(Footnotes to Table 2 continued)
Service, Inc. v. World-Wide Auto. Corp., 182 F. Supp. 412 (D.N.J. 1960) (case decided that the dealer could not sue under the act since it had no written franchise. There was a $9,000 settlement); Wagner v. World Wide Auto. Corp., 201 F. Supp. 22 (W.D.N.Y. 1961) (case decided that the absence of a written franchise did not prevent an action under the act. There was a substantial settlement before the case went to the jury. Automotive News, Jan. 6, 1964, p. 4, col. 3).

511 Tolm Motors, Inc. v. World Wide Auto. Corp. (S.D.N.Y. Nov. 21, 1960) in NADA Magazine, Nov. 1962, p. 68 (dealer sued for wrongful termination of franchise. Motion for summary judgment denied on May 22, 1958. Order entered in 1960 dismissing for lack of prosecution).

512 S. H. Arnolt, Inc. v. Renault, Inc. (N.D. Ill.) in NADA Magazine, Nov. 1962, p. 67 (suit for wrongful termination of distributorship in 1958. Settled during trial in 1960); Brondes Motor Sales v. Renault, Inc. (N.D. Ohio) in NADA Magazine, Nov. 1962, pp. 67-68 (suit for wrongful termination of dealership dismissed by stipulation on April 17, 1962).

513 European Motor Cars Co. v. Renault, Inc. (D. Minn. 1962) in NADA Magazine, Nov. 1962, p. 68 (dealer's case dismissed and judgment for Renault of $2,000 on its counterclaim for unpaid bills); Ray Caldwell v. Lake States Imports, Inc. (N.D. Ohio 1961) in NADA Magazine, Nov. 1962, p. 68 (cancelled Renault dealer sued. Case dismissed with prejudice).

514 Auto-Imports, Ltd. v. Peugeot, Inc., 1964 Trade Cas. 79335 (S.D.N.Y.) (suit against codefendant Renault, Inc., was dismissed. Only the branch of the case against Renault involved the Dealer's Day in Court Act).

515 Gimbel Motors, Inc. v. Renault, Inc. (D. Conn.) in NADA Magazine, Nov. 1962, p. 69 (suit filed in 1958. Many motions made but not on trial list in 1961).

516 Childers & Venters, Inc. v. Willys Motors (E.D. Ky. June 6, 1960) in NADA Magazine, Nov. 1962, p. 68 (dealer sued for $350,000 alleging wrongful termination of franchise and refusal to buy back parts as provided in selling agreement. Judgment on a jury verdict for $8,800 and costs).

517 Alfieri v. Willys Motors, Inc., 227 F. Supp. 627 (E.D. Pa. 1964) (dealer sued for wrongful termination alleging, *inter alia*, an oral agreement that he was to be the only Willys dealer in the area. The court granted summary judgment for defendant on the obligations of the oral agreement, but denied summary judgment on the allegations of bad faith in withholding deliveries and cancelling the franchise); Andres v. Willys Motors, Inc. (N.D. Ohio) in NADA Magazine, Nov. 1962, p. 68 (dealer sued for wrongful termination of franchise in 1958. Willys filed a motion for summary judgment on August 17, 1962).

518 Fiat Motor Co. v. Alabama Imported Cars, Inc., 292 F.2d 745 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 898 (1963) (facts unknown. Reported opinions concern service of process. A letter from the dealer's attorney says that the case was settled); J. R. Townsend Co. v. White Motor Co., (S.D. Cal.) in NADA Magazine, Nov. 1962, p. 68 (dealer sued in 1957 for termination of franchise. Settled).

519 Waco Motors, Inc. v. Porsche, Inc., (S.D. Fla. Jan. 1961) in NADA Magazine, Nov. 1962, p. 68 (dealer-distributor sued for wrongful termination of franchise. Suit dismissed).

520 Wakeman Corp. v. F. W. D. Corp. (S.D. Fla.) in NADA Magazine, Nov. 1962, p. 69 (dealer sued for wrongful termination in 1962); Synder v. Volvo Western Distributors, Inc. (S.D. Cal.) in Automotive News, Oct. 16, 1961, p. 61, col. 4 (dealer's franchise terminated and he sued, alleging pressure to stock more cars and increase facilities and that his sales were sufficient to comply with the contract); Barney Motor Sales, Inc. v. Cal Sales, Inc., 178 F. Supp. 172 (S.D. Cal. 1959) (Standard-Triumph dealer sued distributor for wrongful termination. Reported opinion concerns whether distributor is a manufacturer under the provisions of the Good Faith Act).

Several points can be made about this information. The most impressive thing is that the dealers have been highly unsuccessful in recovering money from the manufacturers as a result of filing complaints under this act. In slightly more than fifty-six per cent of the 57 cases where results are known, the dealers received nothing from their Good Faith Act suit. In slightly less than forty-four per cent of these cases the dealers did receive something, but these cases must be examined in more detail before one can conclude anything about the effectiveness of the act from the standpoint of those dealers who have sued.

The one dealer who received a final judgment as a result of litigation won 8,800 dollars. Willys Motors did not appeal the jury's verdict against it.[521] *Automotive News* describes most of the out-of-court recoveries as "nuisance settlements."[522] No information is available about many of these settlements; one of the conditions imposed by one manufacturer is that the dealer's attorney not discuss the case.[523] However, it is clear that some settlements are for very small amounts as compared to what the dealers alleged in their complaints. In three of the settlements made by Volkswagen, the dealers received only 9,000 dollars each, although two of them had alleged damages of over 1 million dollars and the third had asked for 300,000 dollars.[524] Volkswagen's representative termed the settlement as far cheaper than the cost of defending the suits.[525] One of Chrysler's settlements was for less than 8,000 dollars in a suit for 480,000 dollars.[526] One of the

521 Childers & Venters, Inc. v. Willys Motors (E.D. Ky. June 6, 1960) in NADA Magazine, Nov. 1962, p. 68. A dealer received a judgment in another case, but it was only for termination benefits. In Walker v. Ford Motor Co., 241 F. Supp. 526, 529 (E.D. Tenn. 1965), the court as trier of fact found that the "plaintiffs were undoubtedly mistreated by the defendant's personnel," but that the conduct of Ford "did not rise to the dignity of coercion." Ford, after terminating, had refused to repurchase parts unless the dealer signed a release. See FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 23 (1962), which purports to give Ford this right. The court, without discussing why § 23 was against public policy and void, awarded the dealer his loss on selling his parts inventory and compensation for his services in selling it. The judgment was for $36,157.72, which Ford could reduce to $14,269.72 by repurchasing certain parts within thirty days.

522 Automotive News, Dec. 11, 1961, p. 96, col. 5.

523 Letter from dealer's attorney.

524 Cases cited note 510 *supra*.

525 Automotive News, April 20, 1964, p. 2, col. 5, at 8, col. 5.

526 McLaren Motors, Inc. v. Chrysler Corp. (N.D. Cal. Dec. 1960) in NADA Magazine, Nov. 1962, p. 68. "A Chrysler attorney in San Francisco said the corporation began seeking a settlement below its appeal costs after the District Court dismissal last year. McLaren accepted the proffered offer after notice of appeal was filed to the Ninth Court of Appeals [sic]

American Motors settlements was for 3,000 dollars in a case where 100,000 dollars had been demanded.[527]

On the other hand, a few settlements have been for slightly higher amounts. In *Jim Kelly, Inc. v. Chrysler Corp.*, the dealer sued for 600,000 dollars but settled for 15,000 dollars.[528] In letters to me, attorneys for three dealers have described their settlements as "substantial,"[529] "about 60% of the damages I thought I could prove,"[530] and "the final outcome of the . . . case was a settlement which both sides were unhappy about, and hence was probably a fair settlement."[531] Nonetheless, one can conclude that in no more than a few cases was the dealer able to collect a significant amount, especially when one thinks of litigation costs, lawyers' fees, and the costs of delay.

The other item of interest in Table 2 is that in those cases where there was no settlement, the dealers were unable to get to the jury in 21 instances (or about sixty-four per cent of the 33 cases not settled). Six dealers won before juries, but five of those six verdicts were overturned by the judiciary. Obviously, the judges have not viewed favorably the evidence the dealers have offered.

This information allows us to guess that those dealers who sued view the Dealers Day in Court Act as totally ineffective—the statute produced little tangible benefit for most of them. However, to assess effectiveness and study the use of the full legal system by an organized group seeking "reform," there are some other questions to be asked. We must consider why these dealers lost and whether or not there remains some deterrent force in the statute to protect other dealers whose situations differ from those who sued.

Some clues as to the answers to these questions might be found by considering a number of factors. At the outset, one must acknowledge the possibility that most of the 57 dealers were incompetent and undeserving. Certainly 57 is a very small percentage of the some 30,000 automobile dealers in this country, and one would expect some dealers to be below average. Litigation comes at the end of an elaborate filtering process designed to screen out any dealers with worthy cases: all of the 57 failed to obtain satisfaction from the internal review systems of their manufacturers. Of course, these internal review systems might operate in bad faith, as a mere cover for arbitrary and unfair actions

in San Francisco, but before briefs were submitted or prepared." Automotive News, Oct. 16, 1961, p. 4, col. 5.

527 Carl Price v. American Motors Sales Corp. (N.D. Ala.) in Automotive News, March 13, 1961, p. 3, cols. 3-4.

528 (E.D. Mich. March 30, 1959) in NADA Magazine, Nov. 1962, p. 68. Material in NADA files indicates that the settlement was reached during the taking of depositions of Chrysler executives.

529 Letter from dealer's attorney.

530 *Ibid.*

531 *Ibid.*

by the manufacturers' local personnel. However, it is difficult to see why it would be in the long-term interest of a manufacturer to allow this to happen. If the internal review systems fail to screen out a worthy dealer's case, it is unlikely that the failure is a product of bad faith. Rather, it is likely that the internal review system will be applying different values from those applied by the decision maker (judge, jury, trade association, or disinterested academicians) who deems the dealer's case worthy.

This leads us to the cases to discover the criteria to which a manufacturer's conduct must conform. For if the courts and the manufacturers agree on those criteria, we may have explained the dealers' lack of success in using the statute. Those dealers who sued may have been complaining about perfectly permissible actions. Whether a dealer is deserving of relief will turn on the values the Good Faith Act is made to serve by its judicial construction. That construction, in turn, is a product of the relative positions of the parties, their tactics, and the persuasiveness of the legal arguments they can marshal.

b. Judicial construction of the Good Faith Act: positions, tactics, arguments, results, and consequences

i. RESOURCES AND STRATEGY

After the statute was enacted, the manufacturers were in a much better position to litigate than were individual dealers. In late 1956 and for several years thereafter, a dealer's lawyer who considered bringing suit faced the prospect of a difficult and time-consuming task. First, he could see a discouraging array of legal issues embedded in the language that emerged from the legislative compromises. Probably most significant from the standpoint of a dealer's chances of success was whether the act gave a dealer a cause of action where a jury found that a manufacturer had failed to "act in a fair and equitable manner" toward the dealer, or whether the act was limited to protecting a dealer against "coercion, intimidation, or threats of coercion or intimidation." Either reading was plausible.[532] The consequences of the alternatives could differ importantly. On one hand, a general fairness test might allow a jury to review all of a manufacturer's decisions concerning a dealer to see if they coincided with the jurors' views of such things as "ethical" sales methods, fair allocations of scarce merchandise, loyalty through hard times, and personal problems of a dealer which affected his business. Typically

532 See Note, 70 HARV. L. REV. 1239, 1246-50 (1957). This note, published before any of the cases were decided, suggested the possibilities. Whitney North Seymour, representing Ford, attempted to attack some of its conclusions on the ground that it was "the writing of a student author . . . ." Brief for Appellant, p. 37, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

this review would tend to favor dealers. On the other hand, a coercion-only interpretation would be more restrictive and favor manufacturers. As long as a manufacturer was not coercive, it could abide by its own standards of fairness without being subject to review in a Good Faith Act suit.

Another issue existed if the courts limited the statute to coercion. Then the definition of that far from precise term would be critical. Coercion, in the context of this statute, connotes pressure to induce action that would not otherwise be done and pressure which is illegitimate. But what constitutes pressure? How does one distinguish good pressure from bad? Finally, a dealer's attorney would have to be prepared to argue about remedies. The act speaks of "damages" without defining the term. Does this mean "contract"—expectation—damages or only "tort"—reliance—damages? What about doctrines such as certainty of proof and mitigation?

While the dealer's attorney could foresee a difficult job of persuading the court about the law to apply, he also had to consider his chances of success before a jury. Of course, the facts of his case were very important, but what would be the general reaction of a jury to his client? Attorneys who have represented dealers have written that there is general jury sympathy for the individual dealer who is fighting a giant corporation.[533] However, several have indicated some possible important qualifications. Automobile dealers may not have as favorable a public image as manufacturers,[534] and some "conservative" people on juries view the Good Faith Act as an interference with free enterprise.[535]

The complaining dealer's resources may affect the decisions to sue and to settle and they may influence the dealer's success in the case. Most of the dealers who wanted to sue had lost their franchises,[536] and often one factor was their lack of sales and profit.

[533] Letters were sent to nineteen lawyers who had tried Good Faith Act cases for dealers. The lawyers were those whose identity could be determined from the available material and whose addresses could be found. Ten replied.

[534] Again, the dealer is in a disadvantageous position. The manufacturer occupies a highly respected position in the public eye. The administrations of Presidents Franklin D. Roosevelt, Truman, Eisenhower, Kennedy and Johnson have selected top automobile executives for highly publicized key posts. The public image of the dealer is generally only poor to fair. Many dealers, although desirous of conducting their business on a high plane, find they must stoop to the level of the disreputable operators or fail commercially.

Letter from attorney.

[535] Letter from attorney. The attorney also asserted that the federal judges in his area share this view.

[536] Almost all of the Good Faith Act cases involve termination or nonrenewal of a franchise. In Bateman v. Ford Motor Co., 202 F. Supp. 595 (E.D. Pa. 1962), the dealer sued to enjoin termination. The most notable exception is Zarbock v. Chrysler Corp., TRADE REG. REP. (1965 Trade Cas.)

These dealers were short of cash,[537] and their lawyers often had to take their cases on a contingent fee basis[538]—in effect, the lawyers had to gamble that they would win to get paid. Some dealers thought that the National Automobile Dealers Association should solve all of the problems of contingent fee litigation, where a major question of statutory interpretation was involved, by financing and handling several test cases to seek favorable constructions of the Good Faith Act.[539] NADA's officers thought otherwise. They perhaps agreed with the manufacturers' interpretation of the act. NADA planned to enter one early case as an amicus curiae on an appeal,[540] but the dealer settled the case.[541] It has yet to find a case it wants to back, and its decision not to pursue a test case strategy has been criticized by others who represent dealers.[542]

While an individual dealer faced a host of legal issues if he wanted to use the act, the manufacturers faced a problem of uncertainty in running their relationships with dealers. They could not be sure how far they could push dealers to operate efficiently and sell as many cars, trucks, parts, and accessories as possi-

¶ 71361, at 80535 (D. Colo. 1964), where the dealer still had his franchise despite the suit.

[537] A dealer who has an immediate need for money will be disappointed by the results of many law suits. For example, the *Milos* case began on October 15, 1958, and certiorari was denied on October 28, 1963. Appendix for Appellant, p. 1a, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963). See also Automotive News, Aug. 7, 1961, p. 3, cols. 3-5.

[538] Letters from attorneys. Several attorneys stressed that their Good Faith Act cases had been extremely time consuming. One attorney said his office no longer will accept Good Faith Act cases for dealers. Another commented:

> The lawyers who represent the defense of these anti-trust cases, including those under the "Day in Court" act, find that if they have a very wealthy client who is disposed to spend any amount for defense and nothing for tribute that they can make a career out of the defense of one of these cases. When one of these cases is brought against Ford or Chrysler or General Motors, a senior member of one of the big firms takes over the defense and then he has one or two juniors assigned to him who make it a full-time job to pursue extensive discovery and other procedures to give the plaintiff a bad time. They get orders for inspection of all the plaintiff's documents and then take interminable depositions revolving around these documents on the theory that it may lead to the discovery of relevant evidence or may affect damages. *No attorney in his right mind will take one of these cases in this area for the plaintiff on a contingency basis*, and I would say that the plaintiff should be prepared to spend at least $50,000.00 if he wants to take on the manufacturer.

(Emphasis added.) Other attorneys have indicated that they would take cases on a contingent fee basis. Most of the estimates for attorneys' fees were far lower. Most letters spoke of fees of from $5,000 to $10,000.

[539] See Automotive News, March 6, 1961, p. 62, cols. 1-5.

[540] *Id.*, May 8, 1961, p. 1, col. 1, at 4, col. 5.

[541] *Id.*, Oct. 16, 1961, p. 4, col. 5.

[542] Interviews.

ble. Clearly they had an interest in having the statute construed to provide standards for their field men's conduct. Moreover, they had resources to devote to the battle. The amount of money involved might be major to a cancelled dealer, but few, if any, cases involved a risk of significant liability to the manufacturers even if the dealer won.[543] Thus the manufacturers could afford to fight as long as necessary to get favorable interpretations to set guide lines for the future. While dealers' attorneys might have to work on a contingent fee, the manufacturers already had their own large and competent legal staffs and could afford to hire trial and appellate specialists. Assuming dealers' and manufacturers' attorneys to be equally competent,[544] an attorney on a contingent fee can afford to invest only so much time on a particular case.[545] Since the manufacturers were interested in guide lines for the future, they could afford to invest, for example, 40,000 dollars worth of attorneys' time in a case they could have settled for 10,000 dollars.[546] Moreover, there was the factor of experience. A dealer's attorney usually started a case without any background in arguing a case under the Good Faith Act. On the other hand, a manufacturer's legal staff became expert in arguing such a case as it faced a series of these suits. It could polish its basic brief in case after case[547] and even influence the company's business practices—such as record keeping—so that it would be ready for any suit.[548]

[543] This is not to say that the dealers did not demand very large sums of money in their complaints. They did, but the probability of proving substantial damages was small.

[544] I have read the briefs and records in all the appellate cases decided under the act except those in the Fifth Circuit, which were unavailable. The attorneys for the dealers appear to range from highly competent to minimally competent.

[545] Of course, sometimes a lawyer working on a contingent fee will invest a great deal of time in research and brief writing. He may get interested in the case or feel that he must win in order to recoup something for his time. Some of the dealers' attorneys in the Good Faith Act cases obviously invested a great deal of time in the cases, but others did not.

[546] Letter from an attorney for a dealer in a Good Faith Act case, asserting that this was true in his case.

[547] See, *e.g.*, the following briefs for the Ford Motor Co.: Brief for Appellee, pp. 12-20, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Brief for Appellee, pp. 16-17, 30-34, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Brief for Appellant, pp. 32-36, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962). See also Brief for Defendant, p. 166, Milos v. Ford Motor Co., 206 F. Supp. 86 (W.D. Pa. 1962), *aff'd*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

[548] A Ford franchise, for example, requires the use of an elaborate form on which are recorded the comparisons between a dealer's performance and those of other dealers. See Exhibit Y, Dealer Comparison Chart, reprinted in Brief for Appellant, p. 44, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965). Each Ford road man files a Dealer Contact Report on each meeting with a dealer. See Appendix for Appellee, pp. 139b, 141b, 143b, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963). A chronological summary of all these reports makes an impressive summary of the relationship from the manufacturer's point of view. See *id.* at 145b-53b. Moreover the manufacturers often prepare charts comparing a dealer's sales with those of his zone and district. These too are useful in litigation. See *id.* at 235b-39b.

Clearly, the manufacturers were in a favorable position. They used several tactics to promote their interests. Primarily they wanted both certainty and maximum freedom of action. Thus they wanted courts to narrow the statute's coverage to coercion, and in turn to restrict the meaning of that concept. A number of dealers' representatives have said that the manufacturers used a test case strategy to aid in getting such interpretations.[549] Ideally, one approaches a court seeking a particular construction of a statute in a case where the facts in the record almost demand that construction—where the construction leads to a result in the particular case that makes sense and the alternative interpretation does not. The facts in a test case give the judge some data about the consequences of some of the alternatives open to him. He can see vividly the impact on people in positions similar to those of the parties in the case before him. While individual dealers decide whether or not to file a complaint, the manufacturer, as any fairly wealthy defendant facing a series of related cases, could control the kind of cases coming before the courts in which the Good Faith Act would be construed. It could defend and bring appeals in those cases where the facts are unfavorable to the dealer, and it could settle any where the facts favor the dealer. Since individual dealers were more interested in money than establishing precedents and NADA did not act, the manufacturers in this way were free to control the cases the court would see.

The net effect of whatever forces were at work was to prompt a sequence of cases favorable to the manufacturers. The first cases in which the act was construed involved dealers who *appeared*

[549] Interviews. See also Automotive News, March 6, 1961, p. 62, cols. 1-5.

> "Actually," Hammond [a cancelled Ford dealer who also is a graduate of the Columbia Law School] said, "there has been nothing of any significance decided by any court. The real damage and danger lies in the dealers'—and factories'—attitude that the law is not effective to achieve what Congress, NADA and the dealers all proudly assumed it would accomplish."
>
> He contended that the factories are building this attitude by avoiding or settling the strong cases before they can be adjudicated in court and become a part of "case law." The few cases which have resulted in opinions thus far have been weak factually, he said.
>
> "In this way they (the factories) have actively and consciously aided the shaping of the case law in a manner most favorable to them," Hammond continued, "while at the same time creating and fostering the impression among dealers that the good-faith law has failed to be effective to safeguard the dealers' interests."

Id. at col. 2.

to be incompetent and undeserving. In the first reported case construing the act,[550] the dealer "left the conduct of its business to his twenty-one year old daughter and nineteen year old son and one mechanic" and failed to file monthly financial reports with the company as required by his franchise. In the second reported case[551] decided on the merits, the dealer's sales were far below those of other Ford dealers. He claimed his sales were poor because his neighborhood had deteriorated as a result of an influx of members of low-income groups. Yet the dealer stipulated that in a test of the area it was found that over 500 Fords had been sold to residents during a year but that the dealer had sold only nineteen per cent of them. In another case that prompted a precedent-setting appellate opinion,[552] the dealer promised to obtain or build better facilities within two years in order to induce Ford to give him the franchise. He failed to carry out his promise because he was content[553] to run a profitable[554] low-volume operation[555] from his small building originally constructed to house a Tucker dealership.[556] No case to date has involved a clear picture of the kind of abuses described in the Senate hearings in 1955 and 1956.

[550] Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378 (D.N.J. 1959). *Automotive News* reports that the court's restrictive construction of the Good Faith Act in this case was welcomed by the manufacturers. They had been fearful "that a loose application of the statute would encourage featherbedding and goldbricking among franchised dealers." Automotive News, Feb. 23, 1959, p. 1, cols. 2-4, at 8, col. 1.

[551] Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D. Cal. 1960). It should be noted that Leach said that the methods used by other dealers in selling to members of lower income groups were unethical; however, he was unable to press this point effectively. Automotive News, Oct. 31, 1960, p. 3, cols. 1-2. If Leach was right that he was being compared with dealers who prey on lower income groups, the decisions of the Ford Motor Company and the court are reprehensible; there is no indication that the court considered this issue.

[552] Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

[553] Milos' position was that there was a recession in his area of Pittsburgh, and so he could not afford to go into debt at the end of the two-year period. Appendix for Appellant, pp. 38a-39a, Milos v. Ford Motor Co., *supra* note 552.

[554] In 1956, Milos' profit on the dealership was $16,134 in addition to his salary. This was $291 per car and truck sold. Appendix for Appellee, p. 141b, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

[555] Milos sold 116 cars in 1956, and his market potential was 228 cars. 227 Fords were sold by all dealers in his area during that year. *Id.* at 39b-40b.

[556] A road man's Dealer Contact Report tells of a meeting with Milos:

> Dealer claims his present facilities are adequate for present sales volume. However when asked what his plans are to secure sales potential Dealer states he cannot handle more volume with present facilities. When confronted with these inconsistencies, Mr. Milos stated he had no intention of spending 30 to $40,000 for improvements nor did he care what place he was in sales-wise or how much of the market he was getting. When asked if he had changed his thinking since accepting the Ford franchise, Mr. Milos stated he never intended to go in debt just to get a sales potential.

Id. at 143b.

The manufacturers had another interest. They wanted to discourage suits to minimize both the risk of adverse judgments and unrewarding litigation costs where the case was unlikely to yield a useful precedent. We have already seen that a dealer's attorney, probably working on a contingent fee, faced a discouraging series of issues inherent in the language of the act. Some manufacturers further discouraged dealers' attorneys by challenging the jurisdiction of the court over the manufacturer[557] and raising a lengthy cluster of arguments about the constitutionality of the Good Faith Act.[558] In one instance, Ford adopted another sometimes effective tactic: counterattack. It filed a counterclaim charging a conspiracy and asking for 5 million dollars in damages. It asserted that the dealer had run his dealership in such a manner as to force the company to let him run a "windfall operation" or to cancel him out and face a suit. The dealer "is an articulate lawyer who worked his way through Columbia University's law school by selling used cars at his father's lot. He has espoused his beefs against Ford throughout New York auto rows, to the extent that the company wants him enjoined by the court from acting as counsel for other ex-Ford dealers in another good-faith action."[559] *Automotive News* reports that "The factory's aims are twofold: To serve as a warning to other dealers of like mind and to lay the

[557] See, *e.g.*, Appendix for Appellant, p. 20a, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

[558] See, *e.g.*, *id.* at 19a-20a:

> The defendant, without waiving any of the other matters available to it in defense of this action as brought or alleged, shows that the statute relied upon in Paragraph 5 of Count One [the Good Faith Act] is unconstitutional and void and of no force and effect for that, among other defects, it constitutes a deprivation of due process of law, an unreasonable interference with freedom of contract, it is vague, indefinite and uncertain, constitutes class legislation, it is so indefinite as not to give notice of the conduct necessary to avoid its penalty, it attempts an illegal delegation of legislative powers, it is not uniformly enforceable, it denies freedom of contract with whom, when and how a party wishes, it denies newcomers the opportunity to contract or attempt to contract with "automobile manufacturers," it imposes duties and burdens upon automobile manufacturers which are not imposed upon other manufacturers whose products are sold in the same manner, it imposes no requirement of mutuality between the parties to specified contracts, nor any requirement that the parties act in good faith with the consuming public, it propagates and stirs up and engenders litigation, and for each of these grounds and otherwise is in violation of the Constitution of the United States of America and the Amendments thereto.

Of course, these may be perfectly good constitutional arguments, but this does not lessen their tactical significance. The void-for-vagueness argument is one of the most difficult of all constitutional problems to deal with. See Note, 109 U. PA. L. REV. 67 (1960). Not many cancelled dealers can afford to pay for adequate research into such subtleties.

[559] Automotive News, May 22, 1961, p. 4, cols. 3, 4.

groundwork for a vigorous contest in the Hammond case."[560] The case is still pending.

ii. STATUTORY CONSTRUCTION

So much for resources and tactics. Now it is time to look at the arguments presented to the courts, what the courts said and did, and what difference it makes. The principal issues for decision—whether the act is limited to coercion, the meaning of coercion, and the appropriate remedies—have already been indicated and will be considered in turn. After this discussion the reasons for the dealers' lack of success in suits under the act should be fairly clear.

(a.) *Does the statute require coercion or only failure to act in a fair and equitable manner?* Most of the debate concerning the Good Faith Act has turned on whether the statute protects a dealer from *any* failure of a manufacturer to act in a fair and equitable manner or whether it protects a dealer *only* from coercion or intimidation.[561] This is not surprising. Dealers would have a much easier time winning if they could claim unfairness because of a manufacturer's failure to consider such things as how badly their business would be hurt by its policies, personal excuses for inability to sell cars, and the like. They want to implement values other than purely economic ones such as success in selling cars. The manufacturers want to keep decisions more impersonal and centered on business success for *both* dealer *and* manufacturer.

The statute allows both manufacturers and dealers to make a plausible argument. The act allows a dealer to sue for damages suffered by reason of the failure of a manufacturer to "act in good faith."[562] "Good faith" is defined as "the duty of each party . . . to act in a fair and equitable manner . . . so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."[563] The key words are "so as." They could mean "for example," thus indicating that coercion was not necessary. They could mean "in order to," thus limiting the statute to coercion.

Neither manufacturers nor dealers have been content to rest with definitions of the words "so as." The manufacturers have pressed for a construction of the act limited to coercion with two basic arguments. First they argue legislative intent with a now

[560] *Ibid.*
[561] See, *e.g.*, Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 103-07 (1959).
[562] 15 U.S.C. § 1222 (1964).
[563] 15 U.S.C. § 1221(e) (1964).

almost standard set of references to legislative history. The House Report on the bill states:

> The term "fair and equitable" as used in the bill is qualified by the term "so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation.[564]

The following colloquy took place on the floor of the House: "Mr. Halleck. In other words, while the words 'fair and equitable' are used, speaking of the relationship between the parties, those words 'fair and equitable' would be limited, as this language is concerned in the bill, to 'coercion and intimidation'? Mr. Celler. That is correct."[565]

On occasion manufacturers also have attempted to trace the process that led to the language in the bill.[566] They point to the original Senate bill's definition of good faith as the duty "to act in a fair . . . manner so as to guarantee the dealer freedom from coercion . . . and in order to preserve and protect all the equities of the automobile dealer which are inherent in the nature of the relationship . . . ."[567] When the "equities" language was deleted to meet the objections of the Antitrust Division of the Department of Justice, only coercion was left. A general fairness construction would run afoul of those objections and thus would make the amendment meaningless.

Secondly, manufacturers bolster their legislative history argument by asserting that courts favor constructions of statutes which avoid difficult constitutional issues, and the manufacturers assert a general fairness interpretation raises serious doubt as to the constitutionality of the act.[568] They point to the following

[564] H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956). This passage is cited in Brief for Appellee, p. 14, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Brief for Appellant, pp. 17-18, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964); Brief for Appellant, p. 11, Garvin v. American Motors Sales Corp., 318 F.2d 518 (3d Cir. 1963); Brief for Appellee, p. 31, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Brief for Appellant, p. 32, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).
[565] 102 CONG. REC. 14070 (1956). This colloquy is cited in Brief for Appellant, p. 18, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964); Brief for Appellee, p. 31, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).
[566] This argument was made in Brief for Appellant, p. 17, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964); Brief for Appellee, pp. 31-32, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).
[567] S. 3879, 84th Cong., 2d Sess. § 1(e) (1956); *S. Hearings, Marketing Practices, Monroney* 1237.
[568] See Brief for Appellee, p. 34, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

constitutional difficulties if juries were free to determine whether or not manufacturers had failed to act in a fair and equitable manner: (1) such a statute would be unconstitutionally vague and uncertain,[569] (2) it would be an invalid delegation of legislative powers to the judiciary,[570] and (3) it would be an unreasonable interference with the right of contract and conduct of private business.[571]

Thirdly, the manufacturers also have relied on Professor Kessler's articles,[572] especially the second one, which advocates a construction limited to coercion in order to protect competition and consumers.[573] The Kessler articles have been important ammunition for the manufacturers.

The dealers have pressed for a general fairness statute with a greater variety of arguments. They have attempted to make more of the structure of the statute itself. The definition of good faith speaks of acting "in a fair and equitable manner . . . so as to guarantee the one party freedom from coercion . . . ." A construction limited to coercion makes the phrases "good faith" and "fair and equitable manner" meaningless. If the act were to be limited to coercion, why didn't the draftsmen say so directly?[574] Moreover, the act speaks of the dealer's duty to act in good faith. To define good faith as the absence of coercion makes this provision silly since few, if any, dealers could ever coerce a manufacturer.[575] The dealers have also turned to the House Report but have stressed its general statements of purpose. That report speaks of the inequality of economic power and the abuses found in the Senate hearings. These problems will not be solved by a construction

569 See Brief for Appellee, p. 22, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Brief for Appellant, pp. 14-16, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964); Brief for Appellant, p. 35, Garvin v. American Motors Sales Corp., 318 F.2d 518 (3d Cir. 1963); Brief for Appellee, p. 33, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Brief for Appellant, p. 41, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

570 Brief for Appellee, p. 33, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

571 *Ibid.*

572 Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959); Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957).

573 See Brief for Appellant, p. 18, Garvin v. American Motors Sales Corp., 318 F.2d 518 (3d Cir. 1963); Brief for Appellee, p. 32, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Brief for Appellant, pp. 34-35, Pierce Motor Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

574 See Brief for Appellee, p. 10, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964).

575 See Brief for Appellant, pp. 18-19, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

limited to coercion.[576]

What has been the response of the courts to the arguments made by dealers and manufacturers?[577] There has been almost no consideration of the constitutionality of the Good Faith Act.[578] It now appears almost certain that the Good Faith Act will be construed to give a dealer a remedy only where he can prove coercion. In some of the first cases, decided in the late 1950's, two district courts took the opposite approach.[579] But the dealers were unable to hold this initial victory. The United States Courts of Appeals

576 Brief for Appellant, pp. 23-24, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Brief for Appellant, pp. 13-14, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

577 For discussions of the cases decided under the Good Faith Act, which differ from the material in this article, see Freed, *A Study of Dealers' Suits Under the Automobile Dealers' Franchise Act*, 41 U. DET. L.J. 245 (1964); Comment, 48 CORNELL L.Q. 711 (1963); Comment, 62 MICH. L. REV. 310 (1963); Comment, 74 YALE L.J. 354, 357-60 (1964).

578 The constitutionality of the statute was upheld in Blenke Bros. Co. v. Ford Motor Co., 203 F. Supp. 670 (N.D. Ind. 1962). The problem is discussed in Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 228-37 (1957); Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1176-77 (1957); Comment, 48 CORNELL L.Q. 711, 738-41 (1963); Comment, 62 MICH. L. REV. 310, 314-16 (1963).

579 See Appendix for Appellant, pp. 223a-24a, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964), where the court said:

> The Act provides a remedy in damages for a failure to act in "good faith" in "performing and complying" with the franchise as well as upon termination or failure to renew. Good faith imposes a duty on both parties to the franchise to act in a "fair and equitable manner" toward each other. Although the Act grants a dealer a right of action for bad faith on the part of the manufacturer "so as" to guarantee the dealer freedom from coercion or intimidation, neither the language of the Act nor its purpose require that it be limited to cases involving force and compulsion. In this case although plaintiff was not coerced or intimidated in the sense of being forced to do something against its will, the evidence clearly presented issues of discrimination, of misrepresentation and intentional misleading, and of an intention to force plaintiff out of business once defendant had found a more desirable outlet for its cars. This court does not believe that Congress intended to limit the application of the Act to situations in which a dealer is forced to bow to arbitrary demands of the manufacturer under the threat of losing his franchise, although the same result can be achieved through the more subtle device of representations and promises which the manufacturer never intends to fulfill.

In Barney Motor Sales, Inc. v. Cal Sales, Inc., 178 F. Supp. 172, 174 (S.D. Cal. 1959), the District Judge said by way of dictum:

> The extreme vagueness of the concept of good faith or bad faith used by Congress in the provision at hand is testimony to the fact that the intention was to control the dealer-manufacturer relationship in its essential premises (by allowing the trial court wide discretion in giving specific formulation to the immensely vague term "good faith") and to disregard the traditional legal implications of words which purported to, but in fact could not, signify the mutual intentions of the parties.

for the Second and Third Circuits construed the act as limited to coercion in several opinions[580] that have been followed in other circuits since then.[581] The Second and Third Circuit opinions largely do no more than adopt the manufacturers' arguments, and there is no attempt to answer those of the dealers. The opinions quote the sentences from the House Report that mention coercion[582] and the colloquy between Representatives Halleck and Celler,[583] and they seem to rely heavily on Professor Kessler's discussion of the statute.[584] Since these decisions in the Second and Third Circuits, the matter does not seem to have been considered in detail in other courts; rather they are content to cite cases and regard the point as settled.[585] Although any of the other circuits could take a different view or the Supreme Court of the United States could consider the point,[586] a dealer who wants to argue for a general fairness statute now has a most difficult burden to carry.

(b.) *The effect of a statute limited to coercion.* The result of this victory of the manufacturers in one respect is easy to state: to win, dealers must prove coercion. Nonetheless, the significance of the victory cannot be assessed until we examine how this not-overly-precise term is defined and what that definition calls for by way of evidence. What is coercion, and how do you prove it?

The briefs of the parties and the courts' opinions are much less explicit on these points than about whether or not coercion is required. The statute uses the term without defining it. The briefs offer definitions from dictionaries,[587] judicial opinions about other issues,[588] and Kessler and Stern.[589] The courts seem to respond[590] to Kessler and Stern, who say:

> It is the authors' position that the meaning of "coercion" is as follows: *X coerces Y* means: (1) *X* offers *Y* the choice of doing *X*'s bidding or else being subjected to some sanction; and (2) *X* has the power to exercise the sanction against *Y*; but (3) for *X* to exercise the sanction against *Y* is not lawful, or for *Y* to do as *X* bids would serve an unlawful end of *X*. "Lawful," as used here, refers to the laws of the United States *other than* the Day in Court Act, including criminal, tort, and contract law. That threat to breach a contract constitutes coercion ("economic duress") is amply supported by the authorities which hold that extra compensation extracted to avoid a breach is unsupported by consideration.[591]

In most of the reported cases the court proceeds by citing a statement in the House Report that certain conduct is not coercion and then asks whether or not the facts in the particular case differ from the conduct mentioned in the House Report.[592] The most popular passage in the Report states that the statute

> does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise.[593]

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580 Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964); Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied,* 375 U.S. 896 (1963); Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert denied,* 371 U.S. 829 (1962). In an earlier case the Fifth Circuit found it unnecessary to decide the point although the court's opinion indicated that a construction requiring coercion would be favored. Woodard v. General Motors Corp., 298 F.2d 121 (5th Cir.), *cert. denied,* 369 U.S. 887 (1962).

581 Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied,* 380 U.S. 979 (1965); Zarbock v. Chrysler Corp., TRADE REG. REP. (1965 Trade Cas.) ¶ 71361, at 80535 (D. Colo. 1964); Augusta Rambler Sales Inc. v. American Motors Sales Corp., 213 F. Supp. 889 (N.D. Ga. 1963).

582 Milos v. Ford Motor Co., 317 F.2d 712, 715-16 (3d Cir.), *cert. denied,* 375 U.S. 896 (1963); Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425, 430 (2d Cir.), *cert. denied,* 371 U.S. 829 (1962).

583 Milos v. Ford Motor Co., *supra* note 582, at 716.

584 *Ibid.*; Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425, 430 (2d Cir.), *cert. denied,* 371 U.S. 829 (1962).

585 See, *e.g.,* Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied,* 380 U.S. 979 (1965); Zarbock v. Chrysler Corp., TRADE REG. REP. (1965 Trade Cas.) ¶ 71361, at 80535 (D. Colo. 1964).

586 In Kotula v. Ford Motor Co., *supra* note 585, Kotula asserted that no dealer had recovered in any reported case under the Good Faith Act. He suggested that the situation was like the one that induced the Supreme Court to exercise "stewardship" over cases under the Federal Employers Liability Act. The Supreme Court did not agree and denied certiorari. See BNA ANTITRUST & TRADE REG. REP. A-7, A-8 (Feb. 23, 1965).

587 See, *e.g.,* Brief for Appellant, p. 17, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied,* 375 U.S. 896 (1963).

588 See, *e.g.,* Brief for Appellee, pp. 19-20, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied,* 380 U.S. 979 (1965).

589 See, *e.g.,* Brief for Appellant, pp. 34-35, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied,* 371 U.S. 829 (1962).

590 See Milos v. Ford Motor Co., 317 F.2d 712, 716 (3d Cir.), *cert. denied,* 375 U.S. 896 (1963); Pierce Ford Sales, Inc. v. Ford Motor Co., *supra* note 589, at 430; Woodard v. General Motors Corp., 298 F.2d 121, 126 (5th Cir.), *cert. denied,* 369 U.S. 887 (1962); Staten Island Motors Inc. v. American Motors Sales Corp., 169 F. Supp. 378, 382 (D.N.J. 1959).

591 Kessler & Stern, *Competition, Contract, and Vertical Integration,* 69 YALE L.J. 1, 106 n.478 (1959).

592 H.R. REP. No. 2850, 84th Cong., 2d Sess. (1956). The report is cited as a take-off for the type of analysis described in the text in Kotula v. Ford Motor Co., 338 F.2d 732, 738-39 (8th Cir. 1964), *cert. denied,* 380 U.S. 979 (1965); Garvin v. American Motors Sales Corp., 318 F.2d 518, 520 (3d Cir. 1963); Milos v. Ford Motor Co., 317 F.2d 712, 716 (3d Cir.), *cert. denied,* 375 U.S. 896 (1963); Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425, 430 n.4 (2d Cir.), *cert. denied,* 371 U.S. 829 (1962); Woodard v. General Motors Corp., 298 F.2d 121, 128 (5th Cir.), *cert. denied,* 369 U.S. 887 (1962); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889, 894 (N.D. Ga. 1963); Leach v. Ford Motor Co., 189 F. Supp. 349, 354 (N.D. Cal. 1960); Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 379, 383 (D.N.J. 1959).

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

Of course, both the Kessler and Stern definition and this passage from the House Report are no more than starting points for decision since both use very open-ended concepts such as "not lawful under contract law" and "adequate representation," "inefficient," and "undesirable." In order to understand what coercion means in the Good Faith Act, one must consider what the courts have done in particular types of cases. Two questions will be considered here. First, to what extent does the statute protect a dealer from a manufacturer's demand that the dealer take unwanted cars, trucks, or accessories or be subject to some sanction? If the draftsmen of the statute had any specific case in mind, it was likely that it was this one. Secondly, what is the likelihood that a dealer who has lost his franchise can get any relief under a statute limited to coercion? This is the most common situation in the cases brought so far.[594] Does the statute deal adequately with those dealers who are most likely to want to use it?

Suppose what looks like the clearest case of forcing unwanted merchandise. A manufacturer's road man tells a dealer he must order a hard-to-sell truck or he will be considered an undesirable dealer and will be cancelled. The dealer protests but orders the truck and sells it for a 125 dollar loss. Has the dealer a cause of action? Perhaps it is surprising, but one cannot be sure. There is no reported case dealing with this problem. In 50 cases out of the 90 I discovered, I know something about the dealer's complaints.[595] In only nine did the dealer allege that he had been forced to take unwanted items,[596] and in at least eight of the nine this was a

[594] See note 536 *supra*.

[595] In the 40 instances where I have no knowledge of the nature of the actual dispute, the newspaper report says no more than that the dealer sued for wrongful termination or that the reported case deals with a procedural matter.

The most common complaints in the cases where information is available are as follows: (1) The responsibility of the manufacturer for the dealer's inadequate sales was asserted in 25 cases. (2) The forcing of unwanted items was asserted in 9 cases. (3) Problems with finding a successor and getting a manufacturer's approval of the sale were asserted in 7 cases. (4) The failure to reimburse for warranty claims was asserted in 3 cases.

[596] Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Bateman v. Ford Motor Co., 202 F. Supp. 595 (E.D. Pa.), *rev'd and remanded*, 302 F.2d 63 (3d Cir.); 204 F. Supp. 357 (E.D. Pa.), *rev'd and remanded*, 310 F.2d 805 (3d Cir. 1962); 214 F. Supp. 222 (E.D. Pa. 1963); Hammond Ford, Inc. v. Ford Motor Co., 1962 Trade Cas. 76227 (S.D.N.Y.); Loesch Motor Co. v. Ford Motor Co. (N.D. Ohio 1964) in Automotive News, July 20, 1964, p. 85, col. 1; Yonce Motors, Inc. v. American Motors Sales Corp. (D.S.C.) in Automotive News, July 6, 1964, p. 4, cols. 3-4; Armstrong v. Ford Motor Co. (W.D. Pa.) in Automotive News, March 30, 1964, p. 4, col. 1; Husak Bros. v. American Motors Sales Corp. (E.D. Mich.) in Automotive News, April 8, 1963, p. 4, col. 1; *id.*, June 8, 1964, p. 6, col. 2; Harvey Motors, Inc. v. Chrysler Corp. (N.D. Cal. 1958) in Automotive News, Oct. 16, 1961, p. 61, col. 3; *id.*, Feb. 13, 1961, p. 8, col.

secondary allegation coupled with a more basic complaint.[597]

What would a court do in the example just given? A manufacturer could argue there was no coercion involved within the meaning of the act. Kessler and Stern say a threat is illegitimate when "for *X* to exercise the sanction against *Y* is not lawful . . . ."[598] A manufacturer has a right under the selling agreement to terminate a dealer who fails to "promote vigorously and aggressively the sale of VEHICLES . . . and the sale of other COMPANY PRODUCTS, in the DEALER'S LOCALITY . . . and . . . develop energetically and satisfactorily the potentiality for such sales and obtain a reasonable share thereof . . . ."[599] It could argue that the dealer has a duty to promote the sale of *all* vehicles made by the company and that satisfactory development of the potential for sales means selling both the good and poor-selling models. A manufacturer must plan far in advance and run the risks of making more of an item than the public is eager to buy. When the manufacturer's planning is good the dealer has an opportunity to share in the benefits. Thus it is fair for a manufacturer to insist that a dealer likewise share in some of the losses caused by mistaken advance planning by helping to dispose of the inventory that had to be built far in advance of information about actual sales. No dealer could expect to be allowed to be only an order taker for the best-selling models and not to be required to help dispose of the others. Moreover, the manufacturer can point to the ever-handy House Report's statement that forcing a dealer to take unwanted cars "*may* in *appropriate instances* constitute coercion . . . ."[600] This means that in other instances, forcing does not constitute coercion, for the implication is clearly that not all forcing is coercive. Thus the demand was for performance of the contract and not unlawful.

Of course, the argument presented assumes that the complaining dealer had not already done his part to share the loss caused by hard-to-sell items before the demand was made.[601] If the argu-

2; McLaren Motors, Inc. v. Chrysler Corp. (N.D. Cal. Dec. 1960) in NADA Magazine, Nov. 1962, p. 68.

[597] In Armstrong v. Ford Motor Co., *supra* note 596, a former Ford-Edsel dealer whose franchise had been terminated sued. One count was a private antitrust action and the other was a Good Faith Act claim for coercion to take unwanted products. One could consider the coercion count a basic complaint, but arguably it was a secondary one tacked on to the antitrust suit. If it was a secondary allegation, the text should be changed to read that in all nine cases involving coercion it is likely that no suit would have been brought if the coercion were the dealer's only grievance.

[598] Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 106 n.478 (1959).

[599] FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2 (a)(i) (1962). Other franchises have similar provisions.

[600] H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956). (Emphasis added.)

[601] Whether a dealer had done his part to share the loss presents a dif-

ment were accepted as valid, the area of protection from forcing would be limited to only those dealers who could show some taking of losses to offset their gains from selling hot models. Even if it were not accepted and a court ultimately found that the manufacturer had no such contract right and had made a "not lawful" demand, the position probably has enough plausibility to require argument before one or more courts in order for the dealer to win. Moreover, a dealer will face even greater difficulties if the threat is not so clear. Suppose the road man says to the dealer, "you should order this truck," and does not expressly threaten to impose a sanction if the dealer fails to do it. The dealer would have difficulty establishing that the road man's statement conveyed a tacit threat and was not merely "recommendation, endorsement, exposition, persuasion, urging or argument [which] shall not be deemed to constitute a lack of good faith."[602] Suppose the dealer understands the road man to be saying "you should order this truck [and you will lose your franchise if you don't]." Do we apply an objective theory to see if the dealer was reasonable in so understanding the statement and if the road man was responsible for creating such an impression? The House Report says that "the existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of action."[603] Obviously, one can make threats without spelling things out in detail. Yet the line between such a tacit threat and "recommendation, endorsement, exposition, persuasion, urging or argument" is a hard one to see. A dealer would face real difficulty in such a case.

Finally, there is another potential problem. Some selling agreements can be terminated at will, and those that cannot expire by their terms at the end of either one or five years.[604] Suppose a road man says to a dealer, "you must order this truck or we will not renew your franchise when it expires in six months." In Kessler and Stern's terms it would be lawful for the manufacturer to exercise this sanction against the dealer, except in the few states that require all terminations and nonrenewals to be for cause.[605] Since a manufacturer has a right to cancel at will or

ficult question of degree—how much of any loss must a dealer help absorb? Should it be based on gains the dealer has made in previous years, an equal loss sharing formula designed to spread the burden over all dealers, or the ability of each dealer to get rid of the poor-selling merchandise? These questions may be sufficiently difficult to influence a court to reject the argument suggested here.

602 15 U.S.C. § 1221(e) (1964).

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

604 See text accompanying notes 426-31 *supra*.

605 KY. REV. STAT. § 190.040(1)(m) (1962); LA. REV. STAT. § 32:1254(A)(4)(c) (1963); NEB. REV. STAT. § 60-1412(13) (1960); OKLA. STAT. ANN. tit. 47, § 565(j)(3) (1962); TENN. CODE ANN. § 59-1714(h)(4) (Supp. 1963); WIS. STAT. § 218.01(3)(a)(17) (1963).

not renew, why cannot it impose any condition it pleases on its decision not to exercise its right? In other words, the greater right (to cancel at will or not to renew) includes the lesser one (to impose any conditions on not exercising the right).[606]

All three reported cases involving American Motors[607] present this problem since American Motors gives most of its dealers only a one-year franchise and typically ends relationships by failing to renew. In at least one of the cases involving Ford, the factory also could have raised the point since the dealer's franchise was terminable at will on 120 days notice.[608] But only one court even mentioned the problem,[609] and it brushed the matter aside in dictum by quoting a passage from the House Report: "Thus, where a dealer's resistance to manufacturer pressure is related to cancellation or *nonrenewal of his franchise* a cause of action would arise."[610] This result may be essential if the act is to have any meaning; otherwise, coercion could be avoided by setting up short-term franchises and using nonrenewal as a lever to induce dealers to do anything the manufacturer desired. Yet the issue may still cause trouble to a dealer who wants to use the statute.

Joined with a dealer's considerable legal problems in convincing a court that forcing unwanted cars is coercive are several practical factors which may undercut the protection of the statute. Forcing unwanted items is not likely to cause great damage to the dealer since he usually can sell these items at prices at or slightly below his cost. Few cars or trucks are so bad that they cannot be sold at such prices. Thus a dealer would face a potentially difficult law suit to recover a relatively small amount of damages.[611] The effort often will not be justified by the potential gain. Furthermore, a dealer who still has his franchise is not likely to sue because he may fear that such a suit would injure his relationship with the manufacturer—at the least, he would expect few favors.[612]

606 Of course, this is the old unconstitutional conditions argument in a different setting. It is no more persuasive here than in the constitutional area. The argument is not logically necessary. See French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 236-37 (1961).

607 Garvin v. American Motors Sales Corp., 318 F.2d 518 (3d Cir. 1963); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889 (N.D. Ga. 1963); Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378 (D.N.J. 1959).

608 Record, Vol. II, p. 470, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

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

610 H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956). (Emphasis added.)

611 For example, in Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965), the dealer's loss on an unwanted truck was only $125. A number of unwanted items could add up over time, but the Good Faith Act has only a three-year statute of limitations. 15 U.S.C. § 1223 (1964).

612 But see Zarbock v. Chrysler Corp., TRADE REG. REP. (1965 Trade Cas.)

Therefore the statute is unlikely to be of great benefit to a dealer who has been forced to take unwanted cars, trucks, parts, or accessories unless the case was flagrant and involved an unusually large loss—for example, one where the forcing went on for several years and involved many items. Yet the act may serve some deterrent function. Forcing unwanted items can be coercion, and the law brands coercion as wrongful. Losing several cases based on this theory could cost a manufacturer some of its dealers' good will and leave it vulnerable in another congressional hearing concerned with the "abuses of big business." If this type of consideration has force, the uncertainty about the meaning of the act might cut both ways. In addition to presenting a dealer with a problem, it might induce a manufacturer to adopt a policy requiring its road men to do nothing that could be construed as a threat in order to push slow-selling items.

The second kind of case in which the meaning of coercion has been tested is the most common one.[613] Here the dealer's franchise has been cancelled or not renewed, and he is unwilling to take the manufacturer's offer of termination benefits and just fade away. He wants a large sum of damages and perhaps a little vengeance as well. What does a statute limited to coercion offer him? The table listing the won-and-lost record indicates that the statute may not offer him much help. That conclusion becomes stronger when one considers what such a dealer would have to prove to establish coercion and a cause of action.[614] First, he would have to prove a threat to terminate unless some action were taken. Secondly, he would have to convince a court that that threat was illegitimate—that terminating was "not lawful" under Kessler and Stern's definition. Finally, he would have to show that "by reason of" the coercion he suffered damage of a type covered by the statute.

In most of the reported opinions there has been no discussion of whether or not there was a threat to impose a sanction unless the

¶ 71361, at 80539 (D. Colo. 1964), where a dealer who still held a franchise sued for losses caused by Chrysler's poor distribution system. Zarbock also was given a Valiant franchise after the commencement of the action. Chrysler's representatives testified that Zarbock's "reputation . . . was good, and that he was a good salesman with a high turn-over for the size of his dealership." Perhaps such a dealer feels more free to sue, or perhaps Zarbock thought that since he was receiving no co-operation from the factory he had nothing to lose.

613 See notes 536, 595 *supra*.

614 Appellee [Ford Motor Company] acknowledges that under certain circumstances threats of termination may constitute a violation of the Act, but in order to constitute such a violation the threats must be coercive or intimidating. They must be made to wrongfully force someone, against his will, to do something he has a legal right not to do.

Brief for Appellee, p. 25, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

dealer acted.[615] The point is assumed.[616] The selling agreement itself contains demands and threats. It states that a manufacturer may cancel if, for example, the dealer fails to sell enough cars, to have adequate facilities and capital, or to do satisfactory repairs. Moreover, the standard procedure of most manufacturers seems to be for the road man first to call defaults to the attention of the dealer and then, if no action is taken, to warn him that he will be cancelled unless he acts within a certain time.

Thus the dealer should have little trouble showing a "threat." So far the real problem has been in taking the next step and showing that the threat is illegitimate. Suppose a dealer refuses to do warranty service on the cars he has sold and tells customers to take their new cars which need service to another dealer on the other side of town. The selling agreement requires the dealer to do this work and says that the manufacturer may cancel if the dealer fails to do it. The manufacturer points this out to the dealer and then demands that the work be done. The dealer refuses and is cancelled. The dealer may have been threatened, but was the threat "not lawful"? It is hard to believe that he would be surprised by the requirement in the selling agreement since it is so typically part of the new-car business. If it is relevant, the clause would probably be deemed reasonable by most people, especially those consumers who tend to worry about the quality of a dealer's service. One would probably conclude that the manufacturer had a contract right to cancel for failure to perform this duty, hence that its demand was legitimate and not coercive. Moreover, assuming the manufacturer has such a right, it seems desirable to encourage it to make this type of "threat." The dealer is warned that the manufacturer intends to enforce its rights and can plan his conduct accordingly.

Conversely, one can easily think of an illegitimate threat. Suppose a manufacturer demanded a political contribution as the

615 In Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378, 383 (D.N.J. 1959), the court said, "it is uncontradicted that during the last half of 1957 defendant's representatives never saw or were able to communicate with DePaolo personally on his premises. Under such circumstances they could hardly have threatened to coerce or intimidate him." This is true, but the franchise itself could contain a packaged threat which would be coercive if it were not legitimate.

616 See the argument of the Ford Motor Company:

> The basic contract rights of the manufacturers are not lost or vitiated by the Act. Their rights to "enforce" the contract through "threats" to terminate or fail to renew, if you will, have *not* been taken from them.
>
> . . . . .
>
> Manifestly, a party who has failed to perform a contractual obligation that is not contrary to public policy or otherwise is not coerced or intimidated in the legal sense if the other party exercises or threatens to exercise his contract rights to obtain performance.

Brief for Appellee, pp. 35-36, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

price of keeping a franchise. Since there is no right to cancel for failing to make such contributions, this would be "not lawful" and coercive. However, the dealers who have sued have had to take much more difficult positions. They have had to argue that (1) although the manufacturer asserts a contract right to terminate because of a dealer's default, (2) in fact there was no default, and (3) hence that its demand is illegitimate.[617] Such an argument can

[617] Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 106 n.478 (1959), say "That threat to breach a contract constitutes coercion ('economic duress') is amply supported by the authorities which hold that extra compensation extracted to avoid a breach is unsupported by consideration . . . ." Things may not be this easy. The lack of consideration necessarily means only that promises made under this kind of economic duress are unenforceable. However, the lack of consideration is not much help when no promise is involved. Then the aggrieved party needs the doctrine of duress in order to bring to bear all of the restitutionary remedies which give back benefits conferred. Yet he will be faced with the great reluctance of the courts to categorize as duress a threat to breach a contract. See DAWSON & PALMER, CASES ON RESTITUTION 979-99 (1958). Suppose a manufacturer's representative threatens to breach the selling agreement by terminating the franchise unless a dealer takes specific action. The dealer takes the action and loses a great deal of money. Consideration is not much help since there is no promise. A threat to breach a contract typically has not been enough for duress. Does this mean that the demand is not coercive? Of course, the concept of economic duress is growing and may expand to cover threats to breach a promise. See Wolf v. Marlton Corp., 57 N.J. Super. 278, 154 A.2d 625 (1959), where a threat to exercise a constitutional right to sell a house to an "undesirable" was held to be duress.

Assuming one accepts Kessler and Stern's position and concludes that a clear threat to breach the franchise would be coercive, there are still some unsettled problems in the manufacturer-dealer situation. Suppose a dealer's sales are neither clearly satisfactory nor clearly unsatisfactory. A manufacturer's representative threatens to cancel the franchise unless sales improve. Assume that a court would find that this was a threat to breach the contract because sales were just barely satisfactory. Now the consideration doctrine probably will not serve to categorize the threat as coercive. A compromise of a claim asserted in good faith where the claim was reasonable is supported by consideration although in fact a court would later find the claim to be invalid. 1 CORBIN, CONTRACTS § 140 (1963).

A threat to cancel under these circumstances probably would not be a repudiation for purposes of anticipatory breach:

> [T]he making of a demand upon the other party to a contract that he shall perform in accordance with an interpretation that is not justified by the law is not in itself a repudiation; such a demand, however, does not require much by way of accompanying expressions in order to justify the other party in understanding that no performance other than that demanded will be accepted.

4 CORBIN, CONTRACTS § 973 (1951). See also UNIFORM COMMERCIAL CODE § 2-610, Comment 2. One is free to negotiate about uncertainty in the definition of performance before that performance is due. However, the virtues of free speech and maintenance of economic relationships by compromise are balanced by the value of security and the right to rely on performance. If the negotiations tacitly communicate that the one asserting the claim is not going to perform, then the interest in security becomes paramount.

While the threat to cancel unless sales are increased where the sales are adequate within the definition in the selling agreement may not itself be an anticipatory breach and may not run afoul the consideration doctrine, it is a threat to breach the contract in the future. Once the time for performance arrives one can assert his interpretation as a justification for his actions, but he must be right; if he is wrong he has breached, and his good faith goes only to whether the breach is total or partial. See RESTATEMENT, CONTRACTS §§ 275, 314, 318 (1932). If a court would categorize a threat to breach a contract as duress, then a threat to terminate made in the mistaken belief that the manufacturer had a right under the contract to do this would be "not lawful" and thus coercive within the Kessler and Stern definition. Such a view is troublesome. Is the Good Faith Act intended to protect dealers from threats of termination where there is a reasonable doubt about the adequacy of performance? So far, none of the cases has come close to this problem.

be based on a claim that the clause in the selling agreement which states the duty is invalid; that the dealer is not, in fact, in default; that his default is excused; or that the default does not give rise to a right to cancel. In other words, the dealer must build his argument that coercion has been used on many of the defenses which are traditionally classified as a part of the law of contracts. The courts have indicated that they will review terminations for alleged failures to perform duties imposed by the franchise. Thus they recognize the possibility, if not the likelihood, that a dealer could be coerced by a demand to perform an invalid duty written in the franchise, to perform more than his duties under the franchise, or to perform where he is excused. The courts have indicated they will review the franchise as written and as administered.[618]

Opinions in Good Faith Act cases have applauded most of the important clauses in the standard franchises, calling them "eminently reasonable, objective and non-discriminatory,"[619] "in the ordinary course and dictated by sound business practice,"[620] and "not inherently unfair or arbitrary."[621] The provisions which have been so approved include (1) the definition of a dealer's sales obligations and the market potential system of further defining that obligation,[622] (2) the requirement that a dealer submit regular financial reports,[623] (3) the requirements that a dealer have adequate facilities[624] and capital,[625] and (4) the requirement that

[618] See, *e.g.*, Milos v. Ford Motor Co., 317 F.2d 712, 717 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

[619] *Ibid.*

[620] Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378, 382 (D.N.J. 1959).

[621] Leach v. Ford Motor Co., 189 F. Supp. 349, 352 (N.D. Cal. 1960).

[622] *Ibid.*; Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

[623] Garvin v. American Motors Sales Corp., 318 F.2d 518, (3d Cir. 1963).

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

[625] Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889, 892 (N.D. Ga. 1963).

the manufacturer approve any buyer of a dealer's business and accept the buyer as a new dealer.[626]

Although one cannot be certain, the courts apparently are saying that if a manufacturer demanded that a dealer comply with a clause that was "eminently [un]reasonable, [not]objective and ... discriminatory,"[627] this would be coercion.[628] Of course, this would be inconsistent with the idea that the parties are the best judge of the fairness of their bargain. The courts may be rejecting the argument that the manufacturer obtained a contract right even to unreasonable clauses when the dealer signed the selling agreement. They may be taking the position that this standardized contract of adhesion is to be reviewed for fairness. The terms used by the courts point to a review designed to carry out the likely expectations of a reasonable dealer—that he be treated equally with other dealers in a like position, that he not be subject to the whim and idiosyncrasies of road men and their supervisors, and that his obligations be based on economically rational business standards. This looking behind a printed, take-it-or-leave-it document would be consistent with a number of recent developments in contract law such as the unconscionability provisions of the Uniform Commercial Code.[629]

To what extent will the courts' review of the provisions in the franchises help the dealers? Probably not much. It is not surprising that the courts have found that the provisions in the franchises reviewed so far bear the stamp of sweet reasonableness. After all, the General Motors franchise was drafted to pacify a Senate investigating committee as well as to relieve strains in the relationship between General Motors and its dealers.[630] The other manufacturers followed this lead. Ford, for example, goes to unusual lengths to explain why it imposes certain duties on dealers.[631] The one major objection that dealers might make to the

626 Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425, 430 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

627 The quoted language is from Milos v. Ford Motor Co., 317 F.2d 712, 717 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

628 The argument would be: (1) an unreasonable clause is not part of the contract and cannot give the manufacturer a contract right; (2) a threat to cancel for failure to comply with such a clause is thus a threat to breach a contract; (3) a threat to breach is duress, "not lawful" within Kessler and Stern's definition, and thus coercive. See note 617 *supra* for some of the problems with this argument.

629 UNIFORM COMMERCIAL CODE § 2-302. Compare the developing English doctrine of "fundamental breach" whereby judicial enforcement of clauses limiting liability is denied when enforcement would be inconsistent with the "core" or primary purposes and obligations of the contract. For an excellent discussion, see Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964). See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

630 See text accompanying note 296 *supra*.

631 See text accompanying notes 457-59 *supra*.

present franchises is that often provisions are vague or leave a great deal to the discretion of the manufacturers' field representatives.[632] There is a somewhat amusing parallel between the manufacturers' complaints that both the federal and state statutes are unconstitutionally vague and the imprecise way the manufacturers drafted the provisions in their own franchises. However, this point has not been considered by a court, and if it were raised, a judge might well find that most of the uncertain provisions have been clarified by practices of the manufacturer. It is unlikely that any clause in a current franchise will be overturned in a Good Faith Act case. The courts' review for reasonableness as written will not help dealers who try to invoke the statute in a termination case. At best, this review will be one more sanction pressing the manufacturers toward reasonableness when they redraft franchises in the future.[632a]

Most courts in Good Faith Act cases, after observing that a clause in the selling agreement is reasonable as written, turn to consider whether or not the franchise was administered legitimately.[633] On one hand, there is the possibility of bad faith and plotting by a manufacturer's field men. On the other hand, even absent bad faith, it is possible that a manufacturer might threaten cancellation when it did not have the right to do so and thus exert coercion.[634]

In all organizations there is the chance that people will dislike each other. Some people use their official power to carry out this

632 See text accompanying notes 434-49 *supra*.

632a The Industry Relations Committee of NADA included in its dealer-factory program for 1965, revisions of the standard franchises to grant more rights to the dealers. Automotive News, April 5, 1965, p. 1, cols. 2-3, at 76, cols. 3-4. However, no major changes were made in General Motors franchises when they were renewed this year. *Id.*, Sept. 6, 1965, p. 3, cols. 3-4. Apparently, NADA was unsuccessful, but no added burdens were imposed on the dealers by the new language. However, the refranchising of some General Motors dealers was contingent upon their agreeing to expand their facilities. *Ibid.*

633 See, *e.g.*, Milos v. Ford Motor Co., 317 F.2d 712, 717 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963); Garvin v. American Motors Sales Corp., 318 F.2d 518, 520-21 (3d Cir. 1963).

634 The court in Walker v. Ford Motor Co., 241 F. Supp. 526, 529-30 (E.D. Tenn. 1965), may disagree:

> The plaintiffs were undoubtedly mistreated by the defendant's personnel. It was insisted by the defendant that they employ salesmen and mechanics which they did not need; that they keep their doors open needlessly; and they were chastised on the basis of unsound quota analyses. Nonetheless, the "advice" given the plaintiffs by the personnel of the defendant did not rise to the dignity of coercion or intimidation, and the Court must reluctantly find and conclude that the defendant's action in terminating the plaintiffs' franchise was not an unlawful exercise of its business judgment.

None of the facts are given in the opinion, but it appears that the case rejects the definition of coercion proposed by Kessler and Stern. See note 617 *supra*. The conduct of the Ford personnel appears to have been of the sort covered by the consideration doctrine relied on by Kessler and Stern.

dislike by punishing others or seeking revenge. Manufacturers' personnel who see dealers and make decisions about the quality of their performance have some discretion, and discretion can be abused. For example, dealers' sales are measured by an elaborate formula. The dealer is assigned a "market potential"—an estimate by the manufacturer of what the dealer can sell in his area. The dealer's actual sales will be a percentage of this potential. This percentage is compared with the percentages of other dealers in comparable areas.[635] Assume the potential for a particular dealer was one hundred cars but that only seventy were sold. Five comparable dealers sold eighty per cent of their potentials. Clearly judgment was involved in deciding that the potential for the dealer's area was one hundred cars, and it would be involved in deciding that seventy per cent achievement when others achieved eighty per cent warranted termination. It is possible that each of these choices could be made in bad faith to get rid of a dealer who was not liked by the official making the decision. Nonetheless, while a plot is conceivable, in most companies it would not be easy to "get" a dealer. Decisions must be reviewed by tiers of superiors. They would have to be conspirators too or be misled by the official who was plotting the overthrow of the dealer. There is a tendency to require a pattern of default by the dealer over time, and so the plotter would have to be patient. Finally, the plotter's desire for revenge would have to be strong enough to warrant taking the risks of getting caught.

To what extent does the Good Faith Act protect dealers from plots by revenge-seeking personnel of the manufacturers? The answer is that the protection supplied by the act is more apparent than real. It is likely that if a dealer proved a plot, he would have established that any threats made were illegitimate and coercive.[636] The threatened alternative to doing the manufacturer's bidding would be termination and the manufacturer would have had no right to cancel if the decision that, say, the dealer's sales were not satisfactory was based primarily on a desire for revenge rather than on a good faith appraisal of the dealer's performance. On the other hand, a manufacturer's official could dislike a dealer intensely but still do no more than smile with malicious pleasure as the dealer put his neck in the noose by his own failures. For

[635] A market potential is not a requirement that a dealer sell a given number of cars in any event. Rather, it is a percentage factor of one dealer's share of sales by many dealers in an area. Although it is based at the beginning of any year upon "expected" sales during that year, it is subject to correction during the year by reference to "actual" sales made by all dealers in the area. Only if the percentage factor for any one dealer is out of line could he be prejudiced by the so-called market potential formula.

Leach v. Ford Motor Co., 189 F. Supp. 349, 352 (N.D. Cal. 1960).

[636] See note 617 *supra*. The plot would be a threat to breach a contract which would come under Kessler and Stern's consideration-as-economic-duress theory.

example, a Ford dealer with a market potential of one hundred cars might sell only ten, while comparable dealers sold eighty per cent of their potential and while the Chevrolet dealer in his area sold two hundred cars. One could not call a Ford representative's recommendation that the dealer be terminated an abuse of discretion even if making the recommendation gave the representative great pleasure. Hence there would be no coercion and no cause of action under the statute.

The distinction just suggested spells trouble for dealers who think they have been victims of a plot. They must prove a plot existed, and they often will not be able to find adequate evidence to establish this. In *Kotula v. Ford Motor Co.*,[637] the dealer offered about as good evidence of a plot as a dealer is ever likely to have,[638] absent a confession by the plotter, and he convinced a jury. However, the trial judge granted Ford's motion for judgment notwithstanding the verdict, and the Eighth Circuit affirmed. In May of 1959, Kotula, a Ford dealer in Albany, Minnesota, was told by a Ford representative to order a two-ton truck. "If you don't want that truck, you don't want to be a Ford dealer."[639] Kotula refused to take the truck. He then found he was unable to get delivery of the cars he had on order for customers. He called Ford's main office in Dearborn, Michigan, and complained. Two days later the district manager for the Twin Cities district and the general field manager visited him and were angry because he had gone over their heads. They asked him to resign as a Ford dealer, but he refused. He finally ordered the truck, got his cars which were on order and then sold the truck at a 125 dollar loss.

In February of 1960, nine months after the truck incident, the same general field manager told Kotula, "Look, Kotula, if it's the last thing I ever do, it will be to make you wish you were never a Ford dealer in your life. . . . Don't ever forget it, Mr. Kotula, that I will get you yet." In May of 1961, about two years after the original truck incident, the district sales manager recommended termination. He sent on a file containing reports of Kotula's alleged deficient sales and bad practices and attempts to aid him remedy the defects. Kotula showed that one of the reports talked of a visit to the dealership during business hours but said the meeting took place on a date which was a Sunday when the business was closed. Another report in the file was written on a form that had not yet been printed at the time it supposedly was written. He said this indicated that the termination file had been

[637] 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

[638] The facts stated in the text are Kotula's version of what happened, since the jury believed him.

[639] The Ford representative testified, "I didn't force him to take a truck. I insisted that he take a truck . . . . I had no way of terminating anybody." Record, Vol. II, p. 348, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

falsely compiled in order to support the plotter's recommendation rather than as an accurate record of what had happened.

Kotula claimed that the decision to terminate for unsatisfactory sales performance was based on false or misleading information in his termination file. He said that Ford set market potentials for him based on what it assumed were the total sales of Fords, Chevrolets, and Plymouths in his area. His sales were far below these potentials for several years. However, the local Chevrolet dealer frequently sold cars to residents of the nearest metropolitan area but registered the cars as bought by people in his city, thus increasing the apparent total of sales in the town. Kotula complained that as a result those who set market potentials for Ford were operating on false assumptions, but nothing was done.[640] Since Kotula's yearly potential was only about twenty-five cars, even a small overstatement of it worked greatly to his disadvantage when his sales were translated into a percentage of that potential.

The termination file also contained a comparison of Kotula's percentage of potential for three years with those of five other Ford dealers. He complained that in "selecting towns to compare with the Albany sales record, Ford skipped over adjoining towns whose average distance from Albany was 24.0 miles, and selected five towns for comparison whose average distance from Albany was 45.2 miles."[641] Two of the dealers were exceptionally good performers. One sold 226 per cent of his objective in 1959 and 160 per cent in 1960.[642] The other, who was not in the same sales zone as Kotula's dealership, sold 190 per cent of his objective in 1959 and 117 per cent in 1960.[643]

However, the undisputed evidence showed some facts favorable to Ford. Kotula sold only 39 per cent of all the Fords purchased by people living in his area in 1957, 45 per cent in 1958, 59 per cent in 1959, and 71 per cent in 1960.[644] In other words, many potential customers preferred to buy Fords from a dealer in another town for some reason. There were no statistics comparing this invasion factor with the experience of other dealers. Also the Chevrolet dealer in Albany was more effective against Kotula than most Chevrolet dealers were against most Ford dealers in the zone. In 1959, Kotula sold twenty-two Fords while the Chevrolet dealer sold twenty-six cars in the area.[645] In the zone the percentage of Fords sold to the percentage of Chevrolets was 114 per cent,[646] as Ford outsold Chevrolet that year. In 1960, Kotula sold twelve Fords; the Chevrolet dealer twenty-two cars.[647] In the zone, Ford's percentage to Chevrolet's was 76 per cent.[648]

[640] Brief for Appellant, pp. 38-45, Kotula v. Ford Motor Co., *supra* note 639.

[641] Brief for Appellant, p. 49, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

[642] Record, Vol. II, p. 274, Kotula v. Ford Motor Co., *supra* note 641.

[643] *Id.* at 274-75.

[644] Exhibit Y, Dealer Comparison Chart, reprinted in Brief for Appellant, p. 44, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

[645] *Ibid.*

The two courts thought that Kotula had not proved his case. The district judge said:

> Certainly, if the District officials intended to get rid of plaintiff as a dealer by reason of any personal ill will, spite, or revenge, as plaintiff contends, it seems inconceivable that they would have waited some two and one-half years to carry out their designs when the contract could have been cancelled by the defendant at will without any cause on 120 days' notice.
>
> . . . [T]here were valid reasons for concluding that Kotula was a submarginal dealer as a Ford representative . . . .
>
> The Court does not deem it necessary to determine whether the jury was justified in deciding that plaintiff had established by the greater weight of the evidence that the contract was terminated on insufficient grounds.[649]

The Eighth Circuit affirmed, saying, "The difficulty with plaintiff's premised theory is that the favorable evidence . . . wholly fails to establish any causal connection between the coercive conduct relied upon, and the termination of the agreement."[650] In other words,

[646] *Ibid.*

[647] *Ibid.*

[648] *Ibid.*

[649] Record, Vol. II, pp. 470, 471, 472, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

[650] Kotula v. Ford Motor Co., *supra* note 649. In this case Ford made an effective policy argument:

> Moreover, to permit recovery on the evidence offered in this case leads to only one conclusion—an automobile manufacturer cannot, without liability, exercise its right to terminate a dealer for failure to perform the obligations of the Sales Agreement if that dealer, despite his failure to perform, can show some personal animosity between himself and one or more of the manufacturer's field personnel. Such a conclusion not only offends the purpose and the legislative history of the Act, but also would place an intolerable burden upon Appellee's business, which necessarily involves personal contact between thousands of employees and its seven thousand (7,000) dealers.
>
> In order to guard against just such personal animosity as has been alleged in this case, the Ford Motor Company has established, and employed in this case, an elaborate and objective system of review by levels of the Company other than the District Sales Office. As a final measure of protection against arbitrary action by its sales personnel, review of dealer terminations by the Dealer Policy Board is utilized.

Brief for Appellee, p. 36, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965). The Eighth Circuit responded with a sweeping ruling that may have far-reaching significance:

> One additional and vital phase of the case requires comment. The termination procedures provide that the notice of termination shall advise the dealer of his right to appeal to the Dealer Policy Board. This requirement was met—the notice informed plaintiff of his right to request a conference with the Dealer Policy Board, which was made up of top level officials of Ford. At plaintiff's request, the

Kotula's evidence could be explained by alternative hypotheses: (1) there was a plot that caused his termination, or (2) the local representatives disliked Kotula, and perhaps took some steps to get rid of him, but Kotula was a sufficiently bad dealer that a good faith judgment by the local representatives' superiors was made to cancel him. The local representatives may have been happy to see Kotula go, but others made the judgment in good faith upon at least plausible grounds.

> Board gave him a hearing, and thereafter considered his complaints and objections, including his insistence that the termination was founded upon baseless and groundless charges. The Board also conducted an extensive and independent investigation which among other things developed the true number of vehicles sold by competing dealers to residents of their franchise territories. Based upon this investigation the Board ultimately decided that the franchise should be terminated. It communicated its findings to plaintiff, "outlining just where we had come out on our analysis of the registration information he had given us, and concluded that his performance was so unsatisfactory that the Company's notice of termination was proper and should be confirmed".
>
> Thus, even if we assumed, which we do not, that there was sufficient evidence to warrant the finding that the termination file depicted a distorted and groundless record of inefficiency and that the causes alleged were a mere pretext for defendant's arbitrary or capricious action, we would be required to go one step further and hold that the evidence was also adequate to warrant a finding that the Dealer Policy Board was a party to the wrongful scheme, and that it too acted in bad faith in its review, investigation and determination. To so hold would require resort to the rankest kind of speculation and conjecture.

Kotula v. Ford Motor Co., *supra* at 739. The major problem with the court's position is that the investigation of the Dealer Policy Board was not very independent of the Ford officials accused of plotting. A member of the Board testified:

> Q. And you did not make such an investigation, did you?
>
> A. Well, we looked into the question of registrations, we felt, very thoroughly. I knew what he had told us about the excise tax situation and he had thought that was a problem with the District, and I couldn't agree with him on that. I had read the file with respect to the report on the truck incident and also read what Norton had to say about him at later dates, and it didn't seem to me that he had the problems quite to the extent that merited or would necessitate our coming out there to enable us to conclude the matter.
>
> Q. What is your answer, no? A. No.
>
> Q. You say, "we made an investigation of these registrations." You mean that the Twin City District office made an investigation, do you not? A. I mean we asked basically the Division to arrange with the Twin City District office to check these out and give us a full and complete report on their check-out, so that we could determine what they had done and determine if we thought it was accurate.
>
> Q. When you say "we made the investigation," you don't mean to suggest to the Court and jury that the Dealer Policy Board itself made the investigation? A. No. We caused it to be made.
>
> Q. And actually, it was made through the Twin City District office? A. That's right.

Record, Vol. II, p. 388, Kotula v. Ford Motor Co., *supra*.

The court's opinion can and should be limited to instances of a truly independent investigation.

Since plotters are not likely to confess, and since few would bother to plot against a clearly outstanding dealer because of the difficulty of success, it seems probable that dealers are not going to be able to do much better than Kotula in establishing that they were victims of a bad faith abuse of discretion. Unless another circuit were to decide that *Kotula v. Ford Motor Co.* was wrong and the inference of a bad faith abuse of discretion could have been drawn, the Good Faith Act will offer little help to those in his position. Of course, the chance that another circuit would take a different view might afford a little deterrence. Even if a manufacturer were likely to win all such cases, the chance of having one's conduct reviewed in the litigation process might cause a manufacturer's official to bend over backwards. Few are eager for such an exacting review of their decisions by important superiors. Still the statute does not seem nearly as important either as an aid to the cancelled dealer or as a deterrent force, as do the manufacturers' own internal review procedures.

Assuming it will be this difficult to prove bad faith, can the dealer show coercion by proving that although the manufacturer acted in good faith, it had no right to cancel, and that its threat, in consequence, was illegitimate? The first possibility is to challenge the manufacturer's assertion that the dealer failed to perform the particular duty in question. If the manufacturer threatened to cancel unless the dealer, for example, obtained adequate capital to run his business, and in fact the dealer had adequate capital, the threat might be coercive under Kessler and Stern's definition since the manufacturer would have had no legal right to cancel.[651] However, the problem is complicated by the fact that performance of a dealer's duties is not a yes-or-no matter but a question of judgment. The dealer's sales are to be "satisfactory" to the manufacturer; the dealer's capital and facilities "adequate."[652] Thus the courts could take one of three positions: (1) if the manufacturer's judgment is not proved to have been in bad faith, then it is final and there is no breach even if the judgment is thought to be wrong;[653] (2) if the manufacturer's judgment is unreasonable, then there is a breach although the judgment is

[651] This assumes that a threat to breach a contract, made in the good faith belief that it is a threat to assert rights granted by the contract, is duress, thus "not lawful" and thus coercive. For the difficulties with this argument see note 617 *supra*.

[652] See text accompanying notes 434-49 *supra*.

[653] The draftsmen of the Ford franchise have attempted to reach this result by contract: "Any determination to be made, opinion to be formed, or discretion to be exercised by the Company in connection with any provision of this agreement shall be made, formed or exercised by the Company alone and shall be final, conclusive, and binding upon the parties hereto." FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 31 (1962). One can wonder whether or not the courts would give effect to this clause. Suppose a determination were made in bad faith. In any event, it provides one more argument a dealer's attorney must meet.

not shown to have been in bad faith; or (3) if the manufacturer's judgment is found to have been wrong by the trier of fact, then although it is not shown to be unreasonable or in bad faith, there is a breach.

There has been little discussion of "satisfaction" and "adequacy" in the briefs filed in the cases so far.[653a] The Ford Motor Company, in arguing that the statute was unconstitutional, indicated its fear of the third possibility:

> The real issue in the case at bar is whether the defendant, both for its own survival in a highly competitive industry and in the interests of the car-buying public in a given locality, safely may terminate its sales agreement with an inefficient dealer—here a dealer who had effectively ceased selling automotive products—without being subject to a long and expensive trial under the amorphous concepts of the Act.
>
> Is a jury now to review the defendant's (Ford's) distribution of automobiles to all its dealers over a three-year period and decide how many of each model should have been allotted to the plaintiff . . . in relation to the other dealers in the country, both from a point of view of a sales quota in times of plenty and a production allocation in times of shortage? . . . . If during one of these years, there was a shortage of station wagons, how does the jury decide how the manufacturer should have allocated station wagons to dealers? If there were two dealers in [a particular town] . . . upon what basis will the jury determine that the defendant should have made allotments to each?[654]

The manufacturers could make several arguments against allowing a jury to determine whether or not a manufacturer was right in determining that the dealer's performance was unsatisfactory or inadequate. Many are implicit in Ford's constitutional argument —a jury's bias in favor of a "small" dealer could color its view, a jury would lack experience needed to make these judgments, and the manufacturer could not act without running the risk that a jury would disagree. Moreover, insofar as the contract calls for satisfactory performance this means performance which satisfies

[653a] In the *Milos* case Ford argued that the dealer was in fact "woefully inadequate" in his sales performance, Brief for Appellee, pp. 11-26, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963), but it also asserted that "the jury may not substitute its criteria for those established by the agreement of the parties or second-guess Ford in the establishment of sales objectives." *Id.* at 22. In the *Kotula* case Ford argued that the dealer's "effort to vindicate his sales performance at best does no more than to challenge the business judgment of Appellee in terminating the contract for poor performance. It does not in any way serve to establish coercion." Brief for Appellee, p. 32, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965). In both arguments Ford assumes it can make a wrong determination and still not be coercive.

[654] Automotive News, Nov. 13, 1961, p. 2, col. 3, at 42, col. 3.

the company—not a jury. A dealer could counter that in most contracts one accuses the other of being in default at his peril. The company said "satisfactory" but not "satisfactory to the manufacturer" or "adequate in the manufacturer's opinion." If the dealer succeeded with such an argument, the expanded definition of coercion would encompass most of the benefits to dealers provided by the rejected "fair and equitable" reading of the act. Juries could review manufacturer decisions for correctness. To date few cases have dealt with the point even by implication. The trial court in the *Kotula* case assumed that there would be no cause of action under the act although the jury found "the contract was terminated on insufficient grounds."[655] Other cases have commented on the manufacturer's decision as being reasonable or its "honest belief."[656] It seems unlikely that the courts would accept this theory, yet the possibility remains.

If the courts decide that the manufacturer need not be right in its decision to cancel in the eyes of a jury, must it be reasonable or is lack of proof of bad faith enough to block a cause of action for coercion? Again there is little argument in the briefs about this question. Professor Kessler argues:

> [S]ome of the dealer's obligations are not anchored in objective criteria. Many use "adequate" or "sufficient" performance as a yardstick. Judicial consideration of these provisions should not be patterned on the treatment of personal satisfaction clauses. The manufacturer should be denied absolute discretion. In weighing a dealer's argument that he substantially complied and that the manufacturer insisted on an unreasonable standard of performance, courts should consider the New York experience with architects' certificates in the building industry. The New York courts, when determining whether the absence of a required architect's certificate barred contractual recovery, have taken the position that a certificate was unnecessary where the architect had denied it unreasonably.[657]

Kessler does not say why the courts should follow the New York architects' certificate view, but presumably he bases his conclusion on the policies of the statute and on the fact that the franchise is a contract of adhesion drafted by the manufacturer. Dealers could argue that their legitimate expectations are that the manufacturers will not only exercise good faith but will make reasonable business judgments as to the adequacy of the performances of

[655] Record, Vol. II, p. 472, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

[656] See, *e.g.*, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425, 430 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962).

[657] Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1183 (1957). Compare "the business judgment rule" as applied to corporate officers and directors in suits by shareholders. See FEUER, PERSONAL LIABILITIES OF CORPORATE OFFICERS AND DIRECTORS 13-23 (1961).