LAW AND SOCIETY

CHANGING A CONTINUING RELATIONSHIP BETWEEN A LARGE CORPORATION AND THOSE WHO DEAL WITH IT: AUTOMOBILE MANUFACTURERS, THEIR DEALERS, AND THE LEGAL SYSTEM†

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The relationship between automobile manufacturers and their dealers—traditionally characterized by a power imbalance in favor of the manufacturers—has been a test, in microcosm, of the ability of the legal system to respond to rapidly changing social and economic patterns. The setting, superficially, is one of contract in the sense that this relationship finds expression in selling agreements or franchises; but problems stemming from disproportionate bargaining strength have seldom been resolved to the dealers' satisfaction in terms of orthodox contract theory. With the aid of legal materials, letters, personal interviews, newspaper articles and industry journals, Professor Macaulay traces in stages the efforts of the dealers to redress the power imbalance and the consequences of these efforts. He concludes that little has been done to benefit a conscientious but inefficient dealer unable to meet reasonable business requirements or the dealer who resists a strategy of low-profit-per-unit high-volume selling. Rather the legal system induced manufacturers to apply standards for evaluating dealers which focus on the particular circumstances of each case and prompted creation of informal systems for preventing disagreements and settling disputes.

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† Part II of this Article, dealing with federal legislation and evaluating the impact of the dealers' efforts to redress the balance of power, will be published in a subsequent issue of this volume of the *Review*.

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Much of the information for this Article was derived from contact with people who, for various reasons, desired not to be identified. Correspondence by letter was carried on with officials of General Motors, Ford Motor Company, Chrysler Corporation, and American Motors Corporation. I wrote to all of the attorneys who represented dealers in reported cases under the federal Good Faith Act, 15 U.S.C. §§ 1221-25 (1963). Where states had administrative licensing statutes regulating the dealer manufacturer relationship, I wrote to the head of the administrative agency, asking how often and in what way his statute had been applied. Where states had penal statutes, I wrote to the attorneys general for data on the use of the statute. In addition, interviews were conducted personally. At the suggestion of my colleague, Prof. Joel Handler, I contacted by telephone, rather than written questionnaire, the executives or managers of the new-car dealer trade associations in the forty-eight states having them (my directory lists no associations in Alaska or Hawaii). I was able in

dealers tried to use existing laws and processes and when they tried to change the rules of the game to produce results that favored them. Also I will consider how the legal system promoted or hindered other nonformal or nongovernmental means of solving the problems that prompted the lobbying. In the legal battles between the dealers and the manufacturers, the courts initially applied the common law of contracts so that the manufacturers were free to manage their business relationships with dealers without outside review of their good faith or the reasonableness of their business judgment. Legislatures and administrative agencies then imposed some degree of review, but the courts have rather narrowly confined this new limitation on the manufacturers' power to do business with their dealers. This Article will attempt to explain how and why these agencies took the courses they did and will look at the information available to the legal agencies about the consequences and costs of possible solutions. To what extent do we have no more than a test of political power; to what extent reasoned choices about ends and means? Also I will consider the nonformal ways of solving the problems raised by the dealers, that developed in response to all of this action in the legal system. The impact of legal action may be far more than what is reflected by appellate cases or even complaints filed before trial courts or administrative agencies because people may plan their conduct or bargain about disputes in light of even potential legal action far in the future.[1]

Finally, this Article is about certain ideas law professors sometimes examine in "Contracts" courses. Prof. Lawrence Friedman[2] argues that while "Contracts" is a body of generalized rules that is supposed to serve any and all types of transactions, when any problem becomes socially significant it tends to be removed from the domain of generalized contract law and becomes the particularized law of, say, "sales," "insurance," or "labor law." As a result, when operating in the area left to contract law, the courts have become more and more free to fashion results that are fair in terms of the facts of the particular case since they no longer must worry about maintaining or creating clear, predictable rules for important economic transactions. In the terms I used in an earlier Article,[3] the courts have moved from a policy of aiding the functioning of the market as their primary goal ("functional" policy) to one of carrying out the reasonable expectations of the parties in a particular transaction ("transactional" policy) or even to seeking relief of hardship or engaging in some social engineering (the nonmarket particularistic "relief-of-hardship" and generalized "economic planning" policies).[4] In this Article, I will look at the "removal" of manufacturer-dealer relations from the area

[1] For a consideration of the relationship of other-than-legal systems of sanctions to legal sanctions in the area of contracts, see Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMERICAN SOCIOLOGICAL REV. 55 (1963).

[2] FRIEDMAN, CONTRACT LAW AND AMERICAN SOCIETY (1965).

[3] Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 813-17 (1961).

[4] I explained these policies as follows:

The transactional policy calls for courts to support the market by taking action to carry out the *particular* transaction brought before them. The court should discover the bargain that was made and enforce it. If this discovery is not possible, the court should work out a result involving the least disruption of plans and causing the least amount of reliance loss in light of the situation at the time of the dispute. The market is supported by transactional policy because the legal system is directed to seek the result which best solves the problem in the particular case in market terms. A court following this policy will be eager to look at all the "legislative history" of a written contract and will confine or overturn rules which let people back out of bargains or disrupt plans.

Finally, *the functional policy* calls for the lawmaker to create generally applicable rules which facilitate bargaining by producing a system or structure in which exchanges can take place. Rules should be adopted which aid quick and rational bargaining and allow the parties to consider the impact of contract law in their planning. The courts should not seek the best result case-by-case since predictable law is a more important means of supporting the market. Most functional rules fill in gaps left in making contracts, or draw lines indicating when reliance will be protected or when a contract has been performed, and the like.

In sum, transactional policy calls for a case-by-case approach, and functional policy the creation of generally applicable rules. Of course, these are only extreme points on a scale useful for analysis. Few, if any, decisions turn on either an application of a general rule to facts with no judicial choice involved or on an application of pure discretion unfettered by any standard. It is the tendency in either the direction of rules to promote individual planning or discretion to reach good results which is significant in the analysis presented here.

As in the case of the market-oriented policies, the strategies designed to promote general economic welfare through social control can be divided into the particular and the general. *The relief-of-hardship policy* calls for courts to let one party out of his bargain in exceptional cases where enforcement would be unduly harsh, or, where the content of the bargain is in doubt, to place the burden on the party best able to spread the loss or absorb it. This case-by-case approach is based not on considerations of market functioning but on ethical ideals and emotional reactions to the plight of the underdog, to pressing an advantage too far, to making undue profit, or to inequality of resources. It is reflected in some aspects of the impossibility-of-performance doctrine, of the certainty and foreseeability limitations on contract damages, of the requirement of mutuality of performance, and of the application of many other devices which let bargainers out of contracts.

The economic planning policy is the other nonmarket strategy and the one calling for generalized rules to promote economic welfare. This policy is something of a catchall as these goals can range from wealth redistribution to regulation of particular industries or types of transactions. The most obvious examples involve a change in the market context by removing certain types of bargains from the kinds which will be legally enforced or by requiring particular terms in some bargains. More subtly the policy may shape the construction of contracts in desirable directions or affect other general rules.

A great deal of overlap among these policies is possible. A particular result may be justified by reference to several different policies, both market and nonmarket in orientation.

Id. at 814-15.

of the common law of contracts, asking both how this was done and what kinds of policies are reflected in the legislation and in the applications of that legislation by administrative agencies and courts. To reveal the ending of the story at the outset, the legislation ambiguously combines elements of "transactional," "relief-of-hardship," and "economic planning" policies. However, the major emphasis of the courts and administrators has been on "transactional" policy: While the manufacturers have lost their power to write their own ticket without interference from the legal system, a power which might be justified in terms of supporting the functioning of the market, no legal agency has yet done much to relieve the hardship imposed by a manufacturer on a conscientious and nice but inefficient dealer who has been unable to live up to reasonable business requirements. In short, some of the traditional ideas upon which old-fashioned classroom contract law is based re-emerge to govern these new statutes and their applications; in one sense, the field of "Contracts" is hard to kill.

In order to carry out, to some extent, this ambitious program, some facts are needed.[5] First, we need to understand the problems inherent in the manufacturer-dealer relationship. Next, I will describe the creation and application of the new laws and the effect that this has had on the dealers' problems. Then, I will be able to draw some conclusions about the dealers' gains and their costs, the functioning of the legal system, and the types of policies that are being carried out in the area of manufacturer-dealer relations.

II. THE NATURE OF THE DEALERS' PROBLEMS: THE SETTING FOR LEGAL WARFARE

In this section we will look at how problems are both avoided and created in the manufacturer-dealer relationship and how those that do arise are solved privately without resort to outside forces

I am not pleased with my names for the two market supporting policies, but I have not been able to think of more descriptive terms. Despite any problem with the terms "transactional" and "functional," the law does tend to focus both on the expectations of the parties in the particular case and on the needs of the market institution. Yet what is good for the market as an impersonal mechanism is not necessarily going to carry out the expectations of particular parties, and so it is often helpful to keep these means of market support separate.

[5] Professor Kessler has reported many of the facts about manufacturer-dealer relations and the history of legal action in a fine article. See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957). Undoubtedly, my Article is greatly influenced by his. However, since I am asking different questions about the manufacturers and their dealers eight years after he wrote, our reports differ slightly where we discuss the same events. Professor Kessler's article is an important social fact that itself influenced developments after its publication. See also Kessler & Stern, *Competition, Contract and Vertical Integration*, 69 YALE L.J. 1, 103-14 (1959).

such as publicity or law. We will also survey what the dealers viewed as major wrongs committed by the manufacturers and for which the dealers had no remedies. This information should help explain why the dealers turned to the legal system for help in changing their relationships with the manufacturers, some of the purposes of the statutes and cases that were the result of this appeal to the legal system, and the consequences of all of this lawmaking.

A. General Considerations: The Relationship and the Balance of Power

1. THE NATURE OF THE RELATIONSHIP: PROBLEM AVOIDANCE AND CREATION

Initially, one must recognize that to describe the nature of the relationships between manufacturers and dealers requires generalization and thus some degree of inaccuracy. Not all dealers are alike. Some run an efficient volume operation selling, in a large city, a popular make such as Chevrolet. But others are not such efficient or skilled salesmen. Others sell fewer cars at higher markups. Some sell in smaller towns or in rural areas. Still others sell less popular makes of cars. One would expect that these differences would affect the relationships with the manufacturer. Nor are all manufacturers, or even all divisions of any one manufacturer, alike. Ford's policies toward its dealers have been far different from Cadillac's toward its dealers. Then, too, these relationships change over time and are influenced by such things as depressions, wars, sales campaigns, and governmental policies. Yet what follows is generally true if read with due allowances for the influences of such particularistic factors.[6]

The goal of the relationship is simple: to sell new automobiles so that profits are produced for both the manufacturer and the dealer. Both must provide significant resources if the relationship is to achieve this goal, and both must take significant risks. The dealer gives the manufacturer representation in a particular sales area by investing in plant, equipment, inventory, personnel, and promotion. Thus the dealer pays for much of the distribution system in the automobile industry, and his money rather than the manufacturer's is tied up in bricks and mortar, and, more importantly, in unsold new automobiles. Manufacturers require dealers to have a large inventory of various models of new cars, and the dealers buy their cars from the factory for cash upon

[6] In addition to material specifically cited, this section of the Article is based on interviews and such works as DRUCKER, CONCEPT OF THE CORPORATION 98-114 (1960); PASHIGAN, THE DISTRIBUTION OF AUTOMOBILES, AN ECONOMIC ANALYSIS OF THE FRANCHISE SYSTEM (1961); Ridgeway, *Administration of Manufacturer-Dealer Systems*, 1 ADMINISTRATIVE SCIENCE Q. 464 (1957).

delivery or even upon order.[7] Moreover, the dealer provides the skills in, and takes the risk of, making sales of new cars and handling used cars traded in on new cars. The dealer in seeking his own success helps achieve success for the manufacturer as well. The manufacturer, on the other hand, is supposed to give the dealer a salable product—an appropriate selection of different types of cars and trucks as well as opportunities to sell financing and insurance, accessories, and repair parts and service. Of course, a salable product is the result of such things as design and engineering, quality production, planning, advertising, trade name, nationwide service facilities, and a competitive price.

This relationship is held together by many factors, but primarily by mutual profit. The dealer is not left alone to sink or swim. He is at the end of an elaborate bureaucratic structure that is focused on his efforts. Manufacturers stand ready to do such things as train his salesmen and mechanics and advise him on management methods. He receives relatively frequent visits from the manufacturer's "road man" whose job is to help the dealer sell more cars. The dealer's and road man's degree of success is watched by a district and a territorial staff of the manufacturer. Problems common to many dealers are taken to Detroit for solution at the top levels of the corporate hierarchy of the manufacturer.[8] For example, top management has been concerned with helping their dealers handle used cars taken as trade-ins.[9] Moreover, the manufacturer's general success helps individual dealers as it is quite profitable to sell a "hot" car since there is less need to give customers large discounts.

To a great extent there is a shared agreement about the rights and duties of both manufacturer and dealer. To some extent this value system is formalized in an elaborate carefully drafted document called a "selling agreement" or a "franchise." Here the obligations of the dealer are defined in terms of what is rational in business—for example, the dealer must sell as many cars as dealers in similar areas sell, but there is no requirement that he have a pleasing personality or be unquestioningly loyal to the manufacturer.[10] On a less formal level, the nature of the business and the practices of manufacturers and dealers over time tend to create patterns of expectations. For example, although the selling agreement may give a manufacturer a right to cancel for inadequate sales, the company may have an announced policy of rehabilitation or giving dealers a second chance.[11] Many dealers would

[7] See Skilton, *Cars for Sale: Some Comments on the Wholesale Financing of Automobiles*, 1957 WIS. L. REV. 352.

[8] See DRUCKER, *op. cit. supra* note 7, at 108.

[9] *Ibid.*

[10] See, *e.g.*, FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION (1962).

[11] See, *e.g.*, Automotive News, Feb. 3, 1964, p. 10, col. 1.

expect to be treated as others had been treated and thus feel that they had a right to a second chance and help from the manufacturer to increase sales. Also manufacturer and dealer tend to share the general values of our society concerning business. Both believe that one is not in business for his health, but both have some view of the requirements of "business statesmanship."[12] Both usually share the values of part of our society concerning the desirability of limiting the role of government in economic activity—few officials of manufacturers or of dealers are likely to be found on the membership list of the Americans for Democratic Action.[13]

Despite all of these reasons for harmony, the manufacturer-dealer relationship is not always a happy one. The goal of the relationship is profit for both, but different business strategies will produce varying payoffs for each party. For example, a Ford dealer might be able to make a one hundred dollar profit on the sale of one car or a ten dollar profit on each sale of ten cars. The immediate result of either strategy is the same for the dealer, but clearly the impact on the Ford Motor Company differs greatly because in one case it sells but one car while in the other it sells ten. And even if our hypothetical Ford dealer sells ten cars at only a ten dollar profit on each one, he has no reason to care whether he sells Mustang sports cars, Falcon station wagons, or Thunderbirds. Yet the Ford Motor Company does. It must sell many units of all of the various models it makes, and it must sell its less popular models to recover its tooling costs on them.[14] Moreover, our hypothetical Ford dealer might seek to minimize his capital investment in his dealership in order to reduce indebt-

[12] See, *e.g.*, DRUCKER, *op. cit. supra* note 7, at 103; GENERAL MOTORS, ANNUAL REPORT 3 (1964); NATIONAL AUTOMOBILE DEALERS ASSOCIATION, THE FRANCHISED NEW CAR & TRUCK DEALER STORY 39-40 (1964).

[13] See, *e.g.*, "The newly rich and the shopkeepers, auto dealers, realty men and other small businessmen . . . tended for Barry [Goldwater] . . . ." Otten, *Business & Government*, Wall Street Journal, Feb. 2, 1965, p. 16, cols. 4-5. The dealers and the executives of the manufacturers were closer together in their Republicanism during the Eisenhower Administration. See *Hearings Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 960-61 (1956) [hereinafter cited as *S. Hearings, Marketing Practices, Monroney*].

Other congressional hearings which will be cited in this Article are *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. (1955) [hereinafter cited as *S. Hearings, General Motors, O'Mahoney*]; *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess. (1956) [hereinafter cited as *H.R. Hearings, Dealer Franchises, Celler*]; *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. (1956) [hereinafter cited as *H.R. Hearings, Marketing Legislation, Klein*].

[14] See, *e.g.*, *Preamble* to FORD MOTOR COMPANY, FORD SALES AGREEMENT at ii (1962).

edness or to free his capital for other uses.[15] Yet if increased investment results in increased sales of new cars, as is often assumed, Ford has an interest in seeing that the dealer remodels his premises, builds new facilities, keeps a large inventory of cars and parts, and adds more salesmen and mechanics.

The fact that modern manufacturers are large organizations is in itself a disintegrative factor. To some degree the dealer is part of an impersonal bureaucracy taking orders that come down from the top in the guise of advice and assistance. The road man, in his zeal to establish a good record of increased sales, may unofficially alter company policies to the dealer's detriment. These policies already may have been slightly altered in that direction as they were passed from top management to territorial offices to district offices and then to the road man.[16] Road men tend to be younger men without a great deal of experience.[17] As a result, an older dealer, with a great deal of experience, may resent the source of the company's advice and demands.[18] Road men change frequently in many companies, and thus the chance for friendship is decreased.[19] Finally, the goal of the manufacturer's organization is to sell automobiles, and it is set up to reward attainment of that goal and penalize failures. Consequently, even though a road man is sympathetic to a dealer's personal excuse for failure—family problems or ill health, for example—he is limited by his position in the organization as to how far he can consider such noneconomic factors.

Also there is not always full agreement about the rights and duties of the parties. The selling agreement is drafted by the manufacturer's lawyers in fairly legal language and accepted without change by the dealer.[20] Thus the dealer may have to acquiesce in the imposition of many duties without, through the process of bargaining, forming a belief that they are justifed. In a negotiated contract one may see the advantages gained by the other man as rightfully his since he paid a price for them by making a concession about another matter. However, in a printed-form, take-it-or-leave-it contract, one may resent a particular obligation or be surprised when he learns of it during the course of the relationship, because he failed to read or to understand the printed document. The conduct of the manufacturer may create an impression about the dealer's rights that contradicts the terms of the selling agreement.[21] Moreover, the dealer is likely to consider himself as an independent, and largely self-made, businessman, and the manufacturer may do a great deal to foster this view of the situation.[22] As a result, the dealer may think of the dealership as "his" business with all of the attributes usually implied by this concept. For example, most retailers who are successful own their own going business and are not dependent upon a single supplier for the very existence of that business. They can rely on the market for a product to sell; if they lose the Jones Furniture Company line, they can always stock Smith Furniture. Thus, the typical retailer can pass on his business to his son or widow, sell it to whomever he pleases for a profit that reflects the going business value, and, most importantly, run it as he pleases. Yet the automobile manufacturer sees to it that its dealers have, as an absolute matter, none of these rights.[23] This is done either through the terms of the selling agreement or by company policies since manufacturers need a great deal of control over who sells their products and how they do it—life is easier for the manufacturer if it can treat the dealer as a subordinate employee subject to orders and without tenure rather than as a typical independent retailer. Employees who are fired are often unhappy; a man who has had "his" business destroyed by having his franchise cancelled is likely to feel even a greater sense of wrong.

15 Often the dealer will be an older man who is concerned whether or not his wife and family will be able to get back the capital he has invested in the dealership upon his death. Interviews.

16 "Many . . . field men just get the smell of a new sales drive and, in their ambition, the suggestions from the top gather momentum until they're pretty awful when they reach the dealer level." Automotive News, Feb. 13, 1956, p. 1, cols. 2-3, at 43, col. 3.

17 *S. Hearings, Marketing Practices, Monroney* 708.

18 Interview.

19 Interview with dealer.

20 Interview.

2. PRIVATE SOLUTIONS OF PROBLEMS: THE BALANCE OF POWER

The relationship between manufacturer and dealer is not an evenly balanced one. Generally, the manufacturer of a successful line of automobiles has the dominant position both at the initiation and during the life of the relationship. However, one must not fall into the trap of thinking of the "poor little dealer" battling one of the nation's largest manufacturing corporations. Sometimes this may be the case; sometimes it may not. Many times the dealer is successful and wealthy, and his bargaining "opponent" is not General Motors but a particular road man or district manager. If a Ford dealer, for example, is doing an outstanding job selling cars, he will be able to ignore many of the requests or demands of the road man and demand that the road man use his influence

21 The dealer may even be told that he will not be required to comply with a provision of the franchise by one representative of the manufacturer and then be held to it by another. See, *e.g.*, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964).

22 See, *e.g.*, *S. Hearings, Marketing Practices, Monroney* 695.

23 See, *e.g.*, GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION (1962).

to get the dealer more of the best selling models quickly.[24] Also the dealer may have contacts with friends at various levels of the manufacturer's sales organization or in top management, and thus he may be able to go over the road man's head.[25] Then, if the make of automobile is not as successful as Chevrolet or Ford, a dealer with ability will receive some deference since he would be difficult to replace and since he may have a chance to become a dealer for another manufacturer.

Nonetheless, in most instances the manufacturers' representatives have held the balance of power over the dealers. Until the middle 1950's, the formal selling agreement between the parties said that the manufacturer made no promise to supply the dealer with cars and said that the manufacturer could terminate the franchise at will and without showing cause.[26] Manufacturers could adopt this approach since the gains to them of having legally enforceable rights against dealers are slight as compared with the costs of giving dealers legally enforceable rights. Typically, the manufacturer gets what it wants from its dealers. It often has more applicants who would like to be dealers than it has dealer-

[24] See the following statement by one of Ford's dealers with a very high sales record for many years:

> Senator MONRONEY. You have received pressure?
> Mr. HOLTSINGER. Yes, sir.
> Senator MONRONEY. Do you think it reached a point where it would be intimidation or fear of termination of your contract?
> Mr. HOLTSINGER. I have never been afraid of that. Maybe I didn't have sense enough to be afraid, but I never have been afraid.
> Senator MONRONEY. It isn't imaginary that dealers have been fearful that unless they did what the zone and district men said, that they would have some rather serious problems? Is that a correct statement?
> Mr. HOLTSINGER. I presume some of them did, but there has never been any fear on my part. I had one to tell me not long ago he didn't think I had bought enough automobiles and I told him to guess further. "I don't give a damn what you think. I think I have bought enough."

S. Hearings, Marketing Practices, Monroney 1403.

> Mr. HOLTSINGER. I never have had any trouble speaking my mind to them. I don't know whether you ever heard of Mr. Charlie Sorenson or not, but I will tell you that people that spoke of him spoke under their breath, and I told him once I was further in the Ford business than he was, that I had every nickel in the world I had in it, and he had a job. I have still got my contract.
> Senator MONRONEY. Do you know of any other dealers that did that?
> Mr. HOLTSINGER. I don't know. If they had told him that and meant it, they probably could.
> Senator MONRONEY. They probably didn't have the sales record you had, either. That would have some bearing on it.
> Mr. HOLTSINGER. I am not my brother's keeper, as far as that is concerned.

Id. at 1406-07.

[25] Interview.

[26] See, *e.g.*, FORD MOTOR COMPANY, FORD SALES AGREEMENT §§ 8(b), 10 (1949).

ships available.[27] It can either replace a particular dealer with another or even afford to lose representation in one dealer's market area without suffering a serious loss. A dealer is in a very bad position if his franchise is terminated. Upon termination it is difficult to salvage his large investment because a cancelled dealer finds it hard to get a franchise from another manufacturer of popular cars or has difficulty selling his building, tools, inventory, and good will to another dealer.

Short of cancelling a dealer's franchise, a manufacturer has another important sanction. The dealer naturally wants a stock of the best selling cars—the "hot" models—but often allocations are necessary because of shortages.[28] Those dealers who, in the factory representative's view, are most deserving get the most cars.[29] Also a dealer needs the factory's cooperation in getting fast delivery of cars that have to be built to the customer's order; delays here can cost sales.[30] Thus, a dealer thinking of opposing a factory policy may fear that to do so will cost him in the day-to-day operation of his business. Moreover, the nature of a bureaucracy gives top management certain advantages over one at the end of the chain of command. For example, it is difficult for a dealer who wants to negotiate for favors, exceptions to general policies, or recognition of unusual circumstances to find anyone he can talk with who has the power to make these concessions.[31] As a result, the dealer will be frustrated and give up unless the matter is worth all of the many costs of a trip to Detroit or unless the dealer knows higher officials personally.

Even if the dealer can find some one who has power to make concessions, in many instances he has relatively little to bargain with. The dealer might offer, in exchange for a concession from the factory, to exert more efforts to sell cars, not to switch franchises to another make, not to take on another franchise along with the manufacturer's, or not to sue. Unfortunately for dealers, in most instances, manufacturers need not buy these things from dealers. The threat to switch manufacturers' makes is only credible if an equally profitable alternative franchise is available in the dealer's community, and as fewer and fewer manufacturers sell

[27] Interview; *H.R. Hearings, Dealer Franchises, Celler* 381. However, an official of one manufacturer commented, "It may be difficult in many areas to find people who desire to be automobile dealers or who are willing to risk their venture capital in the retail business. Therefore, termination of any dealer always presents an immediate problem with respect to replacing that dealer." Letter. Undoubtedly, Chevrolet dealers in big cities are easier to replace than Studebaker dealers in small towns and other makes fall somewhere in between.

[28] See, *e.g.*, Zarbock v. Chrysler Corp., 1965 Trade Cas. ¶ 71, 361 (D. Colo. 1964).

[29] *Ibid*; Interviews.

[30] *Ibid.*

[31] Interviews.

most of the cars sold, the dealers have less and less of a "market out." Lawsuits against manufacturers are costly, time consuming, and hard to win. Dealers can be replaced or the factory can give a franchise to another dealer at a location close to the one who wants to bargain. If it is hard to find another dealer with sufficient capital, the manufacturers have programs to finance a young man with ability—say, the negotiating dealer's general manager—so that he can go into business with modern facilities and a large inventory of best-selling cars.[32]

B. *Some Relatively Recent History: Problems and Solutions the Dealers Found Unsatisfactory*

One can point to a number of examples of disharmony and the use of a manufacturer's power. Events in the 1920's and 1930's are reported vividly by historians Allan Nevins and Frank Ernest Hill.[33] We must look at this material in some detail since an understanding of the historical background is needed to understand the dealers' attempts to use the legal system to solve their problems. Often there is a "cultural lag" in the response of the legal system to social problems. It is easier to outlaw yesterday's practices than to anticipate tomorrow's. Later it will be seen that the legal system has done a better job handling the manufacturers' tactics of the 1920's and early 1930's than their more recent policies.

In the Ford Motor Company in the 1920's, "the discipline was military, each individual reporting to his superior."[34] Ford's position was that nothing was wrong with the Model T or Ford's policies, and so any lack of sales must be caused by the dealer's failings.[35] Dealers were supposed to talk only with road men and were not to complain to the company.[36] When cars are selling and profits are high, this kind of system can work; when the market for cars breaks, those at the bottom of the chain of command will be most unhappy and ready to try to do something about their situation. In 1921, Ford forced its dealers to take unordered cars. At that time Ford owed several banks about thirty million dollars and the United States forty million dollars. There was a depression that year, and Ford's factories were closed as a result of a lack of demand for cars. Henry Ford was faced with loss of some of his control over his company. The bankers wanted representation as a condition of giving him financial aid. To avoid borrowing from the bankers, Ford began production at his factories, shipped the cars he made to his dealers although none

[32] *Ibid.*
[33] NEVINS & HILL, FORD: EXPANSION AND CHALLENGE 1915-1933 (1957).
[34] *Id.* at 259.
[35] *Ibid.*
[36] *Ibid.*

had been ordered, and tacitly told them to accept the cars and pay for them on delivery or resign their franchises. "As one commentator put it: 'Instead of borrowing money himself, Ford compelled his dealers to borrow.'"[37] Most dealers survived, but the forcing of unordered cars made many angry.[38]

As would be expected, the depression of 1929 and the early 1930's caused great trouble for automobile dealers.[39] General Motors did the most to protect its dealers, but even many of them were forced out of business as sales dried up. Other manufacturers' dealers had a harder time. In 1929, Ford made his contribution to fighting this depression by applying the remedy that had worked in 1921. He expanded production, raised wages, and cut car prices. However, at the same time he announced a new sales policy. He believed that many dealers had made money without any effort on sales of the then new Model A, and so he cut the markup or commission given the dealers from twenty to seventeen and one-half per cent of the list price. Then he increased the number of dealers so that there would be a Ford dealer "at every cross-roads." Nevins and Hill have described the consequences:

> . . . the brusque, domineering [Charles] Sorensen was entrusted with the execution of the program. Believing that many dealers had become rich and lazy, he went to work with a will. . . .
>
> A Ford branch manager, Henry C. Doss, has given us an account of Sorensen's ironfisted approach. Having seen some of the worst effects of the . . . "cross-roads" program, Doss was against both the reduced discounts and the increase in dealerships. He was called in to give his opinion.
>
> . . . . . .
>
> Sorensen explained that the 8300 dealers affiliated with the Ford Company must be increased to 10,000, and that every dealer would be expected to give extra effort to his work. He looked at Doss defiantly.
>
> "I think that will be a great mistake and it will be disastrous," replied the branch manager. "You will be years living it down. You'll lose a lot of your dealers to Chevrolet and others."
>
> But Sorensen was adamant. Fresh dealers were given contracts in droves. Experienced agents who opposed the new policies and spoke their minds frankly were replaced as rapidly as possible. Stressing the importance of weeding out "undesirables," the company reminded branch managers of their wide powers in cancelling franchises. The "cross-roads" program was now at its worst. Many newcomers went into business in corner stores with the most rudimentary service facili-

[37] *Id.* at 165.
[38] *Id.* at 159-66.
[39] *Id.* at 578-80.

ties. "No objection," states *Motor*, "was raised to dealers getting locations as close as possible to established operators with large investments." Doss . . . resigned—but in vain.

. . . . . .

As indignation spread among the Ford dealers, their outcry reverberated across the country. Even agents for other cars, who still enjoyed discounts ranging from 20 to 24 per cent, and who perhaps felt themselves threatened, joined their voices in protest. One Detroit newspaperman termed the clash of interest "the biggest factory-dealer battle in the automobile industry since its start thirty years ago." A convention of Illinois bankers attacked the Ford policy on the double ground that failing dealers were a financial problem, and that the multiplication of agencies had stimulated excessive allowances for old cars and fomented an unhealthy condition in the industry. So incensed were the bankers that they refused to give credit to any of the newly-established "cross-roads" agencies. Meanwhile, the defections from the Ford ranks which Doss had predicted grew into a steady stream. Chevrolet in particular recruited many able Ford dealers, who added strength to the already well-schooled and well-protected General Motors corps.

Even amid the nation's varied troubles that winter of 1929-1930, the rebellion of the Ford dealers attracted the sympathetic gaze of industrial analysts. . . . *Business Week* offered a measured appraisal of the outbreak:

> Specifically, many Ford dealers object to: (1) roadmen who tour the country and report all violations of factory rules and enforce strict discipline upon the dealer organization; (2) reduced discounts by which the possible margin for net profit has been reduced to approximate invisibility; (3) treating contracts as "scraps of paper" as was done with the demand upon dealers to sign riders to their franchises accepting 17.5 per cent discount at the peril of their business lives; (4) ironbound, factory-set quotas which frequently have little relation to sales possibilities in the dealer's territory but are ever before them; (5) inclusion of Lincoln cars and Ford trucks in quotas for localities where sales of either may be practically impossible; (6) failure of factory to consider dealer's needs in distributing models and colors; (7) having to buy all garage equipment from a recognized Ford source regardless of relative need or price of equipment; (8) factory exercising authority over amount of money to be spent for show rooms, garages, and similar investments in the business.

Ford and Sorensen, seeing that if they persisted the network of dealers would be torn to shreds, had to retreat. . . . [They appointed a new sales manager, gave higher discounts and gave more attention to public demands for different designs.]

. . . . . .

> "Dealers naturally are gratified over their victory," wrote a newspaper observer, "but they are not wildly enthusiastic because they have no illusions as to what it presages." They had two fears: that the company would force cars upon the well-established dealers by high-pressure methods, and that it would multiply small new dealers with contracts calling for low quotas, and hence earning lower commissions. Both fears proved to have some justification. As competition grew hotter, all companies did a certain amount of forcing. All applied various kinds of pressure; and the Ford Company was not behind its rivals. [And Ford increased the size of its dealer force in 1931.][40]

Another crisis for the dealers came in the early 1950's. The dealers emerged from World War II with the pleasant situation of demand far exceeding supply.[41] The Studebaker was a big seller, and Nash, Hudson, Packard, and even the new Kaiser-Frazier dealers found themselves in good positions.[42] The big three dealers were very successful too.[43] But supply began to catch up with demand in the early 1950's about the time the newly rebuilt Ford Motor Company began its serious efforts to challenge General Motors for sales leadership. Moreover, some of the models produced by some manufacturers were not well accepted by consumers who now could get delivery of the cars they wanted within a reasonable time; in short, there was distress merchandise on the car market available at highly discounted prices.[44]

During this period all manufacturers sought to induce their dealers to sell more cars. The race between Chevrolet and Ford was hotly contested. More "high volume" dealers appeared who seemed to offer to sell cars for less. One way to profit from volume selling is to make many small profits that add up to a big total profit. Another is to "pack prices" so that the actual price paid by the customer only appears to be small. For example, if a dealer gives a customer $1,000 as a trade-in on a car worth only $500, the dealer can recover his loss by telling the customer that the list price of his new car is $500 greater than it actually is. Or a dealer can pack in very high insurance charges and interest costs and turn a tidy profit.

This "discount house" approach dismayed many, but clearly not all, dealers.[45] On one hand, volume selling requires great effort, sharp trading, and efficient cost controls and business methods. On the other hand, volume selling implies a loss of status—the respected solid merchant must become "Horse Trader

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[40] *Id.* at 580-83. (Footnotes omitted.)
[41] See, *e.g.*, NEVINS & HILL, FORD: DECLINE AND REBIRTH 1933-1962, at 315 (1963).
[42] Automotive News 1965 Almanac, April 26, 1965, § 2, pp. 74-75.
[43] *Ibid.*
[44] *S. Hearings, General Motors, O'Mahoney* 3603.
[45] See, *e.g.*, *S. Hearings, Marketing Practices, Monroney* 278-79.

Harry, the Mad Mongolian" and engage in distasteful practices that cost him community esteem. Ford, in effect, told its dealers it approved of misleading advertising and the pack;[46] General Motors "reluctantly" decided to go along with the practices of the industry.[47] From the view point of top management, it was just aggressive salesmanship or meeting the competition. Yet it could look very different from the position of a dealer. He was likely to view aggressive salesmanship as coercion and pressure.

Factory representatives—road men and district managers—were in the middle. Promotion came to those who produced sales, and the more the dealers were pushed, the more they sold.[48] As a result, dealers were pushed and pushed harder.[49] Each year as it

[46] *Id.* at 993-95.

[47] *Id.* at 206, 733.

[48] See Automotive News, Feb. 13, 1956, p. 1, cols. 2-3, at 43, cols. 1-3. A Dodge field man explained that dealers would not order trucks since they were harder to sell than cars but that if one got trucks into a dealer's hands, he would sell them. "Frequently, he'll make a profit, too." *Id.* at 43, col. 3.

[49] See *id.* at 43, cols. 1-3.

A fictional account of a meeting between a road man and a dealer, which as been called an accurate one by an industry paper, illustrates the problem as it was seen by many dealers:

> "What I want . . . is for the factory to cut the quota down. By thirty-five percent. If you can't see your way to get this through, Mr. McGregor, then I'll put it up to the factory directly," Scott stated.
>
> . . . . .
>
> "Boys," McGregor stood up for the first time, his smile still undiminished in brilliance, "your schedule for June calls for two hundred units, and two hundred units is what I know you'll sell. Before the month is out you'll be calling in begging us for more . . . ."
>
> . . . . .
>
> "Mr. McGregor," Scott said, "why can't we have a working arrangement that makes sense? A quota based on a rate of sales rise . . . ."
>
> . . . . .
>
> "We've got to work out a system that'll allow us to reduce the number of units, based on a—"
>
> "My boy—" McGregor's gaze was incredulous, "that's like asking the President of the United States if he'd mind cutting down his term to two years."
>
> "I'm going to the factory then."
>
> "My boy," McGregor said, and a new fiber of toughness threaded through his tone, "as far as the factory is concerned, I'm it."
>
> "I'm sorry. I'm going to the factory myself."
>
> "With what?" McGregor stood, his legs splayed in a stance of confidence. "Let's assume you get up to the third floor. What's your weapon, my boy? Do you think you can walk in and organize a new system when the system we have produces a first quarter of over five million dollars? What's your weapon, my boy? But before you try to figure that one out, let me just give you a few hints as to how the future stacks up. . . . What's on the drawing boards for 1965 and '66 is staggering! . . . We've had over one hundred applications for franchises for next year. Why? Because in this business you can smell a good thing, and everyone wants to get in on it . . . which means the company is going to be very choosy about its dealerships, which means that by 1965 they might be scratching

was time to renew the franchise, the dealer had to review his performance with the district people, promise in writing to do better or resign his dealership, agree to buy tools and equipment that the factory said he needed and receive a pep talk.[50] In addition, during the year dealers would review their performance with several manufacturer's representatives in a parked car or in a hotel room—but not at the dealership where witnesses could make records of what was said.[51] Cooperation could be rewarded with allocations of hard to get station wagons. To get those "hot" models dealers could be pursuaded to order hard to sell trucks.[52] Unordered cars would arrive, and dealers who returned them lost favor with their district managers.[53] The manufacturer typically told the dealer that he was expected to sell his make's national average.[54] If Buick sold eight per cent of the cars sold nationally, the Buick dealer in each town had to sell eight per cent of the cars sold in that area.[55] Given the nature of an average, many dealers were bound to be in trouble. Moreover, in a town where the income level was low, the Chevrolet dealer had a much easier job than the Buick dealer.[56]

All of this sales pressure had many consequences. Consumers probably paid somewhat less for their cars, but dealers, in some cases, offset this by higher charges for financing and insurance or by increasing the alleged list price of the car from which discounts would be given.[57] Some dealers saved money by cutting

> off the gripers from their back, which means they only play ball with the happy teams. . . . I'd say you'll want to get in for the big blast-off, I doubt if you'll want to bow out just when it carries the biggest payload . . . ."
>
> "I wasn't talking about bowing out," Scott said.
>
> "You might not have known it," McGregor said softly, "but you were."

GILBERT, AMERICAN CHROME 79-80 (1965). "Here for the first time are reconstructed actual conversations between dealers & factory representatives, so lifelike that it would seem that the author is present when his mythical regional sales manager . . . puts heat on dealer . . . ." Motor News Analysis 4 (March 1965). Another fictional version of a road man-dealer interview will be found in KEATS, THE INSOLENT CHARIOTS 114-22 (1958).

[50] *S. Hearings, Marketing Practices, Monroney* 239.

[51] Munn, *What Dealers Tell Me*, Automotive News, May 16, 1955, p. 3, cols. 1-2, at 76, col. 5; *S. Hearings, Marketing Practices, Monroney* 104-05, 216. Road men explain meetings in hotel rooms or automobiles by saying "we have been trained and taught to respect a man's privacy." Record, Vol. II, p. 346, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

[52] See, *e.g.*, *S. Hearings, General Motors, O'Mahoney* 3389.

[53] Interview with former road man for one of the manufacturers.

[54] See *S. Hearings, General Motors, O'Mahoney* 3456-57, 3459, 3547-48, 3787-91.

[55] *Id.* at 3787-91.

[56] *Id.* at 3243-44; but see *id.* at 3789-91.

[57] The following is a partial list of the sales tactics common in the 1950's in some parts of the country:

down on the predelivery service given to new cars and on effort given to repairs under the warranty obligation.[58] Still others

The switch.—Advertising a notable bargain, then telling customers it has been sold and persuading them to switch to another car—and a less attractive deal.

Bushing.—Luring a buyer by offering a bargain price, then hiking the price. The original offer is made by a salesman "subject to the manager's approval." The manager later indignantly disclaims it and persuades the buyer, by this time emotionally committed, to accept the higher price. In some cases bushing is cruder—the buyer is given a price, persuaded to sign a blank sales agreement. Later he finds it has been filled in for much more than he expected to pay.

Lowball.—Sometimes the same as bushing—a low price given verbally, later repudiated—but also used to describe the practice of giving an unsophisticated customer much less than the going trade-in value of his car.

Highball.—A very high offer made verbally on a trade-in just to get the customer inside the salesroom, where he will be pressured to take less.

Would you take?—Cards are tucked under your windshield wiper in a parking lot asking "would you take" a fantastically high price for your car because the dealer "has a buyer." If the prospect goes around to try to collect he gets the full highball treatment.

Unhorsing.—Lending a prospect a car while his own car is taken and held for sale in an allegedly rising used-car market. It turns out after a month or so that the market has inconveniently fallen and his car has been sold for considerably less than he expected—leaving the customer with no car and under obligation to the dealer.

The pack.—A simple method of luring buyers with nonexistent bargains. A group of dealers—sometimes only one—raise their list price for a new car by several hundred dollars. This permits all sorts of alleged bargain offers from "$1 profits" to "double book value" trade-ins. In at least one case it recently enabled a dealer to offer customers more than they paid for their 1955 cars if they would trade them in on 1956 models. The pack is facilitated by the fact that there is no real local list price; manufacturers' prices are quoted f. o. b., Detroit. This practice is sometimes called the top pack in contrast to a plain pack, in which various charges for mysterious accessories and services are packed onto the sales price.

The finance pack.—A maneuver to increase the profit on financing of car purchases. Here the dealer can sometimes recoup profits that have been squeezed out of a sale. Using a rate chart supplied by the finance company, the dealer can set the rates so high that he can sell the time contract to the finance company at a discount and still receive an extra profit for himself. This "commission" to the dealer is of course paid by the buyer in his installments to the finance company. Sometimes overcharges for insurance are included. Where these charges are lumped together into a single monthly payment, as they often are despite a Federal Trade Commission order that they be itemized, the buyer has no real way of knowing what he is paying for.

Ballooning.—Drawing up a time contract with low monthly payments except for the last installment, which in some cases is so big the buyer has to refinance his note.

H.R. Hearings, Dealer Franchises, Celler, 591. See also Miller, *The Social Base of Sales Behavior,* 12 SOCIAL PROBLEMS 15 (1964), for a study which analyzes "sales behavior by focusing on the interaction which occurs between the new car salesman and customer during the sales transaction: the 'contract,' marking the beginning; the 'pitch,' the middle; and the 'close,' signifying the end of the social encounter." *Id.* at 16.

[58] See *S. Hearings, Marketing Practices, Monroney* 1258. "We recall a time some years ago when many dealers were following the example of the wild traders in confining new-car preparation to a wash and polish in order to have another $30 to trade away." Automotive News, May 3, 1965, p. 12, cols. 1-2.

sold new cars to used car dealers for a small profit in order to achieve the expected "market penetration" and keep the factory pleased—of course, the used car dealer operated in another area so that he did not compete with the "bootlegging" dealer who sold him new cars. The new car dealer with whom he did compete was not happy.[59]

Some dealers flourished. Some quit. Others were cancelled by the factory or pushed into an involuntary "voluntary" termination.[60] The internal review that existed within the manufacturers' organizations was thought to uphold almost uniformly the cancellations.[61] A large group of dealers were unhappy with their lot. Some wanted to control their relationships with the manufacturer; perhaps more wanted to control the conduct of other automobile dealers by ending "bootlegging" or achieving "territorial security" so that neighboring dealers would be discouraged from selling to consumers outside of "their territory."[62] Some wanted to control advertising and sales practices.[63] Many wanted all of these things, but some were opposed to any interference with free enterprise.[64]

But there are two sides to this story. The manufacturer's case is much more simple, but not, for that reason, less compelling. Some dealers are poor salesmen and inefficient; others will work

[59] See, *e.g., id.,* Feb. 28, 1955, p. 38, cols. 1-2; *id.,* April 18, 1955, p. 1, cols. 2-4, p. 66, cols. 1-3.

[60] See, *e.g., S. Hearings, Marketing Practices, Monroney* 206.

[61] From 1938 to 1955, the General Motors Dealer Relations Board reversed the termination or nonrenewal of a dealer by a car producing division 6 times and affirmed the division 47 times. In 1954 and 1955, there were no decisions in favor of dealers and 16 in favor of the divisions. Of course, it should be stressed that in those same two years, the general sales managers of divisions reversed nonrenewals and granted new selling agreements in 105 cases and affirmed the division in 74 cases. As a result, the cases where cancellation was not justified may have been screened out before they ever got to the stage of an appeal to the Dealer Relations Board. See *S. Hearings, General Motors, O'Mahoney* 4382-83. On the other hand, the information furnished by General Motors does not show how often the general sales manager's reversal was a one-more-chance decision that ultimately would have resulted in termination for failure to reach high quotas. Significantly the number of cases appealed to general sales managers jumped from 15 in 1953 to 47 in 1954 and 144 in 1955, and the cases appealed to the Dealer Relations Board jumped from 1 in 1953 to 14 in 1954 and 24 in 1955. *Id.* at 4383. Undoubtedly this increase reflects the changed competitive conditions in the new-car market which occurred at this time. It might also reflect changed policies of the sales staffs of the car divisions of General Motors.

[62] See Automotive News, Jan. 24, 1955, p. 1, cols. 2-5; *id.,* April 18, 1955, p. 1, cols. 2-4, p. 66, cols. 1-3.

[63] See *S. Hearings, General Motors, O'Mahoney* 3172-73.

[64] See, *e.g., H.R. Hearings, Dealer Franchises, Celler* 100.

at less than full capacity if they are not pushed.[65] Lower sales ultimately mean higher priced cars for the public. Manufacturers must sell huge quantities of all models of cars and trucks to cover their costs, pay their employees, and return a profit to their shareholders and at the same time provide transportation to the public at an acceptable price. While no single inefficient dealer can injure the manufacturer seriously, collectively many dealers exerting less than their best efforts could. Any system of "due process" for reviewing the action of the sales force of the manufacturer has fairly high costs. Most seriously, such curbs on the men who see dealers might inhibit their efforts to push the dealers to make sales, thus reducing the number of units sold and thereby raising costs and lowering profits. Until relatively recently,[66] these costs have not been seen as worth any benefits that might result.

Moreover, the manufacturers can assert that the pressure for sales helped hold down the inflationary price push of the 1950's since many consumers received their cars for less. Also, even conceding that pressures and coercion existed in some cases, it is difficult to assess how often they occurred.[67] Finally many dealers, if not the majority, have been given an opportunity by the manufacturer to earn a great deal of money by selling a product that is in demand, and many dealers have used this opportunity to make a great deal of money. The price of this opportunity is performance—the dealer must sell cars. Dealers are well aware of the requirement that they sell, and they take the risk of failure as well as the chance of success.[68]

[65] As a result of hearings before two committees of the United States Senate which were held in 1955 and 1956, see *S. Hearings, General Motors, O'Mahoney; S. Hearings, Marketing Practices, Monroney,* the manufacturers eased the pressure for sales. Sales of new cars dropped. Some dealers said at that time that the manufacturers must push dealers just as hard as the dealers pushed their salesmen. Automotive News, Feb. 13, 1956, p. 1, cols. 2-3, at 43, cols. 1-3.

[66] See note 408 *infra* and accompanying text.

[67] One dealer said that there were no real problems but that dealers always complain just as those in service "gripe" at the system. *S. Hearings, Marketing Practices, Monroney* 1403. A similar comment was made by a trade association manager whom I interviewed. Ford had about 6,300 dealers in 1954 and 1955. In 1954, it terminated the franchises of 8; in 1955, 28. *Id.* at 978. One must recall Kessler and Sharp's warning, "As always when dealing with opinion, the student should be alert to the possibility that the countercurrent supporting social control by state action draws its psychological strength from attitudes and convictions which may not have accurately reflected the objective facts of economic and social life." KESSLER & SHARP, CASES ON CONTRACTS 6 n.19 (1953).

[68] The most drastic example is the failure of the Edsel. A Ford official has written:

> The subject of Edsel dealers, as you might expect, involves several complex and difficult matters. Suffice it to say that the entire matter was an unhappy and a trying experience for all concerned. In many instances, Edsel dealers were given a Sales Agreement for another product line of our Company. We also attempted to limit their losses by repurchase of inventories. . . . While we felt then, and feel now, that dealers must be willing to share losses as well as profits with us, the Company did make every reasonable effort to assist Edsel dealers in limiting their losses.

Letter.

III. ATTEMPTED SOLUTIONS: INDIVIDUAL LAWSUITS, COLLECTIVE BARGAINING, AND AN APPEAL TO THE LEGAL SYSTEM FOR CHANGES IN THE RULES

In the process of changing the nature of a relationship through the use of the legal system there is a pattern which involves a typical sequence of stages.[69] In the first stage, individuals seek relief by taking their case to an agency of government. While usually individuals go to court, at times they will turn to an attorney general's office or a regulatory agency. However, usually the individual will fail if the problem requires significant changes in the law. Even if he wins, he may do so in a way that promises little to others in similar situations or his victory may come at unacceptably high costs so that others cannot use his precedent to their advantage. The second stage involves organization of a group of those aggrieved by the problem or the mobilization of a group that already exists. This group usually will attempt to "collectively bargain" with those that are creating the problem (the opponents). Collective private action succeeds sometimes. If it fails, the group reaches the third stage: collective action to induce the legal system—typically the legislature— to make changes that bring solutions. Success in lobbying usually brings about the fourth and fifth stages. The fourth stage involves attempts by the opponents to deal with the situation and responses of the proponents. The opponents may view the law in its most narrow construction and comply only that far, or, at the other extreme, they may seek to make major changes in policies or in organizational structure to modify the circumstances that caused the problem in the first place. The fifth stage involves further legal battles when someone thinks that the new legislation has not been complied with. The failure of an individual at this stage

[69] I prefer to call this sequence of stages a useful pattern for analysis rather than a model. The term model may imply that, absent imperfections, events ought to occur in a certain order or bear certain relationships to each other. I do not make this claim for my five stages of changing relationships through the use of the legal system.

Clearly my pattern for change is not an empirical assertion; I have not catalogued the stages in social movements which use the legal process and found five recurring stages. While I can think of examples where the pattern does describe what happened, all that I assert here is that this sequence of stages helps in thinking about the dealers' and manufacturers' skirmishes in court and before agencies and legislatures.

For a different sequence of stages, see HARRIS, THE REAL VOICE (1964). This book is the story of the late Senator Kefauver's fight for legislation controlling practices in the drug industry. In this case the legislative effort was initiated by a legislator and his committee staff.

may prompt a repetition of at least part of the process—an organization may begin lobbying for repairs to its statute. These stages are like battles in a war. Victory or defeat at any point does not necessarily mean that the war has been won or lost. Only when we have surveyed all of the stages and determined that it is unlikely that the cycle will begin again can we ask who won the war.

This "model" reflects what has happened in many instances. However, it is clear that things are not always that neat. For example, the probability that any later stage may occur may influence any earlier stage. When one comes to court to enforce rights created by a statute (the fifth stage), often the statute is challenged on constitutional grounds. The possibility of such a challenge probably influenced the drafting of the statute (the third stage). Moreover, action in several states may influence action on a federal level which in turn influences action in several other states which in turn influences voluntary compliance elsewhere. Also, those seeking legal help may skip any stage if it is obvious that they will be unsuccessful at that point.

It is likely that this pattern of stages would have to be refined to be a true model which covered all social movements which sought to control other individuals or organizations with superior market power. However, the attempts by the automobile dealers to solve their problems with the manufacturers have followed the pattern of five stages fairly closely. As a result, it has been found useful and less confusing to organize this part of the article in terms of this model rather than chronologically.

A. The First Stage: Individual Legal Action and Individual Defeat

In the 1920's, the 1930's, and the early 1950's, dealers were unhappy about being forced to take unwanted and unordered cars from the factories and about sales quotas enforced by terminations of the franchises of those who failed to meet them. Attempts to stop these practices through the common law of contracts were largely unsuccessful.[70] To a great extent the common law has facilitated the operation of large corporations by not looking to the "inequality" of bargaining power or skill in transactions between manufacturers and dealers and by allowing the manufacturers to deal on the basis of legally unenforceable agreements—"treaties" that are supported by the manufacturers' collection of other-than-legal sanctions. Thus, typically, the manufacturers have been able to act as they pleased because their lawyers

[70] Attempts to stop these practices through the use of private antitrust litigation also has been largely unsuccessful. See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1165-67 (1957).

drafted the provisions of the dealer-manufacturer selling agreements, and dealers accepted these standard forms without modifications. Until fairly recently, when major changes were made in the franchises, they were legally unenforceable as contracts because they lacked mutuality of obligation. While the manufacturer demanded that the dealer sell enough cars and invest enough capital in the dealership to satisfy the manufacturer, it reserved the right to cancel the agreement at will and was careful not to promise to do anything.[71] Thus the document gave the dealers no rights.

If a dealer wants to stop a manufacturer's action through the common law of contract, the dealer must find a promise on which to sue. His best hope is to convince a court to "imply" some obligation of the manufacturer into the selling agreement—for example, an obligation to use its powers only in good faith. Most dealers who have tried have not succeeded in persuading a court to fashion such an implication.[72] This is not too surprising. It is clear that the manufacturer intended to make no such promise to its dealer, and the formal document carefully makes no such promise. Treating the document as written arguably provides predictability and certainty and also carries out the allocations of risks reached in the market. Market functioning[73] is aided since this legal response is a certain item of information and the manufacturer can plan its operations without the costs of challenges to its policies. It can benefit the public by removing inefficient dealers quickly and thus keep the prices of cars low and the quality of service high. Moreover, to read in a limitation of good faith would require courts to define that term on a case-by-case basis over a long period of time. Until the courts had decided sufficient cases to give content to the concept of good faith, the manufacturer would be faced with the choice of making a compromise with its complaining dealer or submitting its actions to review by judge and jury. This unpredictability and the chance of jury awards based on sympathy does not aid market functioning. One can add to this "functional" policy argument some element of "transactional" policy. The dealer assumed the risk that he could

[71] See, *e.g.*, FORD MOTOR COMPANY, FORD SALES AGREEMENT (1938). "Company agrees to give careful consideration to all orders received from Dealer but expressly reserves the right to follow or depart from such orders, and Company shall in no way be liable for failure to ship, or for delay in shipments however caused . . . ." *Id.* at § 8(b). "This agreement may be terminated at any time at the will of either party by written notice to the other party . . . ." *Id.* at § 10.

[72] The cases are surveyed in HEWITT, AUTOMOBILE FRANCHISE AGREEMENTS (1956), and Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1149-56 (1957).

[73] See Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 813-17 (1961). See also Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U.L. REV. 751 (1965).

run a profitable business and sell sufficient cars to satisfy the manufacturer's increasing quotas, or, at least, he should be treated *as if* he had. He signed a document that gave him no rights, and the pressure on dealers to sell has been widely publicized. Thus, perhaps, it makes some sense to say that the dealer accepted a status as a dealer for the X Motor Company at its pleasure and subject to its whims.

In order to give a dealer a remedy, a court must turn from this "functional" policy argument mixed with a little risk assumption and seek to carry out another policy. It could try to follow the lines of "transactional" policy by asking what were the dealer's reasonable expectations for which the company was responsible and look to all of the company's conduct to determine the answer to this question. Very possibly, the company caused the dealer to believe that it would behave as a rational business organization, its representatives would deal in good faith recognizing his rights as an independent businessman, it would not mislead him and cause him to make a large investment without a fair chance to reclaim it, or some or all of these things. While the written selling agreement may convey none of these impressions, a court might conclude that actions speak louder than words. Moreover, a court could turn to nonmarket policies and relieve hardship or do some economic planning. Judge Clark once argued against any action that would require the court to depart from the four corners of the selling agreement:

> With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take. The onerous nature of the contract for the successful dealer and the hardship which cancellation may bring him have caused some writers to advocate it, however; and an occasional case has seized upon elements of overreaching to come to such a result on particular facts. . . . But, generally speaking, the situation arises from the strong bargaining position which economic factors give the great automobile manufacturing companies: the dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact one-sided. To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains.[74]

As we have seen, the bargaining position of all but those dealers who have very high sales or who know the right people is weak.

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

The judicial response under the common law of contract does nothing to improve it. Rather this level of the legal system validated and aided the practices of the manufacturers. However, it is a mistake to assume that the hands-off position of most courts was the major cause of the dealers' troubles. One cannot be sure that the dealers would have been content even if they had won all of their cases and a duty of good faith had been imposed on the manufacturers. On one hand, the cluster of other-than-legal sanctions held by the manufacturers would have left them with great power over the dealers. Good faith is not a precise standard that would diminish much of this type of control. On the other hand, an award of common-law damages is not a very good remedy for defaults in the operation of a continuing long-term relationship. Those manufacturers who would have been sued would not have thought highly of the litigating dealers; the future of these business relationships would not have been promising. Moreover, proving the amount of damages would have been difficult: Had the manufacturer acted in good faith and the relationship continued, how much profit would the dealer have made over how many years?[75]

B. The Second Stage: Organization and Collective Private Action

The failure of individual bargaining and contract doctrine to provide dealers security in their relations with the manufacturers prompted collective action. Dealer trade associations had existed for a long time[76] and could be mobilized to battle the manufacturers. As dissatisfaction grew at particular times, these organizations sought remedies. State trade associations passed resolutions calling for an end to unwarranted pressure for sales and to other policies of the manufacturers that displeased the dealers.[77] Some managers of the state associations talked with friends who held high positions with the manufacturers.[78] The National Automobile Dealers Association (NADA) also passed resolutions,[79] and its representatives sought to negotiate with the manufacturers

[75] *Cf.*, Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1184-89 (1957).

[76] The National Association of Automobile Dealers was organized in 1917 to fight a proposed five per cent tax on factory prices of new automobiles and a ruling by the War Industries Board that since cars were nonessential luxuries manufacturers would have to devote their energies to war work. NATIONAL AUTOMOBILE DEALERS ASSOCIATION, THE FRANCHISED NEW CAR & TRUCK DEALER STORY at iii-vii (1964).

[77] See, *e.g.*, Automotive News, Nov. 7, 1955, p. 6, cols. 4-5, at 73, col. 1 (Connecticut Automobile Dealers Association passes resolution stating that unless threats and coercion by manufacturers' representatives end, the Association will seek legislation); *id.*, Dec. 12, 1955, p. 1, col. 5, at 4, cols. 2-3 (Nebraska Automobile Dealers Association passes similar resolution).

[78] Interviews.

[79] See, *e.g.*, Automotive News, Feb. 7, 1955, p. 1, cols. 3-5, p. 48, cols. 1-5.

about both general policies and the cases of specific dealers who were facing termination.[80]

Dealer associations could do certain things that individual dealers could not do. They could hire professionals with skills in negotiation, legislative drafting, and lobbying. They could object to a manufacturer's policies without fear of retaliation, and thus they could serve an insulating function. They could seek access to top management in Detroit, unlike dealers who, in many instances, could not afford to travel there. They could seek to have top management address state or local dealers' meetings and be available for informal talks afterwards. They could collect facts and inform dealers about the practices of the companies. They could pass resolutions, and resolutions of dealer associations are more likely to cause the manufacturers to re-examine their policies than the complaints of one dealer. But most importantly, dealer associations could purport to speak for a relatively large group of small businessmen before forums sympathetic to this group—in short, they could lobby or threaten to do so.

Dealer associations are likely to favor private negotiations with manufacturers rather than governmental regulation. If such negotiations work, the costs of a solution are minimized. It takes less time and effort, and both parties are more likely to leave the conference room with a good opinion of one another than if governmental force is used to reach a solution. Moreover, dealer associations have ideological problems that may inhibit any attempt to use the legal system or affect the form of governmental help sought. For example, many members of dealer associations are small businessmen with a history of oppostion to government interference with free enterprise.[81] However, from a dealer's standpoint probably the most effective legal approach to manufacturer-dealer problems is a licensing scheme covering both parties that is administered by a governmental agency. Representatives of some associations have said that their groups rejected this

[80] See, *e.g.*, NADA Magazine, Feb. 1957, p. 22 (Speech by George Romney describing 1947 meetings between the Automobile Manufacturers Association and NADA). See also *S. Hearings, Marketing Practices, Monroney* 57.

[81] The executive vice-president of the National Automobile Dealers Association in 1957 called for right-to-work laws to curb unions. "It's only by laws of this type that we will regain our economic freedom." NADA Magazine, Nov. 1957, p. 9. He also deplored, "a country whose citizens seem to accept, albeit in an attitude of apathy, the growing encroachment of Federal power, Federal benevolence, Federal paternalism, Federal injection in the lives of its citizens." *Id.* at 11 (June 1957).

One dealer recently "complained that dealers are 'losing control over their businesses because of the increasing number of controls and regulations enforced by the government.'" Automotive News, March 29, 1965, p. 3, col. 5.

approach because of the affront to free enterprise principles.[82] It is much easier to rationalize in free enterprise terms a penal statute against coercion or the creation of a private cause of action than the creation of an administrative-licensing system.

Unfortunately, for the organized dealers, before the mid-1950's private negotiations with manufacturers were disappointing. At one time the Ford Motor Company told its dealers not to join trade associations,[83] and it never welcomed suggestions from them.[84] In the 1930's a high official of the Buick division of General Motors refused to discuss problems with the NADA since it was a "polyglot" organization representing dealers from all makes rather than just Buick dealers.[85] During this period, officials of General Motors insisted that they could "deal directly" with their dealers as individuals rather than through outside intermediaries.[86]

Some manufacturers created their own dealer organizations to advise top management. The General Motors Dealer Council was established in 1935,[87] the Ford Dealer Council in 1945,[88] and the Chrysler Corporation's divisions created councils in 1950 and 1951.[89] Until the early 1950's, these groups were composed of members appointed by the manufacturers. A number of dealers felt that these dealer councils faithfully told top management just what it wanted to hear and no more.[90] Of course, management has denied this, citing the criticism and argument that was presented at the meetings of the groups.[91] Alfred P. Sloan, Jr., the chief executive officer of General Motors until after the Second World War, explained General Motors' system:

> The group of dealers comprising the General Motors Council . . . has always been appointed by General Motors rather than elected. We have felt that this method, because of the particular setup of General Motors—made up as it is of five car divisions and one truck division—would require quite a complicated arrangement if the council of dealers was to be on an elected basis. Membership on the various groups of this council reflects sizes of dealerships, sizes of dealers' communities, and geographical location, as well as numbers in each division.[92]

[82] Interviews.

[83] NEVINS & HILL, FORD: EXPANSION AND CHALLENGE 1915-1933, at 259.

[84] Interviews.

[85] Interview with dealer who was one of the NADA representatives involved in the incident.

[86] Interview. See also *S. Hearings, General Motors, O'Mahoney* 3183, 3452-53; *H.R. Hearings, Dealer Franchises, Celler* 74-5.

[87] *S. Hearings, Marketing Practices, Monroney* 1444.

[88] *Id.* at 975.

[89] *Id.* at 445.

[90] See *id.* at 16, 57, 125-26, 181-82; *S. Hearings, General Motors, O'Mahoney* 3461.

[91] See, *e.g.*, *S. Hearings, Marketing Practices, Monroney* 725, 975, 990.

[92] SLOAN, MY YEARS WITH GENERAL MOTORS 301 (1964).

Whatever the merits of these channels of communication and means for collective negotiation, many dealers were not satisfied with the results. The battle had to pass to the third stage.

C. *The Third Stage: Lobbying and Battles Before Legal Agencies*

The organized dealers, perhaps in some cases regretfully, turned to the legal system to change manufacturer-dealer relations once it was apparent that they would not solve their problems with individual law suits or negotiation by the dealer organizations. First, they attempted to use laws of general application with some success. But then they tried to create new laws by state legislation and to use the powers of Congress. We will consider the dealers' activities in that order.

1. THE USE OF LAWS OF GENERAL APPLICATION

The various dealer associations first turned to the laws they found on the books and made appeals to have them enforced to the advantage of the dealers. The National Industrial Recovery Act of the early 1930's[93] provided that the members of an industry could create a code of fair competition to end cutthroat competition; it was hoped that this repeal of the antitrust laws would help end the depression. A code was written for automobile dealers by dealer associations. Professor Kessler has described the dealers' National Recovery Administration days as follows:

> With the advent of the NRA and the introduction of a Code for dealers, group action had its first noticeable success. During this period, price competition among dealers was substantially eliminated by controlling used-car prices. The so-called Blue Book, which prescribed a ceiling on trade-in allowances, was introduced. Marked by the absence of vigorous competition, the NRA period often has been labeled the golden age of dealers. The manufacturers, on the other hand, suffered a reduction in market from the lack of aggressive dealer competition. Accordingly, manufacturer pressure defeated the dealers' attempts, after the demise of NRA, to preserve by self regulation the benefits enjoyed during its life.[94]

Also during the 1930's, the Federal Trade Commission and the Department of Justice were induced to take action to curb two abuses. In 1937 the Federal Trade Commission began proceedings against General Motors asserting that it had coerced dealers, forcing them to buy unwanted parts and accessories as a condition of obtaining desirable models and retaining their franchises. It was also asserted that General Motors had forced dealers to refrain from buying parts from other suppliers. These proceedings led to a cease and desist order against General Motors.[95] In 1938, the Department of Justice began proceedings under the Sherman Act alleging that General Motors, Ford, and Chrysler had coerced their dealers to finance sales of cars through particular financing firms. This action led to consent decrees that prohibited such coercion,[96] and it has not been a major complaint of dealers since.[97]

The NRA Code was lost when that statute was declared unconstitutional,[98] and the two antitrust proceedings took a great deal of time but dealt with only some of the problems of the dealers. Some representatives of the dealers thought that new laws were needed.

2. BATTLES BEFORE THE STATE LEGISLATURES

Organized dealers have turned to state legislatures for leverage to change manufacturer-dealer relations. Many state associations have succeeded in lobbying legislation through, but others have been defeated. Some have considered whether or not to attempt to get a statute enacted and decided against it. In this section, we will look at the types of statutes that have been passed, when and where several types of statutes have been considered, passed, or defeated, and why action has or has not been taken.

a. The Types of Statutes

The twenty statutes governing factory-dealer relations can be classified as: (1) administrative-licensing statutes, (2) penal statutes, and (3) other statutes.

The administrative-licensing statutes generally follow the pattern of the Wisconsin legislation of 1935[99] and 1937,[100] but the

[93] National Industrial Recovery Act § 3, 48 Stat. 195, 196 (1933).

[94] Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1168 (1957). (Footnotes omitted.)

[95] In the Matter of General Motors Corp., 34 F.T.C. 58 (1941), *modified*, 34 F.T.C. 84 (1942).

[96] United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941). See also United States v. Ford Motor Co., 1932-39 Trade Cas. 524 (N.D. Ind. 1938).

[97] See *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. 470-72 (1959).

[98] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[99] Wis. Laws 1935, ch. 474, at 748. Inspection of the records at the Wisconsin Legislative Reference Library indicates that the 1935 legislation was the product of an effort to regulate trade practices of dealers. The bill also outlawed action by manufacturers which would coerce dealers to sell installment contracts to a particular finance company. That provision is now WIS. STAT. § 218.01(7) (1963).

[100] Wis. Laws 1937, ch. 377, at 602, ch. 378, at 603, ch. 417, at 688. The material at the Wisconsin Legislative Reference Library discloses that the administrative-licensing provisions were selected after the draftsmen and sponsors of the bill considered and rejected many other sanctions. Ini-

Oklahoma statute of 1953[101] made some modifications which have been frequently followed in subsequent legislation. This borrowing is an example of legislative common law and the practice of following the "majority view." One cause of this uniformity is that the Wisconsin Automotive Trades Association was largely responsible for drafting the Wisconsin legislation, and WATA has given groups in other states a great deal of assistance both in drafting and in strategy.[102]

The Wisconsin act requires all manufacturers, dealers, and the representatives of both of them to be licensed to do business in the state.[103] The statute is administered by an independent state agency[104] with an advisory board of dealers available for consultation.[105] The act labels as wrongful many kinds of conduct including the following actions by manufacturers and their representatives: (1) inducing or coercing a dealer to accept delivery of cars or other things that he did not order, or attempting to do this;[106] (2) inducing or coercing a dealer to enter any agreement with the manufacturer or "to do any other act unfair to said dealer" by threatening to cancel the dealer's franchise, or attempting to do this;[107] or (3) [u]nfairly, without due regard to the equities of said dealer and without just provocation . . . ." cancelling the franchise of a dealer.[108]

tially, Senator Ingram asked the Legislative Reference Service to draft a bill declaring "open contracts" between automobile manufacturer and dealer to be against public policy. An open contract is one that requires a dealer to buy any and all cars sent to him by the manufacturer. The bill that was drafted stated that such a contract was not enforceable before the courts unless it contained provisions specifying the exact kind and number of motor vehicles with which the dealer was to be charged. Since manufacturers have many other-than-legal sanctions, this would have been an ineffective statute.

The word "coercion" is written on that draft along with the suggestion that criminal penalties be imposed. Several more drafts were prepared by the Legislative Reference Service. One stated that a manufacturer that coerced a dealer would forfeit its charter and right to do business in Wisconsin. Of course, this would have meant that all of the people in Wisconsin who wanted to buy such a manufacturer's cars and all of the manufacturer's other dealers would be penalized along with the manufacturer; in today's terminology it involved "overkill." Another draft called for the award of double damages to the injured dealer which he could obtain in a private civil action. Finally, a bill appears in the file that added the manufacturer licensing features to the 1935 legislation along with provisions on when licenses could be denied, revoked, or suspended. See Wis. Senate Bill 206 (1937).

101 OKLA. STAT. ANN. tit. 47, §§ 561-68 (1962).
102 Interview.
103 WIS. STAT. § 218.01(2)(bd)(3) (1963).
104 WIS. STAT. §§ 218.01(1a), 218.01(1)(j)-(l) (1963).
105 WIS. STAT. § 218.01(4) (1963).
106 WIS. STAT. § 218.01(3)(a)(15) (1963).
107 WIS. STAT. § 218.01(3)(a)(16) (1963).
108 WIS. STAT. § 218.01(3)(a)(17) (1963).

Dealers and their salesmen also are prohibited from engaging in certain conduct. They cannot make misrepresentations to sell cars,[109] sell on Sunday,[110] or sell from other than a permanent building with adequate facilities for sales and service.[111]

The primary sanction under this statute is the denial, suspension, or revocation of a manufacturer's, dealer's, or individual's license.[112] The license may be revoked as to only a particular area of the state; for example, the X Motor Company could lose its license to do business in the city of Madison but retain it for the rest of the state if this were an appropriate remedy.[113] The statute also provides for criminal penalties. Violations of the sections governing manufacturers can result in a $5,000 fine.[114]

The Oklahoma manufacturer-dealer licensing law and those that are modeled on it follow the Wisconsin licensing pattern and even the Wisconsin statutory language but with several significant changes. First, the act in Oklahoma is administered by a Motor Vehicle Commission composed of seven members appointed by the Governor.[115] "[E]ach shall be of good moral character and each shall have been actually engaged in the manufacture, distribution or sale of motor vehicles in the State of Oklahoma for not less than ten (10) consecutive years . . . ."[116] In effect, a group of established automobile dealers sits in judgment on other dealers and on manufacturers and their representatives rather than an independent state agency as in Wisconsin. Clearly, this commission will have a certain type of "expertise."

The Oklahoma law expands the list of prohibited conduct of manufacturers and their representatives to include, in addition to the Wisconsin provisions: (1) refusing to deliver to any franchised new car dealer of the manufacturer's make, any motor vehicle publicly advertised for immediate delivery within sixty days after the dealer orders it,[117] and (2) refusing to extend to a dealer "the privilege of determining the mode or manner of available transportation facility which said dealer desired to be used or employed in making deliveries of new motor vehicles to him or it."[118] These two sections have the virtue of dealing with particular problems in a more specific fashion than the Wisconsin provisions, but they impose very heavy burdens on manufacturers.[119]

109 WIS. STAT. §§ 218.01(3)(a)(5),(8)-(10) (1963).
110 WIS. STAT. § 218.01(3)(a)(21) (1963).
111 WIS. STAT. § 218.01(3)(bf)(1) (1963).
112 WIS. STAT. § 218.01(3) (1963).
113 WIS. STAT. § 218.01(8)(d) (1963).
114 *Ibid.*
115 OKLA. STAT. ANN. tit. 47, § 563 (1962).
116 OKLA. STAT. ANN. tit. 47, § 563(a) (1962).
117 OKLA. STAT. ANN. tit. 47, § 565(j)(1) (1962).
118 OKLA. STAT. ANN. tit. 47, § 565(j)(4) (1962).
119 Manufacturers face difficult problems in distribution since they of-

The penal statutes are more varied, but all leave enforcement to local law enforcement agencies and use fines rather than licensing as sanctions. The Minnesota[120] and South Dakota[121] acts closely follow the Wisconsin language in defining the things that a manufacturer may not do. The Wyoming statute prohibits a manufacturer from requiring the construction of a building or the purchase of anything to keep a dealership.[122] The North Dakota statute does no more than require that a manufacturer repurchase certain items from a dealer upon termination of a franchise.[123]

A separate category is needed for the New York statute.[124] It says that a manufacturer may not terminate a dealer's franchise "except for cause" but does not provide expressly any remedy or sanction if a manufacturer fails to comply.

b. *When and Where What Kinds of Statutes Have Been Passed*

Twenty statutes have been passed, at least eight have been defeated, and dealer associations in at least nine states have considered pressing for legislation but decided not to do it. Table 1 indicates what has been done and where. Unfortunately, as one moves from the formal enactments of state legislatures to consideration by dealer associations, the available information becomes more and more fragmentary and less reliable.

c. *Why Action Has or Has Not Been Taken*

Why have dealers' associations in some states pressed for statutes and succeeded in getting them passed while in other states the associations have failed? Why would an association decide not to press for some type of statute? To answer these questions as far as they can be answered, one must look to the balance of power between the dealers and the manufacturers when they appeal to state legislatures and to the balance of gains and costs to the dealers which comes with these statutes.

The organized dealers have a number of advantages in a power struggle at the state level. They can present arguments directed toward social policy in terms of the abuses of "coercion" and "arbitrary" cancellations of a business that represents a man's life

fer so many combinations of models, colors, and accessories and since they must schedule production far in advance. Moreover, there are economies if the manufacturer can arrange transportation to combine shipments to dealers in the same general area. For a discussion see Zarbock v. Chrysler Corp., 1965 Trade Cas. ¶ 71,361 (D. Colo. 1964).

120 MINN. STAT. ANN. § 168.27(14) (1960).

121 S.D. CODE § 54.1103 (Supp. 1960).

122 WYO. STAT. ANN. §§ 40-39 to -40 (1957).

123 N.D. CENT. CODE §§ 51-07-01 to -03 (Supp. 1963).

124 N.Y. GEN. BUS. LAW §§ 195-98.

TABLE 1

State	Statute passed: date first passed and type	Statute introduced and defeated: date and type where known	Statute considered and rejected by dealer organization	Rank in 1964 as to: Number cars sold in state[125]	Rank in 1964 as to: Number new-car dealers in state[126]
(1) Wisconsin	1937[127] (admin.-licensing)	———	———	17th	8th
(2) Iowa	1937[128] (admin.-licensing; limited application) 1965[130] (admin.-licensing; typical application)	1963[129] (admin.-licensing)	———	23d	10th
(3) North Dakota	1937[131] (penal; limited application)	———	———	47th	35th
(4) Florida	1941[132] (admin.-licensing)	———	———	9th	18th
(5) Virginia	1944[133] (admin.-licensing)	———	———	13th	16th
(6) Wyoming	1949[134] (penal; limited application)	———	———	50th	45th
(7) Rhode Island	1950[135] (admin.-licensing)	———	———	39th	46th
(8) South Dakota	1951[136] (penal)	———	———	44th	38th
(9) Oklahoma	1953[137] (admin.-licensing—dealer board)	———	———	26th	20th

(For footnotes to Table 1, see pages 521 and 522)