BOOK REVIEW

Law and the Balance of Power. By *Stewart Macaulay*.† New York: Russell Sage Foundation, 1966. Pp. xix, 224.

The effects and the import of industrial concentration have generated voluminous commentary. Most of the studies deal with the problem in an antitrust setting or in terms of the structural alterations that might occur and their resultant impact on the national economy. Poised precisely in the center of a universal concern with industrial aggrandizement is the automobile industry. It carries all the bench marks that invite legislative and judicial scrutiny—oligopolistic market composition, immense material resources, a history of expansion, and the possession of brute market power. Professor Macaulay addresses his study to the tensions exuded by the latter force. More specifically, he focuses on the unique and frequently turbulent relationship between automobile manufacturer and franchised dealer.

The public views the dealer as an integral part in the manufacturer's distribution system. To the consumer, producer and dealer visually and tactiley merge into the symmetry and design of the automobile.[1] The manufacturer views the relationship quite differently. To him the dealer represents nothing more than a sales instrumentality who bears no burden of risk and who should therefore be happy to have the opportunity to market a heavily advertised presold item. On the other hand, the dealer feels that he is exploited in that he must bear the risks of investment without counterbalancing rights of control over his destiny. Professor Macaulay's book is a successful endeavor, via a five stage analysis, to give some coherence to this labyrinth of cross-pressures and embranglements.

Dealers initially endeavored to meet manufacturers' bargaining power with private legal action—usually based upon breach of contract. A lack of express mutuality of obligation and a general refusal by the courts to inject into the contract any implied obligations, such as a promise by manufacturers to use their substantial powers in

† Professor of Law, University of Wisconsin.

[1] For another perspective of the auto industry see R. Nader, Unsafe At Any Speed (1965).

"good faith," deprived dealers of any chance of success in private litigation. In addition, the disparity in bargaining power allowed the manufacturers to continue to insist upon "termination at will" agreements. The dealers next resorted to collective private action, utilizing with little success the association technique. The third stage in the conflict encompasses the use of existing legislation and various efforts by dealer representatives to have state and federal curative laws enacted.

Macaulay only summarily discusses the use of federal statutes predating the Dealer's Day in Court Act.[2] The space that he devotes to this form of action focuses primarily on the codes of fair competition that were developed under the depression-inspired National Industrial Recovery Act. Unfortunately, he swiftly glosses over dealer utilization of trade regulation statutes. Admittedly the dealers were generally unsuccessful, but the ratiocination and tone from several of the decisions serves to provide valuable insights into the texture of the relationship.

The favorite and most logical basis for attack is for the dealer to allege the existence of a tie-in. For example, where a Chevrolet Motor Company contract specified that the dealer sell and use for repair only General Motors parts, it was argued that Chevrolet parts were "tied" to Chevrolet cars and to the franchise.[3] If the dealer wanted the automobiles, he was obligated to purchase replacement and repair parts. In acknowledging the presence of a tying arrangement, but nevertheless denying relief, the Seventh Circuit invoked the anomolous view of the automotive distribution process that prevails among the general public in justifying the imposition of additional burdens on the dealer: "In the minds of the owners, the cars are identified and associated with the manufacturer."[4] According to this theory, therefore, since the manufacturer bears the risk of goodwill loss, he should have the right to dictate the use of repair and replacement parts.

The irony of the situation is that the dealers have been forced to financially support advertising funds whose acknowledged purpose is to create and perpetuate the manufacturer identity image. Lincoln-

[2] 15 U.S.C. §§ 1221-25 (1964).

[3] Pick Mfg. Co. v. General Motors Corp., 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936) (action brought by a General Motors competitor).

[4] *Id.* at 643.

Mercury Dealers Advertising Funds (LMDA's), established by Ford Motor Company, were designed to coordinate local advertising efforts in order to achieve uniform and economical coverage. Membership was compulsory. To finance the project Ford assessed each new car, turning the funds over to the local LMDA's.[5] All advertising was handled by Kenyon and Eckhardt, an agency who also did Lincoln-Mercury institutional advertising. A North Carolina dealer attacked the plan on two grounds: first, in his view, the dealers were forced to buy advertising programs as a means of assuring the continuance of the franchise; and secondly, he contended that Ford conspired to restrain trade in the sales of cars and advertising. The district court dismissed the tying arrangement allegation on the highly questionable reasoning that "All of the tying cases . . . involve efforts by a defendant to tie one of his own products to the sale of another of his products—never to the sale of somebody else's product . . . ."[6] The Fourth Circuit predicated its refusal to overturn the trial court's denial of restraint of trade primarily on the grounds that "only those arrangements which *unduly* or *unreasonably* restrain commerce are forbidden."[7] The higher cost of autos resulting from advertising was considered to be *de minimus.*

The dealers lack of success in obtaining relief through the trade regulation statutory complex is surprising in view of the contemporary liberality of interpretation in that area. In post World War II antitrust decisions, tying arrangements that involved fields other than the auto industry have received curt and preemptory treatment. Perhaps the unique quality of the dealer-manufacturer relationship accounts for the difference in judicial treatment. It could be argued

[5] General Motors, as a result of Justice Department pressure, no longer requires compulsory dealer contribution to national advertising. The Wall Street Journal, Dec. 4, 1956, at 2, col. 2.

[6] Miller Motors, Inc. v. Ford Motor Co., 149 F. Supp. 790, 806 (M.D.N.C. 1957), *aff'd,* 252 F.2d 441 (4th Cir. 1958). For a criticism of the "single vendor" definition of the tying arrangement see Austin, *The Tying Arrangement: A Critique and Some New Thoughts,* 1967 WIS. L. REV. 88.

[7] Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441, 446 (4th Cir. 1958) (emphasis in original). The Fourth Circuit concluded that a lack of these elements distinguished the present case from United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618 (1941), where the Justice Department was successful in sustaining charges that General Motors "made use of their monopoly over the supply of General Motors cars and their power over the economic fate of General Motors dealers, to force GMAC on dealer-purchasers and retail purchasers of General Motors cars, in effect tying the GMAC finance conditions and restrictions to the wholesale purchase and retail sale of General Motors cars." *Id.* at 402.

that any time the goodwill or national image of the auto manufacturer is jeopardized, there appears a sublimal presumption in favor of the manufacturer's activities. And undoubtedly the passage of the Dealer's Day in Court Act[8] has diluted much of the thrust of trade regulation implementation. One court used a congressional finding that the "antitrust laws [do] not afford automobile dealers a remedy against inequitable and oppressive use of the manufacturers' superior economic power . . . ."[9] as subsidiary support in denying a dealer antitrust recovery. It might be noted that thus far the Government has enjoyed something less than total success in defining and containing the functional boundaries of the franchise technique. It is a problem that will undoubtedly draw continuing court attention.

The most siguificant result of dealer lobbying, and the focus of Macaulay's study, was the enactment of the Automobile Dealer Franchise Act of 1956.[10] The result of intense and bitter dealer-manufacturer skirmishing in and out of congressional hearings, all of which Macaulay succinctly describes in detail, the Act provides for the recovery of damages when the manufacturer fails to "act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise . . . ."[11]

According to Professor Macaulay, the Act produced dual response activity, one formal and the other informal. The latter response, considered by the author to be the fourth stage of the dealer-manufacturer struggle, was manifested by manufacturers creating additional due process safeguards upon which dealers could rely in cancellation cases, expanding avenues of communication, and in a general over-hauling and revising of the franchise agreements. These concessions were significantly greater than the benefits achieved in formal confrontation with manufacturers under the federal Dealer's Day in Court Act,[12] which Macaulay discusses, along with the effects of local legislation, in the "Fifth Stage."

The main obstacle to the successful implementation of the Automobile Dealer Franchise Act is that dealers have thus far been unable to obtain a favorable court interpretation of "good faith." Macaulay

[8] 15 U.S.C. §§ 1221-25 (1964).
[9] Nelligan v. Ford Motor Co., 262 F.2d 556, 559 (4th Cir. 1959).
[10] 15 U.S.C. §§ 1221-25 (1964).
[11] 15 U.S.C. § 1222 (1964).
[12] 15 U.S.C. §§ 1221-25 (1964).

concludes that "It now appears almost certain that the Good Faith Act will be construed to give a dealer a remedy only where he can prove coercion."[13] In addition, the courts have approved many of the more significant provisions in the franchise agreement and consequently have diluted much of the thrust of a contract of adhesion argument.[14]

Macaulay's analysis of federal and state legislation (the latter probe focusing primarily on the Wisconsin treatment) is thorough and scholarly enough to influence future judicial decision making. However, the essence of the book is its endeavor to relate the pressures and methodology of private action groups and informal procedures to the strictures of legislative and judicial formality. The ultimate effect of the Good Faith Act and state laws has been to create a viable and functionable private review system. Macaulay presents a lucid portrait of this process and its impact upon the consumer-dealer-manufacturer. Yet, assuming the interplay of these tensions, the question nevertheless remains—what is the nature of the dealer-manufacturer relationship?

The impact and compulsion of externals precludes contouring the relationship into one of the recognized legal definitional niches. The nature of the product—second only to the home as a financial investment—the brute size of the industry, and saturation advertising have all operated to efface the role of the dealer. The fact that in the final analysis the ultimate risk of sales loss falls on the manufacturer has undoubtedly had its influence. It is therefore quite possible that a new legal relationship is in the process of crystallization. And although the new field will draw substantial lifeblood from areas such as antitrust, agency, and from legislation such as the Good Faith Act, the main sense of direction will still come from contract law.

It is difficult to determine whether Macaulay agrees with the above conclusions. On one hand he acknowledges that his study reveals "the long process by which legislatures removed automobile manufacturer-dealer relations from the domain of general contract law and created a new area of law."[15] It would appear that Professor Friedman's residual theory of contracts, whereby the field of contract

[13] S. MACAULAY, LAW AND THE BALANCE OF POWER 106 (1966).

[14] The contract of adhesion argument could be raised under the "unconscionable" contract provision of § 2-302 of the Uniform Commercial Code.

[15] S. MACAULAY, *supra* note 13, at 197.

is inexorably being reduced through the creation of new areas,[16] has been embraced by Macaulay. If so, it is a very tentative and weak embrace, for he observes that though "contract law itself may have lost much of its subject matter . . . many of its ideas continue to be significant in what may be called the 'newly developing nations' of the law."[17]

By way of explanation it should be noted that the residual theory is used to explain the contemporary concern of the courts with the relative equities of the contracting parties. An emerging economic environment demanded that contract principles be applied on a consistent and predictable basis. Abstraction, so it is argued, dominated contract resolution. However, as the economy matured and as portions of contract law were legislatively and judicially segregated into fields of specialization, *e.g.*, sales, antitrust, insurance, courts were relieved of the burden of maintaining predictability and could therefore shape a result to coincide with the individual needs of the litigants.

As mentioned, Macaulay's findings neither refute nor support the residual theory. He admits that a certain amount of contract preemption has occurred through legislation, but at the same time he notes that "some of the traditional ideas upon which old-fashioned classroom contract law is based reemerge to govern these new statutes and their application . . . ."[18]

This inconclusiveness prompts a small seed of suspicion as to the validity of the residual theory. If Professor Friedman's study did not demonstrate otherwise (which it does as far as Wisconsin is concerned), one might wonder whether contract commentators have not fallen into the error of assuming the existence of a "pure" or "perfect" theory of contracts. Perhaps contract scholars are relating to a model, existing in the never-never land of abstraction, which is held out as perfection much in the same fashion as the debunked theory of pure competition.[19] In other words, has contract law actually lost

[16] "The law of contract, then, is residuary; it applies to those agreements that are not subject, in whole or in part, to special legal treatment, by virtue of some special statute or legal rule . . . ." L. FRIEDMAN, CONTRACT LAW IN AMERICA 17 (1965).

[17] S. MACAULAY, *supra* note 13, at 199.

[18] S. MACAULAY, *supra* note 13, at 4.

[19] Professor Friedman makes this analogy: "The law of contract is, therefore, roughly coextensive with the free market. Liberal nineteenth-century economics fits in neatly with the law of contracts so viewed. It, too, had the abstracting habit." L. FRIEDMAN, *supra* note 16, at 20-21. However, Friedman adds a disclaimer: "In fact, there was

its vitality in the realities of day-to-day commercial transactions? One might say, and without further study it would be nothing more than merely a comment, that with the branching off and development of new areas such as the one discussed by Professor Macaulay, the perimeter of contract law is actually expanding.

ARTHUR D. AUSTIN*

never any point at which the law of contracts corresponded exactly with such an economic theory." *Id.* at 21.

* B.S. 1958 University of Virginia; LL.B. 1963 Tulane University; Assistant Professor of Law, Cleveland-Marshall Law School of Baldwin-Wallace College.