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A Bill of Rights for Auto Dealers

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A BILL OF RIGHTS FOR AUTO DEALERS

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INTRODUCTION

The enactment of Chapter 93B of the Massachusetts General Laws¹ has provided the auto dealers of Massachusetts with a true "Bill of Rights" governing their relationship with the auto manufacturers. At the heart of this Chapter are prohibitions against terminating or failing to renew a dealership except for due cause,² or engaging "in any action which is arbitrary, in bad faith, or unconscionable. . . ."³ Although legislation directly affecting only a few hundred businesses⁴ might appear rather specialized, this statute, the first of such pervasive scope in the nation, may set a precedent for the entire automobile industry.⁵ As a possible forerunner of similar legislation

¹ Acts 1970, ch. 814 (4 Mass. Leg. Serv. 712 (West 1970)), effective Jan. 1, 1971.

² Mass. Gen. Laws Ann. ch. 93B, § 4(3)(c) (4 Mass. Leg. Serv. 714 (West 1970)).

³ Mass. Gen. Laws Ann. ch. 93B, § 4(1) (4 Mass. Leg. Serv. 713 (West 1970)).

⁴ It is generally accepted that there are approximately 800 auto dealers in the state, and that over 90% of their sales are of vehicles manufactured by the "Big Three," namely, General Motors, Ford and Chrysler.

⁵ Although the statute is not the first in the nation affecting automobile dealers, particularly with regard to termination or failure to renew the franchise, it goes far beyond that crucial aspect of the relationship. Indeed, this statute, in addition to other state statutes of more limited scope, has undoubtedly had immediate impact in the form of the revisions to its standard dealer contract announced by General Motors in December of 1970.

In addition to the federal Auto Dealers' Day in Court Act, 15 U.S.C. §§ 1221-225 (1964), discussed *infra*, the following states are among those which have enacted legislation protecting auto dealers:

Colorado:

Colo. Rev. Stat. § 13-11-14(10), (11) (1964). Section 13-11-14(11)(d), which prohibited any cancellation of a motor vehicle dealer's franchise "unfairly, without due regard to the equities of said dealer and without just provocation . . ." was held unconstitutionally vague in *General Motors Corp. v. Blevins*, 144 F. Supp. 381, 395 (D. Colo. 1956), in light of the fact that another section of the same article imposed criminal penalties for violation of any of its provisions. *Contra*, *E.L. Bowen & Co. v. American Motors Sales Corp.*, 153 F. Supp. 42, 45-46 (E.D. Va. 1957); *Ford Motor Co. v. Pace*, 206 Tenn. 559, 571-75, 335 S.W.2d 360, 365-67 (1960), in which the court criticizes the *Blevins* case rather pointedly; *Forest Home Dodge, Inc. v. Karns*, 29 Wis.2d 78, 94-95, 138 N.W.2d 214, 222-23 (1965).

Florida:

Fla. Stat. Ann. § 320.64(8) (1968) parallels the wording of the Colorado statute, *supra*. The Florida statutes also impose criminal penalties for violations. See Fla. Stat. Ann. § 320.70 (1968).

Iowa:

Iowa Code Ann. § 322.3 (1966). This statute prohibits an auto manufacturer from terminating or failing to renew any franchise "without just, reasonable and lawful cause therefor . . ." Iowa Code Ann. § 322.3(5). Unlike the Colorado and Florida statutes, *supra*, this provision is expressly exempted from the section imposing criminal liability for violations, thus avoiding the vagueness problem which resulted in the Colorado statute being declared unconstitutional. See Iowa Code Ann. § 322.14 (1966).

Minnesota:

Minn. Stat. Ann. § 168-27 (1960), as amended, (Supp. 1970). This statute makes it unlawful for any auto manufacturer "[t]o cancel or refuse to renew [a] franchise . . . without just cause." Minn. Stat. Ann. § 168.27(14)(3). Its constitutionality has

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for all franchisees in other states, the Massachusetts statute could ultimately affect a marketing system encompassing over ten percent of the Gross National Product and twenty-five percent of all retail sales. Moreover, because it has been demonstrated that the power exercised by franchisors over their franchisees has a direct effect upon the franchisee's dealings with his customers,⁶ the statute may have repercussions extending into every home.

been sustained in *Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc.*, 142 F. Supp. 469 (D. Minn. 1956).

New York:

N.Y. Gen. Bus. Law § 197 (McKinney 1968), as recently amended by ch. 582 of the 1970 Laws, prohibits termination of a franchise "except for cause." Section 197-a, also added by ch. 582 of the 1970 Laws, prohibits any failure to renew a franchise "except in good faith."

North Carolina:

Gen. Stat. N.C. § 20-305(3) (1965) parallels the wording of the Colorado statute, *supra*. North Carolina also imposes criminal penalties for violations. See Gen. Stat. N.C. § 20-308 (1965).

Rhode Island:

R.I. Gen. Laws § 31-5-23(8) (1969) also parallels the wording of the Colorado statute, *supra*. Criminal penalties for violations are imposed by R.I. Gen. Laws §§ 31-5-27 and 31-5-39 (1969).

Tennessee:

Tenn. Code Ann. § 59-1714(h)(4) (1958) also parallels the wording of the Colorado statute, *supra*. Tennessee also imposes criminal penalties for violations. See Tenn. Code Ann. § 59-1718 (1968).

Wisconsin:

Wis. Stat. Ann. § 218.01(3)(a)(15)-(17) (1957), as amended, (Supp. 1970). Section 218.01(3)(a)(17) of the Wisconsin statutes parallels the wording of the Colorado statute, *supra*. The Supreme Court of Wisconsin has found the statute on its face "to be a proper exercise of the police power. . . ." *Forest Home Dodge, Inc. v. Karns*, 29 Wis.2d 78, 94, 138 N.W.2d 214, 222 (1965). Criminal penalties are imposed for violations. See Wis. Stat. Ann. § 218.01(8) (1957), as amended, (Supp. 1970).

Some jurisdictions have enacted similar laws affecting franchisees in general. These include:

Delaware:

The recently enacted Laws of Delaware 1970, ch. 693 added a new subchapter IV, containing §§ 2551-256, to Del. Code Ann. tit. 6, ch. 25, to prohibit "unjust" termination of or failure to renew a franchise; "unjust" being defined as "without good cause" or "in bad faith."

Puerto Rico:

Laws P.R. Ann. tit. 10, §§ 278-278d (Supp. 1969) grants an action for damages if a dealership is not renewed or is terminated without "just cause," a phrase of civil law origin, akin to "good faith."

⁶ See the remarks of Congressman Rooney, whose search for the reasons behind the high-pressure sales techniques of magazine salesmen led him to discover that Cowles Publishing Co. had initiated an incredible annual increase in distributors' quotas, thereby pushing the distributors to fraudulent excesses in a futile effort to survive. 115 Cong. Rec. H12,098-103 (daily ed. Dec. 10, 1969); 115 Cong. Rec. E11,150-52 (daily ed. Dec. 29, 1969). See also *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453, 456 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3rd Cir. 1969), which involved a claim that the sales quota established by the manufacturer for all dealers was so high that most could not achieve it; R. Nader, L. Dodge & R. Hotchkiss, *What to Do With Your Bad Car*; An Action Manual for Lemon Owners 122 (Grossman 1971) [hereinafter cited as Nader]

The primary purpose of this article will be to summarize and analyze the provisions of the new Massachusetts statute viewed in its factual and legal context. Actual practices in the auto industry will be emphasized, demonstrating their lack of economic justification and their inherent unfairness both to the dealers and to their customers. The legality of these practices will also be evaluated, in somewhat limited detail, in light of both existing statutes⁷ and the pertinent case law, principally in the federal arena. Finally, the pattern and specific terms of the Massachusetts Act will be discussed, with emphasis upon its contribution to the solution of these issues and its potential impact on a national scale.

I. THE PROBLEMS ADDRESSED BY THE ACT

A full appreciation of the provisions contained in the new Act requires an exposition of the business practices of which auto dealers have complained for decades.⁸ There is little need to provide statistics to demonstrate that the principal auto manufacturers are economic giants and that the industry is dominated by the "Big Three" as an oligopoly.⁹ The total dependence of the auto dealers on but a few factories for their continued source of supply severely limits their scope of trading power in the general market.¹⁰ While franchisees in

(in which the authors report that as a result of manufacturer refusals to reimburse dealers for pre-delivery and warranty work, customers sometimes get "the sunshine treatment" whereby the car is parked in the lot for a few days and then the customer is called and told the job is done); E. Ayres, *What's Good for GM* 137 (Aurora 1970) [hereinafter cited as Ayres] (quoting a dealer's letter to the *Automotive News* to the effect that, "When G.M. delivers cars to its dealers [they] have so many things wrong with them that it takes three to four times more time to precondition them for delivery to the customer . . .") Ayres also reports that as a result of inadequate payment for warranty work dealers must make extra charges for non-warranty work. *Id.* at 130.

⁷ The statutory discussion will include the Sherman Act, 15 U.S.C. §§ 1-7 (1964); the Clayton Act, 15 U.S.C. §§ 12-27, 44 (1964); the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a-c, 21a (1964); the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1964); the federal Dealers' Day in Court Act, 15 U.S.C. §§ 1221-225 (1964); and related measures.

⁸ See generally *Hearings on the Role of Giant Corporations in the American and World Economies Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 91st Cong., 1st Sess. (1969).

⁹ *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453, 456 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3rd Cir. 1969). The figures are literally staggering—nine million new vehicles are sold annually, tens of millions more are already on the roads, and close to thirty thousand automobile dealers across the country sell and service these vehicles.

¹⁰ See Ayres, *supra* note 6, at 127-28 suggesting that with less than 3% of all domestic dealerships representing more than one manufacturer, the reason for the manufacturers' preference for the single dealership is that it "heightens the barrier to new competition." See the dissenting opinion of Justice Black in *Ford Motor Co. v. United States*, 335 U.S. 303, 323 (1948) ("The dealers are thus economic dependents of the company whose cars they sell."); *Forest Home Dodge, Inc. v. Karns*, 29 Wis.2d 78, 85, 138 N.W.2d 214, 217 (1965) ("Implicit in this law is the recognition of the gross disparity

general often complain of excessive control and abuses by their franchisors,¹¹ the structure of the automobile industry implicitly embodies these very factors. In varying degrees, each of the auto manufacturers has been the object of bitter dealer complaints,¹² loosely categorized as encompassing "operating," "capital" and "administrative" items.

A. *Dealer Complaints Concerning "Operating Items"*

In the operating class are such matters as adequate and prompt payment for pre-delivery work performed by the dealer as the final step in the manufacturing process, and reimbursement for labor and parts supplied to satisfy the manufacturer's express warranty to the consumer. In each instance, dealers have long contended that in order to continue to function, they must perform this work at their own expense, but then find themselves at the mercy of the manufacturer with respect to allowance of the claim, the standard of payment, and actual receipt of the funds.¹³ Even in 1970, it is claimed that in order to show a modest interim profit, one major manufacturer has held up the processing of some eight hundred thousand claims for warranty reimbursement.¹⁴ For years it was recognized that the reimbursement rate for labor was grossly below the dealer's actual costs,¹⁵ and even now reimbursement for parts is at net cost plus twenty-five percent, which approximately equals the average markup obtained by dealers selling to wholesalers.¹⁶

of bargaining power between the manufacturer of automobiles and the local retailer."]. See generally *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968), for a discussion of comparable problems confronting the gasoline station dealers vis-a-vis the major oil companies.

¹¹ See generally H. Brown, *Franchising: Trap for the Trusting* (2d printing 1970) [hereinafter cited as *Brown*]; Brown, *Franchising—The Franchisee's Viewpoint; Remedies, in The Realities of Franchising, A Guide for the Practicing Attorney* 13-26 (Mass. Continuing Legal Education, Inc. ed., Faneuil Press 1970); *Hearings on the Impact of Franchising on Small Business Before the Subcomm. on Urban and Rural Economic Development of the Senate Select Comm. on Small Business, 91st Cong., 2d Sess.* (1970).

¹² See *Brown*, supra note 11, at 77-86; *Ayres*, supra note 6, at 105-37.

¹³ See *Nader*, supra note 6, at 113, reporting that under the manufacturer's pricing policy, the dealer does not obtain reimbursement for pre-delivery work except for extraordinary repairs, but has to look to his customer for such compensation. As for reimbursement for warranty work, the dealer may be paid 35% less than what he receives for identical work for regular customers, and is subject to constant uncertainty as to whether the manufacturer will accept responsibility for the warranty repairs. See *Car Dealer "Insider" Newsletter*, vol. V, no. 9, Dec. 14, 1970, at 2, in which Lowell Dodge, an associate of Ralph Nader, commented in an interview that ". . . when a dealer is over zone average on warranty claims, he gets an audit, or he has to get prior approval for anything over \$50."

¹⁴ See *Car Dealer "Insider" Newsletter*, vol. IV, no. 22, March 16, 1970, at 4.

¹⁵ *Brown*, supra note 11, at 84 & n.20.

¹⁶ *FTC, Staff Report on Automobile Warranties* 133-35 (Nov. 1968) [hereinafter cited as *FTC Report*]. Overall compensation for warranty work is demonstrably lower than that received by dealers for comparable non-warranty work. See *Ayres*, supra note 6, at 130, noting confirmation of underpayment in a study conducted in 1968 by the

With regard to pre-delivery inspection before the sale to a customer, dealers claim that actual costs of this work run from twenty to thirty dollars more per car than the amounts allowed by the manufacturers.¹⁷ This inequity has been compounded by the increasing frequency of manufacturing deficiencies and damage in transit.¹⁸ In addition, some manufacturers allow dealers to obtain reimbursement only after the vehicle is sold to a consumer.

It is not difficult to perceive the effect of these abuses upon consumers. Where auto dealers are financially pressed just to break even on pre-delivery and warranty work,¹⁹ it is certainly foreseeable that consumers may be shortchanged by dealers. Hard pressed economically by rapidly increasing costs, and perhaps buffeted by the economic recession, a dealer has little choice but to cut corners with his customers,²⁰ and may even be pressed into filing fraudulent claims with the manufacturer for reimbursement.²¹ While such practices by

Management Information Corporation for the National Automobile Dealers Association, later corroborated in a study conducted for Ford by Arthur Andersen and Company. In its own study, G.M. contested these findings. A Ford representative, however, reportedly testified in a Tennessee lawsuit that dealers were paid 35% less for warranty work than they receive for the identical work performed for regular customers. Nader, *supra* note 6, at 122.

¹⁷ FTC Report, *supra* note 16, at 130.

¹⁸ Because the manufacturers do not use available inspection systems or even road-test cars before domestic sale, serious manufacturing defects are passed on to the dealer. Although he can theoretically obtain factory reimbursement for "extraordinary" repairs, the chance of obtaining payment is remote except in rare circumstances. See Nader, *supra* note 6, at 112-13. In a confidential report to the author, a luxury car dealer of over 25 years' standing, told of his repeated refusal to accept a truck-load of damaged vehicles until the factory acceded to an independent appraisal of the damage and expressly agreed to pay. The theoretical right to such payment for extraordinary repairs had been so frequently violated that the dealer was willing to risk his dealership rather than submit to further abuse. See also FTC Report, *supra* note 16, at 191-92, outlining the increasing shortage of skilled workers and the industry's unpreparedness for a 50% increase in annual production from 1965 to the present. In the face of such difficulties, Chrysler's adoption of the "5-year-or-50,000-mile" warranty, followed by Ford and General Motors, constituted nothing more than a selling ploy, rather than a reflection of increased manufacturer confidence in the quality of new vehicles. The brunt of this expanded warranty was borne by the dealers who had to fulfill its provisions at a loss. See Nader, *supra* note 6, at 127-29.

¹⁹ In *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1201 n.6 (2d Cir. 1970), the court footnoted that for the latest year, the dealer's questioned claims for warranty reimbursement ranged from 48% to 106% of its annual net profits.

²⁰ In a December 5, 1969, bulletin "To All Chevrolet Dealers," Robert D. Lund, General Sales Manager of Chevrolet, advised all dealers that "[u]nless a safety defect is discovered, no warranty work is to be performed unless requested by the customer and needed." Nader, *supra* note 6, at 123. When G.M. discovered that a dealer had complained to Senator Philip Hart, a "clarification" was sent on January 16, 1970, allowing performance of needed warranty work without owner request, but only on approval of the dealer's service management. *Id.*

²¹ For a case involving allegations of such conduct see *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970), arising from an attempt by Ford to audit a dealer's warranty claims by interviewing the dealer's customers.

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marginal dealers are hardly excusable,²² the remedy may lie not in further punishment of the dealer, but rather in the proper recognition of the source of these problems—the abusive manufacturer practices.

Another principal complaint on the part of auto dealers concerns the subsidies granted to leasing and fleet buyers. Although such subsidies have technically been channeled through dealers, with a modest allowance to the dealer for processing each vehicle, in economic reality the subsidy emanates from the manufacturer. It has been difficult to assess the amount of the allowance per car, because in addition to the usual cash allowance of approximately \$150, the subsidy may assume various other forms. For example, the vehicle may have various accessories or optional equipment for which no charge is made. Also, each of the Big Three grants an unknown allowance to one of the three major leasing companies for joint advertising contributions,²³ and vehicles purchased by the leasing companies are sold with a guaranteed repurchase price at the end of six months.²⁴ The three major leasing companies are allowed to perform their own warranty work, with full and prompt cash reimbursement by the manufacturer. Finally, when the manufacturer repurchases the vehicle at the end of six months, the new car warranty recommences on the resale of the vehicle, and dealers who purchase such vehicles are extended automatic floor plan loans by the manufacturer.

Although estimates of the composite value of such subsidies vary, in recent litigation alleging a Big Three combination to drop the subsidies, it is claimed that each vehicle now involves an additional cost of \$700.²⁵ The most flagrant example of these subsidies in operation prior to their recent renunciation by the Big Three, occurred in December, 1969, and involved the sale of several thousand autos to a major leasing company. One of the Big Three offered the vehicles to the leasing concern at \$950 per car below the regular dealer cost,

²² In *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970), sustaining a temporary injunction against termination of a dealership under the Dealers' Day in Court Act, Judge Friendly cautioned, ". . . any dealer who regards [the lower court's decision] as a Magna Carta for cheating Ford or any other manufacturer does so at his peril." Query whether this observation would have been appropriate had the complaint alleged antitrust violations, rather than violations of the Dealers' Day in Court Act, in light of the Supreme Court's denial of *pari delicto* as a defense in antitrust suits. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

²³ It is reported that when Ford won the Hertz account from Chevrolet over a decade ago, it doubled its \$10 million advertising contribution to the rental company and has periodically effected additional generous increases. Similar amounts are allegedly paid by Chrysler to Avis and by General Motors to National. Car Dealer "Insider" Newsletter, vol. V, no. 11, Dec. 28, 1970, at 1-2.

²⁴ One factory utilizes a six-month lease, rather than a sale and repurchase guarantee, though each method is economically equivalent.

²⁵ *City of Philadelphia v. General Motors Corp.*, Civil No. 70-2753 (E.D. Pa., filed Oct. 7, 1970).

but lost the contract to another of the Big Three which bid over \$1,000 below dealer's cost.

The principal complaint of the dealers with respect to such subsidies lies in their claim that there can be no economic or legal justification for their having to pay the factory more for the identical product, when they must then compete with the leasing companies in the same consumer market.²⁶ Legal considerations aside, the dealers can see no economic justification for quantity discounts, advertising allowances, or the other preferential benefits accorded the leasing companies, since the dealers buy more, advertise more, and perform the identical functions. Even further, the dealers have had to bear the brunt of consumer complaints, particularly those voiced through legislatures and consumer councils. Yet, because ten percent of all vehicles are sold at a discount to the leasing and fleet buyers, it is the general public which inevitably has to make up for such discounts. For example, when vehicles discounted in this manner are resold each six months, their prices are usually far below the market value for comparable used cars. Every car owner thus loses some value on his trade-in, thereby paying his pro-rata share of the discount subsidy to preferred buyers. Although a few consumers may pick up a bargain, the buyers of ninety percent of all new vehicles suffer the economic consequences through the excessive depreciation of their used car trade-ins. Although the Big Three have now renounced such subsidies commencing with the 1971 model year, this action contains no assurance against back-sliding, and does not precisely disclose whether all forms of subsidizing will be discontinued.²⁷

In daily operations, each dealer is perhaps most concerned with the product received from the manufacturer. At one end of the spectrum, favored dealers may receive unfair allotments of the most desirable merchandise. For example, when one of the manufacturers recently announced an extremely desirable low-priced model, it was confidentially reported to the author that favored dealers were promised immediate delivery of hundreds of that model, while others received but a handful. Conversely, the manufacturer may seek to unload excessive production in certain lines, mistakes in production,²⁸

²⁶ One of the three major leasing companies has now publicly instituted a "lease or buy" program, placing it in direct competition with regular retail dealers. See Car Dealer "Insider" Newsletter, vol. V, no. 19, Feb. 22, 1971, at 1-2.

²⁷ It is reported that generous increases in 1971 advertising allowances have more than made up for the dropping of cash discounts and guaranteed repurchase plans. Car Dealer "Insider" Newsletter, vol. V, no. 11, Dec. 28, 1970, at 1.

²⁸ See Louis, Chrysler's Private Hard Times, *Fortune*, vol. LXXXI, no. 4, April, 1970, at 102, 146, particularly with reference to the several hundred luxury models erroneously manufactured in a "stripped condition" with standard transmissions and no radio, heater, power steering or power brakes.

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or vehicles "loaded" with high-profit extra equipment; or it may merely wish to guarantee early distribution of the entire end-run in a model year.²⁹

The seldom discussed area of parts, accessories and supplies may well involve more problems than any other aspect of the manufacturer-dealer relationship, stemming from the fact that each manufacturer has a preemptive position for replacement of its own products.³⁰ Here again, there can be extremes at both ends, with some manufacturers insisting that the dealer carry an excessive inventory³¹ and others taking an inordinately long time to fill dealer orders for replacement parts.³² Even when parts are available from the manufacturer, capricious price changes during the model year can leave dealers with higher priced parts and only a theoretical chance to avoid losses through a cumbersome return procedure.³³ With respect to many parts, accessories and supplies, the manufacturers exercise varying degrees of pressure to induce their dealers to purchase from them at inflated prices even though alternate sources of supply are available.³⁴ Such pressure may encompass the entire range of persuasion, from simple sales talk or offers of preferential treatment to implicit threats of a

²⁹ This is accomplished by requiring all closing orders for the model year to be received by May 1, with the dealer taking the risk of unwanted styles, etc., or else foregoing a normal supply for inventory.

Another perennial source of irritation to dealers has been abuse of "minimum sales requirement" (MSR) quotas. See *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453, 456 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3rd Cir. 1969), involving a claim that the MSR established by the manufacturer for all dealers was so high that most could not attain it. In the Fall of 1970, Chrysler modified the MSR approach with a "push-pull sales incentive program," offering certain discounts to dealers who assented to a high quota. When the quotas assigned were found to be extremely high, Chrysler reduced them for complaining dealers by 25%. *Car Dealer "Insider" Newsletter*, vol. V, no. 9, Dec. 14, 1970, at 4.

³⁰ At least one major manufacturer expressly prescribes in the dealer's franchise agreement that all replacement parts must be purchased exclusively from the factory.

³¹ A rejected amendment which Chrysler Corporation proposed for addition to Section 4(4)(c) of the new Massachusetts Auto Dealers' Act would have provided that dealers must at all times carry a 90-day inventory of repair parts.

³² See *Car Dealer "Insider" Newsletter*, vol. III, no. 33, May 26, 1969, at 3.

³³ When the price of a part is reduced by the factory, the dealer cannot obtain a credit for the identical parts he may have in inventory, but within certain time limits, he can return parts on hand for credit at invoice cost and reorder the identical part at the new price. Realistically, in order to take advantage of this procedure, the dealer would have to maintain a perpetual inventory of all of the thousands of parts he has on hand, constantly monitor all price changes, and scramble to return the higher-priced parts within the prescribed time limit.

³⁴ See Ayres, *supra* note 6, at 139-61, describing the exclusionary tactics of the Big Three against Automatic Radio Company, the sole remaining independent producer of car radios, through the simple device of denying access to advance information concerning the dimensions of the hole in which the radio was to be inserted. Since several months are needed for tooling, refusal to supply this simple data effectively precluded Automatic from producing radios for new vehicles.

slowdown in deliveries.³⁵ Perhaps worst of all, each manufacturer has an extensive list of "captive" parts—items which can be purchased only from the factory even though manufactured by third parties.³⁶ Suffice it to say that this particular subject is so complex and rife with competitive abuse that the FTC is presently conducting an extensive survey to unravel its ramifications, particularly with respect to independent body repair shops.³⁷ Both with respect to the vehicles and the parts supplied by the factories, the dealers have no alternative but to pass on to consumers the same conditions as the manufacturers im-

³⁵ In a similar context, involving the major oil companies and their gasoline station dealers, the Supreme Court affirmed a finding of compulsion even in the absence of any "overt coercive acts." The Court found that an oil company's position of dominance over its dealers was "inherently coercive" since each dealer fully recognized what was expected of him. See *FTC v. Texaco, Inc.*, 393 U.S. 223, 228-29 (1968).

³⁶ This term refers to parts and accessories manufactured by captive suppliers who apparently contract not to deal directly with the dealers. Compare the situation in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (holding an agreement not to supply appliances to a particular retail outlet to be a per se boycott violation of the antitrust laws). There are intimations that the factory adds a markup of several hundred percent on such "captive" parts, though for a captive market, the profit margin should be substantially less than that of an ordinary seller who has to bear the risk of inventory losses. See Ayres, *supra* note 6, at 127.

The demand for such over-priced captive parts is increased by the fact that contemporary automobiles are so vulnerable to crash damage. Tests conducted by the Insurance Institute for Highway Safety disclosed that crashes in the 5 to 10 m.p.h. range caused damage ranging from \$64 to over \$800. See Nader, *supra* note 6, at 107-08. Nader further reports:

The design of these automobiles seems explicitly intended to increase the demand for replacement parts, almost all of which are sold exclusively by the same companies responsible for the damage-prone design in the first place.

Id. See the similar testimony of Dr. William Haddon, Jr., former Director of the National Highway Safety Bureau of the U.S. Department of Transportation, and now President of the Insurance Institute for Highway Safety, given March 10, 1971, before a subcommittee of the Senate Commerce Committee. Dr. Haddon testified that the average damage to 1971 models in crashes at 5 to 10 m.p.h. had risen markedly from the results for 1970 models. He went on to note that there is "a highly remunerative market in replacement parts sales, most of which automobile design has made certain will be made by the maker of the automobile itself." When asked by Senator Philip A. Hart if manufacturers deliberately designed cars that were vulnerable to costly damage, Dr. Haddon responded, "It should be obvious to all. They do it knowingly." *N.Y. Times*, March 11, 1971, at 70, col. 1.

If the exorbitant manufacturer markups on "captive" parts are confirmed in the pending case of *DiCostanzo v. Chrysler Corp.*, Civil No. 70-3331 (E.D. Pa., filed Dec. 3, 1970), it may explain in part the spiraling increase in the cost of auto repairs and the attendant rise in property damage insurance premiums. See Ayres, *supra* note 6, at 207.

³⁷ See Trade Regulation Reports, no. 460, April 6, 1970, at 9-10, outlining FTC Chairman Casper W. Weinberger's statement of March 18, 1970 before the Senate Subcommittee on Antitrust and Monopoly; Parts, Inc., 3 Trade Reg. Rep. ¶ 19,336, at 21,477-78 (FTC 1970); Maremont Corp., 3 Trade Reg. Rep. ¶ 19,401, at 21,521 (FTC 1970) (consent order requiring divestiture by auto parts company of warehouse distributors and jobber stores having 1969 sales of more than \$100 million); *United States v. Ford Motor Co.*, — F. Supp. —, 5 Trade Reg. Rep. ¶ 73,445 (D. Mich. 1971) (decree in antimerger suit requiring divestiture of acquired spark plug plant, battery plant and trade name "Autolite").

pose upon the dealers. When consumers complain of having to buy models "loaded" with expensive accessories or of having to pay ever-increasing charges for repair parts, the dealer, who acts merely as a conduit, can hardly be blamed.

In the areas of advertising, special sales campaigns and retail prices to consumers, the factory again dominates, and inevitably at the dealer's expense. For example, one of the Big Three requires each dealer to contribute \$15 per vehicle to a national advertising fund theoretically administered by the dealers themselves. In fact, all advertising is composed and placed by the manufacturers, including periodic national sales campaigns, which advertise special "giveaways" on items such as power transmissions or power brakes—although there is no corresponding reduction in the manufacturer's price to the dealer. In response to recent complaints that the suggested retail price prescribed by the manufacturers is exaggerated merely to give the consumer the impression that he can get a real bargain,⁸⁸ the current trend among the manufacturers is to reduce the suggested retail price to such a low percentage markup that the dealer can barely survive.⁸⁹

B. Dealer Complaints Concerning "Capital Items"

Although not so readily visible, the more basic complaints emanate from capital matters which relate directly to the dealer's equity in his business. Ranking high in the hierarchy of such complaints is the dealers' objection that the manufacturers have persistently refused to recognize any element of dealer-developed business "goodwill" as an essential ingredient in the manufacturer-dealer relationship.⁴⁰ The manufacturers' position on this subject is epitomized in the legislative statement presented by General Motors in opposition

⁸⁸ These complaints have led to the recent announcement by the FTC of a proposed trade regulation rule which would prohibit the use of fictitiously high retail prices and misleading comparative pricing claims resulting from failure to disclose that formerly "standard" equipment on the model in question is now "optional" or not available at all. The proposed regulations would supply interpretations of the Automobile Information Disclosure Act. See Trade Regulation Reports, no. 488, Oct. 19, 1970, at 4-5.

⁸⁹ Car Dealer "Insider" Newsletter, vol. V., no. 6, Nov. 23, 1970, at 1-2 reports that new sticker prices will embody markups in the 15% bracket. Given the exaggerated sticker prices for prior years, it will be difficult to convince consumers of any radical change.

⁴⁰ See *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080, 5 Trade Reg. Rep. ¶ 73,330 (7th Cir. 1970), cert. denied, 91 S. Ct. 872 (1971) (holding that the trial court erred in granting judgment n.o.v. on the grounds that no damage was shown as a result of termination of an aircraft dealership. In so holding the Court of Appeals for the Seventh Circuit observed:

[W]e are in a day and age in which the value of the nationally advertised franchise is a matter of general recognition. If [the plaintiff] were deprived of the dealership (or franchise right) as a result of an illegal conspiracy, some damage would appear to be implicit.

432 F.2d at 1086, 5 Trade Reg. Rep. ¶ 73,330, at 89,291.

to the new Massachusetts Act, in which it contended that since the manufacturers design, engineer and fabricate the vehicles; deliver a completed product; teach the dealer how to advertise, merchandise and service the car; make available financing for floor planning and consumer credit; provide an express warranty to the consumer; train mechanics, develop repair equipment, provide repair manuals and supply required parts; the *manufacturers*, therefore, perform every service comprised in the term "goodwill."

While conceding that contributions of this scale are basic to the entire concept of franchising, it would nonetheless seem evident that the manufacturers are amply compensated for their efforts through annual net profits exceeding one billion dollars. It also offends common sense to evaluate at zero a dealer's capital investment in physical facilities; his purchase of products on a C.O.D. basis; his efforts in molding an efficient work force of salesmen, mechanics and administrative personnel; his local advertising; his reputation for honest selling and efficient servicing; and his very ability to survive in a highly inter- and intra-competitive market.

This dichotomy between manufacturers and dealers on the subject of goodwill is basic to an appraisal of many manufacturer practices which could not exist if the dealer's goodwill were recognized. Historically, manufacturers have asserted a broad right, under the terms of the franchise agreement, to terminate⁴¹ or refuse to renew a dealership. On the same basis, the manufacturers have consistently asserted the right to restrict the dealer's right to sell, transfer⁴² or even to capitalize his dealership, and in any event the Big Three have persistently refused to permit a dealer to sell his dealership at any price which exceeds the net value of its *tangible assets*. In accordance with the manufacturers' adamant position that a dealer's goodwill and equity in his business have no value, there has been a veritable mushrooming of manufacturer-owned retail outlets directly competing with independent dealers in relevant market areas, and the manufacturers have exercised an untrammelled prerogative of granting new dealerships in such areas regardless of whether the territory is adequately serviced by existing dealerships.

From the manufacturer's viewpoint, such absolute negation of the dealer's goodwill is essential in order to assure complete freedom in restructuring its marketing complex. Under the cloak of improving

⁴¹ This contention was advanced by Ford in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970).

⁴² See *American Motors Sales Corp. v. Semke*, 384 F.2d 192 (10th Cir. 1967), in which the court approved an instruction to the effect that refusal to allow transfer of a dealership would not of itself give rise to an inference of bad faith under the federal Dealers' Day in Court Act.

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sales, a manufacturer may unilaterally decide that a particular dealer should relocate his agency, that another must expand his facilities, and that a third must cease operations altogether. Alternatively, the manufacturer may decide that a multiple-brand agency must drop or establish separate facilities for one of its lines. Although this frequently occurs inter-competitively, it occurs most often intra-competitively. For example, Ford may decide that a Ford-Mercury dealer must drop one line or establish separate facilities for each line. Or a dealer handling Chrysler, Peugeot and Toyota, may find the Toyota factory demanding a separate facility for its brand.

Even assuming that the manufacturer's best interest may justify such a move, if the dealer is unwilling or unable to accept the change, he may lose his entire goodwill even though he is without fault. Further, the manufacturer may err in its judgment or may be motivated by considerations of image rather than considerations of the direct profitability of the particular change. The manufacturer usually disregards whether the dealer's profit structure can survive such a radical change in operations, and this risk must be borne entirely by the dealer.⁴³ By denying the very existence of any dealer's goodwill, the manufacturers need only gamble on having to pay the dealer for the appraised value of his tangible assets such as vehicles, parts and equipment, thereby ignoring such factors as goodwill, capital investment in the physical facilities, or even the value of the auto-leasing subsidiary frequently operated by dealers. Finally, to discourage the dealer's resort to litigation in defense of his business, the manufacturer's offer of payment for the tangible assets is made conditional upon the dealer's release of all claims.

These awesome controls are claimed by the factory under a strict reading of the dealership agreement, an arrangement offered to the dealer on a take-it-or-leave-it basis.⁴⁴ The implicit threat that these

⁴³ But cf. *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 5 Trade Reg. Rep. ¶ 73,399, at 89,627 (9th Cir. 1970) (complaint charging elimination of a distributor by a dominant manufacturer of sealing products should not have been summarily dismissed since such conduct could be a violation of Section 1 of the Sherman Act, in part because the distributor could be left without the ability to continue in business and to distribute other lines).

⁴⁴ The manufacturer's tremendous leverage in exercising complete control over the drafting process can redound to its detriment, however. As Judge Friendly observed in the recent case of *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1207 (2d Cir. 1970):

Ford encounters the rule of "construction against the draftsman," which applies with particular force "in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position." ALI, *Restatement of Contracts* 2d, Tent. Draft No. 5, § 232 at pp. 103-04 (1970). See also 9 Williston, *Contracts*, § 1017A at pp. 162-65 (3rd ed. 1967).

The court also noted that the dealer might also prevail under general principles of contract law, citing *Restatement (Second) of Contracts* § 231, comment *d* (Tent. Draft

pervasive controls may be invoked by the manufacturer against the dealer at any time is itself sufficient to vouchsafe to the franchisor-manufacturers day-to-day superiority in all dealings with their franchise-dealers.

Finally, it seems evident that fairer dealing between the manufacturers and the dealers on such capital matters would in no way impinge upon consumer protection. On the contrary, guaranteeing reasonable security, continuity of existence, independence and economic stability for the dealers would enhance their ability to fulfill their customers' requirements.

C. Dealer Complaints Concerning "Administrative Items"

The administrative porcedures by which the foregoing abuses are perpetuated, including the procedures for handling dealer grievances, disclose a recurring pattern. For example, each of the Big Three fosters a program through which a potential dealer who lacks sufficient funds to open an independent agency may start by purchasing a minority interest in the dealership with the expectancy of acquiring the balance through his bonuses and his share of the profits. In fact, the manufacturers completely dominate the entire operation of such minority enterprises and maintain them primarily as a readily available dumping ground for overproduction or factory mistakes. By relying heavily upon its own vast assets and its guaranteed manufacturer's profit on each vehicle, the manufacturer can ignore the need for profitability in minority retail operations. For example, it can provide the minority enterprise with physical facilities and equipment far beyond what the independent dealership can afford; it can indulge in excessive advertising, salaries and other operating expenses; and it can even push the sale of vehicles through excessively low prices or exceedingly generous trade-in allowances to consumers. As for the minority dealer, his equity interest in the dealership is in extreme peril where such practices prevail.⁴⁶ For the independent dealer at-

No. 5, 1970), or under the Dealers' Day in Court Act on the ground that a contractually permitted termination was "impermissibly motivated."

In the consumer realm, the courts are becoming increasingly reluctant to enforce restrictive express automobile warranties against consumers, primarily because of "the gross inequality of bargaining position occupied by the consumer in the automobile industry." See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 391, 161 A.2d 69, 87 (1960).

⁴⁶ The economic theory underlying the operation of such "company stores" is intriguing. Ayres, *supra* note 6, at 115 reports:

One of the easiest ways to increase market penetration is to sell at a loss. The trick, of course, is that the loss at retail level is not as great as the resulting profit at the wholesale level. With most of the manufacturer's overhead met by a given volume of sales, the manufacturer's profit on all "extra" units is substantially larger than the average profit of the preceding units, large enough to

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tempting to compete with such "company stores," the future is extremely bleak since such dual distribution systems are pregnant with every conceivable type of anti-competitive abuse.⁴⁸

With regard to record keeping, each manufacturer not only prescribes the forms and bookkeeping procedures to be followed by its dealers, but also requires that detailed reports be submitted monthly, and that complete and certified audits be submitted annually. New car buyers must register their warranties directly with the manufacturer, giving their own name and address, the dealer's name, the model and options purchased, and the date of the transaction. All claims against the manufacturer for pre-delivery and warranty work must be accompanied by detailed reports from the dealer. These requirements, combined with requirements for other miscellaneous reports, and the manufacturer's contractual right to audit the dealer's records, effectively put the manufacturer in possession of every confidential dealer record, including his itemized customer list. Despite vehement manufacturer protestations that such confidential information is kept segregated from their other divisions, there is little doubt that such information is used by the manufacturers not only for constant inven-

subsidize the factory store's operating losses and still leave a profit for the manufacturer.

Strong arguments have been offered to classify a franchise agreement as an investment contract and, therefore, a security under existing security laws. See 49 Op. Cal Att'y Gen. 124 (1967) so ruling; Goodwin, *Franchising in the Economy: The Franchise Agreement as a Security Under Securities Acts, Including 10b-5 Considerations*, 24 Bus. Law. 1311 (1969). Such classification would authorize invocation of the broad proscriptions of the securities laws against fraudulent practices in connection with securities transactions. Where a dealer purchases a minority stock interest in a dealership, there is no doubt that he has purchased a "security" and is, therefore, entitled to the full benefit of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1970) (proscribing manipulative and deceptive devices in the sale of a security). See Brown, *supra* note 11, at 70-76.

⁴⁰ In February, 1971, large newspaper advertisements in Houston, Texas, offered to the public all models of one manufacturer at one dollar above the dealer's invoice cost. Such retail pricing not only guarantees a loss, but inevitably operates to destroy any independent dealers in the area.

See Ayres, *supra* note 6, at 115-16, reporting that while market penetration is the prime goal of each of the Big Three, their secondary motivations are somewhat disparate. G.M., with its present 55% share of the market and its concomitant fear of a government divestiture drive, should its share of the market materially increase, is simply "holding the line" until Ford and Chrysler become well enough established for G.M. to claim that it must expand to meet the burgeoning "competition" of its rivals. Ford and Chrysler, on the other hand, are fiercely striving to increase their share of the market and in so doing have employed "company stores" and company-dominated dealerships to engage in ruthless price cutting without regard for its devastating effect upon independent dealers in the area or for the retail losses sustained by the company stores. In this connection, Ayres further observes that:

[T]he double-edged danger of the factory store idea is that *after* competition has been destroyed by low prices at the retail level, it would be possible for the prices to rise with nothing but the good will of the manufacturers and the porous shield of government regulation to stop them.

Id. at 117.

tory controls and guidance in production, but also in developing the market restructuring plans which are repeatedly foisted upon the dealers. It is difficult to believe that the numerous factory representatives who swarm over each department of a dealership, including new car sales, used car sales, parts inventory, repair facilities, advertising and marketing, come to the specific dealership without any of the information contained in such reports. Moreover, the many abuses surrounding the operation of minority dealerships suggest a strong inference that such confidential information is either directly or indirectly made available to "company stores" selling at retail in direct competition with independent dealers.⁴⁷

On the matter of disciplinary controls, in addition to actual termination or the equally drastic measure of refusing to renew a dealership, both of which result in forfeiture of the dealer's entire goodwill, there is always available to the manufacturers the awesome coercive power of the *threat* of termination or non-renewal. While these disciplinary devices are common to all franchisors, the auto manufacturers also have at their disposal an arsenal of other disciplinary devices, both in the area of punishment and of reward. For example, an audit for fraudulent warranty reimbursement claims can not only be internally disruptive, but can go so far as to include personal interviews with each of the dealer's customers.⁴⁸ Approval of reimbursement claims for pre-delivery and warranty work can be endlessly delayed or subjected to reprocessing every ninety days. There may be discrimination in the delivery of automobiles, either for inventory or on special order, the same being true for repair parts. On the other hand, each of these devices can easily be reversed and employed as a reward in the form of *avored treatment* in each of these areas.

Money and the extension of credit can also be used for subtle, but effective, disciplinary control. For example, each manufacturer withholds a sum equal to two percent of the dealer's purchases of new vehicles in the form of a compulsory savings account, the proceeds of which are remitted to the dealer either annually or quarter-annually, depending upon the policy of the particular manufacturer. Although such funds belong to the dealer, the manufacturer does not pay any interest for the period during which it is retained. In addition to the availability of the fund to guarantee the dealer's open account, the manufacturer can use it to cover any allegedly fraudulent pre-delivery or warranty reimbursement claims which it unilaterally may determine to be due. In addition, during an extended strike or reces-

⁴⁷ So reported in Ayres, *supra* note 6, at 129-30.

⁴⁸ See, e.g., *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970), in which a dealer sought an injunction against such interviews.

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sional period, the manufacturer may arbitrarily decide which dealers may be allowed to draw in advance on their own money or even use it as a collateral pledge for high-interest loans which must be secured from third parties. The threat of such disciplinary action does not necessarily suggest the tortious use of force or even overt coercion. A whispered innuendo that the dealership may be restructured can terrorize the dealer or, if disclosed by the factory to adjacent dealers, can virtually destroy the dealership through rumor and attrition. Each dealer is not only acutely aware of all of these possibilities, but has seen them actually employed against other dealers or perhaps even against himself.

Disputes with representatives of the manufacturers and even with the manufacturers themselves could present a challenge of immense proportions, given the approximate total of 27,000 dealerships in the nation. The industry has thus come to tolerate both state and federal associations, to which all dealers may belong, as well as varying types of "line" associations for dealers handling specific brands. Some of these associations are sponsored by the manufacturers on an elected basis and some are formed independently by the dealers themselves. Although such associations could serve as effective organizations for independent bargaining with the manufacturers, historically their function has been primarily to provide a forum for the exchange of ideas and an escape valve for general complaints.⁴⁰ Legitimate association efforts to achieve any genuine results have generally encountered endless delays, studies and vacuous results on the manufacturers' side. Such associations have, however, gradually achieved a level of accomplishment in obtaining remedial legislation in a growing number of states. In the past two years there has been a growing crescendo of demands by dealers, the latest being in the area of objection to the subsidies to fleet and leasing companies. In some instances such associations have even provided financial support for test litigation.

As for specific grievance procedures, one manufacturer provides a "Policy Board" of company executives, to which any dispute may ultimately be taken, and all hearings are held in the Detroit home office. As a matter of cost, convenience and availability of witnesses,

⁴⁰ In a variety of ways, the manufacturers attempt to subvert dealers who are elected to Dealer Councils. In *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d at 1199 n.2, the court noted that Ford admitted that until 1969 it had a "policy" against auditing dealers who were members of the Ford National Dealer Council. The author knows of one instance in the Fall of 1970 in which another of the Big Three promised to a newly-elected Dealer Council member 500 cars of a very desirable model at a time when most dealers could obtain only three or four cars of this model. Wining and dining in Detroit, with a concentrated indoctrination in the manufacturer's viewpoint, is also frequently employed by the manufacturers in seeking friends among the Dealer Councils.

it is rather obvious that the ordinary dealer, let alone one who has been hard pressed economically, cannot afford such pilgrimages. Because of the desultory results of almost all such hearings, that manufacturer has recently activated a highly-advertised hearings procedure at the regional level before a board of dealers selected from the Dealers Council. It is unknown whether the Policy Board will respect the decisions of such panels since the manufacturer has declined to state publicly its position on this question. However, in all such proceedings the manufacturer in question prohibits a dealer from being represented by counsel at any hearing.

For several years, a second member of the Big Three has widely advertised its good intentions, its fairness and the legality of its treatment of dealers through a so-called "Umpire Plan" or "one-way" arbitration procedure. The final arbiter is a retired Supreme Court Justice, selected and paid by the manufacturer, and all hearings are conducted in Missouri, supposedly as a centralized geographical convenience. The one-way aspect arises from the manufacturer's absolute commitment to be bound by the arbiter's decision, while the dealer is not so bound. However, because of an almost uninterrupted series of findings in favor of the manufacturer,⁵⁰ the procedure is now being seriously questioned. At the first level are the same questions of cost, convenience and availability of witnesses, even though the Missouri location may provide a modicum of relief in these areas. But far more basic is the manufacturer's inherent ability to mislead the dealer as to the issues which may be submitted to arbitration and as to the standards which will be applied by the Umpire in resolving those issues. For the most part, the primary standard applied in such proceedings has been "sanctity of the contract," and the proceedings have focused only upon the narrow contractual provisions applicable to a specific dispute. As demonstrated by the prior discussion of the broad range of dealer complaints, there are numerous questions involved in most dealer disputes, including such questions as the potential applicability of the antitrust laws as well as the viability of the newly-developing theory, discussed *infra*,⁵¹ that the manufacturer has fiduciary obligations to its dealers. The heart of the problem lies in the fact that the application of such *legal* standards transcends the *con-*

⁵⁰ Of the 20 appeals decided up to December 7, 1970, all but one were in favor of the manufacturer. Letter of Ross L. Malone, Vice President and General Counsel of General Motors Corp. to Harold Brown, Feb. 24, 1971, on file at the offices of the Boston College Industrial and Commercial Law Review. The only successful appeal involved a dealer's request to transfer the dealership to his son. The present Umpire has never decided in favor of a dealer. Further, the manufacturer has adamantly refused to arbitrate a dealer's claim of favoritism in the allotment of vehicles.

⁵¹ See discussion on p. 779 *infra*.

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tract and requires an examination of economic realities and other extrinsic factors, but such extrinsic factors receive no consideration by the Umpire in the one-way arbitration proceedings.

Naturally, the dealer is theoretically free to litigate his rights, principally in treble damage class antitrust suits.⁵² However, aside from the dealer's obviously difficult position in resorting to litigation while the contractual relationship with the manufacturer still exists, it is well known that legal proceedings can be quite lengthy and very costly, with expenses of over \$100,000 being common, and with the possibility of expending as much as \$500,000 if there are protracted trials and appeals.⁵³ Moreover, litigation is at best a precarious venture. The recent sponsoring of test litigation by the National Automobile Dealers Association on the issue of subsidies to leasing and fleet buyers, has led to the manufacturer's counterclaim that such financial support itself constitutes a combination in restraint of trade.⁵⁴ In the recent case of *Halverson v. Convenience Food Mart, Inc.*,⁵⁵ after ten months of unsuccessful bargaining with a franchisor, a franchisees' association notified its members of the need to litigate, and requested their participation and financial support. When these facts were disclosed at a preliminary hearing, the court dismissed the suit on the merits and referred to the Illinois Bar Association a complaint against the association's attorney for his participation in alleged solicitation.⁵⁶ Yet, the small businessman's need for legal protection is so desperate, and the public policy favoring private enforcement of the antitrust laws is so strong,⁵⁷ that Senator Philip Hart, Chairman of the Senate Subcommittee on Antitrust and Monopoly, has suggested that the Small Business Administration should make loans to small businessmen to finance meritorious antitrust claims.⁵⁸

Unless the availability of relief in the form of a class antitrust

⁵² As authorized by § 4 of the Clayton Act, 15 U.S.C. § 15 (1964) and Fed. R. Civ. P. 23.

⁵³ Without any trial on the merits, legal fees and costs of \$157,000 were involved in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970). These expenses covered extensive pretrial motions on numerous affidavits and a circuit court appeal, principally from the granting of a temporary injunction against termination. Car Dealer "Insider" Newsletter, vol. V, no. 8, Dec. 7, 1970, at 4.

⁵⁴ *Merit Motors, Inc. v. Chrysler Corp.*, Civil No. 2000-70 (D.D.C., filed July 22, 1970). Actual or threatened litigation has been recognized as a tool which can be used in furtherance of monopolistic practices. See *Bendix Corp. v. Balax, Inc.*, 321 F. Supp. 1095, 5 Trade Reg. Rep. ¶ 73,471 (E.D. Wis. 1971).

⁵⁵ Civil No. 70C-499 (N.D. Ill., filed March 3, 1970).

⁵⁶ But cf. *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 5 Trade Reg. Rep. ¶ 73,399, at 89,629-630 (9th Cir. 1970), regarding the rule for sparing the use of dismissal as a means of enforcing a court's order.

⁵⁷ See *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751-52 (1947).

⁵⁸ Release by the Senate Subcommittee on Antitrust and Monopoly, Sept. 16, 1968.

suit is to be wholly illusory, thereby, at least arguably, denying the franchisee due process of law, some reasonable means must be found to permit notification of a class antitrust suit to other members of the class, and some acceptable method of requesting each member of the class to bear his share of the legal costs must be devised. In an effort to meet this need, the author has submitted to the Judicial Conference of the United States a proposal that the Federal Rules of Civil Procedure and the Rules for Multidistrict Litigation be amended to permit notification of all members of a class concerning the pendency of a class suit and the terms for sharing of legal costs, subject at all times to court supervision.⁵⁹ While avoiding direct solicitation, such a rule would afford each member of the class a fair opportunity to participate in the suit and to bear his proportionate share of the cost. It is apparent that without the financial support of an association or of others in the class, the individual franchisee cannot conceivably hope to retain competent antitrust counsel, since none but the most courageous of advocates would embark upon such protracted litigation on a wholly contingent fee basis. Given the financial realities of antitrust litigation, there is strong reason to believe that it is precisely this obstacle upon which many franchisors rely as a shield for their blatant disregard of the antitrust laws.

⁵⁹ See B. Christensen, *Lawyers for People of Moderate Means* 78-79 (American Bar Found. 1970), reviewed, *Brown & Cohen*, 5 *Valparaiso L. Rev.* — (1971):

The ideal of the American legal system is equal justice under law. . . . [T]he fact is that as the litigative system now functions, equal justice can be had only if both sides to the dispute are fully represented by competent counsel.

. . . .
If all litigants are to be equal, . . . then no litigants can be "more equal" than others.

In response to the suggestion that "stirring up" social litigation constitutes barratry, Christensen comments:

While the stirring up of frivolous or fraudulent claims is undoubtedly evil, the stirring up of legitimate claims that would otherwise go unasserted because of the prospective claimants' poverty, weakness, ignorance, or naivete may in fact be a positive good.

Id. at 145.

In the past, the Supreme Court has permitted jointly sponsored litigation under the First Amendment guarantee of freedom of association. See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, rehearing denied, 377 U.S. 960 (1964); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). Given the prerogative of an antitrust specialist to litigate antitrust matters in any state, as recognized in *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966), *rev'd* on rehearing in banc, 364 F.2d 168, *aff'g* 235 F. Supp. 1 (S.D.N.Y. 1964), *cert. denied*, 385 U.S. 987 (1966), it would appear that appellate courts have manifested a clear disposition toward encouraging the joint assertion of rights by those of limited financial means. See § 10 of the new Massachusetts Auto Dealers' Act, granting dealers the right of free association "for any lawful purpose." *Mass. Gen. Laws Ann. ch. 93B, § 10* (4 *Mass. Leg. Serv.* 717 (West 1970)).

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II. THE PRIOR STATE OF THE LAW GOVERNING MANUFACTURER-DEALER RELATIONSHIPS

Rather than attempt the impossible task of discussing all of the laws which governed the relationship between auto manufacturers and their dealers prior to enactment of the Massachusetts Act, it will suffice for present purposes to review them descriptively, with selective analysis of certain highlights. The most significant elements of the prior law in this area are longstanding common law principles, chiefly in equity, the antitrust laws,⁶⁰ the Federal Trade Commission Act,⁶¹ the "Baby" FTC Act,⁶² and the federal "Dealers' Day in Court Act."⁶³ Except for the last named statute, none of these laws addressed the special problems of franchising. Auto dealerships, as well as gasoline service stations, substantially antedated the surge of franchising after World War II, with the result that much of the doctrinaire approach to the franchising problem involved those two industries. Only recently has there been a serious effort to discern the precise nature of the franchising relationship and to find appropriate remedies in existing law. That process is necessarily slow and expensive, and it has become increasingly apparent that legislation is needed to meet the challenge effectively. Given the scope of the legal problems, it is evident that no more than an initial analysis is possible, it being incumbent upon counsel to exhaust the source materials applicable to specific issues. This is no easy task, however, and the challenge is compounded by the fact that few practitioners or even courts have had the opportunity to obtain broad experience on many of these issues.

A. *The Common Law and the U.C.C.*

At common law, it was fairly well established that mere termination or failure to renew a dealership was not actionable so long as the contractually prescribed procedures were observed.⁶⁴ Such cases reflect the standard common law view that there is no requirement of "com-

⁶⁰ Generally including the Sherman Act, 15 U.S.C. §§ 1-7 (1964); the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a-c, 21a (1964); the Clayton Act, 15 U.S.C. §§ 12-27, 44 (1964); and related measures.

⁶¹ 15 U.S.C. §§ 41-58 (1964).

⁶² Mass. Gen. Laws Ann. ch. 93A, §§ 1-10 (Supp. 1971).

⁶³ 15 U.S.C. §§ 1221-225 (1964).

⁶⁴ See, e.g., *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001 (4th Cir. 1933); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966). See H. Brown, *Franchising: Trap for the Trusting* 79 n.4 (2d printing 1970) [hereinafter cited as *Brown*]. For one of the most recent cases involving a gasoline station dealer, see *Division of the Triple T Service, Inc. v. Mobil Oil Corp.*, 60 Misc.2d 720, 304 N.Y.S.2d 191 (1969).

passion" in the enforcement of a contract.⁶⁵ Yet without much discussion of its radical departure from that view, a recent Massachusetts case awarded damages for the "bad faith" termination of an exclusive territorial distributorship where the manufacturer terminated immediately prior to submitting a successful bid on a government contract scheduled to be awarded in the dealer's territory.⁶⁶ Although the court was obviously responding to the foul play involved in a termination designed to avoid payment of a substantial commission, with disarming simplicity it ignored its prior holdings, only recently reaffirmed, that unless there has been fraud in the inducement, a party who signs an agreement "is bound by its terms."⁶⁷ In any event, the decision offers some promise that upon presentation of the full scope of the abuses inherent in franchising, the courts will respond appropriately. In this particular case, the court devoted no attention to either the intricacies of franchising or the dynamic forces involved, but rather rested its damage award solely on bad faith. Of greater significance are the questions left unanswered by the court regarding the extent to which this case may portend the application of the full powers of equity to all aspects of franchising.

Although the Uniform Commercial Code was not enacted with franchising specifically in mind, nonetheless it has been suggested that certain of its provisions could afford a source of relief to franchisees. Of potential applicability in this connection are the Code's requirements of "good faith" and "conscionability" in contracts to supply all of the buyer's requirements,⁶⁸ the standard of "best efforts" by the parties to such exclusive dealing arrangements,⁶⁹ as well as the "reasonable time" standard for the duration of such contracts when no specific duration is provided,⁷⁰ and the requirement that "reasonable notice" be given before termination of such agreements.⁷¹ The difficulty in persuading a court to acknowledge the standard of good faith

⁶⁵ See, e.g., *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 171 N.E. 884 (1930); *Division of the Triple T Service, Inc. v. Mobil Oil Corp.*, 60 Misc.2d 720, 727, 304 N.Y.S.2d 191, 199 (1969) (recognizing implied obligations of good faith and fair dealing only "during the term of the contract unless the relationship is continued beyond the expiration date."); 9 *Williston on Contracts* § 1017A at 153-57 (3rd ed. 1967); cf. 5A *Corbin on Contracts* § 1229 (1964). See generally *Hewitt, Termination of Dealer Franchises and the Code—Mixing Classified and Coordinated Uncertainty with Conflict*, 22 *Bus. Law.* 1075 (1967) [hereinafter cited as *Hewitt*]; *Brown, Franchising: A Fiduciary Relationship*, 49 *Texas L. Rev.* — (1971).

⁶⁶ *RLM Associates, Inc. v. Carter Mfg. Corp.*, — *Mass.* —, 248 N.E.2d 646 (1969).

⁶⁷ *Gifford v. Gifford*, 354 *Mass.* 247, 248, 236 N.E.2d 892, 893 (1968).

⁶⁸ U.C.C. §§ 2-306, -302. All U.C.C. references will be to the 1962 Official Text unless otherwise indicated.

⁶⁹ U.C.C. § 2-306.

⁷⁰ U.C.C. § 2-309(2).

⁷¹ U.C.C. § 2-309(3). See also *Leff, Unconscionability and the Code—The Emperor's New Clause*, 115 *U. Pa. L. Rev.* 485 (1967); *Hewitt, supra* note 65.

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in the termination of a dealership, even with the aid of such U.C.C. requirements, is exemplified in a recent New York case involving a gasoline service station.⁷² In a lengthy opinion displaying an obvious effort to find such a source of relief, the court felt constrained by prior law to rule that the common law did not require good faith and, since the service station dealership was intimately a part of the sub-lease of the premises, that the U.C.C.'s applicability only to personal property precluded its applicability in this instance. The sympathetic disposition of the court was best demonstrated in its concluding direction that the opinion be transmitted to the New York legislative committees then considering generic relief for all franchisees.⁷³

This author has long contended that a full and proper understanding of franchising and its problems would result in recognition of the need to apply fiduciary standards not only during the relationship and in the context of attempted termination, but also at its very inception when the franchise is being granted or sold.⁷⁴ Such standards should be invoked particularly because of the gross imbalance between the parties to the typically complex and enduring franchising agreement, with virtually total power vested in the franchisor to control every aspect of the franchisee's activity, including access to his most confidential records. Because auto dealers in particular must rely completely on the manufacturer for continuity in the supply of new vehicles, they are constrained to repose their faith in the manufacturer. The latter is not only aware of that reliance, but in fact insists upon it. That very combination of elements has already been recognized by some courts as a source of quasi-fiduciary obligations.⁷⁵ Although no American court has specifically considered whether there are fiduciary obligations inherent in franchising, in a case of first impression, a Toronto, Canada, trial court found no difficulty in applying such well established concepts to this new relationship.⁷⁶ After a painstaking analysis of the extensive controls exercised by the franchisor, that court required restitution to the franchisees of fees paid to the franchisor by third party vendors from whom the franchisees were required to purchase products and services.

Although fraud in the inducement has seldom been charged against the auto manufacturers, the preceding recitation of dealer

⁷² *Division of the Triple T Service, Inc. v. Mobil Oil Corp.*, 60 Misc.2d 720, 304 N.Y.S.2d 191 (1969).

⁷³ *Id.* at 733, 304 N.Y.S.2d at 191.

⁷⁴ See *Brown*, *supra* note 64, at 41-44; *Brown, Franchising: A Fiduciary Relationship*, 49 *Texas L. Rev.* — (1971).

⁷⁵ *Broomfield v. Kosow*, 349 Mass. 749, 212 N.E.2d 556 (1965); *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

⁷⁶ *Jirna, Ltd. v. Mister Donut of Canada, Ltd.*, 3 Ont. 629 (1970) (now being appealed).

complaints suggests that the manufacturers may not, in fact, be making full disclosure to their dealers when such dealerships are granted. If fiduciary obligations should be found to exist at the very inception of the franchising relationship, it would follow that there is an affirmative duty to disclose all relevant data.⁷⁷ Arguably, concealment of such data would toll the statute of limitations⁷⁸ or, if the suit be equitable in nature, the doctrine of laches should not bar recovery. In the final analysis, although a significant trend in favor of protecting franchisees can be discerned in the common law, the auto dealer can hardly rely upon such protection with substantial confidence. With their entire investment at stake, it is not surprising that dealers have generally elected to continue yielding to the awesome economic power of the manufacturers.

B. Federal Law

In the realm of federal law, almost every one of the dealer's complaints may eventually be found to constitute a violation of the antitrust laws,⁷⁹ the Federal Trade Commission Act,⁸⁰ or the federal Dealers' Day in Court Act.⁸¹

1. The Antitrust Laws

The principal statutory provisions of the various antitrust laws contain deceptively simple prohibitions against:

- a. Any contract, combination or conspiracy in restraint of trade;⁸²
- b. Any monopolization or attempt to monopolize, or any conspiracy or combination to monopolize trade;⁸³
- c. Any direct or indirect discrimination in the price of commodities;⁸⁴ and
- d. Any exclusive supply understandings.⁸⁵

⁷⁷ See *Reed v. A.E. Little Co.*, 256 Mass. 442, 152 N.E. 918 (1926).

⁷⁸ For such a tolling provision see Mass. Gen. Laws Ann. ch. 260, § 12 (1959).

⁷⁹ Including the Sherman Act, 15 U.S.C. §§ 1-7 (1964); the Clayton Act, 15 U.S.C. §§ 12-22, 27 (1964); the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a-c, 21a (1964); and related measures.

⁸⁰ 15 U.S.C. §§ 41-58 (1964).

⁸¹ 15 U.S.C. §§ 1221-225 (1964).

⁸² 15 U.S.C. § 1 (1964).

⁸³ 15 U.S.C. § 2 (1964).

⁸⁴ 15 U.S.C. § 13(a) (1964). Section 13 also includes the often overlooked subsection (f), which makes it unlawful "to induce or receive" such price discrimination.

⁸⁵ 15 U.S.C. § 14 (1964). This section specifically prohibits making the sale or lease of a commodity, or the establishment of a price, or the granting of a discount, conditional upon the buyer's agreement not to deal in competitive commodities, if the effect of such an agreement may be to substantially lessen competition or to tend to create a monopoly.

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Quite early, however, the proscriptions of the Sherman Act were made subordinate to the "rule of reason,"⁸⁶ thus opening the door for evolution of its statutory terms⁸⁷ through an array of judicial interpretations, a process which in the past few years has witnessed numerous milestone Supreme Court decisions.⁸⁸ Such judge-made law has gradually developed various categories of "per se" violations, as to which practically no economic justification will be accepted, in contrast to practices which may be justified through extensive analysis of underlying economic considerations.

In the per se category are such violations as resale price maintenance, including both minimum and maximum price setting;⁸⁹ territorial exclusivity, whether horizontal or vertical;⁹⁰ tying sales;⁹¹

⁸⁶ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁸⁷ For discussion of these laws as applied to franchising, see Brown, *supra* note 64, at 45-69 and particularly as to the automobile industry at 77-86; *The Franchising Sourcebook* (2 P.L.I. Commercial Law and Practice Sourcebook Series) (J. McCord ed. 1970) [refer generally to the index under the heading "Automobile Industry"]; *Franchising—Today's Legal and Business Problems* (2 P.L.I. Commercial Law and Practice Transcript Series) (L. Ratner ed. 1970); *The Realities of Franchising, A Guide for the Practicing Attorney* (Mass. Continuing Legal Education, Inc. ed., Faneuil Press 1970) [hereinafter cited as *The Realities of Franchising*]; *Primer on Unlawful Restraints in Marketing and Distribution*, Proceedings of the First Annual New England Antitrust Conference (Warren, Gorham & Lamont, Inc. 1967). For a basic discussion of the antitrust laws, see generally *Antitrust Developments 1955-1968* (A.B.A. 1968); J. VanCise, *Understanding the Antitrust Laws* (P.L.I. rev. ed. 1970).

⁸⁸ Significantly, in the last twelve antitrust appeals, the Supreme Court has reversed a circuit court to rule in favor of recovery. While these decisions suggest a dynamically developing trend toward application of the antitrust laws to a burgeoning variety of arrangements and transactions, the fact that each of these cases required a lengthy and incredibly expensive Supreme Court appeal in itself serves as an interesting commentary on the tenacity and resources which may be required in order to prosecute an antitrust claim successfully. The twelve decisions in question have each contained a full review of the prior state of the antitrust law, and their examination should provide a tailor-made course covering most of the crucial issues in the antitrust field.

⁸⁹ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Parke-Davis & Co.*, 362 U.S. 29 (1960). But cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

⁹⁰ *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). The auto industry's shift to "primary area of responsibility" has yet to be ruled on, since the Supreme Court did not reach the issue in *United States v. General Motors Corp.*, 384 U.S. 127, 139-40 (1966); *White Motor Co. v. United States*, 372 U.S. 253, 264 (1963); or *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 368 (1967). Upon remand to the district court, Arnold, Schwinn & Co. entered into a final consent decree which, although including "primary area of responsibility," was accepted by the government. 1968 Trade Cas. ¶ 72,480 (N.D. Ill. 1968).

⁹¹ *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). In this case, credit was found to be a tying product when it would not be extended unless the debtor agreed to purchase prefabricated homes manufactured by the creditor. See the dissenting opinion of Justices Fortas and Stewart with respect to the potential applicability of the Court's decision to franchising. *Id.* at 524-25. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (in which the granting of leases on farmland was found to be a tying product when such leases would not be granted unless the lessees agreed to ship their products via the lessor railroad).

boycotts;⁹² full-line forcing;⁹³ and, most recently, any customer or territorial restraint on the alienation of products owned by a dealer.⁹⁴ Even so, the discernment of such violations may be a complicated process, as evidenced by *United States v. General Motors Corp.*,⁹⁵ in which the Supreme Court found a classic pricing conspiracy, reversing the trial court's finding after months of litigation that there was no violation. Certain exceptions have been engrafted even on per se violations, such as the "new company" or "failing company" exceptions for territorial exclusivity,⁹⁶ or the exception to "tying sales" where the several products may be found to be a single unit,⁹⁷ or where the seller can establish the need of the tied product to insure the quality of the tying product.⁹⁸

In franchising, some of the most important antitrust violations are in the area of exclusive dealing arrangements, prohibited under Section 3 of the Clayton Act,⁹⁹ and in the area of price discrimination, banned by the Robinson-Patman Act.¹⁰⁰ It has been aptly noted that the exclusive dealing statute was addressed to incipient violations of the Sherman Act, requiring only a showing that the practice may substantially lessen competition or tend to create a monopoly.¹⁰¹ In substance, a violation will be found whenever potential third party vendors may experience unreasonable difficulty in selling their goods

⁹² *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (boycott by manufacturers and other distributor retail outlets against individual retailer held a per se violation of Sections 1 and 2 of the Sherman Act, regardless of the fact that only one small retailer was boycotted).

⁹³ *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

⁹⁴ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

⁹⁵ 384 U.S. 127 (1966). The case involved a combination by the manufacturers and several dealer associations directed against price-cutting dealers. Similarly, the Supreme Court's per se finding with respect to territorial exclusivity in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), followed by only four years the Court's calling for a full trial to adduce more economic data on the identical issue in *White Motor Co. v. United States*, 372 U.S. 253 (1963).

⁹⁶ *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961) (the "new company" exception); *Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964) (the "failing company" exception).

⁹⁷ See *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 270 F. Supp. 619 (S.D.N.Y. 1967), rev'd, 388 F.2d 272 (2d Cir. 1967).

⁹⁸ See *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961); *American Optical Co. v. New Jersey Optical Co.*, 58 F. Supp. 601 (D. Mass. 1944); *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923); *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961), cert. denied, 368 U.S. 931 (1961); *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), petition for cert. dismissed, 381 U.S. 125 (1965); *Engbrecht v. Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962).

⁹⁹ 15 U.S.C. § 14 (1964).

¹⁰⁰ 15 U.S.C. §§ 13, 13a-c, 21a (1964).

¹⁰¹ See the comments of Attorney John Curtin, Jr., in *The Realities of Franchising*, supra note 87, at 28.

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to dealers,¹⁰² provided a "not insubstantial" amount of commerce is involved.¹⁰³ Even so, the arrangement may be allowed as an "all requirements" agreement in which the arrangement is primarily to satisfy the economic needs of the buyer and is of limited duration.¹⁰⁴

Notwithstanding the high incidence of both "tying" sales and "exclusive supply" contracts in the area of franchising, it should be noted that such arrangements have not yet been characterized as per se violations of the antitrust laws.¹⁰⁵ However, such violations will be found if the franchisor is unsuccessful in justifying the arrangement on the grounds that specification in the franchising agreement of a substitute for the tied product would be so detailed that the product could not practically be obtained elsewhere.¹⁰⁶ Perhaps of equal significance, the franchise trademark itself may be the "tying product,"¹⁰⁷ a result consonant with the Supreme Court's recent decision recognizing the extension of credit as such a "product."¹⁰⁸

Since the Robinson-Patman Act prohibition of price discrimination is confined to "commodities,"¹⁰⁹ it will be interesting to learn whether such decisions as those just discussed portend an ultimate finding that a franchise is a "commodity." Such a ruling would require elimination of the widespread disparity in the prices charged by many franchisors to their various franchisees since, as noted earlier, the Robinson-Patman Act contains a general prohibition against engaging in price discrimination, as well as a prohibition against "inducing" or "receiving" such discrimination.¹¹⁰

Procedurally, both the statutes and the courts have done much to support the strong public policy against anti-competitive devices by encouraging private enforcement of the antitrust laws. Under the

¹⁰² L.G. Balfour Co., [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 18,485 (FTC 1968).

¹⁰³ Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499 (1969); International Salt Co., Inc. v. United States, 332 U.S. 392, 396 (1947).

¹⁰⁴ Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (20-year requirements contract sustained despite the length of its duration, where buyer needed assurance of a constant supply of coal).

¹⁰⁵ See *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), petition for cert. dismissed, 381 U.S. 125 (1965), in which the plaintiff franchisee stipulated that it was relying solely upon per se violations of the antitrust laws and the court found that no per se violation existed.

¹⁰⁶ *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847, 851 (N.D. Cal. 1970) (holding that no evidence for such justification would even be allowed as to paper goods, supplies and certain equipment). Further, in that case, the jury specially found no justification for the franchisor's requirement that allegedly "secret" dip and spice mixes and certain cookers and fryers be purchased solely from the franchisor to insure "quality control."

¹⁰⁷ *Id.* at 489; *Susser v. Carvel Corp.*, 332 F.2d 505, 513 (2d Cir. 1964), petition for cert. dismissed, 381 U.S. 125 (1965).

¹⁰⁸ Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

¹⁰⁹ 15 U.S.C. § 13(a) (1964).

¹¹⁰ See note 84 *supra*.

Clayton Act there are provisions for recovery of treble damages and attorney fees,¹¹¹ for the issuance of injunctions against violators,¹¹² and for the introduction of a final judgment or decree, rendered in any contested civil or criminal action brought by the United States for enforcement of the antitrust laws, as prima facie evidence of violation in any subsequent action brought by a private party against the same defendant.¹¹³ In addition, the four-year statute of limitations applicable to private antitrust actions is suspended during the pendency of a government suit.¹¹⁴ To this must be added the formidable threat of a class suit where the prospective plaintiffs qualify for participation in such a suit,¹¹⁵ and common questions of law and fact predominate in their claims.¹¹⁶

In regard to proof of damages in antitrust actions, the Supreme Court, in the interest of aiding plaintiffs, has held sufficient "a just and reasonable estimate of the damage based on relevant data," even though such conclusions are admittedly only approximations.¹¹⁷ Furthermore, although the defendant is still permitted to show that other factors may have produced the plaintiff's damages, the defendant bears the burden of proof on this question.¹¹⁸ Recently, the Supreme Court has ruled that *pari delicto* is not a defense in antitrust actions, although it may mitigate the amount of damages.¹¹⁹ Finally, following its established principle that in interpreting the antitrust laws "[w]e must look at the economic reality of the relevant transactions,"¹²⁰ the Supreme Court, in *Perkins v. Standard Oil Co.*,¹²¹ found no difficulty in penetrating several distributor "levels" in order to unearth an antitrust violation at a lower level, even though none of the distributors

¹¹¹ 15 U.S.C. § 15 (1964).

¹¹² 15 U.S.C. § 26 (1964).

¹¹³ 15 U.S.C. § 16(a) (1964).

¹¹⁴ 15 U.S.C. § 16(b) (1964).

¹¹⁵ See the requirements in F.R. Civ. P. 23.

¹¹⁶ *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722, 727-28 (N.D. Cal. 1967); *Abercrombie v. Lum's, Inc.*, — F. Supp. —, Civil No. 295-70-A (E.D. Va., decided April 12, 1971).

¹¹⁷ *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir. 1957), cert. denied, 355 U.S. 835 (1957); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 379 (9th Cir. 1966), cert. denied, 384 U.S. 963 (1966). See generally Comment, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566 (1967).

¹¹⁸ Cf. *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946).

¹¹⁹ *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

¹²⁰ *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 208 (1968).

¹²¹ 395 U.S. 642 (1969).

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in the chain of supply were wholly-owned subsidiaries of the defendant producer.¹²²

Even this brief overview of the antitrust laws would suggest that many of the current practices followed by the major auto manufacturers could constitute serious antitrust violations. But since those laws are addressed solely to anti-competitive practices, it is necessary to interpret the dealers' complaints not merely in terms of the unconscionability of the practices complained of, but particularly in terms of their effect upon competition. For example, inadequate compensation for pre-delivery and warranty work could constitute a compulsory discount in violation of the resale price maintenance proscription embodied in Section 1 of the Sherman Act.¹²³ The same may be true if the manufacturer unilaterally advertises a sale in which no charge will be made for an optional power steering unit, without granting its dealers an equivalent reduction in the wholesale cost for each vehicle so equipped. The manufacturer's outright prohibition against selling a dealership at a price above tangible asset value would also appear to be unlawful resale price maintenance. The numerous ways in which the dealer's equity and business goodwill are subject to forfeiture may constitute an illegal restraint on alienation of the dealer's intangible assets.¹²⁴ Discrepancies between the price and service allowances granted to leasing and fleet buyers, and those granted to dealers may constitute violations of the Robinson-Patman Act,¹²⁵ not only by the manufacturers but also by those leasing companies which could be found to have induced such price discriminations.¹²⁶ If it can be shown that the factory has an express agreement with its supplier of "captive" parts whereby the latter agrees not to sell directly to dealers or to independent auto body repair shops, such an agreement could constitute an illegal boycott.¹²⁷ Similarly, the numerous complaints involving tying sales, exclusive supply requirements, full-line forcing, excessive quotas and terminations without due cause would probably, by themselves, constitute actionable violations, and would undoubtedly be actionable if shown to be in furtherance of other major violations.

Given the gravity of the complaints against three of the nation's six largest corporations, as well as the dramatic decrease in the number of auto dealers, from 49,000 to 27,000 since World War II, there is considerable cause to wonder at the paucity of both public

¹²² See the chain of supply detailed in *id.* at 647-48.

¹²³ 15 U.S.C. § 1 (1964). See *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

¹²⁴ Cf. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

¹²⁵ 15 U.S.C. §§ 13, 13a-c, 21a (1964).

¹²⁶ See 15 U.S.C. § 13(f) (1964).

¹²⁷ See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

and private litigation against the major automakers. Very recently several suits have been instituted,¹²⁸ but final decisions in those suits may be a decade or more away.¹²⁹ Undoubtedly, the enormous expense of antitrust suits has been a major deterrent to litigation, though in the public arena both political pressures and possible effects on the national economy have played a major role in discouraging enforcement by the federal government.¹³⁰ It is reported that for several years the government has procrastinated in bringing divestiture actions against both Ford and General Motors to require each company to divide into several independent companies.¹³¹ Although such action would provide no restrictions on specific practices nor offer compensation for past violations, theoretically it would foster the competition which the antitrust laws were primarily designed to protect.¹³²

Elimination of the concentrated power of the Big Three would produce a result much like that encouraged by the Supreme Court with respect to the "discount department store" auto dealers involved in *United States v. General Motors, Inc.*¹³³ In that case, the discount dealers maintained multiple-brand dealerships, purchasing surplus vehicles from regular dealers and reselling them at substantial discounts. When other regular dealers complained, General Motors pressured the offending dealers to refuse to sell to the discount dealerships. The Supreme Court found this to be a classic conspiracy to maintain prices. The Court's decision fails to point up the fact that multiple-brand dealerships would actually promote competition by considerably lessening the stranglehold which the manufacturers are

¹²⁸ See, e.g., *DiCostanzo v. Chrysler Corp.*, Civil No. 70-3331 (E.D. Pa., filed Dec. 3, 1970).

¹²⁹ After twelve years of litigation and two favorable rulings by the Supreme Court, the case of *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), has just reached a conclusion through settlement.

¹³⁰ See E. Ayres, *What's Good for GM* 213 (Aurora 1970), noting the political parsimony which persuaded both Presidents Johnson and Nixon in blocking antitrust divestiture actions against General Motors. Although the major auto makers have "subsidized" leasing and fleet buyers for years through a variety of devices, including those discussed supra at pp. 763-64, only recently the Justice Department announced the convening of a federal grand jury to investigate this situation. *Trade Regulation Reports*, no. 506, Feb. 22, 1971, at 6.

¹³¹ See *New York Times*, Dec. 24, 1970, at 26, col. 1, reporting on Ralph Nader's letter to Senator Philip A. Hart, complaining of the fact that major divestiture suits against both Ford and General Motors, based in part upon acquisitions and mergers dating from the 1920's and also upon restrictive franchising practices, have lain idle in the Antitrust Division of the Department of Justice for four years. See the counter-view of Senator Hart that vertical break-ups might be more effective, requiring severance of wholly-owned suppliers of raw materials or forcing divestiture of company-owned or franchised dealerships, thus giving a new competitor a more readily available supply of customers. *Trade Regulation Reports*, no. 506, Feb. 22, 1971, at 4.

¹³² See generally *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

¹³³ 384 U.S. 127 (1966).

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able to maintain on their dealers through their complete control over the dealers' continued source of supply.¹³⁴ Although generally any seller may decline to do business with whomever he desires, under the antitrust laws, such refusal is actionable if in furtherance of another antitrust violation or if the result of combined activity by two or more parties. In remedying such violations, a court may order a seller to deal with a particular party as part of a prophylactic decree.

2. *The Federal Trade Commission Act*

The Federal Trade Commission Act (F.T.C.A.)¹³⁵ created the Federal Trade Commission (FTC) as an independent administrative agency with multiple functions, its principal role being to aid in the enforcement of the antitrust laws through cease and desist orders enforceable through the courts.¹³⁶ Although the FTC was not designed as a forum for private relief, there has been a recent trend to order restitution to injured parties as part of its orders.¹³⁷ The statutory standard governing its efforts is as deceptively simple as the standards set forth in the antitrust laws, namely, "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."¹³⁸ Although the FTC may use the antitrust laws as guidelines, it has flexibly employed this sweeping prohibition of the F.T.C.A. in attempting to reach a panoply of ever-changing business practices,¹³⁹ and has recently invoked it to proscribe certain types of activity even more "incipient" than the practices sought to be reached by the Clayton Act.¹⁴⁰

¹³⁴ A \$10 billion suit has recently been filed against General Motors and the other manufacturers alleging a combination to refuse to sell to discount dealers, as well as price fixing through fictitious freight charges in order to equalize the delivered prices to dealers. See *National Auto Brokers Corp. v. General Motors Corp.*, Civil No. 70C-5421 (S.D.N.Y., filed December 10, 1970).

¹³⁵ 15 U.S.C. §§ 41-58 (1964), enacted as a supplement to, although not technically a part of, the antitrust laws. See 15 U.S.C. § 12 (1964), defining "antitrust laws," but not including the Federal Trade Commission Act within that definition.

¹³⁶ 15 U.S.C. §§ 45(b)-(1). Subsection (1) prescribes that each violation shall give rise to a civil penalty of not more than \$5,000 payable to the United States.

¹³⁷ *Universal Credit Acceptance Corp.*, 3 Trade Reg. Rep. ¶ 19,371 (FTC 1970) (ordering restitution to persons who spent money in reliance on alleged misrepresentations in connection with a credit card franchising plan).

¹³⁸ 15 U.S.C. § 45(a)(1) (1964).

¹³⁹ See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965) (deceptive television advertising); *LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966) (leasing and sale of machinery); *Shell Oil Co. v. FTC*, 360 F.2d 470 (5th Cir. 1966), cert. denied, 385 U.S. 1002 (1966) (tying arrangement for sale of tires, batteries and accessories by gasoline stations); *Sperry and Hutchinson Co. v. FTC*, 432 F.2d 146 (5th Cir. 1970), cert. granted, 401 U.S. — (1971), 39 U.S.L.W. 3419 (Mar. 31, 1971) (unsuccessful attempt to apply the Act to a trading stamp company which was attempting to prevent other parties from "trafficking" in its trading stamps).

¹⁴⁰ See *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316 (1966) (exclusive dealing agreement between shoe manufacturer and its franchisees).

Although many of the FTC's decisions have had primary impact upon other industries employing the franchise system of marketing,¹⁴¹ its recent activity has concerned matters directly affecting the automobile industry. Perhaps the most significant of these recent decisions is *FTC v. Brown Shoe Co., Inc.*¹⁴² In this case, the FTC found that the nation's second largest shoe manufacturer had violated Section 5 of the F.T.C.A.¹⁴³ by virtue of its contractual arrangement with its dealers whereby the dealers were to purchase Brown shoes exclusively over conflicting lines, and were to give them preferential display and inventory space. In return, the dealers were to receive such benefits as use of Brown's architectural plans, merchandising record systems, participation in low-cost group insurance, and the free services of its field representatives. Without even mentioning the word "franchising" the Supreme Court sustained the FTC's finding that a requirement to deal exclusively in the manufacturer's products was an *incipient violation* of both Section 1 of the Sherman Act¹⁴⁴ and Section 3 of the Clayton Act,¹⁴⁵ and expressly recognized the FTC's power to find a violation of Section 5 of the F.T.C.A., even absent a finding that either the Sherman Act or the Clayton Act had been violated.¹⁴⁶

Even more pertinent to franchising was the recent decision of the Supreme Court in sustaining the FTC's cease and desist order against Texaco¹⁴⁷ for inducing its gasoline station dealers to purchase tires, batteries and accessories from sources designated by Texaco, and which paid Texaco commissions on their sales to Texaco dealers. Despite the complete absence of any overt evidence of coercion, the Court found such coercion inherent in the combination of Texaco's dominant economic power, the dealers' total reliance on Texaco for continuity of supplies, and the dealers' realization that unless they did what was expected of them, their short-term dealerships would not be renewed. In thus finding the requisite "combination" in restraint of trade, the Court recognized the implicit threat of termination or failure to renew the dealership, which forms the basis of the extensive control available to every franchisor on a daily basis.

¹⁴¹ See, e.g., *Atlantic Refining Co. v. FTC*, 381 U.S. 357, rehearing denied, 382 U.S. 873 (1965) (commissions obtained from third party vendors of tires, batteries and accessories); *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968) (commissions from third party vendors prohibited even in absence of overt coercion, since the dominant economic power of the manufacturer is "inherently coercive"); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) (price discrimination where grocery wholesalers were not granted the same promotional allowances as direct-buying retailers).

¹⁴² 384 U.S. 316 (1966).

¹⁴³ 15 U.S.C. § 45 (1964).

¹⁴⁴ 15 U.S.C. § 1 (1964).

¹⁴⁵ 15 U.S.C. § 14 (1964).

¹⁴⁶ 384 U.S. at 321-22.

¹⁴⁷ *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968).

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Of particular importance in the franchising context is the second aspect of the F.T.C.A. declaring unlawful "unfair or deceptive acts or practices."¹⁴⁸ While in the past this standard has been employed primarily against deceptive advertising of products and services, it has recently been invoked in franchising situations, not only against deceptive advertising in the sale of franchises,¹⁴⁹ but also in an attempt to hold a franchisor responsible for fraudulent practices perpetrated by its franchisees against consumers. In *Aamco Automatic Transmissions, Inc.*,¹⁵⁰ the first such case brought by the FTC against a franchisor, the complaint alleged that the unfair practices in question were part of the franchisor's instructions to the franchisees and that the latter were subject to default unless they complied. Among the unfair practices alleged were failure to advise consumers that a "free examination" of a transmission did not include free re-assembly unless a purchase was made, and of the fact that a rebuilding job might be done with used parts. The case was recently concluded with the acceptance by the FTC of a consent order prohibiting Aamco from engaging in any of the practices alleged, and requiring Aamco to deliver a copy of the order to all present and future franchisees and to obtain their agreement in writing to abide by its terms.¹⁵¹ In this sense, many consumer complaints against automobile dealers may well involve liability on the part of the automobile manufacturers as well.¹⁵²

¹⁴⁸ 15 U.S.C. § 45(a)(1) (1964).

¹⁴⁹ Meal or Snack System, Inc., [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 18,671 (FTC 1970) (consent order arising out of alleged misrepresentation in the sale of fast-food franchises); Success Motivation Institute, Inc., 3 Trade Reg. Rep. ¶ 19,306 (FTC 1970) (consent order arising out of alleged misrepresentation in the sale of self-improvement academy franchises); Universal Credit Acceptance Corp., 3 Trade Reg. Rep. ¶ 19,371 (FTC 1970) (complaint issued alleging misrepresentation in the sale of a credit card franchising plan); Century Brick Corp. of America, 3 Trade Reg. Rep. ¶ 19,391 (FTC 1970) (consent order whereby franchisors of simulated brick and floor covering distributorships were prohibited from recruiting franchisees through misrepresentation).

On May 8, 1969, FTC Commissioner Everette MacIntyre commented in an address before the Conference of International Franchise Associations in Washington, D.C.:

Too often the franchisor will regale potential franchisees with exaggerated claims about prospective earnings and the extent of management training and assistance they will receive from the franchisor. I believe that not only must the franchisor give accurate information about his franchise system, but that he also has the affirmative duty to reveal any unfavorable news concerning his system. For example, if the Commission or a state attorney general has brought an action against the franchisor, or if a group of franchisees have brought a class action against the franchisor, this information should be brought to the attention of the potential franchisee.

5 Trade Reg. Rep. ¶ 50,240, at 55,486 (1969).

¹⁵⁰ 3 Trade Reg. Rep. ¶ 19,283 (FTC 1970).

¹⁵¹ 3 Trade Reg. Rep. ¶ 19,425 (FTC 1970).

¹⁵² See R. Nader, L. Dodge & R. Hotchkiss, *What To Do With Your Bad Car; An Action Manual for Lemon Owners 107-32* (Grossman 1970).

Pursuant to its regulation-making authority,¹⁵³ the FTC should seriously consider promulgating specific standards of disclosure applicable to all franchisors in their dealings with prospective franchisees.¹⁵⁴ These standards of disclosure should be modeled on the detailed prospectus disclosures prescribed by a recently enacted California statute¹⁵⁵ and proposed in federal,¹⁵⁶ New York¹⁵⁷ and Massachusetts¹⁵⁸ legislation. For example, under the disclosure provisions of the new California law, after fully identifying itself, the franchisor must disclose to prospective franchisees such matters as outstanding convictions, judgments, or administrative or court orders relating to its business activities;¹⁵⁹ its financial and franchising history;¹⁶⁰ its franchise agreement;¹⁶¹ its franchise fees and their computation;¹⁶² other required payments or fees, including those payable to third party vendors;¹⁶³ conditions involving termination, refusal to renew, or the franchisor's option to repurchase a franchise;¹⁶⁴ any supplies, equipment or other goods which the franchisee is required to purchase from the franchisor or third parties;¹⁶⁵ limitations on products or territories;¹⁶⁶ financial dealings, including discounting of paper;¹⁶⁷

¹⁵³ See 15 U.S.C. § 46(g) (1964).

¹⁵⁴ See the remarks of L.G. Meyer, Director of Policy Planning of the Federal Trade Commission at the annual meeting of the International Franchise Association in Miami, Florida, on January 21, 1971, suggesting the promulgation of FTC regulations concerning required disclosures to prospective franchisees instead of statutory disclosure requirements akin to those in the securities acts. Trade Regulation Reports, no. 502, Jan. 25, 1971, at 5-6.

¹⁵⁵ Laws 1970, ch. 1400 (7 Cal. Leg. Serv. 2733 (West 1970)) (amending § 10177 of the Business and Professions Code, amending §§ 25019 and 25212 of the Corporations Code and adding to Title 4 of the Corporations Code a new Division 5, consisting of §§ 31000-516).

¹⁵⁶ S. 3844, 91st Cong., 2d Sess. (1970) (sponsored by Senator Williams of New Jersey). The bill would vest enforcement power in the Securities and Exchange Commission. Although the measure did not receive consideration during the past session, its reintroduction is expected.

¹⁵⁷ Senate Bill 8403B and Assembly Bill 5767B (Feb. 17, 1970), both of which failed to pass. The Committee on Licensing Franchising has held three hearings in 1970 with a view toward submitting new proposals in the 1971 session.

¹⁵⁸ Senate Bill 110 has been submitted to the 1971 session on behalf of the author under the cosponsorship of Senator Mario Umana, the Senate Majority Leader.

¹⁵⁹ Cal. Corp. Code §§ 31111(e)-(4) (7 Cal. Leg. Serv. 2740 (West 1970)).

¹⁶⁰ Cal. Corp. Code §§ 31111(f)-(g), (r) (7 Cal. Leg. Serv. 2740-41 (West 1970)).

¹⁶¹ Cal. Corp. Code § 31111(h) (7 Cal. Leg. Serv. 2740 (West 1970)).

¹⁶² Cal. Corp. Code § 31111(i) (7 Cal. Leg. Serv. 2740 (West 1970)).

¹⁶³ Cal. Corp. Code § 31111(j) (7 Cal. Leg. Serv. 2741 (West 1970)).

¹⁶⁴ Cal. Corp. Code § 31111(k) (7 Cal. Leg. Serv. 2741 (West 1970)).

¹⁶⁵ Cal. Corp. Code § 31111(l) (7 Cal. Leg. Serv. 2741 (West 1970)).

¹⁶⁶ Cal. Corp. Code §§ 31111(m), (s) (7 Cal. Leg. Serv. 2741 (West 1970)).

¹⁶⁷ Cal. Corp. Code §§ 31111(n)-(o) (7 Cal. Leg. Serv. 2741 (West 1970)).

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projected financial earnings and the data used;¹⁶⁸ and the exact connection of any public figure endorsing the franchise.¹⁶⁹

The principle underlying such required disclosures is the recognition that franchisors will be encouraged to maintain higher standards if their activities are subject to public scrutiny. As the progenitor of the disclosure provisions of the securities acts, the late Justice Brandeis aptly observed: "Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best of disinfectants."¹⁷⁰

3. *The Federal "Dealers' Day in Court Act"*

In response to the pressure exerted by the demise of thousands of auto dealerships after World War II, Congress responded with the so-called "Dealers' Day in Court Act,"¹⁷¹ a measure requiring the manufacturer "to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise."¹⁷² The notable failure of the dealers to obtain any meaningful relief under that statute¹⁷³ was predictable in view of the Act's restrictive definition of "good faith" solely in terms of coercion, intimidation or the threat of either, and its express condonation of "recommendation, endorsement, exposition, persuasion, urging or argument."¹⁷⁴ Although recent decisions have attempted to engraft some flesh upon this statutory skeleton,¹⁷⁵ the Act stands as a monument to the false hopes of the auto dealers, and

¹⁶⁸ Cal. Corp. Code § 31111(p) (7 Cal. Leg. Serv. 2741 (West 1970)).

¹⁶⁹ Cal. Corp. Code § 31111(q) (7 Cal. Leg. Serv. 2741 (West 1970)).

¹⁷⁰ L. Brandeis, *Other People's Money, and How the Bankers Use It* 92 (1914).

¹⁷¹ 15 U.S.C. §§ 1221-225 (1964).

¹⁷² 15 U.S.C. § 1222 (1964).

¹⁷³ From 1956 until 1965 not one dealer obtained and held a judgment under that Act. By 1967, an expert witness testifying before a congressional committee could cite only four cases in which a dealer had been successful. See remarks of Attorney John J. Curtin, Jr., in *The Realities of Franchising, A Guide for the Practicing Attorney* 118-19 (Mass. Continuing Legal Education, Inc. ed., Faneuil Press 1970) [hereinafter cited as *The Realities of Franchising*].

¹⁷⁴ 15 U.S.C. § 1221(e) (1964). See H. Brown, *Franchising: Trap for the Trusting* 79-82 (2d printing 1970).

¹⁷⁵ See, e.g., *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966), cert. denied, 385 U.S. 919 (1966) (paying lip service to "coercion," but reasoning almost entirely in terms of "good faith"); *American Motors Sales Corp. v. Semke*, 384 F.2d 192 (10th Cir. 1967); *Swartz v. Chrysler Motors Corp.*, 297 F. Supp. 834 (D. N.J. 1969); Curtin, *The Automobile Dealers' Act, The Hart Bill*, printed in *The Realities of Franchising*, supra note 173, at 117-24. But see such earlier cases as *Milos v. Ford Motor Co.*, 317 F.2d 712 (3rd Cir. 1963) (holding that the dealer must show actual coercion or intimidation to obtain relief under the "Dealers' Day in Court Act"); *Leach v. Ford Motor Co.*, 189 F. Supp. 349 (N.D. Cal. 1960) (holding that, in order to recover under the Act, a dealer must show both "bad faith and coercion").

as proof of the folly of attempting to create a workable definition of "good faith."

Since "bad faith" under the Dealers' Day in Court Act actually requires a showing of coercion, intimidation or the threat of either,¹⁷⁶ it has been virtually impossible for dealers to obtain relief from oppressive manufacturer practices either during or at the termination of a dealership. However, there is a substantial body of law establishing the impropriety of a termination or failure to renew when it is in furtherance of an antitrust violation.¹⁷⁷ Good faith in the performance of contracts is required by the common law, and a bad faith termination would give rise to a separate contract cause of action, even in a federal Dealers' Day in Court Act suit, with federal jurisdiction over this state common law claim conferred by the doctrine of pendent jurisdiction. Despite the availability of these various theories of recovery, most dealers have sought relief solely under the Dealers' Day in Court Act, with its many substantive deficiencies.

In addition to its substantive inadequacies, the Dealers' Day in Court Act embodies a number of procedural shortcomings. The Act provides only single, rather than treble, damages and, since the usual dealer claim under the Act is by nature an individual rather than a collective injury, such claims do not generally qualify to be brought as class actions.¹⁷⁸ Dealers are thus denied not only the promise of adequate recovery and its concomitant inducement to counsel, but are also deprived of the deterrent effect which the prospect of such class suits would have upon the manufacturers. In the final analysis, the popular name of the statute, the "Dealers' Day in Court Act," embodies all that the Act affords by way of relief—merely a day in court. Practically speaking, litigation under the Act is an exercise in frustration, and the experience only serves to confirm the principle that ill-conceived legislation can be worse than no legislation at all.

C. *The "Baby" FTC Act*

The state of Massachusetts has recently enacted a so-called "Baby" FTC Act,¹⁷⁹ embodying the same basic prohibition as the federal statute,¹⁸⁰ and expressly adopting the applicable rulings of the

¹⁷⁶ *Milos v. Ford Motor Co.*, 317 F.2d 712 (3rd Cir. 1963); *Leach v. Ford Motor Co.*, 189 F. Supp. 349 (N.D. Cal. 1960).

¹⁷⁷ *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 5 Trade Reg. Rep. ¶ 73,399 (9th Cir. 1970); Wade, *Some Antitrust Problems in Terminating Franchises*, 44 St. John's L. Rev. 23, 24 n.4 (1969).

¹⁷⁸ See the requirements set forth in F.R. Civ. P. 23.

¹⁷⁹ Mass. Gen. Laws Ann. ch. 93A, §§ 1-10 (Supp. 1970).

¹⁸⁰ Compare Mass. Gen. Laws Ann. ch. 93A, § 2(a) (Supp. 1970) with 15 U.S.C. § 45(a)(1) (1964).

FTC and the federal courts as precedent in Massachusetts.¹⁸¹ Just as the federal statute is administered solely by the FTC with no private right of action, the administration and enforcement of the Massachusetts version was originally confined to the Attorney General through rule-making power and suits to compel compliance.¹⁸² In 1969, however, the remedial provisions of the Act were broadened to afford a direct right of enforcement to consumers, including the possibilities of injunctive relief, class actions, double damages (including reasonable attorney fees), and even treble damages in aggravated cases.¹⁸³

It is against the preceding factual, economic, common law and statutory background that the new Massachusetts Auto Dealers' Act must be evaluated. In essence, the new statute has codified a number of principles which, in time, may well have emerged through continuing judicial interpretation of existing statutes, through an enlightened concept of "good faith," and particularly through expanded application of the proscriptions of Section 5 of the F.T.C.A.¹⁸⁴ and its Massachusetts counterpart,¹⁸⁵ against "unfair methods of competition" and "unfair or deceptive acts or practices." The new Massachusetts Act, however, has legislatively accelerated this evolutionary process and has specifically proscribed many of the abusive practices of which auto dealers have complained for decades. It is, as shall be demonstrated, a true "Bill of Rights" for auto dealers.

III. THE NEW MASSACHUSETTS ACT

In its general pattern, the statute¹⁸⁶ is basically an extension of the "Baby" FTC Act,¹⁸⁷ with further specification of practices which constitute "unfair methods of competition." Following its preliminary sections containing definitions¹⁸⁸ and "long-arm" jurisdiction over non-domiciliaries,¹⁸⁹ the Act restates the prohibitions of the F.T.C.A.,¹⁹⁰ and the power of courts to rely on the interpretations of the federal statute,¹⁹¹ and grants to the Attorney General rule-making

¹⁸¹ Mass. Gen. Laws Ann. ch. 93A, § 2(b) (Supp. 1970).

¹⁸² Mass. Gen. Laws Ann. ch. 93A, §§ 2(c), 4-8 (Supp. 1970).

¹⁸³ Mass. Gen. Laws Ann. ch. 93A, §§ 9-10 (Supp. 1970).

¹⁸⁴ 15 U.S.C. § 45(a)(1) (1964).

¹⁸⁵ Mass. Gen. Laws Ann. ch. 93A, § 2(a) (Supp. 1970).

¹⁸⁶ Acts 1970, ch. 814, to be codified as Mass. Gen. Laws Ann. ch. 93B, §§ 1-14, effective Jan. 1, 1971.

¹⁸⁷ Mass. Gen. Laws Ann. ch. 93A, §§ 1-10 (Supp. 1970).

¹⁸⁸ Mass. Gen. Laws Ann. ch. 93B, § 1 (4 Mass. Leg. Serv. 712-13 (West 1970)).

¹⁸⁹ Mass. Gen. Laws Ann. ch. 93B, § 2 (4 Mass. Leg. Serv. 713 (West 1970)). See also Mass. Gen. Laws Ann. ch. 223A, §§ 1-14 (Supp. 1971) for the general "long-arm" provisions in Massachusetts.

¹⁹⁰ Mass. Gen. Laws Ann. ch. 93B, § 3(a) (4 Mass. Leg. Serv. 713 (West 1970)), which essentially reflects the wording of 15 U.S.C. § 45(a)(1) (1964).

¹⁹¹ Mass. Gen. Laws Ann. ch. 93B, § 3(b) (4 Mass. Leg. Serv. 713 (West 1970)).

power consistent with FTC and federal court interpretations of the F.T.C.A.¹⁹² It is thus important for counsel to become familiar with the gamut of activity under the F.T.C.A., including cease and desist orders, relevant court rulings, and the regulations and advisory opinions issued by the FTC.

It should be noted that the Massachusetts Act's incorporation by reference of all of the antitrust decisions under the federal acts, is not limited to decisions affecting the automobile industry. Fortunately, however, most appellate decisions in the federal trade regulation area recapitulate prior decisions in considerable detail so that a review of the more recent Supreme Court decisions in the various categories will go far toward coverage of the field. Although the F.T.C.A. does not provide a forum for private litigants in adversary proceedings, the "Baby" FTC Act of Massachusetts has recently been amended so as to grant such rights to consumers.¹⁹³ Similarly, the new Massachusetts Auto Dealers' Act confers the identical rights upon motor vehicle dealers.¹⁹⁴ Both of these classes of private litigants have thus been accorded broader private rights than are presently available under the federal acts.¹⁹⁵

A. *Innovations in the Massachusetts Act*

The real innovations of the Massachusetts Auto Dealers' Act are contained in Section 4,¹⁹⁶ which embodies a number of specific prohibitions, as described in the following subsections.

¹⁹² Mass. Gen. Laws Ann. ch. 93B, § 3(c) (4 Mass. Leg. Serv. 713 (West 1970)).

¹⁹³ Mass. Gen. Laws Ann. ch. 93A, §§ 9-10 (Supp. 1970).

¹⁹⁴ Mass. Gen. Laws Ann. ch. 93B, § 12 (4 Mass. Leg. Serv. 717 (West 1970)), specifically incorporating by reference the damages provisions of Mass. Gen. Laws Ann. ch. 93A, §§ 9-10 (Supp. 1970).

¹⁹⁵ In the only such decision to date, the First Circuit has permitted the use of a final FTC cease and desist order as evidence of violation in a private damage suit. *Farmington Dowel Prods. Co. v. Forster Mfg. Co., Inc.*, 421 F.2d 61 (1st Cir. 1970). Previous cases have held that unless the FTC specifically bases its order upon a finding that the respondent had violated the antitrust laws the order will not be admissible as evidence of a violation. See *Lee Nat'l Corp. v. Atlantic Richfield Co.*, 308 F. Supp. 1401 (E.D. Pa. 1970), cert. denied, 400 U.S. 940 (1970) (holding that the final FTC orders upheld by the Supreme Court in *Atlantic Refining Co. v. FTC*, 381 U.S. 357, rehearing denied, 382 U.S. 873 (1965), enjoining Atlantic from further use of its "sales commission plan" in the sale of tires, batteries and accessories (TBA) to dealers, were not per se determinative of the issues in a private treble damages suit and could not be relied upon by a private plaintiff seeking summary judgment on the strength of those FTC orders). Recently proposed federal legislation would grant consumers the right to initiate class actions against manufacturers to redress claims based upon deceptive practices or unsatisfactory goods or services. The preconditions which would have to be met before such suits could be brought, however, will be quite stringent. See S. 3074 and H.R. 18056, 91st Cong., 2d Sess. (1970).

¹⁹⁶ Mass. Gen. Laws Ann. ch. 93B, § 4 (4 Mass. Leg. Serv. 713-16 (West 1970)).

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1. *Prohibited Conduct on the Part of Manufacturers or Dealers*

Subsection 1 prohibits a manufacturer or an auto dealer from engaging "in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of said parties or to the public."¹⁹⁷ In simple and unmistakable language, the statute thus specifies that in *all* their dealings, including the inception, cancellation, termination or renewal of a dealership, the parties must act in good faith. Although the common law may not have required compassion in the enforcement or authorized termination of ordinary contracts,¹⁹⁸ it has long been established that higher standards of conscionability are required of fiduciaries, and that "the circumstances which may create a fiduciary relationship are so varied and so difficult to foresee that it is unwise for courts to attempt to make comprehensive definitions."¹⁹⁹ There is also an incipient trend to recognize that

every contract implies good faith and fair dealing between the parties. In every contract, there is an implied covenant that neither party will do anything having the effect of destroying or injuring the rights of the other party to receive the fruits of the contract.²⁰⁰

Such principles have been used to prohibit the termination of a franchise before the franchisee has had a reasonable opportunity to recoup his investment with a reasonable profit.²⁰¹ Now, through the new Massachusetts Act, the arguments which have been raised in support of recognizing fiduciary duties in the franchising relationship²⁰² stand

¹⁹⁷ Mass. Gen. Laws Ann. ch. 93B, § 4(1) (4 Mass. Leg. Serv. 713 (West 1970)).

¹⁹⁸ *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 171 N.E. 884 (1930); See *Division of the Triple T Service, Inc. v. Mobil Oil Corp.*, 60 Misc.2d 720, 304 N.Y.S.2d 191 (1969) (recognizing a requirement of "good faith" only in the performance of a contract); 9 *Williston on Contracts* § 1017A at 153-57 (3rd ed. 1967); cf. 5A *Corbin on Contracts* § 1229 (1964). See generally *Hewitt, Termination of Dealer Franchises and the Code—Mixing Classified and Coordinated Uncertainty with Conflict*, 22 *Bus. Law.* 1075 (1967).

¹⁹⁹ *Cann. v. Barry*, 293 Mass. 313, 316, 199 N.E. 905, 906 (1936).

²⁰⁰ *Lutz v. Bayberry Huntington, Inc.*, 148 N.Y.S.2d 762, 767 (Sup. Ct. 1956) (involving a construction contract). See 11 *Williston on Contracts* § 1295, at 38-42 (3rd ed. 1968).

²⁰¹ *Gibbs v. Bardahl Oil Co.*, 331 S.W.2d 614 (Mo. 1960); *Beebe v. Columbia Axle Co.*, 233 Mo. App. 212, 117 S.W.2d 624 (1938).

²⁰² See *Brown*, supra note 174, at 41-44, suggesting that because of the franchisor's pervasive power of control in complex transactions all franchising relations are fiduciary in character; *Brown, Franchising: A Fiduciary Relationship*, 49 *Texas L. Rev.* — (1971); cf. *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) (imposing fiduciary responsibilities on a joint venturer); *Broomfield v. Kosow*, 349 Mass. 749, 212 N.E.2d 556 (1965) (fiduciary duties arising out of a confidential business relationship); *RLM Associates, Inc. v. Carter Mfg. Corp.*, — Mass. —, 248 N.E.2d 646 (1969) (duty to act in good faith in terminating commission agent's services); *Jirna, Ltd. v. Mister Donut of Canada, Ltd.* 3 Ont. 629 (1970) (presently under appeal), finding fiduciary obligations in the franchising relationship.

endorsed by legislative action, a precedent which should provide a cogent basis for recognition of fiduciary duties in all other forms of franchising as well.²⁰³

Perhaps the most intriguing aspect of the Massachusetts Act is the intentional absence of any definition of the terms "arbitrary," "bad faith" or "unconscionable," as they appear in its provisions, thus affording broad discretion to the courts in interpreting and applying these terms. This feature of the Act contrasts sharply with the debilitating definition of "good faith" prescribed in the federal Dealers' Day in Court Act²⁰⁴ under which, absent some coercion or intimidation, the courts have indicated that even an arbitrary non-renewal of a dealership will not give a dealer a right of action.²⁰⁵

Even under the new Massachusetts Act it will still be necessary to familiarize the court as thoroughly as possible with the full ramifications of franchising in presenting one's case. However, the Massachusetts courts are now authorized to invoke the full powers of equity, including mandatory and injunctive orders, rescission, modification, restitution, reformation and damages in affording relief to auto dealers. The availability of these fundamentally important modes of relief is a considerable improvement over the federal Dealers' Day in Court Act. In a recent case under that Act, even preliminary injunctive relief against termination of a dealership was denied in accordance with the court's view that, as a matter of law, a permanent injunction would not be granted in the absence of a controversy involving land or unique personalty.²⁰⁶

On the other hand, the dealer must recognize that the same standards as are applicable to the manufacturer in its dealings with him

²⁰³ For a discussion of the application of a statutory standard as a common law precedent see *Tedia v. Ellman*, 28 N.Y. 124, 129, 19 N.E.2d 987, 990 (1939); Note, *Statutory Violation as Negligence Dependent on Type of Statute Involved*, 34 Ill. L. Rev. 229 (1939); Note, 17 N.Y.U.L.Q. Rev. 143 (1939); Note, 18 Texas L. Rev. 102 (1939).

²⁰⁴ 15 U.S.C. § 1221(e) (1964).

²⁰⁵ See *R.A.C. Motors, Inc. v. World-Wide Volkswagen Corp.*, — F. Supp. —, 5 Trade Reg. Rep. ¶ 73,402 (D. N.J. 1970). But see the sources cited in note 177 *supra*, concerning the established antitrust doctrine proscribing a termination in aid of another antitrust violation.

²⁰⁶ *Miller Plymouth Center, Inc. v. Chrysler Motors Corp.*, 286 F. Supp. 529 (D. Mass. 1968). But see *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1206-207 & n.14 (2d Cir. 1970); *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3rd Cir. 1962) (granting a preliminary injunction to preserve the court's jurisdiction and the efficacy of the plaintiff's remedies under the Dealers' Day in Court Act); *Madsen v. Chrysler Corp.*, 261 F. Supp. 488, 507 (N.D. Ill. 1966), vacated as moot, 375 F.2d 773 (7th Cir. 1967) (granting a permanent injunction where manufacturer's "Minimum Sales Responsibility" (MSR) quota was found to be arbitrary, unfair and coercive, and the mere awarding of money damages would not adequately compensate the plaintiff, since it was impossible to calculate such damages with reasonable accuracy).

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will govern his own obligations to the manufacturer. A balancing of these reciprocal responsibilities would be required in such cases as *Semmes Motors, Inc. v. Ford Motor Co.*,²⁰⁷ a recent case involving an attempted termination of a dealership on the grounds that the dealer allegedly submitted false warranty reimbursement claims and had failed to comply with his assigned "Minimum Sales Responsibility" (MSR) quota. The dealer, however, counterclaimed alleging that the termination was retaliatory because of the dealer's activities in the Ford Dealers Alliance, and further alleging that Ford had illegally sought to question the dealer's customers. In a lengthy and careful examination of the multifarious aspects of franchising in the auto industry, the court recognized that "the balance of hardships tips decidedly toward [the] plaintiff,"²⁰⁸ where his entire business may be lost through the termination. Thus, the court affirmed the granting of a temporary injunction without requiring the plaintiff to demonstrate a likelihood of success.²⁰⁹ Based upon the gross disparity between the relative bargaining power of the parties and the need for strict interpretation of the franchise agreement against the draftsman, the court thus recognized that the doctrinaire principle of sanctity of contract would be subordinate to a termination "impermissibly motivated."²¹⁰

Transcending such concepts as "sanctity of contract" and "caveat emptor," the standard of "good faith" may embody the implicit recognition that franchising gives rise to a relationship comparable to that of joint venturers, partners or master and servant. Like these other relationships, franchising has its inception in a contract but may be subject to equitable supervision. Given the traditional reluctance of the courts to enunciate fixed definitions of "good faith" or "fraud" lest the ingenuity of man devise facile means of circumventing the definitions, the good faith standard should retain its inherent flexibility to serve as a test for future practices. Although other more specific statutory standards may be enacted, good faith should always remain as the fundamental guide. Indeed, if franchising legislation were allowed to contain but a single requirement, good faith on the part of all parties in all dealings should suffice. However, imparting content to a generic standard of good faith by stare decisis through years of litigation would be both time consuming and inexpedient. Thus, a

²⁰⁷ 429 F.2d 1197 (2d Cir. 1970).

²⁰⁸ *Id.* at 1205.

²⁰⁹ As the court aptly commented:

But the right to continue a business in which [the dealers] had engaged for twenty years . . . is not measurable entirely in monetary terms; [the dealers] want to sell automobiles, not to live on the income from a damages award. . . . Moreover, they want to continue living.

Id.

²¹⁰ *Id.* at 1207.

truly effective legislative approach should embody specific proscriptions against the abuses most prevalent in franchising. This the Massachusetts Act has done.

2. *Prohibition Against Coercive Practices*

Section 4(2) of the Massachusetts Act²¹¹ prohibits a manufacturer from using coercion or attempted coercion to induce a dealer to order unwanted vehicles, parts or accessories,²¹² or any special features not included in the publicly advertised list price of the vehicle.²¹³ This provision responds directly to the dealers' complaints that they are often required to purchase particular models, with certain optional equipment, accessories or color combinations. Thus, rather than being allowed independence of judgment in choosing marketable merchandise for their particular clientele or geographical area, dealers are often subjected to the manufacturers' concepts of marketability.

Although the proscribed use of "coercion or attempted coercion" reflects a portion of the definition of "good faith" in the federal Dealers' Day in Court Act,²¹⁴ it should be noted that the Massachusetts Act contains no comparable exception for "recommendation, endorsement, exposition, persuasion, urging or argument," as specified in the federal statute.²¹⁵ Further, the situation of the auto dealers is quite similar to that of the gasoline station dealers in *FTC v. Texaco, Inc.*,²¹⁶ where the Supreme Court found "inherent coercion" in the economic dominance exercised by the major oil companies over their dealer franchisees. There the Court particularly noted the fact that, despite the absence of any overt coercion, the dealers fully understood what was expected of them, and the intimidating effect of this knowledge was further buttressed by the implicit threat of non-renewal of their dealerships.²¹⁷ This sort of silent coercion can be even more effective in the automobile business where dealers are exceedingly vulnerable to delays in the shipment of their orders, endless reprocessing of warranty claims, and many other such pressures which would not warrant litigation, but which can be most disruptive to the dealer's business.

In the antitrust field, these matters involve such issues as "full-line forcing," under which a buyer is required to purchase a whole line

²¹¹ Mass. Gen. Laws Ann. ch. 93B, § 4(2) (4 Mass. Leg. Serv. 713 (West 1970)).

²¹² Mass. Gen. Laws Ann. ch. 93B, § 4(2)(a)(c) (4 Mass. Leg. Serv. 713 (West 1970)).

²¹³ Mass. Gen. Laws Ann. ch. 93B, § 4(2)(b) (4 Mass. Leg. Serv. 713 (West 1970)).

²¹⁴ 15 U.S.C. § 1221(e) (1964).

²¹⁵ 15 U.S.C. § 1221(e) (1964).

²¹⁶ 393 U.S. 223 (1968).

²¹⁷ *Id.* at 229.

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of the seller's offering rather than specific merchandise,²¹⁸ and the closely related complaints of "tying sales"²¹⁹ and "exclusive supply" contracts.²²⁰ In "tying sales," the availability of one product, the tying element, is made conditional on the purchase of another product, the tied element. In "exclusive supply" contracts, the seller conditions the making of a sale or the fixing of a price or rebate, upon the buyer's agreement not to use or deal in the wares of a competitor. In the full-line forcing situation, when the dealer is forced to purchase unwanted merchandise, he is left with little choice but to employ strong sales tactics to dispose of such wares to the consumer.

3. *The Dealers' "Bill of Rights" Provision*

Section 4(3) of the new Massachusetts Act embodies a true "Bill of Rights" governing the dealers' relationship with the auto manufacturers. In fourteen separate provisions, specific practices are designated as being violative of the Act's general prohibition against "unfair methods of competition and unfair or deceptive acts or practices."²²¹ It will be seen that while each of these basic rights is addressed to one of the specific abuses described earlier, a new principle has been acknowledged, namely that a franchise is a *status*, not merely a contractual relationship. In the past, franchisors have contended that a franchise is merely a license to use a trademark, conditioned on the subjective quality control required by the Lanham Act to avoid the loss of the mark.²²² That statute, however, expressly condemns any use of a trademark to violate the antitrust laws.²²³ On behalf of franchisees, it has been vigorously contended that the relationship is a license coupled with an interest, creating a *status*.²²⁴ Any statutory prohibition against termination or failure to renew the franchise implicitly recognizes such a *status*. Such a relationship is thus made akin to a marriage, contractual in its inception, but otherwise subject to tenure on the ground of public policy.

Perhaps the seminal decision classifying an automobile dealership

²¹⁸ *United States v. Loew's Inc.*, 371 U.S. 38 (1962) (proscribing "block booking" of films).

²¹⁹ *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N.D. Cal. 1970) (currently being appealed).

²²⁰ Specifically prohibited under Section 3 of the Clayton Act, 15 U.S.C. § 14 (1964). See *Advance Business Systems & Supply Co. v. SCM Corp.*, 287 F. Supp. 143 (D. Md. 1969); *L. G. Balfour Co.*, [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 18,485, at 20,846 (FTC 1968) (indicating that "exclusive supply" does not require a legally binding contract).

²²¹ Mass. Gen. Laws Ann. ch. 93B, § 3(a) (4 Mass. Leg. Serv. 713 (West 1970)).

²²² See 15 U.S.C. §§ 1055, 1064(e), 1127 (1964).

²²³ 15 U.S.C. § 1115(b)(7) (1964). See *Developments in the Law—Trade-marks and Unfair Competition*, 68 Harv. L. Rev. 814, 816-19, 895-906 (1955).

²²⁴ *Brown, Franchising: A Fiduciary Relationship*, 49 Texas L. Rev. — (1971).

as merely a contractual relationship was *Ford Motor Co. v. Kirkmyer Motor Co.*²²⁵ On the strength of that case, it was subsequently held that under the antitrust laws a dealer, once appointed, has no tenure or right to renewal of his contract.²²⁶ That sterile view can be traced to the recent appellate holding that even a combination by a franchisor and a new distributor to take away a distributorship is not necessarily prohibited.²²⁷ More recently, however, the same court discerned a clear anti-competitive effect where the franchisor terminated a distributorship in order to substitute itself as the distributor.²²⁸ The court saw the elimination of the independent distributor as constituting a possible restraint of trade and as evidence of intent on the part of a dominant manufacturer to monopolize. These two cases, however, represent a difference without a distinction, and appear to reflect a complete lack of appreciation for the economic consequences of a dealer's termination. Such a lack of basic understanding derives perhaps from the fact that there is available little valid statistical information²²⁹ and almost no economic literature relating to franchising.²³⁰

²²⁵ 65 F.2d 1001 (4th Cir. 1933).

²²⁶ *Schwing Motor Co., Inc. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956).

²²⁷ *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969).

²²⁸ *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 5 Trade Reg. Rep. ¶ 73,399 (9th Cir. 1970), relying in part upon *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), which reversed a summary judgment of dismissal where the plaintiff alleged that CBS had cancelled its affiliation with one UHF station in Milwaukee following CBS acquisition of a competing station. See generally Fulda, *Single Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?*, 30 Law & Contemp. Prob. 590 (1965), also cited by the court in *Industrial Bldg. Materials*, supra.

²²⁹ See S. Rep. No. 91-1344, 91st Cong., 2d Sess. 18-19 (1970), entitled "The Impact of Franchising on Small Business," decrying the lack of valid statistical information. Reports are expected early in 1971 on the FTC's in-depth study of fifty fast-food and service franchises and on the Small Business Administration—funded study by the University of Wisconsin. The few available studies are often quite unreliable. See, e.g., J. Atkinson, *Franchising: The Odds-On Favorite* (International Franchise Association 1968), reprinted in *Hearings on the Impact of Franchising on Small Business Before the Subcomm. on Urban and Rural Economic Development of the Senate Select Comm. on Small Business, 91st Cong., 2d Sess. 56-110 (1970)* [hereinafter cited as *Senate Franchising Hearings*]. This study eliminates consideration of auto dealers, because their usual investment is \$100,000 or more, and excludes gasoline retailers, because they are considered to be "lessees." Furthermore, the unidentified study group upon which these statistics were based was comprised of highly selected members of the International Franchise Association, the basis of selection being the "completeness" of their reports, thus ignoring the likelihood that only those boasting impressive records would report. Finally, the "failure" statistics included in this study excluded "buy-backs" by the franchisor even though the franchisee may have received much less than his total investment in the "buy-back" transaction. See *Senate Franchising Hearings*, supra, at 3-4, 49-52 (including Mr. Atkinson's reactions to these same contentions when presented by the author to the Senate Subcommittee).

²³⁰ See *White Motor Co. v. United States*, 372 U.S. 253, 261-63 (1963), in which

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Conceptually, it is difficult to reconcile the remedial intent underlying the Dealers' Day in Court Act, which was enacted as a supplement to the antitrust laws, with any interpretation of the Act which affords relief to a dealer only if the manufacturer employs overt coercion, intimidation or the threat of either. By focusing on the overt nature of the conduct in question, such an interpretation implies that only tortious conduct can be anti-competitive, whereas the actual economic abuse emanates from the fact that the manufacturers exercise virtually complete control over their dealers as a result of their awesome power to terminate or fail to renew a franchise.²³¹ In recognition of the economic realities of the manufacturer-auto dealer relationship, and particularly in recognition of the inherently coercive power which is constantly available to the auto manufacturers, Section 4(3) of the new Massachusetts Act²³² specifically prohibits the following conduct on the part of manufacturers:

- a. Refusal to deliver a vehicle within a reasonable time (thus preventing the manufacturers from rewarding favored dealers by unreasonable preference in the supply of desirable merchandise, and thereby eliminating a subtle weapon for "disciplining" recalcitrant dealers);²³³
- b. Coercion or attempted coercion to enter into an agreement or to do any act prejudicial to a dealer by threatening to cancel a franchise (thus eliminating another weapon often used to control franchisees);²³⁴
- c. Termination or failure to renew a franchise without due cause, with the proviso that notice of an allegedly justified termination must be given to the Attorney General at least 60 days prior to the termination date, specifying the ground for such action, and with the further proviso that in appropriate circumstances, a court may modify the 60-day stay or extend it pending a final determination on the merits;²³⁵

the Supreme Court indicated that it lacked sufficient economic data to uphold a summary judgment in a price-fixing case.

²³¹ The *in terrorem* effect of such complete control was fully recognized by the Supreme Court in *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968) (involving the relationship between gasoline station franchisees and the major oil companies).

²³² Mass. Gen. Laws Ann. ch. 93B, §§ 4(3)(a)-(m) (4 Mass. Leg. Serv. 713-16 (West 1970)).

²³³ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(a) (4 Mass. Leg. Serv. 713-14 (West 1970)).

²³⁴ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(b) (4 Mass. Leg. Serv. 714 (West 1970)). Compare 15 U.S.C. §§ 1221(e) and 1222 (1964) with this provision of the Massachusetts Act.

²³⁵ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(c) (4 Mass. Leg. Serv. 714 (West 1970)). Query whether the self-help termination procedures often invoked by franchisors may

- d. Utilization of any false or misleading advertising (thus giving the dealer a direct right to attack manufacturer advertising which is deceptive to consumers, such as misleading price comparisons or grossly exaggerated sticker prices intended to mislead the consumer into thinking that he is getting a bargain);²³⁶
- e. Selling, or offering to sell, a new vehicle to a dealer at a price below that offered to all dealers, including such indirect devices as equipment allowances or disguising such practices as "sales promotion" plans or programs, but this prohibition of price discrimination between dealers does not apply to sales for resale to federal or state agencies or for ultimate use in driver education programs;²³⁷
- f. Selling or leasing, or offering to sell or lease, a vehicle similarly equipped, at a lower actual price than that charged to a dealer, or the use of any device to accomplish such price discrimination (thus prohibiting subsidies to leasing and fleet buyers in any form, including exaggerated advertising contributions);²³⁸
- g. Selling, or offering to sell, parts or accessories at a lesser

be a denial of due process under the Fourteenth Amendment. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (holding that garnishment of wages without a prior hearing constitutes a denial of due process). In *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), prob. juris. noted, 91 S. Ct. 893 (1971), the court upheld the constitutionality of a typical state replevin law allowing forcible entry and taking, based solely on creditor's statement of nonpayment, and notwithstanding the debtor's claim of a meritorious defense. The case may also involve a possible issue of validity of contractual waiver of constitutional rights where there is gross imbalance between the bargaining positions of the contracting parties. Contra, *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970) (holding New York's replevin provisions unconstitutional). See generally Comment, *Prejudgment Wage Garnishment: Notice and Hearing Requirements Under Sniadach v. Family Finance Corp.*, 11 B.C. Ind. & Com. L. Rev. 462 (1970); Comment, *Expanding Limitations on Prejudgment Attachment: Reverberations of Sniadach v. Family Finance Corp.*, 12 B.C. Ind. & Com. L. Rev. 700 (1971).

Given the gross imbalance between the franchisor and the typical franchisee when the franchise agreement is being signed, the validity of contractual provisions reserving to the franchisor the unilateral right to declare the franchisee to be in default may be open to serious question. If the franchisee's premises are leased from the franchisor or if his lease is collaterally assigned to the franchisor, eviction would require the usual court process, although a temporary injunction against such eviction would not be available if only violations of federal law are alleged. See *Helfenbein v. International Indus., Inc.*, — F.2d —, 5 Trade Reg. Rep. ¶ 73,440, rehearing denied, — F.2d —, 5 Trade Reg. Rep. ¶ 73,498 (8th Cir. 1971).

²³⁶ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(d) (4 Mass. Leg. Serv. 714 (West 1970)).

²³⁷ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(e) (4 Mass. Leg. Serv. 714 (West 1970)). See also the provisions of the Robinson-Patman Act on price discrimination in the sale of commodities to competing buyers. 15 U.S.C. § 13(a) (1964); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

²³⁸ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(f) (4 Mass. Leg. Serv. 715 (West 1970)).

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- actual price than that charged to a dealer, except for sales to a genuine wholesaler for resale to retail outlets;²³⁹
- h. Interfering with the dealer's capital structure or financing, subject to reasonable standards agreed to by the parties and exclusive of any change in the executive management control of the dealership (thus authorizing dealers to utilize any form of equity or debt financing of their businesses, including the unlimited sale of non-voting stock, so long as 51 percent of the voting power is retained by the dealers);²⁴⁰
 - i. Interfering with the sale or transfer of any part of an interest in a dealership, provided that the manufacturer's consent must be obtained before a controlling interest in a dealership is transferred and such consent may not be "unreasonably withheld" (thus recognizing the dealer's equity in his business as his independent asset, alienable at market value, while simultaneously preserving reasonable prerogatives for the manufacturers);²⁴¹
 - j. Obtaining any "kick-back" from suppliers with whom the dealer does business;²⁴²

²³⁹ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(g) (4 Mass. Leg. Serv. 715 (West 1970)).

²⁴⁰ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(h) (4 Mass. Leg. Serv. 715 (West 1970)).

It has been suggested that any unreasonable restraint on alienation of a franchise may constitute a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1964), under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). See proposed conclusions of Rufus E. Wilson, head of the FTC Bureau of Restraint of Trade, in Report of the FTC Ad Hoc Committee on Franchising, Trade Regulation Reports, no. 444 [Supplement], Dec. 15, 1969, at 47-48.

²⁴¹ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(i) (4 Mass. Leg. Serv. 715 (West 1970)). See note 235 supra. The reasonableness of this provision does not appear to warrant the gratuitous insult by a District Manager to a group of dealers shortly after enactment of the statute, "[n]ow you can give your dealership to your idiot son or sell it to the Mafia." In fact, the provision will go far to halt nepotism in the form of forced intra-family transfers to avoid forfeiture of the dealer's equity. See the proposed complaint in *Adolph Coors Co.*, FTC File No. 701-0032, Trade Regulation Reports, no. 503, Feb. 1, 1971, at 4, in which the proposed order details a cancellation procedure to be followed by a brewery in terminating distributors, including 180-day written notice detailing the reason for cancellation. The proposed order also grants the distributor the unlimited right to sell his dealership to a third party, subject only to the brewery's reasonable approval of the transferee's qualifications.

²⁴² Mass. Gen. Laws Ann. ch. 93B, § 4(3)(j) (4 Mass. Leg. Serv. 715 (West 1970)). See *Atlantic Refining Co. v. FTC*, 381 U.S. 357, rehearing denied, 382 U.S. 873 (1965) (upholding FTC cease and desist order against "sales-commission plan" whereby oil company received commissions on tires, batteries and accessories sold by third party supplier to dealers of the oil company); *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968) (upholding FTC cease and desist order in similar circumstances even absent any "overt coercion" to induce dealers to deal with the third party supplier).

- k. Competing with a dealer in the relevant market area, except where an independent person has a bona fide minority interest in, and a reasonable expectation of acquiring full ownership of, the dealership;²⁴³
- l. Granting a competitive franchise in the relevant market area, provided that a franchise may be granted to an independent dealer or to a bona fide minority dealer, so long as the manufacturer notifies existing dealers in the area of its intent to grant a new franchise and so long as any objections entered by existing dealers are submitted to final and binding arbitration;²⁴⁴ and

²⁴³ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(k) (4 Mass. Leg. Serv. 715 (West 1970)). This provision will prohibit a franchisor from directly competing with its own franchisee, although this prevalent practice would appear to be illegal under the antitrust laws anyway. See *United States v. New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79 (7th Cir. 1949). The practice also violates the general principles of equity under which any purchaser of a business is entitled to the full benefit of his bargain. Direct competition by a franchisor at the same economic level as its franchisees is rife with potential for economic abuse, particularly when combined with pervasive control over the activities of the franchisees. See *FTC v. Texaco, Inc.*, 383 U.S. 223 (1968). Thus, the likelihood of antitrust violations is high when the factory operates a "company store" and subsidizes its operating retail losses by capital gifts, free use of executives and advertising allowances. As one court has noted: "Predatory price-cutting in one locality, subsidized by adventitious resources" could constitute a violation of Section 2 of the Sherman Act (15 U.S.C. § 2 (1964)). See *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453, 459 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3rd Cir. 1969); 15 U.S.C. §§ 1, 13 (1964), denying the "fair trade" exemption under the Sherman and Robinson-Patman Acts in situations involving dual distribution of products.

For a variant of the problems in dual distribution systems, see *Continental Franchise Review*, vol. 4, no. 4, Feb. 22, 1971, at 7, reporting on the complaint in *Fulford's, Inc. v. General Electric Co.*, settled January 8, 1971, which involved a claim that permitting only certain franchised dealers to make sales to the building trade, constituted a per se "customer restriction" violation of Section 1 of the Sherman Act (15 U.S.C. § 1 (1964)) under the rationale of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

²⁴⁴ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(l) (4 Mass. Leg. Serv. 715 (West 1970)). This provision would prohibit a franchisor from "swamping" a given territory with an excessive number of franchises. When a franchisor sells a franchise, the buyer should be given a reasonable opportunity to succeed in business, contingent of course upon his successfully competing against independent third parties, but free from competition provided directly or indirectly by his own franchisor. See discussion in note 243 *supra*. In contrast with the judicial policy of strictly construing a former employee's express covenant not to compete, equity will liberally imply such a covenant on the part of the seller of a business to protect the buyer from the seller's competition. *Tobin v. Cody*, 343 Mass. 716, 180 N.E.2d 652 (1962). Under the antitrust laws, where the dealer is adequately serving the relevant market area, it might be argued that the granting of a new dealership should constitute a combination in restraint of trade by the factory and the new dealer under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1964). See *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (resale price maintenance combination between manufacturer and dealers directed against "discount" dealers); *Braun v. Berenson*, 432 F.2d 538, 5 Trade Reg. Rep. ¶ 73,338 (5th Cir. 1970) (reversing dismissal of action alleging combination between lessor shopping center owner and another tenant to re-

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- m. Requiring the dealer to waive any of his rights under the new Act.²⁴⁵

Prohibitions (k) and (l) warrant further comment, particularly in view of two recent decisions by the Court of Appeals for the Ninth Circuit.²⁴⁶ Although the antitrust laws were primarily designed to foster competition, rather than merely to protect individual businesses, it would seem readily apparent that the preservation of the independence of numerous small businessmen is essential to the advancement of competition.²⁴⁷ That independence can be sapped both by direct competition from the franchisor, as well as through the granting of an excessive number of independent dealerships in a prescribed territory. The supposed right of a franchisor to combine with a new appointee to destroy an existing dealership, recently recognized in *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*,²⁴⁸ may, at first blush, appear justifiable since the number of "independent" dealers, and hence the quantum of competition, is not thereby diminished. But what cannot be ignored is the fact that the mere possession of such awesome power by the franchisor is sufficient to debilitate the supposed independence of all its remaining franchisees. Because of its monopolistic implications, the exercise of such power by a franchisor is most destructive to competition when the franchisor

fuse to rent additional space to plaintiff tenant); *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir. 1952) (combination by lessor of produce market and other produce dealers to exclude plaintiff dealer from leasing space in the market). But see *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969) (agreement by manufacturer and new distributor to terminate existing distributor held not a per se boycott; seemingly reversible under *United States v. General Motors Corp.*, supra, as a classic conspiracy to restrain trade, particularly where the offending dealership is owned or controlled by the manufacturer.

²⁴⁵ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(m) (4 Mass. Leg. Serv. 716 (West 1970)).

²⁴⁶ *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 5 Trade Reg. Rep. ¶ 73,399 (9th Cir. 1970).

²⁴⁷ See deValpine, *Antitrust—The Unevaluated System*, in *A Primer on Unlawful Restraints in Marketing and Distribution; Proceedings of the First Annual New England Antitrust Conference 1, 4* (Warren, Gorham & Lamont, Inc. 1967). The decrease in automobile dealerships from 49,000 at the end of World War II to a current number of less than 27,000, indicates an annual average net loss of almost 1,000 dealerships. Among gasoline station dealerships, such economic decimation is even worse, the best available statistics showing an annual loss of from 25% to 40% of the nation's 225,000 gasoline station dealerships, either through insolvency or failure to obtain a renewal. The dealer's equity is inevitably forfeited in such circumstances. Given the fact that franchisees account for \$90 billion in annual sales, 10% of the Gross National Product, and over 25% of all retail sales, it is imperative to assure greater independence for these small businessmen if meaningful competition is to be preserved.

²⁴⁸ 416 F.2d 71 (9th Cir. 1969).

controls a dominating share of a particular market. However, the impact of termination upon the franchisee is equally devastating whether exercised by a dominant or a smaller franchisor. This devastating impact is further intensified by the fact that franchising agreements customarily contain a covenant by the franchisee not to compete with the franchisor in the event of any termination. Accordingly, even absent any allegation or proof that a given franchisor has engaged in the numerous anti-competitive practices at its disposal, the very fact that franchisors possess such pervasive power should prompt considerably more penetrating and circumspect scrutiny of franchisor conduct than has previously been evident—particularly in the area of termination of dealerships.

4. *Prohibitions Against Specific Dealer Conduct*

As previously noted, in 1969, Massachusetts granted to all consumers a direct cause of action for violations of the "Baby" FTC Act,²⁴⁹ a remedy which, surprisingly, has been ignored.²⁵⁰ Consonant with the strong contemporary trend toward consumer protection, the new Massachusetts Dealers' Act also includes specific prohibitions against the following dealer practices toward consumers:

- a. Requiring a purchaser to buy equipment or accessories not desired or requested, unless such features were already installed when the car was received by the dealer and the customer was so informed;²⁵¹
- b. Representing as a new car any demonstrator or otherwise used vehicle;²⁵² and
- c. Using false or misleading advertising.²⁵³

²⁴⁹ Mass. Gen. Laws Ann. ch. 93A, §§ 9-10 (Supp. 1970).

²⁵⁰ See Acts 1970, ch. 880 (4 Mass. Leg. Serv. 807 (West 1970)), amending the Massachusetts Uniform Commercial Code (Mass. Gen. Laws Ann. ch. 106) by adding after the present section 2-316, governing exclusion or modification of warranties, a new section 2-316A, denying to any seller or manufacturer the right to limit implied warranties to consumers and restricting the right to limit consumer remedies for breach of express warranties. Even now the FTC and various state legislatures are investigating abuses of express warranties which deny consumers the substantial benefit of their bargain. See proposed federal Consumer Warranty Acts, H.R. 18056, 91st Cong., 2d Sess. (1970), discussed in Trade Regulation Reports, no. 486, Oct. 5, 1970, at 8; S. 3074, 91st Cong., 2d Sess. (1970); H.R. 261, 92d Cong., 1st Sess. (1971); proposed FTC trade regulation rule covering new car pricing practices of manufacturers and dealers in support of Automobile Information Disclosure Act, reported in Trade Regulation Reports, no. 488, Oct. 19, 1970, at 4.

²⁵¹ Mass. Gen. Laws Ann. ch. 93B, § 4(4)(a) (4 Mass. Leg. Serv. 716 (West 1970)).

²⁵² Mass. Gen. Laws Ann. ch. 93B, § 4(4)(b) (4 Mass. Leg. Serv. 716 (West 1970)).

²⁵³ Mass. Gen. Laws Ann. ch. 93B, § 4(4)(c) (4 Mass. Leg. Serv. 716 (West 1970)).

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B. *Pre-delivery and Warranty Provisions*

1. *Pre-delivery Obligations*

Under Section 5 of the new Massachusetts Act²⁵⁴ the manufacturer must specify the dealer's pre-delivery and preparation obligations, together with a compensation schedule detailing the amounts which will be paid to the dealer for fulfillment of those obligations, and copies of both must be filed with the Attorney General. The compensation schedules must be reasonable, and the dealer's delivery and preparation obligations constitute the limit of the dealer's product liability as between himself and the manufacturer. Unless his obligations are so specified, the dealer would not be responsible for performing any pre-delivery and preparation work and, presumably, can refuse to accept a vehicle needing such work. This provision should result in clear definition of the dealer's obligations to finish the manufacturer's work, and should assure full and fair compensation to the dealer for any work performed.

2. *Warranty Obligations*

As to warranty work, Section 6 of the new Massachusetts Act²⁵⁵ specifies that the manufacturer must properly fulfill its warranty agreements, including adequate and fair compensation to the dealer for labor and parts.²⁵⁶ Claims must be acted upon within thirty days,

²⁵⁴ Mass. Gen. Laws Ann. ch. 93B, § 5 (4 Mass. Leg. Serv. 716 (West 1970)).

²⁵⁵ Mass. Gen. Laws Ann. ch. 93B, § 6 (4 Mass. Leg. Serv. 716 (West 1970)).

²⁵⁶ A similar provision in the Tennessee statutes, Tenn. Code Ann. § 59-1714(h) (7) (1968), requiring that the labor rate for warranty reimbursement be no less than that charged to a retail customer is presently under constitutional attack by the Big Three and International Harvester Co. See *Ford Motor Co. v. Noles*, Civil No. 5056 (M.D. Tenn., filed April 29, 1968); *General Motors Corp. v. Tennessee Motor Vehicle Comm.*, Civil No. 5107 (M.D. Tenn., filed April 29, 1968); *Chrysler Motors Corp. v. McCannless*, Civil No. 5065 (M.D. Tenn., filed May 10, 1968); *International Harvester Co. v. McCannless*, Civil No. 5078 (M.D. Tenn., filed April 18, 1968).

In view of such federal precedents as the Davis-Bacon Act, 40 U.S.C. § 276a(a) (1964) (prescribing "prevailing wages" for labor on government construction contracts), the Walsh-Healey Act, 41 U.S.C. § 35(b) (1964) (requiring that specified local labor rates be incorporated into government procurement contracts), and the Fair Labor Standards Act, 29 U.S.C. § 206 (1964) (prescribing minimum labor rates), it is difficult to comprehend the basis for a constitutional attack on state legislation prescribing "retail" labor rates for warranty work, particularly since states are not confronted with the jurisdictional problems inherent in the federal statutes.

Under the "5-years-or-50,000-miles" warranty the labor rates problem was particularly acute, due to the duration of the warranty. In the past two years, all of the factories have gradually returned to the "1-year-or-12,000-mile" warranty, thus easing the dealer's obligations considerably. Although this legislation is not a "labor" statute, it should be obvious that when the dealer is reimbursed by the factory at "wholesale" labor rates, he cannot be expected to pay his labor at "retail" labor rates. The Big Three have publicly stated that if they lose the pending constitutional attack on the Tennessee

with specification of grounds if rejected. Claims under this section and under section 5 (for pre-delivery work), must be paid within thirty days of approval. This section should eliminate most of the dealers' complaints regarding inadequate compensation for warranty work and endless delays in approval of reimbursement claims, and should result in prompt cash payments to the dealers, thus relieving them of having to look to the customer for payment. Perhaps more so than any other provision, these requirements will be buttressed by the Act's general prohibition against conduct which is arbitrary, in bad faith or unconscionable.²⁵⁷

3. Manufacturer Pre-delivery Practices Since Enactment of the Massachusetts Act

On the effective date of the new Massachusetts Act, with its provisions requiring specification of the dealers' delivery and preparation obligations, the major auto manufacturers adopted procedures which appeared to make a mockery of the legislation. After filing with the Attorney General the required documentation specifying the dealers' pre-delivery preparation obligations and the compensation schedules specifying the amounts which would be paid by the manufacturers to the dealers for this work, the manufacturers estimated the average pre-delivery preparation cost per vehicle; for example, \$50 for each Thunderbird. That amount was then added to the dealer's invoice, together with an additional charge of seven percent of the increase to cover the federal excise tax. To illustrate, if the normal Thunderbird invoice were \$4,000, the new invoice bears an increase of \$50 plus \$3.50 for the tax.

Once the dealer had completed his preparation and pre-delivery operations, he was entitled to submit a claim to the manufacturer for reimbursement in accordance with the compensation schedules on file with the Attorney General. It was specified by most of the manufacturers, however, that no dealer was to file a claim for reimbursement until completion of a retail sale by delivery to a customer. Finally, even upon allowance of the reimbursement claim, there would only be a credit to the dealer's "parts account," rather than a cash payment directly to the dealer. The net result of all of this was that instead of actually being compensated by the manufacturer for services performed in connection with pre-delivery preparations, the dealer had to surrender his own cash to the manufacturer, thereby losing the use of it; pay an additional amount in federal excise tax; and then wait

statute, they will accede to an amendment to the Massachusetts statute prescribing "retail" labor rates for warranty work.

²⁵⁷ Mass. Gen. Laws Ann. ch. 93B, § 4(1) (4 Mass. Leg. Serv. 713 (West 1970)).

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until delivery to the consumer before receiving a credit against *his own money*. Furthermore, although the standard dealer franchise agreement provides for the extension of thirty days' credit on the dealer's parts account, the pre-delivery reimbursement was to be credited to that account, thus diminishing the amount of credit actually available to the dealer.

Although the manufacturer is not subject to price control on its new car invoice charges to the dealer, it is nevertheless bound by the provisions of the Robinson-Patman Act prohibiting any price discrimination between competitors.²⁵⁸ Since the hundreds of Massachusetts dealers are in direct competition with the dealers in the six bordering states, charging a Massachusetts dealer \$4,053.50 for the identical vehicle sold in an adjacent state for \$4,000, would appear to be a clear violation of the Robinson-Patman Act. Oddly enough, the very same procedure has been condoned by dealers in the three other states which have adopted similar statutory provisions, namely, Wisconsin,²⁵⁹ Tennessee²⁶⁰ and Mississippi.²⁶¹ In Massachusetts, however, the dealers regarded this advance payment procedure as flouting the policy and the very terms of the newly adopted statute and vigorously protested the practice. Apparently acceding to the intense pressure exerted by the auto dealers, General Motors has publicly announced that commencing March 1, 1971, new car invoice charges will be evenly increased on a national basis, and dealers will be reimbursed for the cost of warranty work on each car, payable as the work is performed.²⁶²

Although it is not possible to legislate specifically against every existing or potential opportunity for abuse in this area, the generic proscriptions of the Massachusetts "Baby" FTC Act,²⁶³ as well as the prohibition in the new Massachusetts Act against "any action which is arbitrary, in bad faith, or unconscionable,"²⁶⁴ should be sufficiently flexible to encompass newly developing forms of abusive practices. Thus, for auto dealers in particular, the Massachusetts statute stands in clear contrast to the federal Dealers' Day in Court Act²⁶⁵ under which relief has been frustratingly elusive.²⁶⁶

²⁵⁸ 15 U.S.C. § 13(a) (1964).

²⁵⁹ Wis. Stat. Ann. § 218.01(3)(a)(22) (Supp. 1970).

²⁶⁰ Tenn. Code Ann. § 59-1714(h)(7) (1968).

²⁶¹ Miss. Code Ann. § 8071.7-06(A)(9) (Supp. 1970).

²⁶² See Wall Street Journal, Feb. 24, 1970, at 5, col. 2.

²⁶³ Mass. Gen. Laws Ann. ch. 93A, § 2(a) (Supp. 1970), reflected in the parallel wording of Mass. Gen. Laws Ann. ch. 93B, § 3(a) (4 Mass. Leg. Serv. 713 (West 1970)).

²⁶⁴ Mass. Gen. Laws Ann. ch. 93B, § 4(1) (4 Mass. Leg. Serv. 713 (West 1970)).

²⁶⁵ 15 U.S.C. §§ 1221-225 (1964).

²⁶⁶ From 1956 to 1965, not one dealer was able to obtain a favorable final judgment under that statute. See note 173 supra.

C. *Provisions Restricting Permissible Contract Terms and Practices*

In addition to the substantive regulations just discussed, Sections 7 through 11 of the new Massachusetts Act²⁶⁷ place specific restrictions upon the terms which may be included in contracts between the auto manufacturers and their dealers. Among these restrictions are the following.

1. *Prohibition Against Unreasonable Restrictions on Dealers*

To counter-balance the gross disparity between the relative bargaining positions of the auto manufacturers and their dealers, Section 7 of the new Massachusetts Act²⁶⁸ prohibits unreasonable restrictions on numerous general matters, including transfer or sale of a dealership, right to renew, termination, "discipline" devices, covenants not to compete, site control, and other sources of leverage which have individually and collectively contributed to the dominance of the manufacturers over their dealers. Illustrative of the unreasonable restrictions sought to be proscribed by this provision would be prohibitions against the dealer's selling a dealership to a willing buyer at a price exceeding the value of the net tangible assets of the dealership. The provision would also prevent a manufacturer representative from selecting a new dealer to replace an existing dealer. The specific reference to "discipline" would appear to preclude the manufacturers from punishing a dealer through any form of discrimination or harassment. Although it is not anticipated that minimal irritations will give rise to litigation under the new Act, its statutory assurances will undoubtedly enhance the dealers' willingness to assert their rights where material abuses are encountered.

To confirm the full impact of these principles, Section 8 of the Act²⁶⁹ expressly extends the Act's provisions to the whole range of contracts between the manufacturer and its dealers, even including the "franchise offering."²⁷⁰ Given the statutory prohibition of "unfair or

²⁶⁷ Mass. Gen. Laws Ann. ch. 93B, §§ 7-11 (4 Mass. Leg. Serv. 716-17 (West 1970)).

²⁶⁸ Mass. Gen. Laws Ann. ch. 93B, § 7 (4 Mass. Leg. Serv. 716 (West 1970)).

²⁶⁹ Mass. Gen. Laws Ann. ch. 93B, § 8 (4 Mass. Leg. Serv. 716 (West 1970)).

²⁷⁰ This specific reference to the "franchise offering" expressly lays the foundation for anti-fraud protection for prospective franchisees, similar to that presently afforded to a purchaser of a security under the federal securities acts. See 15 U.S.C. §§ 78a-78hh-1 (1964), and particularly 15 U.S.C. § 78j(b) (1964); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1970). A recently enacted California statute accords such protection specifically to franchisees, as would proposed federal legislation. See notes 155 and 156 supra; H. Brown, *Franchising: Trap for the Trusting* 70-76 (2d printing 1970) (regarding the question of whether a franchise is an "investment contract" and therefore a "security"); Goodwin, *Franchising in the Economy: The Franchise Agreement As a Security Under Securities Acts, Including 10b-5 Considerations*, 24 Bus. Law. 1311 (1969). This issue is now being widely litigated. See *Mr. Steak, Inc. v. River City*

deceptive practices" in Section 3(a) of the Act, and the broad definition of "fraud" in Section 1(m), as including misrepresentation, "whether intentionally false or due to gross negligence, a promise or representation not made honestly and in good faith, and an intentional failure to disclose a material fact," the Act appears to impose requirements of fullest disclosure in connection with any "franchise offering." There is considerable doubt that any of the factories have ever met such standards with respect to disclosing to prospective dealers the numerous practices of which existing dealers complain, whether "operating," "capital," or "administrative" in nature.

2. Provision for Compensation to Dealers

Section 9 of the new Massachusetts Act²⁷¹ provides that if "without due cause" the manufacturer fails to renew, terminates or restricts a transfer of a dealership, the dealer must "receive fair and reasonable compensation for the value of the business." As simple as the justice of this formula would appear, it will bring to an end the manufacturers' practice of ignoring the dealer's contribution to the goodwill of the dealership, and their prior policy of prohibiting the dealer from charging a purchaser for this asset in a sale of the dealership. Goodwill is universally recognized as a valuable, though intangible, asset of any going business. Significantly, this alternative to the dealer's right to seek injunctive relief against termination of a dealership, was the ultimate focus of the manufacturers' opposition to adoption of the Massachusetts Act. Perhaps the unspoken reason for their adamant opposition to this section is its implicit restraint on the market restructuring abuses discussed above.²⁷²

3. Dealers' Right of "Free Association"

Section 10 of the Massachusetts Act²⁷³ provides that "[e]very franchisee shall have the right of free association with other franchisees for any lawful purpose." Given the furor which preceded the adoption of the National Labor Relations Act²⁷⁴ and its counterpart in Massachusetts, the State Labor Relations Law,²⁷⁵ it may be open to question

Steak, Inc., — F. Supp. —, Civil No. C-1787 (D. Colo., decided Sept. 30, 1970) (holding that a fast-food franchise is not a "security" under the federal securities acts); *Abercrombie v. Lum's, Inc.*, — F. Supp. —, Civil No. 295-70-A (E.D. Va., decided April 12, 1971) (holding that franchise agreements were not "investment contracts" subject to the securities acts). Where the auto manufacturer sells the dealer securities representing a fractional interest in an auto dealership, under some form of a dealer development program, there would appear to be no doubt as to the applicability of SEC Rule 10b-5.

²⁷¹ Mass. Gen. Laws Ann. ch. 93B, § 9 (4 Mass. Leg. Serv. 716-17 (West 1970)).

²⁷² See discussion on pp. 768-69 *supra*.

²⁷³ Mass. Gen. Laws Ann. ch. 93B, § 10 (4 Mass. Leg. Serv. 717 (West 1970)).

²⁷⁴ 29 U.S.C. §§ 151-68 (1964).

²⁷⁵ Mass. Gen. Laws Ann. ch. 150A, §§ 1-12 (1958), as amended, (Supp. 1971). Many other states have enacted similar statutes.

whether the auto dealers have obtained a material right under this provision, particularly since earlier drafts of the new Massachusetts Act would have specifically accorded the dealers the full panorama of collective bargaining rights contained in the State Labor Relations Law, including the separate statute governing the use of arbitration as a method of settling disputes.²⁷⁶ In the absence of such a specific recognition of collective bargaining rights, the limiting phrase in the new Act, allowing dealers the right of free association "for any lawful purpose,"²⁷⁷ appears to beg the question. Nevertheless, it is apparent that a substantive achievement is embodied in the phrase "right of free association with other franchisees," and that the necessity of giving meaning to those words calls for limited construction of the restriction "for any lawful purpose." Resort to the historical background of the statute and a clear appreciation for the purposes underlying it should provide some basis for its meaningful interpretation. In this connection it should be noted that a fundamental inconsistency confronting all franchisees is the fact that, while conceptually and theoretically they are independent businessmen, in fact they are subject to so many economic and legal burdens that their status is not substantially different from that of employees. As aptly expressed by a Canadian court in the recent case of *Jirna, Ltd. v. Mister Donut of Canada, Ltd.*:²⁷⁸

It appears to me that the relationship between the franchisor and the franchisee in the case at bar is much more than a simple vendor-and-purchaser relationship. In some respects it has at least some of the attributes of a partnership. To the extent that the arrangement requires the franchisor to purchase all supplies from persons of its own choosing, a principal-and-agency relationship has been established. Certainly, what has been created is a very close association, a venture in common, or a joint venture. If that be so, then what may be described as fiduciary obligations or at least *quasi*-fiduciary obligations, have been created.²⁷⁹

The court further observed:

In this particular type of relationship, it appears to me that franchisor and franchisee are bound together over a very long period of years in a relationship which in many re-

²⁷⁶ Mass. Gen. Laws Ann. ch. 150C, §§ 1-16 (Supp. 1971). Full collective bargaining rights would be accorded to all franchisees under Senate Bill 110, currently under consideration by the Massachusetts Legislature. See note 158 *supra*.

²⁷⁷ Mass. Gen. Laws Ann. ch. 93B, § 10 (4 Mass. Leg. Serv. 717 (West 1970)). See discussion in note 59 *supra*.

²⁷⁸ 3 Ont. 629 (1970) (currently under appeal).

²⁷⁹ *Id.* at 637.

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spects is almost as close as that of master and servant. While of course it is not the same, nevertheless the relationship is so close that confidence is necessarily reposed by the one in the other.²⁸⁰

Similarly, in spite of the contractual terms of the franchise, the National Labor Relations Board (NLRB) has held that some franchisees are in fact "employees" within the statutory definition of the Wagner Act.²⁸¹ In January, 1969, the Labor Court of Sweden held that the gasoline station dealers of Esso were entitled to collective bargaining rights in view of the dominant economic power of the oil company and the control inherent in the fact that the dealers had to look to the company as their sole source of supply.²⁸²

On the technical side, to the extent that franchisees are regarded as independent businessmen, collective activity can be perilous. For example, when the International Teamsters Union tried to organize a number of gasoline station dealers in California several years ago, their activity was successfully attacked as a common law criminal conspiracy,²⁸³ much as were the seminal attempts to organize labor unions in the 1920's.²⁸⁴ In a recent case before the FTC, the National Association of Women's and Children's Apparel Salesmen was charged with being an illegal combination of independent businessmen under the Clayton Act, the Association contended that it is a labor organization, and thus not subject to the jurisdiction of the FTC. The FTC, however, admitted as part of the record of its proceedings, a recent decision by the NLRB disqualifying the Association from acting as a labor organization, despite the fact that the NLRB decision was subject to appeal.²⁸⁵ Nonetheless, out of "deference" to the NLRB's ruling, the FTC found that the labor antitrust exemption was not available to the Association.²⁸⁶

There is also the potential risk that even acting as independent businessmen, a so-called "strike" by a group of franchisees would

²⁸⁰ *Id.* at 640-41.

²⁸¹ 29 U.S.C. §§ 201-19 (1964). See, e.g., *Mister Softee of Indiana, Inc.*, 162 N.L.R.B. 354, 64 L.R.R.M. 1034 (1966); *News Syndicate Co., Inc.*, 164 N.L.R.B. 422, 65 L.R.R.M. 1104 (1967); cf. *The Southland Corp.*, 170 N.L.R.B. No. 159, 67 L.R.R.M. 1582 (1968).

²⁸² As reported in *Gasoline Retailer*, vol. 68, no. 1, Jan. 7, 1970, at 3.

²⁸³ Since none of the convictions were appealed the cases are unreported.

²⁸⁴ See, e.g., *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 250-51 (1917).

²⁸⁵ *National Ass'n of Women's and Children's Apparel Salesmen, Inc.*, [1967-1970 *Trade Reg. Rep.* ¶ 19,016 (FTC 1969)].

²⁸⁶ *National Ass'n of Women's and Children's Apparel Salesmen, Inc.*, 3 *Trade Reg. Rep.* ¶ 19,538 (FTC 1971). For the NLRB's decision see *Bambury Fashions, Inc.*, 179 N.L.R.B. No. 75, 72 L.R.R.M. 1350 (1969).

constitute a per se boycott violation under the antitrust laws.²⁸⁷ In the labor relations context, that very risk led to the need for exemption of labor disputes from the impact of the antitrust laws.²⁸⁸ But even that exemption was held insufficient to shield the action of numerous brokerage firms which jointly imposed uniform reductions in the commissions paid to their "employee-representatives."²⁸⁹ In this circumstance the statutory exemption was held to require either the existence or the prospect of a joint collective bargaining agreement with a union.

Historically, auto dealer associations have been of several types, with varying purposes and efficacy. At the national level, the National Automobile Dealers Association draws its members from individual dealers of all the manufacturers, having neither direct nor affiliative connections with state and other groups. Although its membership is substantial and it maintains a full-time staff, including legal counsel to contest challenges to state legislation benefitting auto dealers, it has been criticized as being too unwieldy to act in an expeditious and effective manner. Within its limitations, however, it has afforded considerable assistance to dealers, most recently in its successful educational campaign to induce the Big Three to forego subsidies to leasing and fleet buyers, and through its financial support of a pending test case on this question against Chrysler.²⁹⁰ As previously noted, Chrysler has claimed that this financial support is itself evidence of a combination in restraint of trade on the part of the dealers of the other manufacturers.

In most states, there are associations of the dealers of all the manufacturers, some of the larger states having two such organizations. While it is impossible to evaluate the individual effectiveness of so many entities, it is known that some have acted vigorously in various areas, particularly in the legislative sphere, while others have been little more than social clubs. In at least one instance, an association has reverted to coordinating group insurance plans as its principal activity, and has expressly terminated all lobbying efforts as a threat to its non-profit corporate charter and its tax-exempt status.

More recently, there have arisen a number of so-called "line" associations, confined to the dealers of a particular manufacturer and usually active in a limited geographical area. As a result of strong leadership, tight membership and common problems, arising from the

²⁸⁷ See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

²⁸⁸ 15 U.S.C. § 17 (1964).

²⁸⁹ *Cordova v. Bache & Co., Inc.*, 321 F. Supp. 600, 5 Trade Reg. Rep. ¶ 73,406 (S.D.N.Y. 1970). Interestingly, the court also held that although the employees' association was not a proper party plaintiff, it would permit individual employees to be substituted as plaintiffs. *Id.* at 608, 5 Trade Reg. Rep. ¶ 73,406, at 89,657.

²⁹⁰ See discussion at p. 775 and note 54 *supra*.

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fact that all members deal with the same manufacturer, these associations have been rather vocal in their demands for radical changes in the factory-dealer relationship. The independence of such "line" associations affords a marked contrast to the ineffectiveness of the regional "Dealer Councils" created by the individual manufacturers and consisting of dealers elected by other dealers. One possible reason for the general ineffectiveness of such councils is their close identity with the individual manufacturer. In addition, the long history of procrastination, protracted studies, and ultimate inaction on the part of the manufacturers in response to suggestions from the councils offers little by way of hope for future improvement. Ford's recent effort, discussed earlier,²⁰¹ to invigorate this program by providing regionally selected dealer groups to review individual dealer complaints, appears specious in the absence of any firm commitment on the part of Ford to abide by the decisions of these panels.

Technicalities aside, it seems evident that genuine collective bargaining by franchisees provides the only realistic hope for an effective franchising relationship. Even those who doubt the need for such collective bargaining would doubtless find that mechanism for the resolution of dealer grievances preferable to the cataclysmic alternative of treble damage class antitrust suits, involving claims of \$100 million or more. Interestingly enough, during the pendency of such suits counsel for the dealers and the factory may engage in a form of "collective bargaining" to settle the claims, subject to the provisions of Federal Rule 23, requiring court approval of any settlement after formal notice to all members of the class. To avoid the necessity of such "back-door" collective bargaining, the author has recommended to the FTC that it promulgate regulations or propose legislation to permit such bargaining without the disruption, expense and delay inevitably entailed in antitrust litigation.

Permeating this entire issue is the gross imbalance between the relative bargaining positions of the individual franchisees and the franchisors, particularly where the franchisors are economic giants, such as the auto manufacturers or the major oil firms. Although labor groups may decry the comparison, the fact remains that the greater the franchisee's investment of money and labor in his dealership, the greater is his fear for the consequences of standing up for his rights. In contrast, the non-unionized employee who is unhappy with his lot, at least has the options of resigning or of joining in an effort to obtain collective representation. Given both the impossibility of legislating against every conceivable abuse in every franchising industry, and the unsuitability of litigation as a means of resolving conflicts in a dy-

²⁰¹ See discussion at pp. 773-74 *supra*.

namic and continuing joint enterprise, the courts should not prove insensitive to the compelling social need for permitting collective efforts on the part of franchisees. Such judicial sanction would be consonant with the public policy underlying the antitrust laws themselves, namely the preservation of competition through the conservation of one of the most essential elements in the competitive formula—the small, but independent, businessman.

D. Sanctions Under the Massachusetts Act

1. Civil Penalties and Injunctions

Adhering to the pattern of the federal antitrust laws, the new Massachusetts Act provides heavy penalties in support of its provisions. Section 12 of the Act²⁹² assigns to the Attorney General the primary duty of enforcement, incorporating by reference the extensive powers granted to him in the "Baby" FTC Act.²⁹³ Those powers include such matters as the right to obtain both temporary and permanent injunctions,²⁹⁴ including a civil penalty of not more than ten thousand dollars for each violation;²⁹⁵ the power to accept assurance of discontinuance and voluntary payment of the costs of investigation or to compel the creation of an escrow fund for restitution to aggrieved persons;²⁹⁶ and extensive investigatory powers, including the power to examine records,²⁹⁷ the power to subpoena witnesses,²⁹⁸ and the power to take testimony under oath.²⁹⁹ Finally, to aid in obtaining information, the statute declares any information acquired under its authority to be inadmissible in a criminal prosecution for "substantially identical transactions,"³⁰⁰ and establishes a fine of not more than five thousand dollars for failure to appear to give testimony or for wilfully destroying documentary evidence in order to evade an investigation.³⁰¹ Punishment for contempt of court is also available for non-compliance with a court order issued in support of the Attorney General's investigatory powers.³⁰² For habitual violations of injunctions against practices prohibited under the Act, the Attorney

²⁹² Mass. Gen. Laws Ann. ch. 93B, § 12 (4 Mass. Leg. Serv. 717 (West 1970)).

²⁹³ Mass. Gen. Laws Ann. ch. 93A, §§ 4-8 (Supp. 1970).

²⁹⁴ Mass. Gen. Laws Ann. ch. 93A, § 4 (Supp. 1970). By way of contrast, the FTC is not yet empowered to obtain temporary injunctions, a fact which may account for its inability to act expeditiously, particularly in the area of false advertising.

²⁹⁵ Mass. Gen. Laws Ann. ch. 93A, § 4 (Supp. 1970).

²⁹⁶ Mass. Gen. Laws Ann. ch. 93A, § 5 (Supp. 1970).

²⁹⁷ Mass. Gen. Laws Ann. ch. 93A, § 6(1)(b) (Supp. 1970).

²⁹⁸ Mass. Gen. Laws Ann. ch. 93A, § 6(1)(c) (Supp. 1970).

²⁹⁹ Mass. Gen. Laws Ann. ch. 93A, § 6(1)(a) (Supp. 1970).

³⁰⁰ Mass. Gen. Laws Ann. ch. 93A, § 6(7) (Supp. 1970).

³⁰¹ Mass. Gen. Laws Ann. ch. 93A, § 7 (Supp. 1970).

³⁰² Mass. Gen. Laws Ann. ch. 93A, § 7 (Supp. 1970).

General is empowered to petition the court to dissolve or suspend a domestic corporation, or to revoke the authority of a foreign corporation to do business in the Commonwealth.⁸⁰⁸

2. *Additional Provisions for Damages*

In addition to the enforcement rights granted elsewhere in the Massachusetts Act, Section 12⁸⁰⁴ grants to each dealer the right to obtain damages, to the same extent permitted under the damages provision of the "Baby" FTC Act.⁸⁰⁵ For any unfair or deceptive act or practice declared unlawful under the "Baby" FTC Act or any regulations promulgated thereunder, both damages and equitable relief are available.⁸⁰⁶ Class suits may also be maintained,⁸⁰⁷ and unless a reasonable tender offer of settlement is made within thirty days of demand, twice the amount of actual damages may be recovered, and treble damages may be awarded if the court finds a wilful violation or finds the manufacturer's refusal to comply with the Act to have been in bad faith.⁸⁰⁸ Finally, the dealer's reasonable attorney fees and court costs may be recovered.⁸⁰⁹ These provisions, and particularly the specific authorization of class suits, go far toward equalizing the litigational power of the parties.

Subject to the same conditions specified in the federal antitrust laws,⁸¹⁰ Section 12 of the Act⁸¹¹ also specifies that final administrative and court orders in both federal and state governmental proceedings are to be available as prima facie evidence of a violation.⁸¹² The availability of this source of proof of violations will considerably lighten the burden of a private litigant, leaving to him only the requirement of showing causation and actual damages.

⁸⁰⁸ Mass. Gen. Laws Ann. ch. 93A, § 8 (Supp. 1970).

⁸⁰⁴ Mass. Gen. Laws Ann. ch. 93B, § 12 (4 Mass. Leg. Serv. 717 (West 1970)).

⁸⁰⁵ Mass. Gen. Laws Ann. ch. 93A, § 9 (Supp. 1970).

⁸⁰⁶ Mass. Gen. Laws Ann. ch. 93A, § 9(1) (Supp. 1970).

⁸⁰⁷ Mass. Gen. Laws Ann. ch. 93A, § 9(2) (Supp. 1970). The conditions specified for the bringing of a class suit are comparable to those established in Fed. R. Civ. P. 23.

⁸⁰⁸ Mass. Gen. Laws Ann. ch. 93A, § 9(3) (Supp. 1970).

⁸⁰⁹ Mass. Gen. Laws Ann. ch. 93A, § 9(4) (Supp. 1970).

⁸¹⁰ See 15 U.S.C. § 16(a) (1964).

⁸¹¹ Mass. Gen. Laws Ann. ch. 93B, § 12 (4 Mass. Leg. Serv. 717 (West 1970)).

⁸¹² Under the federal antitrust laws, it is not entirely clear whether a final FTC cease and desist order is admissible as proof of an antitrust violation. The First Circuit has held such an order admissible. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969). But see *Lee Nat'l Corp. v. Atlantic Richfield Co.*, 308 F. Supp. 1041 (E.D. Pa. 1970), cert. denied, 400 U.S. 940 (1970) (holding FTC cease and desist order inadmissible where it was clear that the order was not predicated upon a finding of violation of the antitrust laws); cf. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965).

3. *Provision Voiding Violative Contracts or Practices*

Section 13 of the new Massachusetts Act³¹³ declares that [a]ny contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.

This provision clearly underscores the strong public policy considerations underlying the Act and, by declaring any violative contract or practice to be void and unenforceable, the provision effectively implements the Supreme Court's admonition that in anti-competitive matters "[w]e must look at the economic reality of the relevant transactions."³¹⁴ Such a vigorous embodiment of the Act's remedial purposes should encourage liberal interpretation of all of its provisions and should fortify it against attack on constitutional grounds.³¹⁵

4. *Statute of Limitations Applicable to Sanctions*

Under Section 14 of the new Massachusetts Act,³¹⁶ except in case of concealment, suit must be instituted within four years after the cause of action accrues.³¹⁷ Even this limitation is suspended during the pendency of any federal or state proceeding under the antitrust laws or trade regulation rules, with the proviso that in such circumstances suit must be brought within one year after the final disposition of such federal or state proceedings.³¹⁸

5. *Summary and Observations*

Each of the foregoing provisions to aid the private litigant is primarily intended to complement and buttress governmental enforcement efforts. Hopefully, the stiff penalties available under the Act in the form of double and treble damages and possible invalidation of

³¹³ Mass. Gen. Laws Ann. ch. 93B, § 13 (4 Mass. Leg. Serv. 717 (West 1970)).

³¹⁴ *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 208 (1968).

³¹⁵ See *Fornaris v. Ridge Tool Co.*, 423 F.2d 563 (1st Cir. 1970), rev'd, 400 U.S. 41 (1970). The reversal, however, was based upon the abstention doctrine and did not address itself to the merits of the lower court decision invalidating the statute in its retrospective application on due process grounds. For a similar attack on the recently enacted Hawaiian Motor Vehicle Industry Licensing Act, see *General Motors Corp. v. Burns*, 316 F. Supp. 803 (D. Hawaii 1970) (ordering a three-judge court to be convened).

³¹⁶ Mass. Gen. Laws Ann. ch. 93B, § 14 (4 Mass. Leg. Serv. 717 (West 1970)).

³¹⁷ This provision is comparable to the statute of limitations governing private suits under the federal antitrust laws. See 15 U.S.C. § 16(b) (1964).

³¹⁸ See *Braun v. Berenson*, 432 F.2d 538, 5 Trade Reg. Rep. ¶ 73,338 (5th Cir. 1970) (according a liberal interpretation to the federal statute by holding that each subsequent refusal to lease additional space to the plaintiff, who was alleging a combination between his lessor and other tenants to prevent him from expanding his facilities, would give rise to a separate cause of action, thus renewing the statute of limitations).

the contract will act as strong deterrents against violations.³¹⁹ Further, all of the enforcement provisions emphasize the strong public policy underlying the statute, and the consequent need for liberal construction and application of its terms.

E. *Exception for Subsidies in Sales to Governmental Units*

For reasons not readily apparent, the new Massachusetts Act specifically permits manufacturer-subsidized discounts to individual dealers on vehicles intended for resale to the United States Government or to the Commonwealth of Massachusetts or any of its political subdivisions, by exempting such sales from the Act's general prohibition against price discrimination.³²⁰ As to such sales, the Act merely requires that the manufacturer notify all dealers in the relevant market area and make equally available to such dealers the same offer, discount or other inducement.³²¹ In an interesting twist, when the Big Three recently responded to intense dealer pressure by publicly announcing the abandonment of their discount structure for state and local governments, a number of cities, counties and states instituted treble damage antitrust class suits against the manufacturers alleging a Big Three combination to maintain resale prices and requesting injunctive relief in addition to damages.³²² In the analogous situation presented in *United States v. General Motors Corp.*,³²³ where General Motors and a number of its regular dealers employed similar tactics to curtail the activities of the so-called "discount department store" dealers, the Supreme Court had little difficulty in discerning a classic combination in restraint of trade. Given the result in that case, it will be interesting to observe the ultimate response of the courts to the manufacturers' claim that continuation of governmental discounts would constitute quantity price discrimination against their dealers under the Robinson-Patman Act.³²⁴ In contrast to the situation in the *General Motors* case, in this instance the dealers are left completely free in their pricing policies on governmental sales.

³¹⁹ Compare the newly enacted California Franchise Investment Law, which allows recovery only of actual damages and which allows the defendant to raise as a defense: (1) the plaintiff's actual knowledge of the facts concerning any alleged misrepresentation or omission in connection with the sale of a franchise; or (2) that the defendant did not know, or in the exercise of due care would not have known, of the alleged misrepresentation or omission. Cal. Corp. Code § 31301 (7 Cal. Leg. Serv. 2746 (West 1970)).

³²⁰ Mass. Gen. Laws Ann. ch. 93B, § 4(3)(c) (4 Mass. Leg. Serv. 714 (West 1970)).

³²¹ Mass. Gen. Laws Ann. ch. 93B, § 11 (4 Mass. Leg. Serv. 717 (West 1970)).

³²² See, e.g., *City of Philadelphia v. General Motors Corp.*, Civil No. 70-2753 (E.D. Pa., filed Oct. 7, 1970); *City of New York v. General Motors Corp.*, Civil No. 70-C-4245 (S.D.N.Y., filed Sept. 30, 1970); Car Dealer "Insider" Newsletter, Oct. 12, 1970, at 2.

³²³ 384 U.S. 127 (1966).

³²⁴ See 15 U.S.C. § 13(a) (1964).

F. Severability and Constitutional Problems

The severability clause of the enabling act introducing the new Massachusetts Act⁸²⁵ may be of crucial importance in view of the recent decision of the Court of Appeals for the First Circuit in *Fornaris v. Ridge Tool Co.*,⁸²⁶ holding unconstitutional under the federal due process clause the retroactive application of a 1964 Puerto Rico statute⁸²⁷ prohibiting the termination of a dealership except for "just cause," a phrase of civil law origin, approximating "good faith." In holding the Puerto Rico law unconstitutional as applied to a pre-existing dealership terminable at will, the court did not consider whether the common law itself may have required "good faith" and whether the franchising relationship is more of a "status" than a purely contractual relationship.⁸²⁸ A similar attack by General Motors seeking to enjoin enforcement of the recently enacted Hawaiian auto dealer licensing statute is now pending before a three-judge federal district court in Hawaii.⁸²⁹ If these actions are successful, the efforts of Congress and the states to provide protection for approximately one million existing franchisees would be tragically frustrated. On the other hand, the existence of this possibility should impel prompt legislative action to safeguard all future franchisees, since there is no question as to the legislative power to control franchise agreements either entered into, extended or renewed after enactment of the applicable statute.

IV. COMMENTARY AND CONCLUSIONS

Narrowly viewed, it was the aim of this article to explore the economic and legal implications of franchising as a marketing system in the automobile industry. This has required extensive analysis of the nature of the franchising relationship, the sources of friction, and an evaluation of the dealers' complaints in light of existing law,

⁸²⁵ Acts 1970, ch. 814, § 2 (4 Mass. Leg. Serv. 717 (West 1970)).

⁸²⁶ 423 F.2d 563 (1st Cir. 1970), rev'd, 400 U.S. 41 (1970) (per curiam reversal based upon the abstention doctrine with some intimations of criticism of the lower court's constitutional reasoning).

⁸²⁷ Laws P.R. Ann. tit. 10, § 278a (Supp. 1970). But see the case cited in note 5, supra.

⁸²⁸ See the discussion of these possibilities supra at pp. —, and in Brown, Franchising: A Fiduciary Relationship, 49 Texas L. Rev. — (1971).

⁸²⁹ *General Motors Corp. v. Burns*, 316 F. Supp. 803 (D. Hawaii 1970) (ordering the convening of a three-judge court to adjudicate the constitutionality of the statute. The suit attacks Hawaii's Motor Vehicle Industry Licensing Act (Hawaii Rev. Stat. §§ 437-1 to 437-42 (1968)), as recently amended.

The licensing system of regulating the auto industry has been used in several states. See generally note 5 supra. This method may be contrasted with the new Massachusetts Act which took the approach of specifying certain anti-competitive practices which would be considered violative of the state's preexisting "Baby" FTC Act.

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both common and statutory. While the dealers and individual representatives of the manufacturers are undoubtedly cognizant of daily events in their particular spheres of business activity, it does not necessarily follow that either are able to assemble the entire picture in such form as to permit fully informed reflection and broad analysis. Assessment of the numerous dealer complaints in the area of "operating," "capital" and "administrative" abuses requires familiarity with a broad range of factual background seldom available in composite form.

Such operating matters as inadequate reimbursement for pre-delivery and warranty work; delays in the daily delivery of autos and parts; "loading" the dealer with unwanted vehicles; overcharging for replacement parts; unrealistic sticker pricing, followed by drastic changes in wholesale pricing policy; factory advertised sales; price-cutting for the large leasing companies; and many other sources of daily abuse, may come to be tolerated out of a simple lack of appreciation for their basic economic injustice and for the fact that each may be violative of both common law principles of conscionability and the anti-competitive prohibitions of the antitrust laws.

The same correlation is necessary to appreciate the full meaning of the dealers' capital complaints, stemming from utter disregard of the dealer's goodwill and equity in his business. This disregard is basic to the operation and understanding of such abuses as arbitrary market restructuring; unreasonable limitations on the transfer, sale or disposition of the dealership; arbitrary decisions to cancel or refuse to renew a dealership; direct competition with existing dealerships by factory stores; or the granting of an excessive number of dealerships in a particular market area.

In the context of such operating and capital abuses, administrative shortcomings also become crucial. These cover the entire range of administrative complaints including abuse of the dealer's confidential records; abuse of minority dealers; and inadequate grievance machinery, embodying procedures and standards which inevitably preclude fair treatment of the dealers. It has been suggested that serious consideration be given to the ameliorative role the dealer associations could fulfill in educating the dealers and the public; in persuading the manufacturers to improve conditions for the dealers; in supporting legislative and litigational efforts toward reform; and ultimately in providing a mechanism for genuine collective negotiations with the manufacturers, as a viable alternative to the destructive extreme of treble damage class litigation.

Permeating every aspect of the manufacturer-dealer relationship is the gross imbalance in bargaining positions between the nation's

economic giants and the individual dealers. While the dealer is induced to place his confidence in the manufacturer, there is substantial indication, from the composite of factory abuses, that this trust has not been fully honored. In pursuit of justice, the dealer has sought relief at common law, has petitioned Congress for special legislation and has suffered fifteen years of frustration under the much touted Dealers' Day in Court Act. Although new remedial efforts have been mounted, invoking equitable principles and the federal antitrust laws, it is obvious that conclusive and effective results may be years away.

In this setting, some questions may arise as to the immediate efficacy of the newly adopted Massachusetts Act, even though it embodies the first plenary recognition of the requirements of good faith in franchising and the first far-reaching specification of the anti-competitive practices intended to be encompassed by its prohibition against "unfair competition." In the final analysis, this Act is essentially directed at only three companies, each of which is acutely aware of its proscriptions. Massachusetts is but a single state among fifty, and the statute can have no legal effect beyond its borders. Since such matters as the subsidies to leasing and fleet buyers are readily amenable to extrastate continuation, the over-all impact of the new Act, on a national scale, is comparatively small when contrasted with the vast scope of the abuses it seeks to regulate. However, its potential national impact may be found in the guiding principle expressed by Justice Brandeis, that sunlight is, indeed, the best "disinfectant." The Massachusetts Act may prove to be such a disinfectant if, in perusing its contents, the dealers obtain a fuller comprehension of their rights; and if, through reviewing its provisions, each manufacturer representative, from those charged with the formation of executive policy on down to the District Manager and his subordinates, becomes more familiar with the whole range of factory practices and his particular role in their fulfillment. If this does occur, then perhaps the Act's national impact will be considerably greater than its limited legal effect would suggest.

In the final analysis, the most effective weapon in the struggle to attain equitable treatment for the dealers may be public opinion. But public opinion, in this sense, is not limited to that of attorneys, judges and legislators in other jurisdictions, all of whom are immediately concerned with the problem. Most importantly, it is the public opinion of the influential media, of the academic community and, consequently, of a more informed public at large, which may turn the tide toward improving the lot of the dealers. Whatever the source of the ultimate impetus toward that end, it is clear that radical changes are needed if franchising is to thrive as the ideal symbiosis of major American in-

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dustry and local entrepreneurs,⁸³⁰ contributing through its dynamic expansion to the fulfillment of the great "American Dream."⁸³¹

⁸³⁰ See Goodwin, *The Name of the Franchising Game Is: The Franchise Fee, The Celebrity or Basic Operations?*, 25 *Bus. Law.* 1403 (1970).

⁸³¹ As this article goes to press there are indications that much needed changes are indeed in the wind. In a recent address to the Car and Truck Rental and Leasing Association convention, on February 11, 1971, in Miami, Florida, Alan Ward, Director of the FTC's Bureau of Competition, made a number of comments directly related to some of the abuses discussed above. While stressing that the views he expressed were his own, the fact that Mr. Ward is one of the numerous young lawyers who have recently been hired by the FTC to increase its enforcement activities cannot be disregarded in analyzing the prospective import of his comments. Particularly pertinent excerpts from his remarks include the following:

On "goodwill":

We do question . . . the general proposition that the trademark is the entire source of value within the franchise system and the franchisee's business is simply an extension of the franchisor's and has no independent value apart from the value of the physical assets of the business. . . . Without the hard work and promotional efforts of the franchisee, not only would the individual franchise outlet be a failure, but the entire system arguably would produce substantially less business than the franchisor could produce by his own efforts. It may be, then, that the franchisee's business should be accorded some "goodwill" value when the franchise terminates. . . .

On termination:

[U]nder some circumstances, it may well be that arbitrary exercise of the power to terminate will itself amount to a violation of the law.

On manufacturer control:

Some franchisors require their franchisees to lease land directly from them, to lease or buy the franchise building, the equipment, the supplies and such services as insurance from the franchisor or from a single supplier designated by the franchisor. One franchisor admitted to the staff that the sole reason for requiring the franchisee to lease the land from him was the control it gave the franchisor over the franchisee.

On procurement of supplies:

[I]n most situations where standardized products exist, the franchisor may recommend suppliers but he should not go substantially beyond that. And, under some conditions, recommendations alone may involve antitrust risk.

On the "role" of the regulators:

At a time of rapidly rising costs for each of you, you should pass on to interested government agencies your ideas on how to increase competition among your suppliers and servicing organizations. . . . It is in our interest—and yours, too—that you be aware of what we are doing and that all facts about these types of practices be brought to our attention. This will insure that any corrective action will be in the public interest.

It would appear that the FTC has listened carefully to the complaints of dealers and, if Mr. Ward's remarks are any indication of current FTC thinking, many of the abuses detailed above may be far nearer to correction than had previously been suspected.