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The Judicial Treatment of the Automobile Dealer Franchise Act

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COMMENTS

THE JUDICIAL TREATMENT OF THE AUTOMOBILE DEALER FRANCHISE ACT

In 1956, following well publicized congressional investigations which uncovered various methods whereby automobile manufacturers were abusing their dealers,[1] Congress attempted to remedy the situation by enactment of legislation designed to regulate the dealer-manufacturer franchise agreement. The result was the Automobile Dealer Franchise Act[2] (commonly known as the Dealer's Day in Court Act, and hereinafter referred to as the "act"), which has been characterized as both a novel approach[3] and a new departure in the exercise of federal regulation.[4] The act gives the dealer a federal cause of action for actual damages resulting from the manufacturer's failure to act in "good faith" in performing, cancelling, or failing to renew the dealer's franchise. As stated in the preamble, the purpose of the act was "to supplement the antitrust laws," and "to balance the power now heavily weighted in favor of automobile manufacturers."[5]

The representatives of the auto industry initially viewed the act with a jaundiced eye and warned that this special class legislation[6] would radically change the existing case law by allowing the dealer to win where formerly he would have lost. However, the court decisions under the act have not borne out such dire predictions. This discussion will examine what has, in fact, been the judicial interpretation and treatment of the act.

I. The History and Nature of the Franchise Agreement

In the infancy of the auto industry, the manufacturer sold directly to the consumer. This method of distribution soon proved inadequate and uneconomical because of the consumer's demand for numerous services which the manufacturer was not in a position to render and because of the extensive capital necessarily tied up in sales outlets.[7] The manufacturers consequently adopted independent distribution systems under which they sold their cars to middlemen or dealers, who, in turn, sold to con-

1 *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. (1955); *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 26 (1956).

2 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-25 (1958). Hereinafter, sections referred to in text will be those of the act.

3 *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 26, at 46 (1956).

4 Language of President Eisenhower as he signed the bill into law, 3 U.S. Code Cong. & Ad. News 4842 (1956).

5 70 Stat. 1125 (1956).

6 H.R. Rep. No. 2850, 84th Cong., 2d Sess. 14 (1956).

7 For a comprehensive study of the economic and legal factors in the development of the franchise agreement, see Hewitt, Automobile Franchise Agreements (1956) [hereinafter cited as Hewitt].

sumers. In order to escape direct liability through agency,[8] the manufacturers, in formulating their franchise agreements, specifically designated the dealers as "vendees."[9]

Because of its success as a method of product distribution, the basic form of franchise agreement has remained relatively unchanged to the present day. The fundamental contract is quite simple and effective. The dealer is granted the exclusive right to sell the manufacturer's automobiles in a certain area in return for the latter's promise to cultivate and promote consumer choice of the automobiles involved.[10] The duration of the franchise agreement is either left indefinite or specified as one or five years.[11] In addition, the agreement usually provides for termination by the manufacturer for cause.[12]

Prior to the Automobile Dealer Franchise Act most courts held that a court or jury could decide whether, in fact, a manufacturer had terminated the franchise for good cause.[13] Only a few federal courts actually left the manufacturer's discretion unfettered.[14] As a result, the manufacturers made their franchise agreements terminable at will. The courts initially responded by holding such agreements unenforceable for lack of mutuality.[15] However, long prior to the act, the majority of courts came to view the franchise agreement as an enforceable contract terminable at will without liability.[16]

Prior to the act, the courts recognized that the manufacturer was able to demand an advantageous agreement because of his superior bargaining power,[17] but they refused to alter any contract "freely entered into" by the dealer.[18] As a result, the dealer, fearing the loss of the substantial capital

8 Joslyn v. Cadillac Auto Co., 177 Fed. 863 (6th Cir. 1910); Columbia Motors Co. v. Williams, 209 Ala. 640, 96 So. 900 (1923); Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912); Dildine v. Ford Motor Co., 159 Mo. App. 410, 140 S.W. 627 (1911).

9 The manufacturer's liability was not completely eliminated by this change in language. See MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), holding the manufacturer liable for defects which made the vehicle "inherently dangerous."

10 See Note, *Dealers Franchise Agreements*, 63 HARV. L. REV. 1010 (1950).

11 Today, the various automobile companies have different lengths of time for their franchise contracts, *e.g.*, one-year contract (Ford); five-year contract (General Motors), and continuing contract (Ford).

12 See HEWITT 242-43, 250.

13 Shepherd v. Union Cent. Life Ins. Co., 74 F.2d 180 (5th Cir. 1934); Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 N.E. 221 (1912); Holton v. Monarch Motor Car Co., 202 Mich. 271, 168 N.W. 539 (1918); Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912); see 3 WILLISTON, CONTRACTS § 675A (rev. ed. 1936); RESTATEMENT, CONTRACTS § 265 (1932).

14 Huffman v. Paige-Detroit Motor Car Co., 262 Fed. 116 (8th Cir. 1919); Oakland Motor Car Co. v. Indiana Auto. Co., 201 Fed. 499 (7th Cir. 1912).

15 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); see 35 ILL. L. REV. 601 (1941).

16 Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940); Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir. 1940); *cf.* Hudson Sales Corp. v. Waldrip, 211 F.2d 268 (5th Cir. 1954).

17 Buggs v. Ford Motor Co., 113 F.2d 618, 619 (7th Cir. 1940).

18 Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675, 677 (2d Cir. 1940);

invested in his dealership,[19] was extremely vulnerable to pressure exerted by the manufacturer to increase car quotas, a maneuver which burdened the dealer with unwanted cars and parts.[20] The franchise had truly become a "contract of adhesion."[21]

To strengthen their position, the dealers banded together in the National Association of Automobile Dealers, which led the agitation for effective legislation.[22] Some commentators also aided the movement by criticizing the courts' strict adherence to freedom of contract concepts when the economic realities indicated that, in fact, the dealers had no such freedom.[23] It is clearly evident that there was much dissatisfaction with the judicial treatment of the franchise contract, which did little to lighten the heavy burdens imposed upon the dealer. The advent of legislation was no surprise.

II. STATE AND FEDERAL LEGISLATION

Prior to the passage of the Automobile Dealer Franchise Act, many states enacted statutes with the purpose of limiting the manufacturer's right to terminate the franchise. This was to be accomplished by requiring a yearly license to do business in the state and refusing to grant such a license to a manufacturer who had terminated an agreement without just cause.[24] Some of the state laws have been held unconstitutional,[25] and the remaining ones have afforded little protection to the dealers. The acts have not usually been interpreted to give a dealer private rights against his manufacturer;[26] generally they limit only the manufacturer's right to terminate and do not apply to non-renewal of a franchise.[27] Thus, by

Ford Motor Co. v. Kirkmyer Motor Co., 65 F.2d 1001, 1005 (4th Cir. 1933). See also Myers Motors, Inc. v. Kaiser-Frazer Sales Corp., 178 F.2d 291, 301-02 (8th Cir. 1949); Martin v. Ford Motor Co., 93 F. Supp. 920, 921 (E.D. Mich. 1950).

19 The average dealer has about $118,000 invested in his dealership. H.R. REP. No. 2850, 84th Cong., 2d Sess. 3 (1956).

20 See United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1939), *cert. denied*, 314 U.S. 618 (1941); FTC, REPORT ON THE MOTOR VEHICLE INDUSTRY 1075 (1939). See also authorities cited notes 1 & 3 *supra*.

21 See KESSLER, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1156 (1957).

22 See Kelley, *Mutiny of the Car Dealers*, Harpers Magazine, August 1956, pp. 69, 70-71.

23 See HAMILTON & ASSOCIATES, PRICE AND PRICE POLICIES 69 (1938); Issacs, *On Agents and "Agencies,"* 3 HARV. BUS. REV. (1925). See also HEWITT 207-38.

24 KY. REV. STAT. §§ 190.010-.080 (1956); MISS. CODE ANN. § 8071.3 (Supp. 1954); N.Y. GEN. BUS. LAW §§ 195-98; TENN. CODE ANN. §§ 59-1701 to -1720 (Supp. 1956).

25 ARK. STAT. ANN. §§ 75-1501 to -1526 (Supp. 1955) [Rebsamen Motor Co. v. Phillips, 289 S.W.2d 170 (Ark. 1956)]; COLO. REV. STAT. ANN. §§ 13-11-1 to -11-18) (Supp. 1955) [General Motors v. Blevins, 144 F. Supp. 381 (D. Colo. 1956)]; VA. CODE ANN. §§ 46-531 to -577 (1950) [Joyner v. Centre Motor Co., 192 Va. 627, 66 S.E.2d 469 (1951)].

26 Only two acts have been interpreted to give the dealers private rights. Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc., 142 F. Supp. 469 (D. Minn. 1956); Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955).

27 Only MINN. STAT. ANN. § 168.27(14)(3) (1961) and WIS. STAT. ANN. § 218.01(3)(a)(17)

providing for short-term franchises, and refusing to renew, the manufacturer could easily avoid the statute.[28] Since the state legislative efforts to improve the condition of the dealer resulted in merely illusory benefits in most cases, the dealers successfully demanded federal legislation.

Prior to World War II, dealers had agitated for federal assistance in their struggle with the manufacturers. Congress responded by asking the Federal Trade Commission to make an investigation.[29] The FTC report concluded that the manufacturers were using their great economic power to coerce and intimidate their dealers and that the greatest abuse resulted from the arbitrary use of the termination clause in the one-sided franchise contract which the dealers were forced to accept.[30] But no legislation was adopted, perhaps because the dealers feared complete government regulation of the industry.[31] After the war, the existence of a "seller's market" caused the dealers to forget their grievances temporarily, but when the market returned to normal, the dealers again turned to Congress, which now held its own hearings. The conclusion was that the same conditions which had existed at the time of the FTC investigation still prevailed.[32] As a result, Congress passed the Automobile Dealer Franchise Act, giving the dealer his much desired "enforceable franchise" and his "day in court."

III. Scope and Content of the Act

Section 2 of the act provides that an automobile dealer may bring a suit in a proper federal district court against any automobile manufacturer engaged in commerce to recover damages the dealer has sustained because of the failure of the manufacturer "to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating or cancelling, or not renewing the franchise." The manufacturer is permitted to assert as a defense that the dealer failed to act in good faith. Section 3 provides a three-year statute of limitations. Section 4 states that the act shall not "directly or indirectly" modify any provision of the antitrust laws of the United States; and section 5 provides that the act shall not invalidate any provisions of state law, except in cases of express conflicts.

It is clear that the dealer's cause of action is based upon a negative element: the manufacturer's lack of "good faith." As defined in section 1(e), good faith is the "duty of each party to any franchise . . . to act in a fair

(1961) state that nonrenewal without just provocation shall constitute an unfair cancellation.

28 Such state legislation was the reason General Motors switched from a five-year contract to a one-year contract franchise. See Business Relations Institute, Automobile Dealer Franchise Agreements and Factory-Dealer Relations 23 (1948).

29 H.R.J. Res. 594, 52 Stat. 218 (1938).

30 FTC, Motor Vehicle Report 153, 1067, 1075 (1939).

31 For reasons why the dealers reversed their stand, see Hewitt 109, 266.

32 H.R. Rep. No. 2850, 84th Cong., 2d Sess. 4 (1956).

and equitable manner toward each other so as to guarantee the one party freedom from 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." With such a provision, Congress hoped to aid and protect the dealer by giving him a potent weapon to brandish against the manufacturer's abuse of power. As expected, dealers soon instigated suits against virtually all the automobile manufacturers.[33] However, the courts have construed and interpreted the act according to its literal language, with the result that the manufacturers have triumphed in practically every case decided thus far.[34]

IV. JUDICIAL TREATMENT OF THE ACT

To date, the Supreme Court of the United States has not passed upon any provision of the act. This can best be explained by its relatively recent passage. In fact, only a few appellate courts have ruled on the act.[35] Despite this paucity of precedent, however, a definite judicial pattern has been formed as to several problems under the act.

A. *Constitutionality of the Act*

Most of the early law review discussions of the act suggested that there were serious questions as to its constitutionality.[36] Thus far, however, the

[33] So far all the five American manufacturers, Ford, General Motors, Chrysler, American Motors and Studebaker-Packard have been sued under the act as well as foreign manufacturers such as Volkswagen and Fiat. For full list of cases, see note 34 *infra*.

[34] The following cases have been decided under the act to date: Bateman v. Ford Motor Co., 302 F.2d 63 (3d Cir. 1962); Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir. 1962); Woodard v. General Motors Corp., 298 F.2d 121 (5th Cir. 1962); Fiat Motor Co. v. Alabama Imported Cars, Inc., 292 F.2d 745 (D.C. Cir. 1961); Blenke Bros. Co. v. Ford Motor Co., 217 F. Supp. 459 (N.D. Ind. 1963); Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto Corp., 216 F. Supp. 141 (D.N.J. 1963); Bateman v. Ford Motor Co., 214 F. Supp. 222 (E.D. Pa. 1963); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889 (N.D. Ga. 1963); Sam Goldfarb Plymouth, Inc. v. Chrysler Corp., 214 F. Supp. 600 (E.D. Mich. 1962); Milos v. Ford Motor Co., 206 F. Supp. 86 (W.D. Pa. 1962); Blenke Bros. Co. v. Ford Motor Co., 203 F. Supp. 670 (N.D. Ind. 1962); Garvin v. American Motors Sales Corp., 202 F. Supp. 667 (W.D. Pa. 1962); Blenke Bros. Motors, Inc. v. Chrysler Corp., 189 F. Supp. 420 (N.D. Ill. 1960); Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D. Cal. 1960); Schnabel v. Volkswagen of America, Inc., 185 F. Supp. 122 (N.D. Iowa 1960); Barney Motors Sales v. Cal Sales, Inc., 178 F. Supp. 172 (S.D. Cal. 1959); Pinney & Topliff v. Chrysler Corp., 176 F. Supp. 801 (S.D. Cal. 1959); Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378 (D.N.J. 1959).

[35] Bateman v. Ford Motor Co., 302 F.2d 63 (3d Cir. 1962); Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir. 1962); Woodard v. General Motors Corp., 298 F.2d 121 (5th Cir. 1962); Fiat Motor Co., v. Alabama Imported Cars, Inc., 292 F.2d 745 (D.C. Cir. 1961).

[36] See Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219 (1957); Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957); McHugh, *The Automobile Dealer Franchise Act of 1956*, 2 ANTITRUST BULL. 353 (1957); Note, 25 GEO. WASH. L. REV. 667 (1957); Note, 70 HARV. L. REV. 1239 (1957); Comment, 52 NW. L. REV. 253 (1957); Note, 9 STAN. L. REV. 760 (1957); Note, 26 U. CINC. L. REV. 277 (1957); Comment, 3 WAYNE L. REV. 206 (1957); *cf.* General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956) (COLO. REV. STAT. ANN. §§ 13-

manufacturers have not been successful in attacking the act on constitutional grounds. In *Blenke Bros. Co. v. Ford Motor Co.*,[37] for example, defendant Ford Motor Company alleged that the act violated the Constitution in several respects, thus raising the following issues.

Whether the Statutory Definition of "Good Faith" Is a Constitutionally Ascertainable Standard Within the Meaning of the Due Process Clause of the Fifth Amendment.[38] In resolving this issue, the court relied on numerous instances in which language similar to that used in the definition of "good faith" in the act had survived attack under the vagueness doctrine.[39] Also, an analogy was drawn to the use of such terms as "coerce," "restrain," and "good faith" in the National Labor Relations Act.[40] Moreover, the court noted that the term "good faith" was further limited in the Automobile Dealer Franchise Act by the proviso that recommendation, endorsement, exposition, persuasion, urging or argument should not constitute a lack of good faith. The court reaffirmed the principle that "the requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding."[41] Thus the court concluded that "good faith" "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[42]

Whether the Act, by Restricting Freedom To Contract, Takes Property Without Due Process of Law.[43] Citing the famous *Nebbia*[44] case, the court determined that there was sufficient public interest to make the action of Congress reasonable under the circumstances and not arbitrary or discriminatory. Additionally, the court felt that Congress had an adequate reason to limit defendant's freedom to contract in light of the history of manufacturers' frequent abuses of the franchise.

Whether the Act Is Arbitrary and Discriminatory Because, After Providing That Both Parties Must Act in Good Faith, Congress Granted Only the Dealers the Right To Enforce Such Obligations in the Courts. The court rejected this argument, saying that Congress, in seeking to balance the power between manufacturer and dealer, did not deem it necessary to give

11-14(10)(a)(d) & (e) (Supp. 1955) held unconstitutional). See also FTC, REPORT ON THE MOTOR VEHICLE INDUSTRY (1939).

37 203 F. Supp. 670 (N.D. Ind. 1962).

38 Congressional enactments are subject to the due process clause of the fifth amendment, which has been construed to require ascertainable standards. See Winters v. New York, 333 U.S. 507 (1948).

39 See Jordan v. DeGeorge, 341 U.S. 223, 231 n.15 (1951).

40 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (Supp. IV, 1962).

41 Sproles v. Binford, 286 U.S. 374, 393 (1932).

42 Blenke Bros. Co. v. Ford Motor Co., 203 F. Supp. 670, 672 (N.D. Ind. 1962), quoting United States v. Petrillo, 332 U.S. 1, 8 (1947).

43 Defendant based its argument on the ground that due process of law requires that there be no interference by government in private affairs unless the public interest so requires, and since there was no overriding consideration of public interest involved, the act took defendant's property without due process.

44 Nebbia v. New York, 291 U.S. 502, 536 (1934).

the manufacturer a right of enforcement because it assumed the manufacturer could not be coerced or intimidated by the dealer. Moreover, the court pointed out that the manufacturer still retains all of its effective remedies at law. The court concluded that Congress did not act discriminatorily or arbitrarily, but, on the contrary, used reasonable means to effectuate a legitimate purpose. The only other court to consider the constitutionality of the act said in dicta that it felt the act was constitutional because a similar state statute had been ruled constitutional.[45] These cases appear to have fairly well established, at least for the present, the constitutionality of the act.

B. *Good Faith Under the Act*

Several district courts and courts of appeals have construed the act according to its literal language, and all have recognized that there can be no recovery by the dealer in the absence of actual coercion, intimidation, or threats thereof by the manufacturer.[46]

In *Pierce Ford Sales, Inc. v. Ford Motor Co.*[47] the court looked to the act's legislative history and quoted from the House report:

> "The bill, however, does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise."[48]

The court went on to say that, since the act imposes no obligation to preserve an inefficient dealership, it certainly imposes none to accept a dealership overburdened with liabilities at its inception. In this case, the court held that it was not bad faith on the part of Ford to refuse to accept a prospective dealer who, in the company's opinion, would incur too great a debt in buying the dealership to operate it successfully. Such conduct by Ford was held to come within the proviso of section 1(e) (defining good faith) which states that "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." Hence, a manufacturer may refuse to accept a person as a dealer because of an honest belief that the prospective dealer lacks either the ability or the financial resources to be a successful dealer.

In *Woodard v. General Motors Corp.*[49] the court said that the plain meaning construction of the good faith definition would give a dealer a

45 See Garvin v. American Motors Sales Corp., 202 F. Supp. 667 (W.D. Pa. 1962).

46 Blenke Bros. Co. v. Ford Motor Co., 203 F. Supp. 670 (N.D. Ind. 1962); Blenke Bros. Motors, Inc. v. Chrysler Corp., 189 F. Supp. 420 (N.D. Ill. 1960); Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D. Cal. 1960); Barney Motor Sales v. Cal Sales, Inc., 178 F. Supp. 172 (S.D. Cal. 1959); Pinney & Topliff v. Chrysler Corp., 176 F. Supp. 801 (S.D. Cal. 1959); Staten Island Motors, Inc. v. American Motors Sales Corp., 160 F. Supp. 378 (D.N.J. 1959).

47 299 F.2d 425 (2d Cir. 1962).

48 See H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956).

49 298 F.2d 121 (5th Cir. 1962).

cause of action only if the acts of the manufacturer were unfair and inequitable *and* were also coercive. The court quoted the House Report in justification for such a construction: "The term 'fair and equitable' as used in the bill is qualified by the term 'so as to guarantee the one party freedom from coercion' . . . ."[50] Also, the court maintained that it was not strange or shocking that Congress should have restricted the cause of action to cases involving coercion, since one of the principal evils the act was designed to remedy was the exertion of pressure by the dominant automobile manufacturers upon dealers to accept automobiles, parts, accessories and supplies which the dealers neither needed nor wanted, and which they felt their markets would not absorb.[51] In this case, the franchise agreement between General Motors and Woodard contained the following provisions:

> "In order to provide product representation commensurate with the good will attached to the name 'Chevrolet' and to facilitate the proper sale and servicing of Chevrolet motor vehicles . . . dealer will maintain a place of business satisfactory as to appearance and location, and adequate in size and layout for new car sales operations, . . . and used car sales, and will maintain the business hours customary in the trade."[52]
>
> "Once Dealer is established in facilities and at a location mutually satisfactory to Dealer and Chevrolet, Dealer will not move to or establish a new or different location . . . without the prior written approval of Chevrolet."[53]
>
> "If Dealer does not conduct its business in accordance with any requirement set forth [above] . . . , Chevrolet may terminate this Agreement by giving to Dealer written notice of termination to be effective three (3) months after receipt of such notice."[54]

General Motors cancelled the Chevrolet franchise agreement because the dealer, Woodard, had for some time failed to provide or obtain adequate facilities. The court found that this action was taken in good faith and affirmed summary judgment in favor of General Motors. The court did not think that the good faith requirement, whether or not viewed in a context of coercion, prevented a manufacturer from terminating a contract with a dealer where the dealer had, over a long period of time, violated a valid and material clause of the contract and failed to comply with the continuing insistence of the manufacturer upon performance. The court also felt that the legislative intent underlying the act was not to include a threat of cancellation within the proscribed coercive measures if there had been a prolonged failure on the part of the dealer to heed the recommendations or yield to the legitimate persuasion of the manufacturer. The court said the facts showed that for a period of nearly eighteen months General

50 H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956).
51 See S. REP. No. 2073, 84th Cong. 2d Sess. 2 (1956).
52 Woodard v. General Motors Corp., 298 F.2d 121, 123 (5th Cir. 1962).
53 *Ibid.*
54 *Ibid.*

Motors, at first patiently and hopefully and later with exasperation and despair, cajoled, then exhorted, and finally demanded that adequate facilities be provided. The court concluded that the duty of good faith, however measured, did not require General Motors to continue the contract arrangement for a longer period.

Recently a federal district court[55] neatly described this difficult area by saying that the act is not a guarantee against termination of a dealer's franchise, but rather the granting of a cause of action for damages, which can serve as a guarantee against coercion and intimidation through conduct amounting to bad faith.[56] The act permits a manufacturer to terminate, or to fail to renew, a franchise where the dealer fails to measure up to his assigned market potential[57] or to keep pace with the other dealers in his zone.[58] Thus it is not coercion for a manufacturer to insist on his contract rights.[59]

In light of the foregoing, it seems abundantly clear that the act's good faith provision gives the dealer more in the way of protection from the manufacturer's misbehavior than did prior common-law[60] and antitrust[61] remedies. The act prevents the manufacturer from injuring the dealer through the use of coercive tactics; but it does not guarantee the dealer freedom from the manufacturer's unfair and inequitable behavior which is noncoercive. In this respect, the act has thus far been a disappointment to the dealers. However, as one of the recent cases indicated, "We have little authority to guide us in the question here presented. The act is new and answers to questions arising under it have not yet been developed."[62] Thus,

55 Milos v. Ford Motor Co., 206 F. Supp. 86 (W.D. Pa. 1962).

56 *Id.* at 93.

57 Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D. Cal. 1960).

58 Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378 (N.J. 1959).

59 Only one case seems to have departed from this otherwise unchallenged interpretation. In Garvin v. American Motors Sales Corp., 202 F. Supp. 667 (W.D. Pa. 1962), the court, appearing quite sympathetic to a rural dealer, held that the evidence supported the jury finding of bad faith on the part of American Motors in terminating the dealer. In so doing, the court seemingly departed from the vast majority of the courts, which presumably would have determined such facts not to be violative of the act as a matter of law.

60 The courts could have implied a good faith limitation since the parties did intend to create an enforceable contract. Such an implication is not without precedent in situations involving agreements quite similar to the dealer's franchise. See, *e.g.*, J. R. Watkins v. Rich, 254 Mich. 82, 235 N.W. 845 (1931); Beebe v. Columbia Axle Co., 233 Mo. App. 212, 117 S.W.2d 624 (1938).

61 Prior to the act, the dealer could, and did, bring an action against the manufacturer under the Sherman Act, 26 Stat. 209 (1890), as amended by the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 1, 2, 15 (1958). Two prime examples of this type of action are Schwing Motor Co. v. Hudson Sales Co., 239 F.2d 176 (4th Cir.), *cert. denied*, 355 U.S. 923 (1956), and Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957). In both cases the dealers lost because the court felt that the manufacturer's termination of the dealership was a proper exercise of an honest business judgment under the facts of the respective cases.

62 Bateman v. Ford Motor Co., 302 F.2d 63, 67 (3d Cir. 1962).

on final analysis, the most that can be said at present is that a trend favoring the manufacturer's position has developed in court analysis of the act's good faith provision.

C. *Remedies Available Under the Act*

1. *Damages*

Assuming the dealer has proved that the manufacturer has acted in bad faith, the act provides that the dealer "shall recover the damages by him sustained and the cost of suit."[63] Since this provision is the only sanction provided by the act, the extent to which damages may actually be recovered will play a major role in determining whether the manufacturer will eliminate his bad faith practices.

Under the act, the initial problem to be solved in measuring damages is the determination of whether the suit is based upon "bad faith performance" or, alternatively, upon "bad faith termination or non-renewal." In the former situation, the damage problems will be essentially those present in a breach of contract case. Franchise contracts typically do not stipulate the number of cars to be delivered by the manufacturer, but only obligate the latter to supply the dealer with "such products available in quantities to meet Dealer's reasonable requirements in Dealer's area of sales responsibility."[64] Faced with such a franchise, some courts have held that the manufacturer is liable for the difference between the profits on the number of cars actually delivered and the profits on the number of cars he would have delivered had he acted in good faith (as used in the common-law sense of "honesty of intention," not to be confused with the act's "good faith").[65] To determine how many cars the manufacturer would have delivered, the courts will allow evidence of the manufacturer's total production, the number of cars distributed to a particular relevant area, and the dealer's customary portion of these amounts.[66] Since most franchise contracts require the dealer to furnish the manufacturer with a monthly estimate of the dealer's requirements for the next three months,[67] these reports could be used as additional evidence of what the dealer expected to receive. In short, the measure of damages for bad faith performance under the act will be essentially the same as under prior case law. To date, no court has considered this particular damage question under the act.

In a suit involving bad faith termination or non-renewal, the additional problem presented is whether there can be a recovery for loss of future profits. Basic contract law requires that such damages be foreseeable by the

[63] Section 2.

[64] See the standard Chevrolet Motor Division Dealer Agreement, Form No. 65D-T-202-60, Form No. 65D-T-201 (1960).

[65] Moon Motor Car Co. of New York v. Moon Motor Car Co., 29 F.2d 3 (2d Cir. 1928); Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 N.E. 221 (1912).

[66] Moon Motor Car Co. of New York v. Moon Motor Car Co., *supra* note 65; Randall v. Peerless Motor Car Co., *supra* note 65.

[67] Chevrolet Motor Division Dealer Agreement, *supra* note 64, at 4.

parties at the time the contract was made and that they be established with reasonable certainty.[68] Some cases arising before the act indicated that no damages were foreseeable, since the agreement itself provided for termination "at will"; the courts further inferred the words "without liability."[69] However, many franchise agreements provide that upon termination the manufacturer will repurchase new cars, specified parts and accessories, and recommended signs and tools which the dealer purchased within a specified time, and that the manufacturer will assume part of the lease obligation.[70] It might be concluded that the dealer should not recover for any additional damage because the failure to stipulate it in the franchise agreement indicates that it was not foreseeable. On the other hand, one of the basic premises of the act is that dealers have negligible control over contract provisions and that it is therefore reasonable to infer that the parties actually considered the enumerated liability clauses as merely descriptive of the total foreseeable damages. In any event, the act's legislative history clearly indicates that recovery was not to be limited to actual damages but was to include loss of future profits.[71] The dealer's main concern in this regard will be to prove and establish future profits with reasonable certainty. The essential elements to be proved are the rate of profit, the quantity of goods to be sold, and the reasonable period for which the franchise might have extended. A good illustration of these concepts in a concrete fact situation is provided by *Garvin v. American Motors Sales Corp.*[72]

The jury awarded Garvin, the dealer, 20,000 dollars in damages, and the court upheld this award as a reasonable inference from the evidence presented. In fact, the opinion seems to indicate that the jury was a bit stingy and might have been justified in awarding twice as much as they did.[73] Although future profits were awarded only for the year following the bad faith termination, the court said that the act did not limit such damages to a single year and that it was permissible to admit mortality tables as evidence of the potential life span of Garvin in case the jury decided that, in the normal course of events, the franchise would have been renewed throughout his life. In measuring the future profits for the year following termination, the court noted that, at termination, Garvin had orders for five automobiles and that a reasonable projection into the future, recognizing the considerable impact that the Rambler had upon the automobile market generally, could well anticipate a sale of at least sixty automobiles within a year. The

68 Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854); see MCCORMICK, DAMAGES § 138 (1935); Comment, 65 YALE L.J. 992 (1952).

69 See MCCORMICK, DAMAGES §§ 25-32 (1935); Comment, 65 YALE L.J. 992, 997-98 & n.34 (1952).

70 See Chevrolet Motor Division Agreement, *supra* note 64, at 20-26. See also HEWITT 160-67.

71 *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 26, at 59-60 (1956).

72 202 F. Supp. 667 (W.D. Pa. 1962).

73 The court thought that it could be inferred from the evidence that actual damages amounted to $22,500 and that future profits for one year would have amounted to $18,000.

court also felt this conclusion was buttressed by the fact that Garvin had earned a profit of 3,000 dollars in the two months prior to termination. The court pointed out that the dealer is not required to show with exactitude the precise sum he lost, since an exact computation is not feasible. Thus the jury may make a just and reasonable estimate of the damages based on relevant data. Also, in such circumstances, where the manufacturer by his own wrong has prevented a more precise computation, the jury is allowed to act on probable and inferential as well as direct and positive proof.[74] Certainly, the thought of a *Garvin* court coupled with a jury sympathetic to the local dealer is not pleasant for those representing the manufacturer's interests. But because *Garvin* is the only case that has even reached the damage issue, its authority is perhaps limited.

2. *Injunction*

A careful reading of the act's legislative history provides no indication that the subject of supplemental equitable relief was considered by Congress. Does this mean that the statutory right to damages is exclusive, so that the dealer cannot enjoin the manufacturer from terminating the franchise, pending the damage action on the merits? The answer is clearly "No" in light of *Bateman v. Ford Motor Co.*[75]

In *Bateman* the dealer asked for a preliminary injunction to restrain the manufacturer from terminating the franchise while the suit for damages was being litigated. The district court refused to grant this relief, holding that the statutory remedy was exclusive.[76] On appeal, the Court of Appeals for the Third Circuit reversed and remanded,[77] agreeing with the dealer that a court should exercise its equitable powers to make the statutory relief more effective. The court noted that article III, section 2 of the Constitution provides that the judicial power of the United States applies to all cases "in Law and Equity" and that from the very beginnings of equity one of the purposes of action by the chancellor was to make effective rights given by the law.[78] Since the purpose of the act was to balance the power which was earlier heavily weighted in favor of the manufacturers, the court thought that to accomplish this goal the dealer should be given equitable assistance in keeping his business going while his legal claim is being tested. The court felt that a judgment for damages acquired years after a dealer's franchise had been taken away and his business obliterated was small consolation. Thus the bare fact that Congress by statute has provided for a

74 Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946).

75 302 F.2d 63 (3d Cir. 1962).

76 Bateman v. Ford Motor Co., 202 F. Supp. 595 (E.D. Pa. 1962).

77 302 F.2d 63 (3d Cir. 1962). On remand the district court held that defendant had not acted in bad faith and denied the petition for a preliminary injunction. 214 F. Supp. 222 (E.D. Pa. 1963).

78 This general equitable power of the court to give injunctive relief to make more effective a remedy provided by law is long established and well known. See 4 POMEROY, EQUITY JURISPRUDENCE § 1338 (5th ed. 1941).

right at law without express provision for injunctive relief does not preclude the exercise of the general powers of a court of equity.

Does this decison compel a manufacturer to carry a dealer's franchise indefinitely? Obviously, the answer must be "No." As the court in *Bateman* put it, "A franchise is not a marriage for life."[79] If the dealer loses on the damage action, he will no longer be protected. Also, the bond given by the dealer to secure the injunction may prove an embarrassing burden if he cannot maintain his case. In short, a dealer's injunction will hurt only the manufacturer who has acted in bad faith.

D. *Jurisdiction and Venue Problems Under the Act*

The act provides that a dealer may sue "any automobile manufacturer engaged in commerce" in any district court of the United States in the district in which the manufacturer "resides, or is found, or has an agent, without respect to the amount in controversy. . . ."[80]

1. *Manufacturer Defined*

Section 1(a) of the act defines an automobile manufacturer as any form of business enterprise engaged in the manufacturing or assembling of passenger cars, including any corporation which "acts for" and is under the "control" of such manufacturer in connection with the distribution of automotive vehicles. In *Barney Motor Sales v. Cal Sales, Inc.*,[81] a Triumph Motor Car dealer sued a corporation engaged in the distribution of Standard-Triumph automobiles in certain western states. The manufacturer of Standard-Triumph automobiles was an English corporation with no interest whatever in the defendant distributing corporation. Defendant, maintaining that its own franchising arrangements with the ultimate retail dealers were exempt from the coverage of the act, moved for summary judgment on the ground that it was not a manufacturer as contemplated by the terms of the act. The court denied this motion and permitted the dealer to introduce evidence to demonstrate that the defendant was dominated by the acts of the actual manufacturer, and that the failure to renew the franchise agreement was in bad faith. Otherwise, reasoned the court, the actual manufacturers could perpetuate their bargaining domination without the risk of legal recourse by the simple device of operating through intermediary agencies such as the defendant. Thus, the power to exact any terms could itself be used to compel the middleman to pass on such terms to the ultimate dealer. The court felt that the essence of the act was to break this chain of domination, whether forged of one link or of many. The court then laid down the rule that when the instrumentality used to exact onerous conditions of continuing in the automobile retailing business is "acting for" the manufacturer in the sense that he is employed by the

79 302 F.2d 63, 66 (3d Cir. 1962).
80 Section 2.
81 178 F. Supp. 172 (S.D. Cal. 1959).

manufacturer, willingly or unwillingly to bring about the condition of subservience forbidden by the act, the instrumentality is itself a part of the manufacturer and is bound by the act's requirement of good faith. The court was quite mindful that this doctrine of *pseudo-respondeat superior* would initially impose a hardship on the middlemen, but it reasoned that as soon as the exploitation of the dealer by the middleman-distributor is thwarted, the unfortunate squeeze on the distributor will cease. Thus a possible circumvention of the act by manufacturers has been eliminated.

2. *Place of Proper Venue*

Under the act, the manufacturer can be sued where he "resides," "has an agent," or "is found."[82] Clearly, the former two places of laying venue refer respectively to the manufacturer's state of incorporation and any place where the manufacturer has a bona fide agent as tested by principles of common-law agency. However, the third place of venue, where the manufacturer is "found," is less certain. Perhaps the first step one should take in attacking this semantic difficulty is to note the great similarity between the act's venue provisions and those found in section 4 of the Clayton Act.[83] If the word "defendant" is substituted for the word "manufacturer," the venue requirements are identical. In construing section 4, the term "found" has generally been equated with "doing business,"[84] which has been defined by a great many courts. Assuming federal law is controlling,[85] the matter of "doing business" will be governed by the standards of "fair play and substantial justice."[86] Using these basic principles, the court in *Fiat Motor Co. v. Alabama Imported Cars, Inc.*[87] held that the relationship between Fiat and one of its wholesale distributors, the latter having its principal place of business in the District of Columbia, subjected Fiat to service in the District. Here Fiat, a New York corporation with its principal place of business in New York City, imported Fiat automobiles and sold them to distributors, one of which was the Roosevelt Automobile Company, a Delaware corporation with its principal place of business in the District of Columbia. The dealer, an Alabama corporation, brought suit under the act against both Fiat and Roosevelt in the District of Columbia. Fiat's motion to quash service was denied and, on interlocutory appeal, the ruling affirmed. The court pointed out that the "Distributor Sales Agreement" to which Fiat and Roosevelt were parties manifested a continuing business relationship involv-

82 Section 2.

83 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

84 See, *e.g.*, United States v. Scophony Corp., 333 U.S. 795 (1948); American Football League v. National Football League, 27 F.R.D. 264 (D. Md. 1961); Riss & Co. v. Association of W. Rys., 159 F. Supp. 288 (D.C. Cir.), *motion denied*, 162 F. Supp. 69 (D.C. Cir. 1958); Boston Medical Supply Co. v. Brown & Connolly, 98 F. Supp. 13 (D. Mass. 1951), *aff'd*, 195 F.2d 853 (1st Cir. 1952).

85 Compare the majority and dissenting opinions in Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).

86 International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

87 292 F.2d 745 (D.C. Cir. 1961).

ing the supervision and control by Fiat of numerous details of the Roosevelt business. Hence, the contacts of Fiat with the District were of such a substantial, continuing, and direct nature as to warrant the holding that it was doing business there in a manner which made it subject to service of process.

Under the broad theory of minimum contacts,[88] it would seem more than likely that the manufacturer will be "found" wherever the aggrieved dealer is located regardless of the fact that the dealer is not an agent of the manufacturer and that the manufacturer has no other contacts with the state. Thus, if *X* manufacturer has a franchised dealer, *Y*, in state *A*, *Y* can bring suit under the act against *X* in state *A* on these facts alone if there is valid service of process.

3. *Service of Process and the Antitrust Laws*

Schnabel v. Volkswagen of America, Inc.[89] makes it quite clear that the act does not provide for extraterritorial service of process as does section 12 of the Clayton Act.[90] In that case the dealer brought a suit in Iowa and served the manufacturer and distributor, respectively, in New Jersey and Illinois. The court quashed both services, saying that the act does not purport to amend the Clayton Act, for the act specifically provides in section 4 that "No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States." The court noted that there were sharp conflicts between many of the important provisions of the two acts, such as the statute of limitations, damages and attorney's fees recoverable, and the provisions relating to venue and process. Thus the act does not incorporate by implication any antitrust provisions. The act is a separate "supplement" to the antitrust laws and as such must be judged by itself.

V. EFFECT OF THE JUDICIAL TREATMENT OF THE ACT UPON OTHER INDUSTRIES USING THE FRANCHISE SYSTEM

Dealer franchises are now the dominant type of contract in the distribution of such items as farm implements, electrical appliances, tires, pianos, petroleum products, radio, television, and wallpaper.[91] As in the automobile industry, the manufacturer grants to the dealer the right to sell his product, generally in defined areas, in exchange for promises to promote and develop markets for the product. Some of the legal and economic problems related to these non-automotive franchise agreements are similar to those in the auto industry.[92] It is quite conceivable that courts, in deciding non-automotive franchise cases, may be so influenced by the Dealer's Day in Court Act

88 For an extension of this principle, see McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

89 185 F. Supp. 122 (N.D. Iowa 1960).

90 38 Stat. 731 (1914), 15 U.S.C. § 22 (1958).

91 See HEWITT 228.

92 *Ibid.*

as to require the manufacturer to act in good faith, *i.e.*, to eliminate coercion, intimidation, and threats thereof. However, the concept of freedom of contract will probably limit the use of such an analogy to the more egregious examples of coercion and otherwise leave the prior case law undisturbed. In any event, the judicial treatment of the act might well open the way for further federal legislation concerning franchise contracts in general. Thus, by writing the act's good faith requirement into every franchise agreement, Congress could eliminate many abuses stemming from these contracts of adhesion without doing violence to the freedom of contract concept.

VI. CONCLUSION

Through the Automobile Dealer Franchise Act, Congress attempted to give the dealer a "countervailing power"[93] to use in his bargaining with a manufacturer. In reality the act has not accomplished this objective.[94] It has, however, limited abuse of power by manufacturers by providing a statutory standard of good faith which prohibits coercion, intimidation, or threats thereof in the manufacturer-dealer relationship. While the act is limited to preventing these three vices and does not prohibit behavior by the manufacturer that is merely unfair or inequitable, it does strengthen the dealer's relative bargaining power. Perhaps it is well that this is all the act does. The concept of freedom of contract should not be encroached upon more than is absolutely necessary to adjust gross bargaining inequities. The act, as interpreted by the courts thus far, does not pass this limit.

J. Patrick Martin

[93] See GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 117, 119 (1952).

[94] The act fails to give the dealer what he really wants: territorial security and the elimination of dealer "bootlegging." For a recent discussion on this subject, see generally Heuerman, *Dealer Territorial Security and "Bootlegging" in the Auto Industry*, 1962 WIS. L. REV. 486. Bootlegging is the practice of a franchised dealer's selling new cars at distress prices to a nonfranchised new car discounter.