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TRADE REGULATION

TEN YEARS UNDER THE AUTOMOBILE DEALERS' FRANCHISE ACT

In response to numerous complaints by automobile dealers, Congress, in 1956, enacted the Automobile Dealers' Franchise Act, or, as it is commonly called, the Automobile Dealers' Day in Court Act.[1] The act attempted to balance the power that was heavily weighted in favor of automobile manufacturers by giving a dealer a cause of action against a manufacturer who fails to act in good faith regarding the franchise.[2] This comment will consider whether the act has given the dealer a *real* or merely an *illusory* cause of action. The cases which have arisen under the act will be examined to analyze judicial construction of the provisions. Except as related to the problem areas discussed herein, the state statutes governing the dealer-manufacturer relationship,[3] and the possibility of relief under the other antitrust laws,[4] will not be considered.

The problems that the courts have considered in Dealers' Act cases have arisen both within and without the provisions of the act. This comment will concentrate on the principal problems which the courts have faced: (1) defining "good faith"; (2) defining "coercion"; (3) determining those activities that are permitted by the act; (4) defining "automobile manufacturer"; (5) obtaining jurisdiction and accomplishing service of process; and, (6) determining the appropriate relief.

I. "Good Faith"

The act provides that an automobile dealer may bring suit against an automobile manufacturer and recover damages due to the latter's failure to act *in good faith* in performing or complying with the terms of the franchise, or in terminating, cancelling, or failing to renew the franchise.[5] "Good faith" is defined as the "duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party."[6] These provisions raise the question whether the courts are confined to the statutory definition, and, if so, whether the definition should be strictly or liberally construed.

Only one court has considered the possibility of going outside the

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1 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-25 (1964).

2 H.R. Rep. No. 2850, 84th Cong., 2d Sess. 1 (1956) [hereinafter cited as H.R. Rep. No. 2850].

3 At present there are approximately twenty state statutes which attempt to control the dealer-manufacturer relationship. For a complete list of these state statutes, see Macaulay, Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers and the Legal System, 1965 Wis. L. Rev. 483, 521 nn.127-49 [hereinafter cited as Macaulay].

4 See generally Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L.J. 1135, 1165-67 (1957) [hereinafter cited as Kessler].

5 70 Stat. 1125 (1956), 15 U.S.C. § 1222 (1964).

6 70 Stat. 1125 (1956), 15 U.S.C. § 1221(e) (1964).

statutory definition of "good faith."[7] It reasoned that Congress could not have intended the courts to be confined to the "immensely vague term" in the statute. The court apparently thought that it could use other statutory definitions[8] or the common law definitions[9] to aid in defining "good faith." This argument has been rejected by other courts and specifically criticized by the Fifth Circuit.[10] It therefore appears well settled that the courts are confined to the statutory definition[11] and must attempt to clarify rather than ignore it. Thus restricted, the courts are confronted with the problem of whether to construe the definition strictly, as urged by the manufacturers, or liberally, as urged by the dealers. The problem centers on whether the words "so as" in the definition introduce words of qualification, which limit lack of good faith to coercion, or words of illustration, which use coercion merely as an example of lack of good faith.

The manufacturers argue that the wording of the act offers no assistance in deciding whether the words introduce a qualification or an illustration. Therefore, they contend that reliance must be placed only on the legislative history, which clearly states that the words introduce a qualification.[12] They argue further that if the language is considered as introducing an illustration, the key words would be "fair and equitable," and that those words are so vague that the statute might well be unconstitutional as a violation of due process of law.[13] Consequently, the manufacturers assert that the definition of "good faith" must be construed strictly.

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[7] Barney Motor Sales v. Cal Sales, Inc., 178 F. Supp. 172, 174 (S.D. Cal. 1959).

[8] E.g., Uniform Commercial Code § 2-103(1)(b), which provides that as to merchants "good faith" means "the observance of reasonable commercial standards of fair dealing in the trade."

[9] A recent case defined "good faith" as "an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of a design to defraud or seek unconscionable advantage." Doyle v. Gordon, 158 N.Y.S.2d 248, 259 (Sup. Ct. 1954).

[10] Woodward v. General Motors Corp., 298 F.2d 121, 128 (5th Cir.), cert. denied, 369 U.S. 887 (1962).

[11] Compare Lawson v. Suwanee Fruit & S.S. Co., 336 U.S. 198, 201 (1949).

[12] See, e.g., Brief for Appellant, pp. 12-15, Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437 (1st Cir. 1966), cert. denied, 35 U.S.L. Week 3150 (U.S. Oct. 25, 1966). Frequently cited on this point are the following passages from the House Report and the debates.

> The term "fair and equitable" as used in the bill is qualified by the term "so as to guarantee the one party freedom from coercion, intimidation . . . ." In each case arising under this bill, good faith must be determined in the context of coercion or intimidation . . . . Each party to an automobile franchise would have a special obligation to guarantee the other party freedom from coercion or intimidation of any kind.

H.R. Rep. No. 2850, at 9. The following exchange between Representative Halleck and Judiciary Committee Chairman Celler took place on the floor of the House:

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

102 Cong. Rec. 14070 (1956).

[13] E.g., Brief for Appellant, p. 15, supra note 12. See Globe Motors, Inc. v. Stude-

The dealers, on the other hand, arguing for a liberal construction, contend that the definition of "good faith" can be ascertained from the wording of the act itself, and thus there is no need to resort to the legislative history.[14] They base their argument on a clause within the act which gives the manufacturer a defense of lack of good faith on the part of the dealers.[15] Pointing out that few dealers are in a position to coerce a manufacturer, they argue that if lack of good faith is confined to coercion, the manufacturer could rarely take advantage of this defense. Consequently, they conclude that lack of good faith must mean something less than coercion in this clause, and therefore should not be confined to coercion in another clause.[16] Furthermore, the dealers point out that the purpose of the act will be defeated if lack of good faith is limited to the context of coercion, since many of the evils against which Congress legislated will remain untouched.[17]

To date, no court has accepted the dealers' argument. On the contrary, the courts have readily accepted the manufacturers' position, and, relying solely on the legislative history, have strictly construed the words as qualification rather than illustration.[18] It is submitted that the courts should not have decided the issue as summarily as they apparently did, since such a position substantially restricts those activities which constitute lack of good faith, and as such has a significant effect on whether the act will fulfill its purpose. It is not suggested that the courts accept the dealers' arguments by the same apparent absence of reasoning with which they accepted those of the manufacturers.[19] It is suggested, however, that the

baker-Packard Corp., 328 F.2d 645, 647 (3d Cir. 1964); Garvin v. American Motors Sales Corp., 202 F. Supp. 667, 670 (W.D. Pa. 1962), rev'd on other grounds, 318 F.2d 518 (3d Cir. 1963).

[14] E.g., Milos v. Ford Motor Co., 317 F.2d 712, 715 (3d Cir.), cert. denied, 375 U.S. 896 (1963). See 6 Corbin, Contracts § 1266, at 59-62 n.73.5 (1962); Kessler 1178 n.284. But see Kessler & Stern, Competition, Contract and Vertical Integration, 69 Yale L.J. 1, 105 (1959).

[15] 70 Stat. 1125 (1956), 15 U.S.C. § 1222 (1964).

[16] It has been suggested that the inclusion of the defense was merely a device to overcome the objection that the act lacked "mutuality" of obligation imposed upon dealers and manufacturers. Comment, 52 Nw. U.L. Rev. 253, 263 n.68 (1957).

[17] Macaulay 760-61.

[18] See, e.g., Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965); Globe Motors, Inc. v. Studebacker-Packard Corp., 328 F.2d 645 (3d Cir. 1964); Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963); Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), cert. denied, 371 U.S. 829 (1962); Berry Bros. Buick, Inc. v. General Motors Corp., 257 F. Supp. 542 (E.D. Pa. 1966); General Motors Corp. v. Mac Co., 247 F. Supp. 723 (D. Colo. 1965); Zarbock v. Chrysler Corp., 235 F. Supp. 130 (D. Colo. 1964); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889 (N.D. Ga. 1963).

[19] With regard to the weight of legislative histories, it has been said that debates are an unreliable source for discovering the meaning of an act. Lapina v. Williams, 232 U.S. 78, 90 (1913). Committee reports stand on a different footing than debates. United States v. St. Paul, M. & M. Ry., 247 U.S. 310, 318 (1918). However, when the intent of Congress cannot be drawn from the act itself, the courts are not authorized, merely by statements in the report of the legislative committee, to read such an effect into the

courts should reexamine the issue and consider thoroughly the merits of both arguments before reaching a conclusion.

II. "COERCION"

Since the courts are currently confined to the strict construction, the problem of determining what activities constitute coercion must be considered. Although the act does not define coercion, it provides that "recommendation, endorsement, exposition, persuasion, urging or argument . . ." are, by themselves, consistent with good faith and thus not coercive.[20] The act is therefore of limited aid, and resort should be made to the legislative history, which enumerates certain activities that might constitute coercion, such as direct or indirect pressure upon the dealer to accept unwanted and unneeded merchandise, or to handle exclusively or sell a specified quota of merchandise.[21] It should be noted that these activities are merely examples of coercion that are neither all-inclusive nor coercive in all circumstances.[22] Generally, the courts have taken a very strict approach in determining what activities are coercive, resulting in a conspicuous lack of success on the part of the dealers in Dealers' Act litigation.[23] This attitude was candidly expressed by the court in *Walker v. Ford Motor Co.*,[24] when it stated that it could foresee few circumstances which would justify the sanction which the act in its present form provided. Then, in the course of its opinion, the court stated that insistence on the employment of unnecessary salesmen and mechanics, requirements that the doors be kept open needlessly, and chastisement on the basis of unsound quota analyses were not coercive.[25]

The concept of coercion was further narrowed in *Fabert Motors, Inc. v. Ford Motor Co.*,[26] which held that when a manufacturer merely threatens to do an act which he has a legal right to do under the terms of the franchise, his conduct is not coercive.[27] The franchise provision in question gave the manufacturer the right to withhold certain payments from the dealer in the event of termination of the franchise which it could not withhold if the dealer resigned.[28] It is submitted that while a "legal right" theory may be applied to a clause such as that in *Fabert*, and a correct result reached, it should not be applied to the termination at will or renewal clauses. On the theory of *Fabert*, if the franchise has a termination-at-will clause, a threat by the manufacturer to terminate unless the dealer accedes to its

bill or to *presume* such an intent by Congress, even though such intent might be *inferred*. Banco Mexicano de Commercio e Industria v. Deutsche Bank, 289 Fed. 924, 928 (D.C. Cir. 1923), aff'd, 263 U.S. 591 (1924).

[20] 70 Stat. 1125 (1956), 15 U.S.C. § 1221(e) (1964). The proviso is explained in H.R. Rep. No. 2850, at 8.

[21] Id. at 9.

[22] Ibid.

[23] General Motors Corp. v. Mac Co., supra note 18, at 725.

[24] 241 F. Supp. 526 (E.D. Tenn. 1965).

[25] Id. at 529-30.

[26] 355 F.2d 888 (7th Cir. 1966).

[27] Id. at 890.

[28] Id. at 889.

demands would not be coercive, since the manufacturer has threatened to do only that which he has a legal right to do. Such a result, however, apparently ignores the particular demand made upon the dealer,[29] and contravenes the fundamental policies of the act.

Volkswagen Interamericana, S.A. v. Rohlsen,[30] the first appellate decision to hold for the dealer, under the act, posited another aid in the determination of coercive conduct. In that case, the court distinguished conditions which would benefit only the manufacturer, such as the forcing of unneeded merchandise, from conditions which would be beneficial to both parties, such as requirements of improved efficiency in service or management. Although the fact situation in *Volkswagen* was clearly within the first category,[31] there will be many cases which do not fall clearly within either one of the categories. Nevertheless, now there is some standard from which to start in determining the types of activities which might be coercive, a standard which was lacking prior to this case.[32] It is submitted that if future courts use the *Volkswagen* test, the act will finally be giving the dealers protection from the principal situation against which Congress legislated, *i.e.*, that in which the manufacturer seeks to take unreasonable advantage of the dealer by means of its superior power.

Kotula v. Ford Motor Co.,[33] decided two years before *Volkswagen*, added nothing to the definition of coercion, but did impose two new proof requirements upon a dealer attempting to establish a violation of the act. In affirming a judgment n.o.v. for the manufacturer, the court first required the dealer to establish that the alleged coercive act was *the cause* of the termination.[34] Secondly, the court stated that if a Dealer Policy Board has approved the termination, the dealer must prove that the board failed to act in good faith.[35]

In *Kotula*, the franchise of the plaintiff, a dealer for fourteen years, was terminated. In the trial court, the jury found that a representative of the defendant had threatened the dealer with termination of his franchise

[29] Professors Kessler and Stern consider the threat to be coercive if the sanction to be imposed upon the reluctant dealer is unlawful. See Kessler & Stern, supra note 14, at 106 n.478. When the threat is to exercise a lawful sanction, there can be no coercion under their standards. But see Berry Bros. Buick, Inc. v. General Motors Corp., supra note 18, at 546, stressing the wrongful nature of the demand rather than the sanction.

[30] 360 F.2d 437 (1st Cir. 1966), cert. denied, 35 U.S.L. Week 3150 (U.S. Oct. 25, 1966).

[31] Briefly, the following facts appeared from the arguments of the case in the court of appeals. The plaintiff-dealer alleged that the executives of the defendant demanded a one-third interest in a new franchise to be created to replace plaintiff's franchise. The new franchise was to be capitalized at $100,000. Plaintiff, in return for most of the assets of his existing franchise (valued at $230,000), was to receive a one-third interest in the new business. The third share was to go two local real estate brokers. Plaintiff refused to accept the defendant's proposal and was almost terminated at that point, but for his threat to go to Germany and complain to the manufacturer. A year and one-half later, defendant notified plaintiff that he was being terminated for cause.

[32] Compare Kotula v. Ford Motor Co., supra note 18.

[33] 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965).

[34] Id. at 736.

[35] Id. at 739.

unless he bought a certain truck,[36] and furthermore, that the dealer was unable to get delivery on two cars he had ordered until after he accepted the truck. Plaintiff contended that there was coercion and intimidation in the truck incident, and that a pattern of coercive activities emerged[37] which culminated in termination.[38] The manufacturer, however, alleged that the termination was a result of the dealer's failure to comply with the terms of the franchise agreement. At this point the appellate court weighed the good-faith reason for termination, *i.e.*, the inadequacy of the dealer, against the bad-faith reason for terminating, *i.e.*, the truck incident, and resolved the problem in favor of the manufacturer by reasoning that the dealer had not established the truck incident as *the cause* of the termination.[39] Thus, on the basis of this case, when there are two possible reasons for a manufacturer to terminate, it seems that the dealer must prove that resistance to coercive conduct probably caused the termination.

It is submitted that this proof requirement imposes upon the dealer an unreasonable burden, and that such an imposition is not called for by the act. There is no provision in the act for any connection between the coercive incident and the termination or failure to renew. The legislative history, however, provides that the coercive activity "is actionable . . . where it *relates* to the termination, cancellation, or nonrenewal of the dealer's franchise."[40] (Emphasis added.) That one incident is "related" to another seems to be a much broader concept than that one incident is "caused" by another: relationship may require only a discernible affinity between two events,[41] whereas causation requires a consequential connection.[42] Although such an interpretation may subject the manufacturer to liability where only a tenuous connection exists, it should be remembered that the dealer must still prove such a relationship. Furthermore, it appears that this interpretation is the only alternative to an automatic judgment for the manufacturer when there exist two possible reasons for termination.

The weakness of the *Kotula* decision is further demonstrated by the *Volkswagen* case, in which the court, on similar facts, reached a different result. In both cases, the courts had to decide between two possible reasons

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36 In May 1959, the representative told Kotula, "If you don't want that truck, you don't want to be a Ford dealer." Kotula took the truck and sold it at a loss. Nine months later, in February 1960, the same representative expressed personal animosity toward Kotula. In May 1961, the same representative recommended the termination. Id. at 735-36.

37 Id. at 736. For a case which holds that a pattern of coercion is necessary, see Zarbock v. Chrysler Corp., supra note 18, at 134.

38 The evidence that there was a plot against Kotula included falsified reports in the termination file. See Macaulay 775-76.

39 The court recognized that the dealer had presented evidence of a series of coercive incidents, but said, "The difficulty with the plaintiff's premised theory is that the favorable evidence, when judged by the controlling legal principles, wholly fails to establish any causal connection between the coercive conduct relied upon, and the termination of the agreement." 338 F.2d at 736.

40 H.R. Rep. 2850, at 9.

41 Cf. Nowland Realty Co. v. Commissioner, 47 F.2d 1018 (7th Cir. 1931).

42 Cf. Kelsey v. Rebuzzini, 87 Conn. 556, 89 Atl. 170 (1913).

for termination, one legitimate and one coercive, and in both cases the termination occurred more than a year and one-half after the alleged coercive incident. Furthermore, in *Volkswagen* amicable relations were restored for much of the interval between the alleged coercion and the termination. The jury in *Volkswagen*, like the jury in *Kotula*, found that the activities of the defendant were coercive. Despite the *Kotula* decision, the appellate court affirmed the jury's finding of liability, and held, on the basis of the record, that it was a jury question whether the termination was *related to*—not caused by—the plaintiff's operation of the franchise or the pressure applied by the defendant manufacturer.[43] It is submitted that if the *Volkswagen* test had been used in *Kotula*, the jury verdict for plaintiff would also have been affirmed.[44]

The second aspect of the *Kotula* decision which may limit the act's effectiveness was the court's statement regarding the manufacturer's termination policy. The court noted that the manufacturer had created a review system, the final step of which was an independent investigation[45] of the entire case by a Dealer Policy Board made up of top executives of the manufacturer.[46] The court stated that it could not find for the dealer unless it first determined that the Policy Board was a party to the scheme of coercive activity and had thus failed to act in good faith. Such a burden is completely unwarranted under both the act and its legislative history. Furthermore, it is highly unlikely that the dealer will be able to get proof of the complicity of the Policy Board, and thus, if this requirement is followed in future cases, a dealer who may get by all the other obstacles will surely fail on this one.

In conclusion to this section, it is apparent that the manner in which most courts have interpreted the act frustrates its purposes. One of the reasons for this frustration is the failure of the act to delineate coercive activities. Although it would be impossible as well as impractical for Congress to attempt to enumerate all the activities deemed to be coercive, a partial enumeration consisting of some of the more important offenses would be useful. Such an enumeration would give the courts some specific guidelines in their determination of those activities which are offensive—guidelines which are necessary if the dealers are to get the protection that the act was intended to provide. The determination of coercive activities should

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43 Volkswagen Interamericana, S.A. v. Rohlsen, supra note 30, at 444.

44 The manufacturer introduced evidence that the dealer was inadequate from 1957 to the date of termination. The truck incident occurred in May 1959, and it is interesting to note that until that time, there was no mention of plaintiff's unsatisfactory performance. Only after that incident was there any action taken toward the dealer, and reports prepared for the termination file. The logical inference to be drawn from these circumstances is that the termination was "related to" the truck incident and the offended field representative.

45 Actually, the investigation in *Kotula* was not completely independent. See Macaulay 777-78 n.650.

46 For the typical composition of the Ford Dealer Policy Board, its authority, purpose, responsibilities, policies, and procedures, see Hearings on H.R. 11360 and S. 3897 Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess. 453-56 (1956) [hereinafter cited as 1956 Hearings].

no longer be left to the courts, which have taken ten years to establish a test for that purpose.

III. Permitted Activity Under the Act

It is difficult to imagine that Congress intended manufacturers to be bound to inefficient or inadequate dealers.[47] Thus, it must be assumed that the intent was to allow the manufacturer either to terminate such franchises or to take steps to improve them. Prior to the act, when a manufacturer deemed a dealer inefficient, an attempt was made to help the dealer improve his performance,[48] and only if that attempt was unsuccessful would the franchise be terminated. Often, in such circumstances, threats were used to force the dealer to improve himself. The Dealers' Act does not prohibit such manufacturer activity. Indeed, if it did, the dealer would be in a worse position after the act than he was before it, since, in such a case, the manufacturer's only alternative would be to terminate the franchise.[49] Although the act gives the dealer a cause of action if the termination was in bad faith, it seems clear that the dealer would rather keep his franchise, with the manufacturer's "help" in making improvements, as before the act, than be terminated and receive a cause of action. Under the act, therefore, a major problem for the manufacturer is determining how far it can go in attempting to improve the inadequate dealer without being coercive.

Generally, the courts have held that the manufacturer has a wide latitude in his choice of methods to improve an inefficient dealer. Their reasoning has been that the manufacturer has the right to expect the dealer to provide a suitable outlet for its products,[50] to protect its good name,[51] and to compete effectively.[52] In permitting certain activities even if "couched in terms of coercion, or threat thereof,"[53] the courts have relied upon the statement in the House Report requiring "appropriate circumstances" before actions of the manufacturer in "excess of normal sales recommendation and persuasion" would give rise to a cause of action.[54] Acts of manufacturers which might otherwise have been coercive, but which have been

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[47] The legislative history of the act clearly states that the act was not intended to prohibit a manufacturer from terminating or failing to renew the franchise of an inadequate dealer. H.R. Rep. No. 2850, at 9-10.

[48] Kessler 1182.

[49] Leach v. Ford Motor Co., 189 F. Supp. 349, 354 (N.D. Cal. 1960).

[50] Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378, 383 (D.N.J. 1959).

[51] Woodward v. General Motors Corp., 298 F.2d 121, 128 (5th Cir.), cert. denied, 369 U.S. 887 (1962).

[52] Ibid.

[53] Leach v. Ford Motor Co., supra note 49, at 354.

[54] H.R. Rep. No. 2850, at 9. The House Report's use of the phrase "appropriate circumstances" in the determination of whether an act is coercive implies that in other circumstances the same act would not be coercive. Furthermore, mention of the phrase "appropriate circumstances" within the discussion of the fact that a manufacturer is not bound to an inadequate dealer raises another inference: the same act when performed with an adequate and an inadequate dealer may be coercive in the former instance but not in the latter.

allowed, include insistence upon performance of franchise terms under threat of termination,[55] establishment of a dealer nearby,[56] and requests that a dealer resign his franchise and thus receive benefits he would not receive if he were terminated.[57]

In order to defend such activities, however, the manufacturer must establish that the dealer was inadequate. Usually, a manufacturer proves this by demonstrating that the dealer has breached one or more of the clauses in the franchise agreement. In arguing that a dealer was inadequate because he had breached a franchise provision, the manufacturer should first be required to show that the provision was material in that it would seriously impair the integrity of the agreement if it were not enforced. Obviously, a manufacturer should not be able to choose an insignificant provision of the agreement and justify his conduct by claiming its breach. It is submitted that the manufacturer will not be seriously hindered by such a requirement, since a manufacturer probably should not be concerned with the breach of an insignificant clause.[58]

Once the manufacturer has established that the provision is material, the next question becomes whether the standard of performance required is reasonable. There are two ways in which the reasonableness issue may arise. The first, and more common, is where a specific standard of conduct is prescribed by the provision in question. In such a case, the court need merely pass upon the standard agreed to by the parties. The second case involves the situation in which the provision provides that the conduct is to be "adequate" or "satisfactory." Here the court must interpret the standard by which to compare the conduct of the parties.

In cases involving a specific standard, the courts have held the franchise provisions litigated thus far to be reasonable, non-discriminatory, objective, and dictated by sound business practice.[59] Although it could be argued that if a court deletes a provision of the franchise as unreasonable, it is rewriting the contract for the parties, such deletion is warranted when the dealer did not have a real opportunity to bargain for the various terms of the agreement.[60]

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[55] Victory Motors, Inc. v. Chrysler Motors Corp., 357 F.2d 429 (5th Cir. 1966); Milos v. Ford Motor Co., supra note 18; Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D. Cal. 1960).

[56] Garvin v. American Motors Sales Corp., 318 F.2d 518 (3d Cir. 1963); H.R. Rep. No. 2850, at 9-10.

[57] Fabert Motors, Inc. v. Ford Motor Co., supra note 26, at 889.

[58] For litigated clauses held to be material, see, e.g., Victory Motors, Inc. v. Chrysler Motors Corp., supra note 55 (minimum sales responsibility); Garvin v. American Motors Sales Corp., supra note 56 (submission of financial statement); Pierce v. Ford Motor Co., supra note 18 (manufacturer approval of buyer of franchise); Woodward v. General Motors Corp., 298 F.2d 121 (5th Cir.), cert. denied, 369 U.S. 887 (1962) (prohibition on changing location without prior written approval of manufacturer); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., supra note 18 (requirement of adequate capital).

[59] E.g., Milos v. Ford Motor Co., supra note 18, at 717.

[60] The Dealers' Act does not operate on the duties of the parties toward each other during the franchise negotiations. See 1956 Hearings 238-41. Compare Uniform Com-

In situations where the provision requires that the performance be "adequate" or "satisfactory," the court must determine what type of performance satisfies the standard. The policy of allowing the manufacturer complete discretion with regard to these terms has been condemned.[61] As an alternative, the courts should attempt to measure the dealer's compliance with the term by objectively determining a definite standard of conduct and then applying a substantial performance test to it.[62] This definite standard could be determined by measuring the actual performance of other dealers similarly situated to the plaintiff dealer. The substantial performance test should be applied for two reasons. First, it would give the dealer the benefit of the doubt which was caused by the indefinite provision. This seems reasonable since the manufacturer dictated the terms of the agreement.[63] Second, the substantial performance test would allow more flexibility than strict application of the definite standard. Such a method of interpreting indefinite franchise requirements seems consistent with the act, for it attempts to arrive at a reasonable measure of performance with which the dealer must comply, and allows the manufacturer to enforce the franchise up to that point.

In summary, if a provision is not material, or if it is material but the standard required is unreasonable, or if upon determination of an objective standard the dealer is found to have complied, a technical breach by the dealer would not be sufficient to classify him as inadequate and thus enable the manufacturer to take those steps allowed with respect to inadequate dealers. If, however, the provision is material and reasonable, or the dealer has not complied with an objectively-determined standard, it may be enforced even though it is burdensome to the dealer.[64]

IV. "Automobile Manufacturer"

The Dealers' Act defines an automobile manufacturer as

> 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.[65]

Clearly this definition includes the giant corporations in Detroit, but it is not so clear that Congress intended to include *independent distributors*—

mercial Code § 2-302, which allows the court to refuse to enforce a clause that is found to have been unconscionable at the time of the making of the contract.

61 Kessler 1183.

62 The test of substantial performance recommended would be similar to that propounded by Judge Cardozo: "We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition." Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 243, 129 N.E. 889, 891 (1921).

63 See Restatement, Contracts § 236(d) (1932); 3 Corbin, Contracts § 559 (1960).

64 General Motors Corp. v. Mac Co., supra note 18, at 726.

65 70 Stat. 1125 (1956), 15 U.S.C. § 1221(a) (1964).

those who are not merely extensions of the manufacturer within distribution systems.[66] If the distributor may be held, it would be in addition to, rather than as a substitute for, the manufacturer. The dealers have argued that they may bring suit against an independent distributor because such distributor is included within the statutory definition.[67] The distributors argue that they are not included within the statutory definition, and that the legislative history gives no indication of an intent to hold anyone other than the manufacturer liable for coercion of a dealer.[68] It is submitted that the statutory language is ambiguous concerning the inclusion of independent distributors within the statutory definition of "automobile manufacturer." The argument for inclusion seems to conflict with the statutory definition of an "automobile dealer,"[69] for, under that language, a distributor is a dealer.[70] It would seem to be inconsistent for a party to be both a dealer and a manufacturer at the same time. Furthermore, if the distributor were held to be a dealer, he could not be sued by another dealer, because the act authorizes suits only against manufacturers.[71]

In order to avoid these incongruous results, one of the premises must be changed. The premise that an independent distributor is a dealer cannot be changed by the courts, since it is statutory in origin. On the other hand, the premise that an independent distributor is an automobile manufacturer can be changed, since it is merely a judicial interpretation of the definition. The statute does not say that a distributor is a manufacturer. Instead, it defines a manufacturer as a firm which is engaged in manufacturing or assembling, *including* a distributor. "Including" should not be considered as adding anything new to the definition. It does not mean that distributors *as well as* manufacturers and assemblers shall be the statutory automobile manufacturer.[72] The meaning that should be given is that the manufacturer could also be *comprised of* distributors which act for it and are under its control,[73] and for whose acts, therefore, the manufacturer alone should be held liable. Furthermore, the legislative history seems to suggest that only the manufacturer can be held.[74] Such a result appears to be desirable, since

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66 1956 Hearings 152.

67 E.g., Brief for Appellee, p. 27, Volkswagen Interamericana, S.A. v. Rohlsen, supra note 30.

68 E.g., Brief for Appellant, pp. 29-34, Volkswagen Interamericana, S.A. v. Rohlsen, supra note 30.

69 The statute provides that an "automobile dealer" shall mean "any person, partnership, corporation, association, or other form of business enterprise . . . operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons." 70 Stat. 1125 (1956), 15 U.S.C. § 1221(c) (1964).

70 Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70, 81 (S.D.N.Y. 1965).

71 70 Stat. 1125 (1956), 15 U.S.C. § 1222 (1964).

72 Cf. United States v. The Betsey & Charlotte, 8 U.S. 443, 452 (1808).

73 Cf. Montello Salt Co. v. Utah, 221 U.S. 452, 463 (1910); Blankenship v. Western Union Tel. Co., 161 F.2d 168, 169 (4th Cir. 1947).

74 Repeated reference is made to the liability of the manufacturer for acts of his distributors. No reference is made to holding the distributor liable, and thus, on the basis of the legislative history, there seems to be no justification for doing so. The

a distributor is only a middleman, and any relief against him will usually not get to the source of the problem—the manufacturer standing behind him.

If only the manufacturer can be held liable for acts of his distributors, the question then becomes whether the manufacturer is liable for all those acts of a distributor which are coercive. In attempting to explain the scope of the manufacturer's liability, the House Report indicated that the "manufacturer is liable *only* for his own 'coercion, intimidation, or threats of coercion or intimidation' or the acts of agents or distributors *subject to his control*."[75] (Emphasis added.) This statement was explained to mean that "the factory shall be liable only for the conduct of persons over whom it has control and *for whose conduct it is responsible*."[76] (Emphasis added.) The manufacturer can have control of a distributor in two ways. First, it may have control by the so called "instrumentality rule," which requires complete domination of the subsidiary by the parent corporation.[77] Second, "a manufacturer can exercise the same kind of control through contractual provisions with a stranger as it can by owning and directing a subsidiary corporation."[78]

It should be noted, however, that more than control is required, for the explanation quoted above requires that the manufacturer be *responsible* for the acts as well. There are two interpretations of "responsible." First, it could be argued that "responsible" should be taken in the causative sense, that is, that the manufacturer would be liable only if the specific coercive acts of the distributor could be traced to some action by the manufacturer. Thus, if a manufacturer coerced an adequate distributor who passed the coercion on to an adequate dealer, the dealer and distributor would have an action against the manufacturer.[79] In *Barney Motor Sales v. Cal Sales,*

original definition in the act provided that a manufacturer was "any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, . . . including any person, partnership, or corporation which acts for such manufacturer or assembler . . . ." S. 3879, H.R. 11360, 84th Cong., 2d Sess. (1956). Objecting to this definition, the Department of Justice pointed out that "the manufacturer is made liable for 'coercion, intimidation, or threats of' the same not only by himself, but also, for instance, by his distributors—whether or not they are subject to his control." 1956 Hearings 133. In commenting upon this objection, Senator O'Mahoney stated:

> This is a valid objection. A manufacturer should not be responsible for the conduct of persons over whom he exercises no control. The reason for the broad language in the definition of manufacturer was to forestall the manufacturer from escaping the consequences of this bill by establishing a sales corporation which would enter into franchise agreements with dealers.

1956 Hearings 27. Of course, the act now includes the phrase "and is under the control of such manufacturer." 70 Stat. 1125 (1956), 15 U.S.C. § 1221(a) (1964).

[75] H.R. Rep. No. 2850, at 7.

[76] 1956 Hearings 27.

[77] See Steven v. Rosco Turner Aeronautical Corp., 324 F.2d 157, 160-61 (7th Cir. 1963); 1 Fletcher, Corporations § 43, at 204-06 (1963).

[78] Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 441 (1st Cir. 1966), cert. denied, 35 U.S.L. Week 3150 (U.S. Oct. 25, 1966).

[79] It seems to follow that if a manufacturer coerced an inadequate distributor and the coercion was passed to a satisfactory dealer, the dealer would have a cause of action against the manufacturer, but the distributor would not. The adequacy of the

Inc.,[80] this causative approach received judicial support. The court in that case spoke in terms of a distributor being utilized to make the dealer subservient, and indicated that the Dealers' Act could thwart the unfortunate squeeze on the distributor which occurs when he is exploited by the manufacturer for the purpose of applying pressure to the dealer.

The alternative interpretation of "responsible" would result in liability to the manufacturer when the distributor is acting *within the scope of his authority*. This interpretation differs from that set out above in that the specific coercive act cannot be traced to the manufacturer, but is within the authority given to the distributor by the manufacturer. The net effect of this approach would be to increase those activities for which the manufacturer would be liable. For example, if it were the distributor's duty to promote vigorously the sale of the manufacturer's automobiles, a great many activities in the sales area would be imputable to the manufacturer for the purpose of establishing its liability under the scope-of-authority test. However, none of the activities of the distributor may have specifically originated from the manufacturer, and therefore there would be no manufacturer liability under the specific-act test.

It should be noted that acts which are performed by an independent distributor on his own initiative, or for which the manufacturer cannot be held liable on the scope-of-authority argument, fall into a "no-man's-land" under the statute, since there seems to be no party who may be sued by the aggrieved dealer.[81] In such cases there may be an action against the distributor on a breach-of-contract theory, but unless the court were willing to overrule pre-Dealers' Act cases, the chances of success are minimal.[82]

In *Volkswagen Interamericana, S.A. v. Rohlsen*,[83] a distributor, on his own initiative, coerced a dealer in order to secure a partnership interest in the dealer's franchise. Thus, the case seemed clearly to fall within the above-mentioned "no-man's-land." However, when the dealer brought suit against the distributor under the Dealers' Act, the suit was allowed. The court felt that although only manufacturers could be sued according to the explicit terms of the act, a distributor might be sued as an agent of the manufacturer. The court then held that an agency relationship would be established if the distributor were subject to the control, or right of control, of the manufacturer. The court proceeded to find that the requisite control existed in the

dealer should, as in the normal two-party, manufacturer-dealer situation, be the determinative factor. No different result should obtain when the situation includes a distributor who, in effect, is merely a conduit for the manufacturer's coercive activities.

80 178 F. Supp. 172, 175 (S.D. Cal. 1959).

81 Seeking to improve an unsatisfactory distributor, a manufacturer might encourage him to apply pressure to those dealers below him who are inadequate. If the manufacturer makes it plain that the adequate dealers are not to be pressured, it should escape any liability for coercion to those dealers; responsibility is avoided under both the specific-authority theory and the general-authority theory. Such a case would fall within the "no-man's-land" area, for neither the manufacturer nor the distributor could be held.

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

83 360 F.2d 437 (1st Cir. 1966), cert. denied, 35 U.S.L. Week 3150 (U.S. Oct. 25, 1966).

instant case, since the terms of the franchise gave the manufacturer control over large parts of the distributor's operation.[84] Conceding, *arguendo*, that a distributor can be liable under the act, it is submitted that the case is erroneous on the control issue, for it seems to ignore the statutory requirement that the distributor "act for" the manufacturer as well as be under its control.[85] It is difficult to perceive how the distributor acted for the manufacturer in this case, since the coercion resulted from the distributor's demands for a partnership interest in the dealer's business.

Furthermore, if the principle enunciated by the court were applied in a situation where the dealer brought the action against the manufacturer, the "right of control" argument would be an unwarranted broadening of the manufacturer's liability. The dealer in *Volkswagen* did not argue regarding the right of control, but merely attempted to show actual control.[86] The fact that the manufacturer dictates the terms of the franchise between it and the distributor would always seem to give the manufacturer the right of control over its distributor. On the other hand, if liability were limited to actual control, the success of a suit against the manufacturer would depend upon the franchise terms in force at the time of the act. Moreover, the addition of "right of control" to the statutory language "and is under the control of" seems to be contrary to agency law, since an agent is "subject to the control" of the principal,[87] but a *servant* is "subject to the control or right of control" of the *master*.[88] Unless the court would be willing to classify the distributor as a servant, it is submitted that "right of control" is an improper test.

In conclusion, it should first be noted that although the problem of whether a distributor is a manufacturer, and thus subject to suit under the act, involves only a few makes of automobiles, it comprises a significant percentage of Dealers' Act litigation.[89] Therefore, in order to avoid the problems created by the ambiguous language concerning distributors, it would seem wise for Congress to state unequivocally whether the distributor is subject to suit by a dealer under the act.[90] Some states already do this: the Louisiana

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84 Id. at 441-42.

85 70 Stat. 1125 (1956), 15 U.S.C. § 1221(a) (1964).

86 See Brief for Appellee, pp. 30-33, supra note 83.

87 Restatement (Second), Agency § 1 (1958).

88 Id. § 2.

89 A compilation as of Nov. 1, 1965, indicates that over 25% of the suits brought under the Dealers' Act are brought by dealers in lines which use the distributor system. Macaulay 743.

90 Dealers' Act cases which have involved distributors as defendants have reached varying results on the issue of whether a distributor is a manufacturer. The issue was noted in one case, although the case was decided on other grounds. Snyder v. Eastern Auto Distribs., Inc., 239 F. Supp. 240, 243 (W.D.S.C. 1965), rev'd on other grounds, 357 F.2d 552 (4th Cir.), cert. denied, 384 U.S. 987 (1966). In other cases the manufacturer issue was completely ignored. Wagner v. World Wide Autos. Corp., 201 F. Supp. 22 (W.D.N.Y. 1961); Reliable Volkswagen Sales & Serv. Co. v. World Wide Auto. Corp., 182 F. Supp. 412 (D.N.J. 1960). In one case there was dictum to the effect that an independent distributor might well be outside the statutory definition of an "automobile manufacturer." Reliable Volkswagen Sales & Serv. Co. v. World Wide Auto. Corp., 216 F. Supp. 141, 144 (D.N.J. 1963).

statute, for example, prohibits "a manufacturer of motor vehicles, a distributor, a wholesaler, distributor branch or factory branch, or officer, agent, or other representative thereof" from engaging in certain activities.[91]

V. Jurisdiction and Service of Process

The Dealers' Act contemplates an action by a financially-weak dealer against a giant corporation. It therefore seems desirable to give the dealer the opportunity to choose the most convenient forum in which to bring his action, since litigating in a distant forum will often entail great expense. Accordingly, the problems of acquiring jurisdiction over a manufacturer and obtaining service of process on a nonresident corporation must be considered, for it would be extremely helpful to the dealer if he could require the manufacturer to defend the suit in the dealer's jurisdiction.

A corporate party is subject to suit within a certain jurisdiction if it has some "minimum contacts" with that jurisdiction.[92] *Snyder v. Eastern Auto Distribs., Inc.*[93] has gone further than any other case under the Dealers' Act in allowing jurisdiction over the manufacturer. In that case, the business transacted with the plaintiff dealer was the only contact that the defendant had in the plaintiff's jurisdiction; thus, when the plaintiff's franchise was terminated, there was no longer any contact with the state. In holding the defendant amenable to suit within the jurisdiction, the court concluded that the critical time with regard to the establishment of jurisdiction was when the cause of action arose;[94] if the defendant had sufficient minimum contacts at that point, it was subject to the jurisdiction of the state. The court then found that doing business with the dealer constituted the requisite minimum contacts. Furthermore, the court stated that the defendant remained answerable within the jurisdiction for a reasonable time after it had ceased its contact.[95] It seems, therefore, that the defendant manufacturer must be subject to the jurisdiction of the dealer's state.

The dealer's problem, however, does not end with the acquisition of jurisdiction, for he still must serve process on the defendant. Because the manufacturer will usually be a nonresident corporation, or will not be found within the borders of the state, there is a question whether extraterritorial service can be made upon such corporation, and, if so, in what manner. Early in the history of the act, an argument was made that the extraterritorial service-of-process provisions of the Clayton Act could be used in Dealers' Act cases to accomplish service on a nonresident.[96] This argument, however, was rejected by the court, even though the Dealers' Act was intended to supplement the antitrust laws, because it was "the intent of Congress that

[91] La. Rev. Stat. § 32:1254(A)(3) (Supp. 1962). Accord, Minn. Stat. Ann. § 168.27(14) (1960); Okla. Stat. Ann. tit. 47, § 562(g), 565(j) (1962).

[92] McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Traveler's Health Ass'n v. Virginia, 339 U.S. 643 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[93] 357 F.2d 552 (4th Cir.), cert. denied, 384 U.S. 987 (1966).

[94] Id. at 556.

[95] Ibid.

[96] Schnabel v. Volkswagen of America, Inc., 185 F. Supp. 122, 124 (N.D. Iowa 1960).

the rights and remedies of one bringing an action under the Dealers' Act are found and contained in that Act, and that Act stands on its own as to those matters."[97] The court then held that since the act itself had no provisions for service of process, the Federal Rules of Civil Procedure governed service in Dealers' Act cases.[98] Since the pre-1963 Rules did not allow extraterritorial service except in limited cases, the dealers were somewhat handicapped.[99]

It appears that this obstacle will no longer present a problem due to the 1963 amendment to the service-of-process provisions of the Federal Rules. As amended, they allow service upon a party not an inhabitant of, or found within the state, in the manner prescribed by federal statute, or *by a statute or rule of the state in which the district court sits*;[100] and they allow service beyond the territorial boundaries of a state when authorized by federal or state statute.[101] Clearly, these amendments provide that extraterritorial service of process can be made in a federal action pursuant to a valid state statute.[102] Thus it is necessary to look to the state statutes concerning service of process in order to determine whether a nonresident corporation may be served beyond the boundaries of a state. Under the typical state statute, service may be made upon a nonresident by using one or more of the following methods: (1) personal service either within or without the state upon an officer, director, or managing agent of the defendant; (2) publication and mailing of the summons to the defendant if he can not be found within the state; or, (3) service on an agent authorized by appointment or by law to accept service for the defendant.[103] Under such a statute, extraterritorial service is clearly permissible. The *Volkswagen* case[104] presents an example of how the amended Federal Rules would facilitate service of process and aid the dealer. In that case, the plaintiff went to another jurisdiction in order to serve process on the defendant. Had the amendments been in effect, plaintiff could have served the defendant by publication pursuant to the statute of the state wherein plaintiff resided.[105]

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[97] Id. at 129.

[98] Id. at 123-25.

[99] Before 1963, the Rules provided that "all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state." Fed. R. Civ. P. 4(f), 28 U.S.C.A. (1960).

[100] Fed. R. Civ. P. 4(e).

[101] Fed. R. Civ. P. 4(f).

[102] 2 Moore, Federal Practice ¶ 4.32[2] (2d ed. 1965).

[103] Some state statutes require service upon an official of the state with concurrent notice to the defendant. E.g., Conn. Gen. Stat. Ann. § 52-59(a) (Supp. 1965); Ind. Stat. Ann. § 25-316 (Burns 1960); Vt. Stat. Ann. tit. 12, § 855 (1958). Others provide for service to be made directly upon the nonresident, either personally or by mail. E.g., Ill. Rev. Stat. ch. 110, §§ 16, 17 (Smith-Hurd 1956); N.Y. Civ. Prac. Law §§ 302, 313 (McKinney 1963); Wis. Stat. Ann. § 262.05, .06 (Supp. 1966).

[104] Supra note 83.

[105] The facts of the *Volkswagen* case appear to satisfy the statutory requirements of the Virgin Islands, where the plaintiff-dealer resided. V.I. Code Ann. tit. 5, § 112 (1957) provides:

In summary, there will probably be no difficulty for the dealer in gaining jurisdiction over the defendant. Once jurisdiction is obtained, whether service can be accomplished will depend upon the liberality of the state service-of-process statutes. The result that is reached by combining liberal jurisdiction and service requirements is desirable in view of the great expenses that often accompany Dealers' Act litigation.[106] It is far more equitable for the small dealer to maintain the suit in his own jurisdiction than to have to pay the costs of moving his evidence and witnesses to a distant forum.

VI. Remedies Under the Act

A. *Damages*

The act provides that the dealer shall recover "the damages by him sustained and the cost of the suit . . . ."[107] This broad provision creates problems of computation for the dealer, and involves uncertainty due to the existence of two variables: the future duration and the future annual profit of the franchise. The product of these factors represents the total loss to be recovered. In attempting to resolve the uncertainties in the computation, the effect that a large or small recovery will have on the parties should be noted. For example, if recovery were limited to a very small amount because of uncertainty in computation, it is unlikely that many suits would be brought. Furthermore, small dealer recoveries would not serve the purposes of the act, since the injured dealer would not receive adequate compensation for his real losses, and the manufacturer would not be deterred from acting coercively in the future. On the other hand, if recoveries are too large, the manufacturers may be deterred to too great an extent, that is, they may hesitate to press an inadequate dealer for improvement, because they fear being held liable for substantial damages.[108]

(a) When service of the summons can not be made as prescribed in Rule 4 of the Federal Rules of Civil Procedure and the defendant after due diligence can not be found within the Virgin Islands, . . . and it also appears that a cause of action exists against the defendant, . . . the court shall grant an order that service be made by publication of the summons in any of the following cases:

(1) When the defendant is a foreign corporation, and has property within the Virgin Islands, or the cause of action arose therein;

. . . .

[106] The costs to a dealer of a Dealers' Act suit have been estimated to be as high as $50,000. See Macaulay 753 n.538.

[107] 70 Stat. 1125 (1956), 15 U.S.C. § 1222 (1964). In the Senate, the bill as originally introduced provided for double damages. S. Rep. No. 2073, 84th Cong., 2d Sess. 4 (1956). The debate on the Senate floor prompted a change to compensatory damages. The House version deleted the word "compensatory" and substituted the present provision. H.R. Rep. No. 2850, at 8.

[108] If the manufacturer feels that he will subject himself to a significant risk of liability by attempting to improve the performance of an inadequate dealer, he may arbitrarily terminate the dealer and escape liability. It has been held that arbitrary refusal to renew does not result in manufacturer liability. Berry Bros. Buick, Inc. v. General Motors Corp., 257 F. Supp. 542 (E.D. Pa. 1966).

The first damage problem is a determination of what the future duration of the franchise would have been, but for the termination. Clearly, if the franchise were for a specific duration, there would be no problem with this computation, for damages *could* be awarded to the end of the term.[109] However, most franchise agreements are for an indefinite term and are terminable at will subject to the giving of notice. Prior to the passage of the act, when dealers with these latter franchises contended that they should be awarded damages for a certain number of years, the manufacturer replied, with great success, that since it could terminate at will, the dealer could only recover the losses for the period between notice and termination.[110] The rationale for the manufacturer's argument was that its legal obligation to the dealer ceased when the notice period expired, and thus there could be no recovery beyond that period. If that rationale were used in a non-renewal situation, there could be no recovery at all, for when the term ends, the manufacturer's obligation would cease, and there would be no period of time comparable to the notice period in the termination-at-will cases for which even a small recovery could be granted. This entire line of reasoning was ignored by the court in the only post-act case to deal with the duration problem, *Garvin v. American Motors Sales Corp.*[111] This court held that the dealer, who had a one-year, renewable franchise, could recover all the profits that he would have earned over the period for which the franchise, *in the normal course of events*, would have been continually renewed. The jury was instructed to consider the dealer's "habits," his "attitude toward life," his "previous health," and the "possibility he might die a natural death" in making their determination of future duration.[112] Even mortality tables were to be allowed in evidence if the jury believed that the franchise would, in the normal course of events, be renewed yearly for the remainder of the dealer's life.[113]

In effect, the *Garvin* court equated the indefinite, terminable-at-will franchise with the definite, renewable franchise. It then said that in both cases the recovery would not be limited to that period of time during which the manufacturer has a legal obligation to the dealer, but rather that the

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[109] Such a result would seem to induce manufacturers to change from indefinite-term franchises to short-term franchises, since under a short-term franchise the manufacturer would be able to limit any liability to the duration of that short term. However, in Garvin v. American Motors Sales Corp., 202 F. Supp. 667 (W.D. Pa. 1962), rev'd on other grounds, 318 F.2d 518 (3d Cir. 1963), where a one-year term was in the franchise, the court felt that it need not limit recovery to that one year.

[110] E.g., Chevrolet Motor Co. v. McCullough, 6 F.2d 212 (9th Cir. 1925). The problem of awarding damages in termination-at-will contracts has arisen in contexts other than the Dealers' Act. For two such cases which take variant positions on the issue of whether such damages should be awarded at all, compare Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948) with Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958).

[111] 202 F. Supp. 667 (W.D. Pa. 1962), rev'd on other grounds, 318 F.2d 518 (3d Cir. 1963).

[112] Comment, The Elusive Measure of Damages for Wrongful Termination of Automobile Dealership Franchises, 74 Yale L.J. 354, 363 (1964).

[113] Garvin v. American Motors Sales Corp., supra note 111, at 672.

recovery may be for that period of time when the dealer's franchise would have been effective but for the coercive termination or failure to renew. It is submitted that the *Garvin* court was correct in its implicit refusal to distinguish between the indefinite-term franchise and the renewable franchise, for, although such franchises are different in form, they are similar in substance. Both are, in effect, long-term franchises, for in the normal situation, the renewal is a matter of course if the dealer is adequate, just as in the normal situation, the termination-at-will clause is not invoked unless the dealer is inadequate. Thus, in both cases, the dealer will retain his franchise only as long as his performance is satisfactory. The only difference between the two is the manner of severing the relationship, a difference which should not have an effect on the amount of recovery if the severance is in bad faith.

The *Garvin* approach presupposes that the dealer will hold his franchise until death or disability. Although that assumption is not generally correct, such an approach is appropriate in those cases involving long-term dealers who have exhibited stability in their past relationship with the manufacturer. There may well be a significant number of such cases arising, for in 1956 over thirty per cent of all General Motors dealers had held their franchises for over twenty years.[114]

The obvious objection to the *Garvin* test is that the jury will engage in "wild speculation"[115] and award unreasonably large damages to the dealers. However, the fact that the jury in *Garvin* limited recovery to what would be, at most, future profits for one year, evidences the fact that juries may not be as easily convinced of what will be the "normal course of events," and furthermore indicates that they will confine recovery to a reasonable amount.[116]

The problem of certainty of future duration is more formidable with regard to the other group of dealers—the seventy per cent that have held their franchises for less than twenty years. The greater influence of extrinsic events must be taken into consideration in these cases: the dealer might sell his business or allow his franchise to lapse, or the manufacturer may discontinue production of the dealer's line of cars,[117] or the manufacturer might lawfully sever the franchise agreement. Even if these possibilities were included in the instructions to the jury, it would be impossible for the jury to do more than speculate as to their likelihood.[118] It has been suggested that statistics could be compiled at each trial, showing the normal duration of a

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114 H.R. Rep. No. 2850, at 12.

115 Comment, 48 Cornell L.Q. 711, 731 (1963).

116 The evidence in *Garvin* showed a loss of $4,000 for parts and $7,000 for equipment that became useless due to nonrenewal, $10,000 for goodwill lost as a result of the nonrenewal, and $1,500 for rent payable on the dealer's unexpired lease. The evidence also indicated that the dealer's loss of profits for one year would be approximately $18,000. The jury's verdict of $20,000 was probably based upon some combination of these figures. Garvin v. American Motors Sales Corp., supra note 111, at 672.

117 The Ford Motor Company's experience with the short-lived Edsel exemplifies such a case. See Jim Barnett Motors, Inc. v. Ford Motor Co., 355 F.2d 502 (5th Cir. 1966).

118 Comment, supra note 112, at 367.

hypothetical dealer similarly situated to the plaintiff dealer. Such a norm might then be accepted as prima facie evidence of the period for which there should be recovery, subject to adjustment by the court if the manufacturer can show some extrinsic event, such as imminent discontinuance of the dealer's product, which would shorten the period.[119]

The second problem in the damage computation is the determination of the potential profit of the franchise. Generally, in order to recover, it must be demonstrated that profits would have existed,[120] and it must be shown with reasonable certainty what those profits would have been.[121] It is insufficient for a dealer to testify to his lost profits unless he is able to substantiate his claims with records.[122] If a requirement of certainty were strictly enforced, recovery might be prevented because of the obvious problems in computing future profits.[123] Thus, a less strict application of the certainty rule would be desirable. Since the Dealers' Act is an antitrust law, authority for applying a more flexible standard may be found in treble-damage antitrust litigation, where the requirement of certainty has been reduced to a "best-evidence" rule.[124]

Even if the certainty rule is not strictly applied, however, the dealer will have significant proof problems if he has not compiled a record of past performance sufficient to give an indication of future profits. This is the dilemma of the dealer who has not been in business long enough to compile a record of earnings. In that case, loss of profits is too speculative and thus should not be awarded. Alternatively, this type of dealer should be allowed to recover "reliance" damages, that is, those damages sustained acquiring adequate facilities in anticipation of performing the franchise obligations.[125] Such damages are easily computed.

There are several other possible methods that have been suggested for the computation of damages. Capitalization of earnings may be used as a method of recovering the value of the franchise as reflected by its profit potential.[126] This method will reflect not merely the tangible operating assets

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[119] Id. at 369-70; Comment, 52 Nw. U.L. Rev. 253, 267 (1957).

[120] Ellerson v. Grove, 44 F.2d 493, 499 (4th Cir. 1930); Klein v. American Luggage Works, Inc., 206 F. Supp. 924, 945 (D. Del. 1962), rev'd on other grounds, 323 F.2d 787 (3d Cir. 1963).

[121] Evergreen Amusement Corp. v. Milstead, 206 Md. 610, 112 A.2d 901 (1955). See generally 5 Corbin § 1020-28 (1964); Note, 64 Harv. L. Rev. 317 (1950).

[122] Volkswagen Interamericana, S.A. v. Rohlsen, supra note 83, at 446.

[123] See, Note, Lost Profits as Contract Damages, 65 Yale L.J. 992, 1018-20 (1956).

[124] See, e.g., Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251 (1946); Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 255 (1931). See generally Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L. Rev. 363, 391-92 (1954).

[125] Compare Gruber v. S-M News Co., 126 F. Supp. 442, 446 (S.D.N.Y. 1954). See Restatement, Contracts § 333 (1932); Note, 70 Harv. L. Rev. 1239, 1251 (1957). See generally 5 Corbin, Contracts §§ 1031, 1035 (1964).

[126] See Equitable Life Assur. Soc'y v. Slade, 122 Conn. 451, 190 Atl. 616 (1937); Note, 70 Harv. L. Rev. 1239, 1251 (1957). See generally 1 Bonbright, The Valuation of Property 233-66 (1937); 1 Dewing, Financial Policy of Corporations 283-349 (4th ed. 1941). The capitalization-of-earnings method assumes that similarly-situated businesses

of the business, but also the intangible assets. In *Volkswagen* the court approved the use of capitalization, but required the figures which were to be used in the computation to be adequately substantiated.[127] This method is particularly inappropriate in computing damages for an infant business, as it requires a reliable past-earnings figure. This figure cannot be valid where earnings often fluctuate greatly from actual potential due to countless extrinsic circumstances. This is essentially the same problem encountered in the loss-of-profits computation.[128]

In an attempt to avoid the uncertainty problems of a recovery based upon a speculative loss of profits, it has been suggested that recovery be based upon the difference between what the dealer could have sold his business for before and after the termination.[129] The pretermination value would be determined by an appraisal based upon the business' capitalized earnings and its individual assets. The post-termination value would be based upon any "going-concern value" remaining, *i.e.*, used car sales and repair service, or liquidation value, or the amount for which a new dealer, procured by the manufacturer or the cancelled dealer, is willing to buy the dealership as a unit.[130] This approach has been criticized on the ground that it is unlikely that a dealer would realize the pretermination value because of the control which the manufacturers have over the purchase price of franchises.[131] This control over the price is exercised through the franchise provision which requires the manufacturer's approval before the franchise may be sold. This approval is withheld if the purchase price is too high, on the ground that the new dealer may weaken his financial position if he is forced to pay too much for the franchise. Obviously, the efforts to capitalize in this situation will encounter the same difficulties that they would have encountered if used to compute profit potential.

in the same industry yield a similar rate of return on capital investment. The rate of return is represented in terms of a percentage of total worth, which is 100%. Therefore, if the business' annual earnings and the industry's rate of return are known, the total worth may be computed by dividing the latter into the former. For example, if a business yields $80,000, and the average industry rate of return is 8%, then the total worth of the business is $1,000,000.

127 Supra note 83, at 446.

128 In a case which awards damages on the basis of lost profits, there is a problem of mitigation of damages. The general contract rule is that there is an absolute duty on the part of the injured party to mitigate damages. Restatement, Contracts §336(1) (1932). In Garvin v. American Motors Sales Corp., supra note 111, however, the court refused to instruct the jury that the plaintiff had a duty to mitigate damages. The court felt that the defendant's mitigation argument was "not maintainable under any construction of the act and appears to be contrary to the tenor and purport of the act." Id. at 673. In Volkswagen Interamericana, S.A. v. Rohlsen, supra note 83, on the other hand, it was held to be error for the trial court to refuse to instruct the jury that the plaintiff had a duty to mitigate damages, particularly since the defendant offered to repurchase some of the useless part and inventory. Id. at 446. The *Volkswagen* approach seems to be the better one on this point. For a complete discussion of the dealer's duty to mitigate damages, see Comment, 74 Yale L.J. 354, 370-75 (1964).

129 Kessler 1188-89.

130 Ibid.

131 Comment, 74 Yale L.J. 354, 375-77 (1964).

Concerning the measure of damages used, it is submitted that estimated loss of profits, even with all the uncertainty, is the best approach in most cases. Such an approach reflects more adequately the real loss sustained by the dealer,[132] since all the investment and time that were expended toward the goal of producing a profit were lost as a result of the manufacturer's lack of good faith. The fact that certainty cannot be attained should not prevent the dealer from recovering, nor should it allow the manufacturer to escape liability for its unlawful act.[133] Due to the lack of preciseness in proof, the jury is likely to have a great deal of discretion in assessing damages, and will probably favor the dealer. Perhaps such favoritism is not altogether undesirable, since it would promote the policies of the act. Control over jury abuse of discretion remains in the court, moreover, by the use of the remittitur procedure.[134]

As an alternative to the private suit and damage remedy, most of the twenty states attempting to regulate the dealer-manufacturer relationship have adopted licensing statutes.[135] Under such statutes, manufacturers and their representatives must obtain a license to do business in the state, and this license can be revoked or suspended if the state law is violated. From these statutes, both formal and informal enforcement procedures have been developed.[136] The formal procedures involve hearings before the state agency designated to enforce the act. The informal procedures, on the other hand, are similar to a mediation situation wherein the state agency acts as an advisor rather than in its quasi-judicial capacity.[137] The formal procedures have been rarely used, and there has been no suspension or revocation as a result of these procedures,[138] whereas the informal procedures have been more frequently used, and the dealer and manufacturer have often been able to achieve a settlement.[139]

Some states have adopted penal sanctions to enforce their dealers' acts.[140] In those states, certain conduct by manufacturers against dealers has been made criminal, and enforcement is left to local prosecutors. These penal provisions have never been applied.[141] Such criminal sanctions do not seem

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[132] In *Volkswagen*, the dealer attempted to recover damages to his reputation caused by the termination. The court, however, analogizing the situation to employment-contract cases, found that there was no basis for such damages under the act. 360 F.2d at 446. In employment-contract cases, the rationale for denying recovery-of-reputation damages is the unforeseeability of such harm when the contract was made. E.g., Mastoras v. Chicago, M. & St. P. Ry., 217 Fed. 153 (W.D. Wash. 1914).

[133] In 1964, Senator Morse introduced a bill to amend the Dealers' Act to allow a recovery of treble damages. 110 Cong. Rec. 3793-94 (1964). Such an amendment would not solve the uncertainty problem, for the jury would still first have to reach a figure to be multiplied by three.

[134] Note, 70 Harv. L. Rev. 1239, 1251-52 (1957).

[135] E.g., Okla. Stat. Ann. tit. 47, § 563 (1962); Wis. Stat. Ann. § 218.01 (1957), as amended by Wis. Stat. Ann. § 218.01 (Supp. 1966).

[136] See generally Macaulay 793-812.

[137] Ibid.

[138] Id. at 809.

[139] Id. at 810.

[140] E.g., S.D. Code § 54.1103 (Supp. 1960); Wyo. Stat. Ann. §§ 40-39 to -40 (1957).

[141] Macaulay 812.

to be a proper remedy for a civil statute which requires the parties to a contract to act in good faith. Dealers' acts, be they state or federal, are essentially statutory modifications of basic contract law,[142] and have traditionally been enforced civilly. The statute should not change to a criminal violation what has always been a civil action. The fact that there has never been a criminal complaint filed by a dealer against a manufacturer is, by itself, some evidence that dealers also believe that criminal actions are no way to resolve their differences with the manufacturers.

B. *Equitable Relief*

The Dealers' Act does not provide for equitable relief, nor does the legislative history of the act reveal any congressional intent to grant such relief. Nevertheless, in *Bateman v. Ford Motor Co.*,[143] the court of appeals held that the district court, by virtue of its general equity power, could grant a temporary injunction prohibiting the manufacturer from terminating the franchise until the case was heard on the damage issue.[144] The court felt that granting the injunction would preserve the effectiveness of the remedy provided by the statute.[145]

There are at least two reasons to question the wisdom of allowing a court to grant a temporary injunction. First, the absence of any consideration of equitable relief in the history of the act raises an inference that Congress did not intend it to be granted. The Clayton Act, for example, makes specific provision for equitable relief.[146] Furthermore, that provision granting equitable relief was probably enacted to specifically counteract[147] Sherman Act decisions which denied injunctive relief because there was no specific grant of such relief in that act.[148] Moreover, in 1964, an amendment was presented to Congress which would have allowed equitable relief to be available in Dealers' Act cases.[149] Since no action was taken on the amendment, it may be implied that Congress had no desire to grant equitable relief in these cases.

Second, the franchise relationship is a personal one which is *usually* terminable at will.[150] It is somewhat analogous to the partnership-contract situation in the sense that two parties who were originally amicable have

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[142] General Motors Corp. v. Mac Co., 247 F. Supp. 723, 725 (D. Colo. 1965).

[143] 302 F.2d 63 (3d Cir. 1962).

[144] Id. at 66. Accord, Sam Goldfarb Plymouth, Inc. v. Chrysler Corp., 214 F. Supp. 600 (D. Mich. 1963); Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314 (Minn. 1965).

[145] On remand, the district court refused to grant the temporary injunction, because the plaintiff failed to carry his burden of proof, which required a showing of "bad faith, coercion, discrimination, or threatened irreparable harm. . . ." Bateman v. Ford Motor Co., 204 F. Supp. 357, 360 (E.D. Pa.), rev'd on other grounds, 310 F.2d 805 (3d Cir. 1962).

[146] 38 Stat. 737 (1914), 15 U.S.C. § 26 (1964).

[147] Paine Lumber Co. v. Neal, 244 U.S. 459, 475 n.1 (1917).

[148] For Sherman Act cases which have held that private injunctive relief could not be given, see Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

[149] 110 Cong. Rec. 3793-94 (1964).

[150] Macaulay 564-65.

had a disagreement and no longer wish to be associated with each other. In partnership cases, the courts refuse to compel one party to continue the relationship if there is a termination-at-will clause.[151] Furthermore, allowance of injunctive relief in a case in which the adverse parties are in a continuous business relationship would create practical problems for the courts. Since the courts would be compelling a continuing relationship, they would have to exercise constant supervision over the parties, a task which the courts neither favor nor perform well.[152]

The court in *Bateman*, however, felt that there were two compelling reasons for allowing an injunction to be issued. First, it felt that the dealer might have to wait years before his damage suit was decided;[153] second, it pointed out that unless the injunction were issued for the period between the effective date of the termination and the damage decision, the dealer's business would be completely destroyed.[154] Neither of these reasons is convincing. With regard to the length of time that the dealer must wait for his damage recovery, the mere fact of delay should not be sufficient reason to allow resort to the injunction.[155] Furthermore, the court apparently overlooked the fact that upon decision of the damage suit and dissolution of the temporary injunction, the manufacturer could destroy the dealer's business by arbitrarily terminating at that point, just as he would have destroyed it had the injunction not been issued. In effect, the dealer had merely received a postponement of the date of termination.

It is submitted that such a postponement is inconvenient and costly for the manufacturer, and unnecessary in order to give the dealer adequate protection. The inconvenience to the manufacturer stems from the fact that had it been allowed to terminate, it could have enfranchised a dealer who would have been more satisfactory to it. Thus, during the period of the injunction, the manufacturer may well be losing sales and goodwill by having to tolerate an inefficient dealer. On the other hand, if the injunction were not issued and the franchise were terminated, any recovery received by the dealer for lost profits would include the period during which the injunction would have been in force. Thus, since the dealer will be allowed compensatory damages for the period in question, injunctive relief should not be granted.

The above discussion has analyzed the problems involved with the issuance of a *temporary* injunction. One court, however, has implied that a *permanent* injunction might lie.[156] Such a decision seems clearly erroneous, especially if the franchise has a termination-at-will clause, for in such a

[151] E.g., Favero v. Wynacht, 371 P.2d 858 (Mont. 1962). See Annot., 70 A.L.R.2d 618 (1960).

[152] The difficulties of policing such an injunction have been aptly stated by the Sixth Circuit: "[I]nterwoven obligations remain uncertain in the contract and the necessary result of such a decree would be the continued policing of the conduct of the parties, . . . a task for which the courts are not equipped and which is incapable of compulsion by usual judicial process." Bach v. Friden Calculating Mach. Co., 155 F.2d 361, 366 (6th Cir. 1946).

[153] Bateman v. Ford Motor Co., supra note 143, at 66.

[154] Ibid.

[155] Comment, 48 Cornell L.Q. 711, 734 & n.184 (1963).

[156] Dahlberg Bros., Inc. v. Ford Motor Co., supra note 144, at 325-26.

case, granting a permanent injunction would effectively read this clause out of the agreement. Presumably, if such a decree were entered, the manufacturer, in order to terminate the franchise, would have to petition the court to dissolve the injunction. Although obtaining the dissolution would probably not be difficult if the manufacturer could show cause, requiring a showing of cause was certainly not within the intent of the parties when they entered the agreement. In addition, the granting of a permanent injunction would be contrary to the purposes of the act for two reasons. First, it may tie the manufacturer to an inefficient dealer, a result not intended by Congress.[157] Second, it would result in a lessening of the dealer's motivation to compete by insuring him of his franchise without the necessity of having to maintain a satisfactory level of performance. Such a "freezing" of the automobile distribution system offends federal antitrust policy, which attempts to foster competition.[158] Therefore, it is submitted that the permanent injunction should never be granted in Dealers' Act cases.

VII. Conclusion

Soon after the Dealers' Act was passed, it was predicted that "ultimate judicial interpretation of the legislation may result in leaving the dealers in substantially the same position they were in prior to a single enactment."[159] It appears from the results of the cases which have been litigated that this prediction was accurate. The courts have construed the act's provisions strictly, as urged by the manufacturers, and as a result, lack of good faith has taken on such a narrow meaning that the dealer's burden of proof is almost insurmountable. In fact, in the ten years since passage, only one case, *Volkswagen*, has resulted in a judgment for the dealer on the issue of lack of good faith.

The dealers' dismal record in court may suggest that the act has not helped the dealers at all. It is quite true that it has not helped those who have had to go to court. Indeed, dealers suing on the statutory cause of action have been no more successful than those who sued on a common law cause of action for breach of contract before the passage of the act. The act, however, should not be written off as a total failure. It has had a positive effect on dealer-manufacturer relations in that it has induced the manufacturers to rework their franchises and to delete some of the objectionable provisions.[160] To this extent the act has accomplished something that the dealers could not have done by themselves. Moreover, the act has probably also deterred some of the objectionable practices which were commonplace

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[157] H.R. Rep. No. 2850, at 9.

[158] See 1956 Hearings 128, 132-33, 246-49.

[159] Brown & Conwill, Automobile Manufacturer-Dealer Legislation, 57 Colum. L. Rev. 219, 237 (1957).

[160] H.R. Rep. No. 2850, at 6-7. The current franchise agreements offer the dealer the option of a one-year, five-year, or indefinite-term franchise, with the first two alternatives providing for cancellation only for cause. Dealer Review Boards were also created as a result of the hearings prior to the act. Furthermore, it is interesting to note that retired Supreme Court Justice Charles Whittaker was named by General Motors to serve as an impartial umpire to decide dealer disputes. Macaulay 557, 854 n.880.

in the industry before the act was passed; but, of course, it would be impossible to measure the extent of this deterrence. Thus, in these two situations, the act has benefited dealers, albeit those who have not had to take advantage of its provisions.

On the other hand, the act has undoubtedly encouraged frivolous litigation, *i.e.*, that type initiated by the dealer with the intent to harass the manufacturer and perhaps receive an unwarranted settlement. To the extent that such "strike" suits have been encouraged by the Dealers' Act, it has been unsuccessful, and has done the dealers' cause more harm than good.

When the act was passed, its major purpose was not to induce changes in the franchises, nor to indirectly benefit those dealers who did not have to bring suit. On the contrary, its purpose, as evidenced by the popular name—"Dealers' Day in Court Act"—was to directly aid those dealers who had to litigate their rights under their franchises. In this regard, the act has been almost an unqualified failure, although *Volkswagen* may represent a turning point. Perhaps the most basic reason for the impotence of the act is its language: it was so poorly drafted that the courts have been unable to implement it. The reason for the poor drafting may have been a congressional desire in the closing days of the 84th Congress to pass "any" act, and not necessarily an effective one.[161] The compromise that resulted from the rush to pass the act was fatal to the act's effectiveness. Thus, in answer to the question posed at the outset of this comment—whether the act creates a *real* or merely an *illusory* cause of action—it is quite apparent that at this time the cause of action is illusory. This need not be so in the future, however, since the favorable opinion in *Volkswagen* may be the start of increased dealer success in court. There certainly appears to be enough language in that opinion to support many dealer arguments that until this time had no chance at all.

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161 See Macaulay 846.