conn.), *aff'd per curiam*, 199 F. 2d 758 (2d Cir. 1952), *cert. denied*, 345 U.S. 942 (1953). See also Kessler, *Arthur Linton Corbin—A Tribute*, 64 *YALE L.J.* 164, 167 (1954); Note, 19 *CORNELL L.Q.* 603 (1934).

279. The pattern is illustrated by *Ford Motor Co. v. United States*, 335 U.S. 303 (1948). On the constitutionality of the act generally, see Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 *COLUM. L. REV.* 219, 228 (1957); Note, 70 *HARV. L. REV.* 1239, 1250 (1957).

280. *H.R. Hearings, Dealer Franchises* 284 (statement of the Ford Motor Co.). See also the testimony of the general counsel of the Ford Motor Co., *id.* at 376-86. Attempts to insulate the manufacturer from litigation have been introduced into recent franchise agreements. See, *e.g.*, 1957 Ford Sales Agreement §§ 2(g), 25.

stration of the statute will create formidable difficulties, some critics have even questioned whether the franchise system of distribution—heretofore regarded as “the approach best suited to [the] type of product and to the mutuality of interests existing between the manufacturer and dealer”—should be retained.<sup>281</sup>

The statutory requirements and terms of existing franchise contracts, which were revised in response to dealer complaints or the Day in Court Bill, supplement one another.<sup>282</sup> Taken together, they give dealers as a group a degree of protection formerly not available.<sup>283</sup> To the extent that the principle of good faith has been adopted in modern franchise contracts, the statute acts to reinforce the pertinent provisions. Should the statutory requirements of good faith and the provisions of the franchise be in conflict, the statute governs. It thus tends to create a flexible framework of minimum franchise requirements. Within this framework, the good faith duty is made relevant in connection with both “performing or complying with the terms or provisions of the franchise” and “terminating, cancelling, or not renewing the franchise. . .”<sup>284</sup> The good faith requirement thus embraces a continuing relationship as well as the exercise of a power to terminate or not to renew.<sup>285</sup> Accordingly, its workability will

281. 1 S. *Hearings, Marketing Practices* 686 (testimony of Curtice). For critical speculation as to the continued existence under the act of the present manufacturer-dealer relationship, see H.R. *Hearings, Dealer Franchises* 112, 123, 237-38. But a NADA official has denied the “slightest danger” of such a change. *Id.* at 81. For discussion of possible alternatives to the existing distribution pattern, see 2 S. *Hearings, Marketing Practices* 1413-15.

282. For a review of changes in recent franchise agreements, see *Business Week*, Feb. 2, 1957, p. 25; *Automotive News*, April 29, 1957, p. 1, col. 1. The 1957 Ford Sales Agreement illustrates the concern of franchise draftsmen over the act. Section 2(g) 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, or to such other person as may be designated by the Executive Committee of the Company from time to time, 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 purpose of this subparagraph 2(g) 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.”

283. See H.R. REP. No. 2850, 84th Cong., 2d Sess. 6-7 (1956); McHugh, *supra* note 249, at 366.

284. 70 STAT. 1125, 15 U.S.C.A. § 1222 (Supp. 1956). The statutory language links good faith and coercion. *Id.* § 1221(e). Thus courts interpreting the statute may give the good faith concept a narrower meaning than that accorded it at common law. *Cf.* Note, 70 HARV. L. REV. 1239, 1248-50 (1957). This interpretation is not compulsory. The sponsors of the bill undoubtedly were influenced by common law notions of good faith, and courts should feel free to apply these traditional concepts to cases brought under the statute. See S. REP. No. 2073, 84th Cong., 2d Sess. 4-5 (1956).

285. H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956). See H.R. *Hearings, Dealer Franchises* 26.

depend on the ability of the judiciary to apply the statute in a manner which accords the dealer a greater degree of independence without destroying manufacturer and consumer interests in an efficient dealership system.<sup>286</sup>

### *Coercion.*

One function of the good-faith requirement is to remove the possibility of unfair control over dealer operations by manufacturer pressure through withholding of deliveries,<sup>287</sup> appointment of stimulator dealers<sup>288</sup> or threats of nonrenewal or cancellation.<sup>289</sup> To the extent that modern franchises in the automobile industry are of considerable duration and cancellable only for specific causes, the threat of cancellation has lost much of its force. Also, the manu-

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286. The Chief Counsel of the Senate Antitrust Subcommittee during the hearings indicated that the act as finally revised is not intended to discourage efforts toward a better system of distribution. Courts should be aware of this important goal. See McHugh, *supra* note 249, at 358, 360.

The good-faith requirement can be interpreted as an attempt by the dealer to better his economic position by restricting, rather than fully utilizing, contract negotiations. Such an attempt may be justified by the disparate bargaining positions of dealer and manufacturer. However, uncritical court or jury application of good faith may unduly burden the manufacturer.

287. *H.R. Hearings, Dealer Franchises* 26. See *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790, 798 (M.D.N.C. 1957) (court found "perhaps more than the usual number of irritating mistakes and delays with respect to body types ordered by plaintiff").

Franchise agreements provide that no order creates an obligation to ship until accepted by the company. *E.g.*, 1957 Ford Sales Agreement § 4; 1956 General Motors (Pontiac) Dealer Selling Agreement § 2. However, some courts have imposed on manufacturers a good-faith obligation to fill orders. *E.g.*, *Jay Dreher Corp. v. Delco Appliance Corp.*, 93 F.2d 275, 277-78 (2d Cir. 1937). See also 1956 General Motors (Pontiac) Dealer Selling Agreement, preamble (company agrees "insofar as possible" to meet dealer's "reasonable requirements").

288. A stimulator dealer is a low overhead outlet installed by the manufacturer in a territory already occupied. The stimulator dealer is in a position to cut automobile prices, thus forcing the original dealer to compete more vigorously. Under a literal interpretation of the statute, the appointment of such a dealer would not be a failure to perform the contract in good faith, since modern franchises are expressly non-exclusive. See 1956 General Motors (Pontiac) Dealer Selling Agreement § 1; 1957 Chrysler Corp. (Plymouth) Direct Dealer Agreement § 1. *But see* 1957 Ford Sales Agreement § 3. But the question whether such an act violates a good-faith requirement seems relevant, for, as a method of industry practice, dealers have been entitled to appeal to company grievance boards in instances of appointment of new dealers in their territory. The position was frequently taken during the hearings that the appointment of a stimulator dealer would be a violation of the good faith provision. *H.R. Hearings, Dealer Franchises* 78, 281, 384; see also H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956); McHugh, *supra* note 249, at 359-60; *cf.* Note, 70 HARV. L. REV. 1239, 1243-50 (1957). *But see H.R. Hearings, Dealer Franchises* 18, 383.

289. "Most dealers and manufacturers are in business on a permanent basis. It has not been actual arbitrary cancellations but the threat thereof that has forced dealers to at times submit to unfair and unreasonable actions by their manufacturers." *H.R. Hearings, Dealer Franchises* 73 (statement of Hewitt). *Cf.* *Ford Motor Co. v. United States*, 335 U.S. 303, 316 n.3 (1948) (charge to jury on use of cancellation threat).

facturer's agreement to aid in liquidating the dealership after termination gives the dealer some protection even under a franchise which is cancellable at will. Furthermore, the latest contracts, containing broad provisions for return of overstocked items and adjustments in car prices at the end of the model year, are bound to relieve pressure on the dealer.<sup>290</sup>

Should these improvements in the franchise fail to alleviate the plight of an individual dealer, he might invoke the good-faith requirement of the statute. But its salutary effect within the context of a continuing relationship should not be exaggerated. A dealer may prefer not to jeopardize a current franchise.<sup>291</sup> And even if he chooses to sue, he must prove coercion—an undertaking made more difficult by the statutory recognition of permissible persuasion, urging or argument.<sup>292</sup>

#### *Cancellation at will.*

Termination as such does not assure the dealer of a cause of action under the Day in Court Bill; he must establish that the manufacturer did not act in good faith. One of the three types of franchises available to dealers offers a "continuing selling agreement" which has no expiration date but is subject to cancellation by the manufacturer for cause at any time and without cause upon specified notice.<sup>293</sup>

No violation of good faith is involved when cancellation under this type of franchise is founded on a legitimate business reason. Thus, the manufacturer faced with shrinking sales volume may eliminate some of his dealers at will.<sup>294</sup> Since the market dictates that all his dealers cannot survive, the manufacturer may properly exercise a free hand in deciding which of them to retain. The manufacturer's discretion to make this selection should not be diminished. Arbitrary cancellation is unlikely, for preferring an inefficient dealer is against the manufacturer's self-interest.

The terminated dealer, furthermore, should not be able to challenge termination in the name of good faith merely because he has not been able to recoup his investment. Admittedly, some decisions on indefinite distributorship contracts apply the so-called Missouri doctrine which gives effect to oral understandings that the right to cancel at will would not be exercised unreasonably.<sup>295</sup> But these cases arose in a context which makes them inapplicable to modern

290. See notes 80-83 *supra* and accompanying text.

291. See notes 200-01 *supra* and accompanying text.

292. *Ford Motor Co. v. United States*, 335 U.S. 303, 316-20, 324-26 (1948), demonstrates the fineness of the distinction. See also Fulda, *The Automobile Dealer Franchise Act of 1956: A Dissent*, 2 ANTITRUST BULL. 367, 368-70 (1957); McHugh, *supra* note 249, at 360-62.

293. See 1957 Ford Sales Agreement § 16(a) (6); 1956 General Motors (Pontiac) Dealer Selling Agreement § 23 C; 1957 Studebaker-Packard Dealer Sales Agreement § 25f.

294. Cancellation in this situation has been upheld when challenged under the antitrust laws. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956).

295. See note 122 *supra*.

automobile dealer franchises. Unlike the dealership arrangements giving rise to the Missouri doctrine, a continuing selling contract presumably is selected by the dealer himself with full knowledge of its implications. To the extent he was free to choose a franchise with a definite expiration date, terminable only for cause, he should not, having decided against this kind of arrangement, be entitled to claim the best of all possible worlds.<sup>296</sup>

*Cancellation for cause.*

Under modern franchise practice, a dealer who does not select a franchise terminable at will can get a contract with a fixed termination date, cancellable only for cause. This type of franchise protects the manufacturer against a dealer who does not meet numerous obligations specifically detailed in the contract. Although predicting the extent to which the statutory good-faith requirement will limit the manufacturer's privilege to terminate for any of the enumerated causes is difficult, a few observations seem in order.

It might be argued that the good-faith requirement is satisfied whenever the manufacturer has cancelled "for cause." Under this interpretation, the dealer can be heard only in cases where the "cause" alleged is a mere pretext for the manufacturer's arbitrary or capricious action. However, industry practice in-

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296. The Missouri doctrine may also be inapplicable in litigation arising from modern automobile franchises because these contracts attempt to negate any liability based on understanding going beyond the printed form. Sole agreement clauses in modern franchise contracts contain provisions stating that the printed franchise contract is the sole agreement between the parties, that it supersedes all prior agreements and that no modifications are binding unless signed by designated officers. See, *e.g.*, 1956 General Motors (Pontiac) Dealer Selling Agreement § 34.

In its original form, the statute had such a wide definition of franchise that understandings between manufacturer and dealer which modified the franchise in violation of sole agreement clauses might have been given effect. "The term 'franchise' shall mean the agreement, contract, understanding, or arrangement between any automobile manufacturer and any automobile dealer which purports to fix the legal rights and liabilities of the parties . . ." S. 3879, 84th Cong., 2d Sess. § 1(b) (1956).

The statute as passed considerably narrowed this definition, see 70 STAT. 1125, 15 U.S.C.A. § 1221(b) (Supp. 1956), to eliminate the possibility of anticompetitive arrangements, H.R. REP. NO. 2850, 84th Cong., 2d Sess. 7 (1956). Thus the change in statutory language is not of itself enough to foreclose the relevance of outside understandings.

When balancing sole-agreement clauses with the statutory good-faith provision, a court will have to consider not only that the printed franchise contract is an apparently complete and integrated document, but also that the wording of the sole-contract provision leaves little, if any, room for application of the doctrine of promissory estoppel. It gives the dealer a fair warning that only a small number of the company representatives can validly bind the company by assurances going beyond the terms of the written document.

That the dealer, when entering into a franchise contract, *has* to deal with representatives with limited authority does not increase their authority unless the manufacturer has honored similar assurances in the past. Furthermore, in light of the clear language of the clauses, courts will, in most situations, regard such assurances as mere puffing, unless the dealer can establish that the manufacturer was guilty of fraud in the inducement. See *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675, 678 (2d Cir. 1940); *Hall Motor Sales, Inc. v. Studebaker-Packard Corp.*, 145 F. Supp. 430 (W.D. Pa. 1956).

dicates that such a limited interpretation is not justified. Manufacturers are not prone to exercise their cancellation privilege whenever a dealer has committed a breach. They have preferred, even before the Day in Court Bill, to remedy instances of noncompliance by discussing the company's reasons for being dissatisfied and giving the dealer an opportunity to remedy the situation.<sup>297</sup> While such practices have become standardized and would now be reinforced by operation of the statutory good-faith requirement, the courts should not end their inquiry into the manufacturer's good faith upon finding mere observance of this procedure.

First, courts should not allow manufacturers to enlarge the catalogue of the dealer's duties further than is necessary to the exercise of a fair amount of control over the dealer's operations. Otherwise, the breach underlying the manufacturer's "good faith" termination procedure might in fact be insignificant. Of course, this danger should not be exaggerated. Manufacturers are, for example, fully aware that attempts along these lines might foster public opinion sufficiently adverse to lead to more restrictive legislation.

Second, not all the duties imposed upon the dealer are of equal importance when judged in terms of indispensable control over his operations. Therefore, breach of a given duty might not be a substantial violation of the franchise contract, considered as a whole. Accordingly, a court using the good-faith requirement might have to differentiate between the various clauses and develop gradations of importance, even in contracts expressly stipulating that non-performance of any of the duties imposed upon the dealer constitutes a material breach.<sup>298</sup> By so doing, however, a court will be substituting its judgment on the prerequisites to effective control for that of the manufacturer. Yet the terms of modern dealer franchises are based on many years of experience, and the legislatures have continuously chosen not to rewrite these terms.<sup>299</sup> Moreover, the nature of adversary proceedings renders a court a less qualified body for the task of rewriting—a factor which is particularly pronounced when the determination of materiality is left to a jury.<sup>300</sup>

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297. See 1 *S. Hearings, Marketing Practices* 693 (statement by Curtice). This technique has been incorporated into the Ford contract, 1957 Ford Sales Agreement § 17(c).

298. See 1957 Ford Sales Agreement § 17(b). Compare *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921) with *Bowen v. Kimbell*, 203 Mass. 364, 89 N.E. 542 (1909). See also 3 CORBIN, CONTRACTS §§ 651, 704 (1951); Note, 37 CALIF. L. REV. 499, 500 n.10 (1949).

299. Thus legislatures have not compelled manufacturers to insert required clauses into each franchise. See note 254 *supra*. This protective device is, however, used in the field of insurance. VANCE, INSURANCE 59 (3d ed., Anderson 1951); *H.R. Hearings, Marketing Legislation* 408.

300. "The judgments of the courts and juries would be substituted for the business judgments of the dealers and the manufacturers. And in so far as the judgments were made by juries, it would be impossible to secure precedents that could be relied upon as a basis for future conduct in the industry." *H.R. Hearings, Dealer Franchises* 282 (testimony of counsel, Ford Motor Co.).

At least some courts have attempted to control the possibility of jury capriciousness. See, *e.g.*, *Busam Motor Sales, Inc. v. Ford Motor Co.*, 85 F. Supp. 790 (S.D. Ohio 1949);



Third, unlike the duty to develop his territory, some of the dealer's obligations are not anchored in objective criteria. Many use "adequate" or "sufficient" performance as a yardstick.<sup>301</sup> Judicial consideration of these provisions should not be patterned on the treatment of personal satisfaction clauses. The manufacturer should be denied absolute discretion.<sup>302</sup> 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. The potential increase in litigation occasioned by this attitude was avoided by utilization of arbitration clauses in construction contracts. And these clauses have been honored.<sup>303</sup> However, effective use of arbitration provisions seems unlikely under the Day in Court Bill.<sup>304</sup>

#### *Failure to Renew.*

The act gives the dealer a cause of action if the manufacturer fails to renew the franchise in bad faith. Since no existing contracts provide an option to renew,<sup>305</sup> the statutory scheme does not reflect modern agreements. But as a matter of practice "under ordinary circumstances," franchise contracts are renewed "as long as the dealer's services are satisfactory."<sup>306</sup> Indeed, it is not uncommon to find dealerships which are family enterprises and in the hands of the second or even the third generation.<sup>307</sup> Still, under the terms of existing franchises, the manufacturer need not give any reasons for nonrenewal. This unqualified privilege is now limited by the statutory good-faith requirement.

At a minimum, the good-faith requirement should not prevent the manufacturer entitled to terminate for cause from waiting out the expiration date

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Hough v. General Motors Sales Corp., 63 F. Supp. 708 (S.D. Cal. 1945); Note, 70 HARV. L. REV. 1239, 1249 n.78, 1251-52 (1957).

Allowing the jury to make this determination would expose manufacturers to juridical risks similar to those faced by insurance companies. PATTERSON, ESSENTIALS OF INSURANCE LAW 278, 283-90 (1935); see also H.R. Hearings, Dealer Franchises 382-84.

301. See, e.g., Ford Sales Agreement §§ 2(b)-(e); General Motors (Pontiac) Dealer Selling Agreement §§ 11, 15, 19 C, E. But see 1 S. Hearings, Marketing Practices 691 (statement of Curtice).

302. See Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912); RESTATEMENT, CONTRACTS § 265 (1932); 1 CORBIN, CONTRACTS § 150, 3 *id.* §§ 644-48 (1951). See also UNIFORM COMMERCIAL CODE § 1-208.

303. See Nolan v. Whitney, 88 N.Y. 648, 650 (1882); Note, 31 COLUM. L. REV. 307, 313-314 (1931).

304. See H.R. Hearings, Dealer Franchises 58. See also Note, 70 HARV. L. REV. 1239, 1256-57 (1957).

305. But see 1957 Studebaker-Packard Dealer Sales Agreement, preamble, ¶ 7.

306. Webster Motor Car Co. v. Packard Motor Car Co., 135 F. Supp. 4, 7 (D.D.C. 1955), *rev'd*, 243 F.2d 418 (D.C. Cir. 1957).

307. See H.R. REP. No. 2850, 84th Cong., 2d Sess. 12 (1956) (minority report).

of the franchise without prejudice; he should not be forced to cancel provided the dealer has received adequate warning. On the other hand, the statutory requirement cannot be construed so broadly as to force the manufacturer to renew in all other situations. Otherwise, franchises would become permanent contracts. The House Report clearly reveals that this result was not intended.<sup>308</sup>

Just as in the cancellation-at-will area, the manufacturer should be entitled not to renew for such legitimate business reasons as market shrinkage. However, this situation does not exhaust the catalogue of justifiable failures to renew. For example, upon expiration of a five-year franchise contract, constantly changing business conditions might prove the terms of a franchise contract ripe for renewal unsatisfactory because of their inflexibility. On the basis of his experience, the manufacturer should be entitled to reevaluate the provisions, particularly those on duration. The dealer should not be allowed to utilize the name of good faith to gain an unlimited option enabling him to obtain identical new five-year franchises at the expiration of each previous one. But if five-year contracts are still available without change, a dealer with a satisfactory history should be protected against discrimination.<sup>309</sup> Conversely, the manufacturer entitled to end an unsatisfactory relationship should be allowed, consistent with the good-faith requirement, to offer a three or one year contract to the dealer, instead. And such a dealer should not be permitted to reject this offer and claim a cause of action under the act. In evaluating these situations, courts will have to balance the legitimate right of the manufacturer to have an effective dealership system with the possibility that he might seek to evade the statute by offering franchises which do not measure up to the standards of presently available contracts.

#### *The Dealer's Remedies*

Under a literal reading, the statute offers a remedy in damages as the sole means by which the dealer is protected against a manufacturer's misuse of his economic power.<sup>310</sup> With case law and provisions in state statutes giving rise to the argument that a dealer's expectation might sometimes be protected most effectively by requiring the manufacturer to live up to his contract,<sup>311</sup> the absence of a provision for equitable relief may seem unfortunate. However, the legislative history throws very little light on the problem, and a court is thus not precluded from going beyond the letter of the statute. Of course, granting an equitable remedy may entail difficulties in court supervision and so be impracticable. Should such remedies be made available, the dealer will have to weigh the advantages and disadvantages of the various possibilities for

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308. *Id.* at 9.

309. Courts should recognize that all offers of renewal are not bona fide, and the dealer should be able to construe some offers as acts of bad faith. See *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 422 (D.C. Cir. 1957) (dissenting opinion).

310. The statute does not include provisions for double damages and attorneys' fees present in the original Senate bill. See notes 260-62 *supra* and accompanying text.

311. *Cf.* Note, 70 HARV. L. REV. 1239, 1247 (1957).

relief. In any event, the wisdom of the statute's failure to provide for equitable relief depends on the adequacy of the damage remedy.

The statute gives the dealer a cause of action for violations during a continuing relationship as well as for wrongful termination.<sup>312</sup> Since dealers are not likely to bring damage suits while their franchises are in effect, most of the problems concerning damage awards will arise in termination cases. For the few cases involving a continuing relationship, the proper measure of damages would be the difference between the dealer's actual profits and the profits he would have made but for the manufacturer's act of bad faith. In proving this amount, the dealer must meet the requirement of certainty in showing his anticipated profits,<sup>313</sup> and the courts will encounter difficulties in determining the amount of recovery. Even in the more common termination suits, these difficulties will not be appreciably lessened by precedent. In the few cases where the dealer was successful, the courts occasionally failed to reveal the basis for their calculation of damages or left the question open.<sup>314</sup> The cases that have dealt with the problem invoked traditional damages doctrine and illustrate the dealer's difficulties in establishing a basis for recovery.

Before lost profits may be recovered, the court must be informed of the number of sales lost, the price at which those sales would have been consummated and the cost to the dealer in making them. Dealers have attempted to prove the number of sales lost by introducing orders submitted to the manufacturer, orders accepted by the manufacturer or agreements on a quota of vehicles over the period of the franchise.<sup>315</sup> Although some courts have based awards on estimates of this type,<sup>316</sup> at least one recent case would recognize only sales evidenced by binding orders from customers.<sup>317</sup> Should the dealer

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312. See notes 287-92 *supra* and accompanying text.

313. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). See also *Loew's, Inc. v. Cinema Amusements, Inc.*, 210 F.2d 86 (10th Cir.), *cert. denied*, 347 U.S. 976 (1954); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). In the latter cases the theaters, suing for damages resulting from an alleged conspiracy to deprive them of first-run motion pictures, continued some business relationship with the defendant distributors during the period of alleged injury.

314. *E.g.*, *Kane v. Chrysler Corp.*, 80 F. Supp. 360 (D. Del. 1948) (defendant's motion for summary judgment denied).

315. *Myers Motors, Inc. v. Kaiser-Frazer Sales Corp.*, 178 F.2d 291 (8th Cir. 1949) (orders submitted to manufacturer held not to bind him); *Chevrolet Motor Co. v. Gladding*, 42 F.2d 440 (4th Cir. 1930) (recovery allowed based on previously ascertained quota); *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 F.2d 3 (2d Cir. 1928) (agreed-upon quota adequate to set forth a cause of action); *Northwest Auto Co. v. Harmon*, 250 Fed. 832 (9th Cir. 1918) (dealer allowed recovery for lost profits on undelivered cars where specific number agreed upon in dealership contract).

316. See *Northwest Auto Co. v. Harmon*, *supra* note 315; *Moon Motor Car Co. v. Moon Motor Car Co.*, *supra* note 315.

317. *Busam Motor Sales, Inc. v. Ford Motor Co.*, 85 F. Supp. 790 (S.D. Ohio 1949), *app'cal dismissed*, 185 F.2d 531 (6th Cir. 1950). The customer orders which the dealer attempted to use as a basis for recovery of lost profits were at best only tentative. The orders had not been accepted; no deposit had been given; no price for the new car or trade-in had been specified. The orders amounted to little more than a position on the dealer's waiting list during a period of car shortages.

establish the number of sales lost, he will have difficulty in proving his anticipated income, despite the fact that automobiles have scheduled list prices. For the retail price of a new car is not the list price but a figure determined in bargaining over the allowance to be given on the customer's "trade-in." And even if courts were to measure gross income by applying the standard list price to the number of sales lost, the dealer would have to establish what his costs would have been—a figure that would include gain or loss on sale of the trade-in. Courts do not award lost profits on the basis of gross margin, and the probable inability of the dealer to prove such resale costs may be fatal to his claim.<sup>318</sup>

In addition to depending on such rigorous proof, the expectation interest does not give the dealer an adequate remedy. He must, according to traditional theory, limit his claim for lost profits to the remainder of the contract period. In contracts for an annual term, lost profits usually are insufficient to compensate the dealer who made large capital expenditures in preparing to sell the manufacturer's cars. Moreover, in cases involving contracts which have no termination date and are cancellable at will by either party, the courts have generally ruled that claims for lost profits cannot exceed the notice period required to cancel.<sup>319</sup>

Often, dealers have sought indemnification for expenditures made in buying real estate, tools and equipment instead of expected profits.<sup>320</sup> Courts have indicated that such reliance damages are proper when the dealer cannot establish his profit expectations and "hardship would otherwise result from the termination";<sup>321</sup> but they have found hardship only where the dealer has not had an adequate opportunity to recoup on his original investment.<sup>322</sup> Thus a dealer has recovered for his outlays in securing customers in anticipation of a con-

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318. See *Busam Motor Sales, Inc. v. Ford Motor Co.*, *supra* note 317. In some recent non-automobile dealer cases, gross profits were awarded. In *Walpole v. Prefab Mfg. Co.*, 103 Cal. App. 2d 472, 230 P.2d 36 (1951), plaintiff, a dealer in prefabricated houses, recovered gross profits on all bona fide orders for resale. But there was evidence showing that gross profits were equivalent to net profits, since plaintiff did not have to incur additional expenses in performing the resale contracts. In *Hill's, Inc. v. William B. Kessler, Inc.*, 41 Wash. 2d 42, 246 P.2d 1099 (1952), the court, with an apparent lack of concern for resale costs, awarded gross profits to a clothier for the manufacturer's failure to deliver men's suits. See Comment, 65 YALE L.J. 992, 1009 n.99 (1956).

319. *Chevrolet Motor Co. v. McCullough Motor Co.*, 6 F.2d 212 (9th Cir. 1925) (contract terminable at will with 5 days notice; recovery for breach limited to 5 days); see *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912); *cf.* *Chevrolet Motor Co. v. Gladding*, 42 F.2d 440 (4th Cir. 1930).

320. See *Bendix Home Appliances, Inc. v. Radio Accessories Co.*, 129 F.2d 177 (8th Cir. 1942); *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001 (4th Cir. 1933); *Isbell v. Anderson Carriage Co.*, *supra* note 319.

321. Fuller & Perdue, *The Reliance Interest in Contract Damages*: 2, 46 YALE L.J. 373, 416 (1937).

322. See *Beebe v. Columbia Axle Co.*, 233 Mo App. 212, 117 S.W.2d 624 (1938); *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425 (8th Cir. 1939) (dictum); *Meyer v. Pulitzer Publishing Co.*, 156 Mo. App. 170, 177, 136 S.W. 5, 7 (1911) (dictum). See also note 122 *supra*.

tract.<sup>323</sup> On the other hand, a dealer who, under pressure of the manufacturer, changed his location at great expense was denied recovery even though he could not prove expected profits. The court refused to recognize the dealer's actions as "caused" by the manufacturer's representations, and ruled that the proper remedy for breach of contract was the profit expectation.<sup>324</sup> A decision fully compensating a dealer for his outlays in establishing the dealership has yet to appear.<sup>325</sup>

The traditional concept of damages fails to recognize the automobile dealership as a specialized form of business activity. The arrangement between manufacturer and dealer constitutes neither a pure sales contract nor a pure agency relationship.<sup>326</sup> The dealer is, of course, dependent on the manufacturer for the supply of new automobiles—the mainstay of the dealer's business. But he is not concerned solely with the sale of new cars. His franchise requires him to service cars as well.<sup>327</sup> In connection with servicing, the dealer also sells repair parts, some supplied by the manufacturer, others purchased from independent sources.<sup>328</sup> In addition, the dealer operates a merchandising business in accessories, oil and gasoline, which does not directly affect the manufacturer's interest in customer satisfaction. Termination of his relationship with the manufacturer causes economic loss to the dealer's business as a whole. Because the dealer may no longer hold himself out to the public as an "authorized" garage, he suffers loss in his service and repair business as well as from the forced selling of inventory and fixed assets.<sup>329</sup> Further, the good will he has established

323. *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948) (recovery limited to protection of reliance interest; expected profits on sale of radios not recoverable); *Wade v. Ford Motor Co.*, 151 Kan. 425, 99 P.2d 775 (1940) (recovery for expenditures in preparation for opening dealership allowed where manufacturer breached promise to grant plaintiff a franchise); *Allen v. Elliott Reynolds Motor Co.*, 33 Tenn. App. 179, 230 S.W.2d 418 (1950) (same).

324. *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001 (4th Cir. 1933). See *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425 (8th Cir. 1939).

325. The expectation interest formula provides no means for compensating an injured dealer for loss of good will.

Courts are wary of awarding lost profits in addition to reliance damages; though such award may properly be made. See 5 CORBIN, *CONTRACTS* §§ 1031, at n.23, 1036 (1951).

All too often the courts, unable to compute damages with mathematical certainty, have denied recovery altogether. See *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912). *Contra*, *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4, 10 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir. 1957) ("the risk of uncertainty is to be thrown on the wrongdoer, rather than on the injured party. It is enough if the evidence shows the extent of the damages as a matter of reasonable inference, even though the result may be only approximate. The jury may form a reasonable estimate of the probable loss in the exercise of its good sense and sound judgment on the basis of the evidence").

326. See note 1 *supra*.

327. *E.g.*, 1957 Ford Sales Agreement §§ 10, 11; 1956 General Motors (Pontiac) Dealer Selling Agreement §§ 17, 19.

328. See *Hough v. General Motors Sales Corp.*, 63 F. Supp. 708 (S.D. Cal. 1945).

329. *Emich Motors Corp. v. General Motors Corp.*, CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 67960 (N.D. Ill.).

in the community cannot readily be transferred to another company: the dealer's name was long associated with one manufacturer,<sup>330</sup> and termination has an adverse psychological effect on sales personnel and consumers.<sup>331</sup> All these elements contribute to making loss of franchise an "economic death sentence."<sup>332</sup>

But can the dealer claim that the total value of his business was lost when the manufacturer cancelled and insist that his past profits record be applied to a certain number of years in the future?<sup>333</sup> At least some past profits were attributable to sales of used cars—not always directly allied with new car trade-ins—to sales of parts not purchased from the manufacturer and to servicing cars not built by him. Once a court determines that a cancellation or nonrenewal was in bad faith, the damages issue should be determined with a view to this specialized context.

Since a measure sufficiently compensatory for the dealer yet ascertainable with a degree of certainty protecting the manufacturer cannot be found within the rationale of the existing case law, a more effective yardstick would be the difference in value of the business as a going concern before and after cancellation. The enterprise value before cancellation can be determined by expert appraisal based on the company's capitalized earnings and an evaluation of its individual assets. This analysis might appear subject to challenge on the ground that no market value could be ascertained since the franchise is an integral element of the dealership which cannot be assigned without the permission of the manufacturer.<sup>334</sup> However, franchises are customarily renewed as long as the dealer maintains satisfactory representation.<sup>335</sup> And the fact of a market for automobile dealerships is proved by advertisements in trade papers to buy and sell franchises as going concerns<sup>336</sup> and the existence of dealership brokers.

After cancellation, the dealership may still have some enterprise value, based on earnings from sales of used cars and repair service. Or, it may have only liquidation value. Frequently, however, the dealership can be sold more favorably as a unit to a customer found either by the manufacturer or the cancelled

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331. See, e.g., 7 S. Hearings, *General Motors* 3257.

332. See note 102 *supra*.

333. For a maximum time limit on foreseeability, Corbin suggests ten years as the span courts feel profits can be established by convincing opinion evidence. 5 CORBIN, CONTRACTS § 1024 (1951). See Note, 70 HARV. L. REV. 1239, 1251 n.89 (1957). No fixed period would appear satisfactory in all cases. Stability of the dealer and of the manufacturer's position in the competitive market will influence this determination. Compare *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912), with *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir. 1957).

334. See Note, 70 HARV. L. REV. 1239, 1251 n.90 (1957). For examples of nonassignability clauses, see 1957 Ford Sales Agreement § 27; 1956 General Motors (Pontiac) Dealer Selling Agreement ¶ 3.

335. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957).

336. For examples of such advertising, see *Automotive News*, April 29, 1957, p. 38, cols. 4-5; *id.* p. 39, cols. 1-3.

dealer. Under the mitigation of damages principle, therefore, the dealer in these situations will not be entitled to increase his damages by rejecting a prospective buyer.

The suggested measure of recovery will thus produce a fair award of damages whether the dealership is sold to another person, liquidated, or operated by the original dealer as a used car lot, service station or under another manufacturer's franchise. In a sense, this formula will make the manufacturer serve as a broker for cancelled dealerships—a burden that does not seem undue in light of the provisions for assistance characterizing modern franchise contracts.<sup>337</sup> Through his zone and district offices, the manufacturer knows of many persons who are interested in purchasing a going business.<sup>338</sup> Nor is it unjust to ask the dealer who has elected a damage remedy to sell to the manufacturer on penalty of suffering a reduction in his damage claim. If the dealer insists on operating without a franchise, he may still receive compensation.<sup>339</sup>

#### CONCLUSION

Manufacturer-dealer relations have been marked by a continuous conflict of interests. In their desire to achieve greater sales volume, manufacturers have sought vigorous competition among dealers who, in turn, have pursued an independence denied them by the economic power of their suppliers. To the extent the Day in Court Bill prohibits manufacturers from unwarranted intervention in the day-to-day business of dealers, it seems a worthy statute. But in so far as the bill provides a means of lessening competition in the chain of distribution, it deserves all the criticism applied to fair trade laws. Protection for the middle man against the evils of "cut-throat" competition is always achieved at the consumer's expense. Moreover, any legislation constricting the freedom of contracting parties to adjust to new conditions by dictating their conduct deprives them and society of the flexibility inherent in contractual relationships and fosters the rigidity of status arrangements. Thus, while dealers claim to represent the most satisfactory channel for the distribution and service of automobiles, in the event they seek further congressional action, it would seem wiser to let the marketplace determine which elements are most efficient rather than by legislation lend support to the existing distribution pattern.

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337. See, *e.g.*, 1957 Ford Sales Agreement § 22(b); 1956 General Motors (Pontiac) Dealer Selling Agreement §§ 26 A.3(b), (d).

338. See note 34 *supra*.

339. To illustrate, a court might find that the value of a dealership before cancellation was \$150,000. Assume the manufacturer sent the dealer a customer who offered \$90,000 for the dealership after cancellation, but the dealer preferred to keep the business as a used car lot and garage. For this use, the business is valued at \$50,000. The dealer would be entitled only to \$60,000 damages.

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#### APPENDIX

##### AUTOMOBILE DEALER'S DAY IN COURT ACT OF 1956 AN ACT

To supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise automobile dealers to bring suit in the district courts of the United States to recover damages sus-

tained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act—*

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) 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.

SEC. 2. 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 the passage of this Act to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: 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.

SEC. 3. Any action brought pursuant to this Act shall be forever barred unless commenced within three years after the cause of action shall have accrued.

SEC. 4. No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

SEC. 5. This Act shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this Act and an express provision of State law which can not be reconciled.