dealers. Otherwise all of the effort that went into the revised selling agreements of the 1950's would be meaningless, and the definitions of dealers' duties and provisions for cancellation for cause would add up to little more than a right to cancel at will. On the other hand, if a jury is to review the reasonableness of a manufacturer's determinations that sales were unsatisfactory and capital and facilities were inadequate, manufacturers could object that many of the problems of a jury review of the correctness of a manufacturer's judgments would be present here too. In theory one can see a distinction between being required to be right and to make a reasonable judgment; in application, the difference may not be so great.[658]

The reported opinions once again are not too helpful. They are full of language describing as "reasonable" a manufacturer's decision that a dealer is not performing his duties.[659] However, the manufacturer's conduct has always been found to be reasonable. Therefore, it has not been necessary to indicate what would happen if a judgment about the adequacy of performance were found to be unreasonable but not proved to have been made in bad faith. The judges could be taken to have held no more than that since the manufacturers' judgments have not been shown to be incorrect, unreasonable, or in bad faith, there has been no need to decide the point.

Even if a manufacturer's judgment is correct, reasonable, and in good faith, the courts have indicated that perhaps more is required to justify termination and make it free from coercion. The selling agreements say that a manufacturer has a right to cancel if a dealer defaults. In *Woodard v. General Motors Corp.*,[660] the Fifth Circuit's opinion contains a passage that has been quoted in two other decisions,[661] which may indicate that an expanded "material breach" approach may be taken under the Good Faith Act. The passage reads:

> We do not think that the good faith requirement, whether viewed in or outside of the context of coercion, prevents a manufacturer from terminating a contract with a dealer where the dealer has, over a long period of time, violated a valid and material clause of the contract and has failed to comply with the continuing insistence of the manufacturer upon performance. And it is shown, we think, by the quoted portions of the House Report, that there was no legislative intent that the prohibited coercion should include a threat of cancellation if there should be a prolonged failure on the part of the dealer to heed the recommendations or yield to the persuasion of the manufacturer that the dealer make a bona fide effort to comply with its undertakings.[662]

658 See 1 CORBIN CONTRACTS § 140 (1963).

659 See, *e.g.*, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645, 649 (3d Cir. 1964) ("reasonable"); Garvin v. American Motors Sales Corp., 318 F.2d 518, 520, 521 (3d Cir. 1963) ("there is nothing arbitrary or unreasonable about this requirement . . . ." "the decision not to renew was based on sound business judgment . . . .").

660 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962).

661 The passage is quoted in Kotula v. Ford Motor Co., 338 F.2d 732, 739 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889, 894 (N.D. Ga. 1963).

At least four requirements for noncoercive behavior are present: (1) the clause must be valid, (2) the dealer must have violated it, (3) the default must be significant to the manufacturer in that the violated clause is material and the violation is over a long period of time,[663] and (4) the manufacturer's demand is for a bona fide effort to comply and the dealer's failure to respond is prolonged. Again, since no manufacturer has failed to pass this test, all we can say is that a manufacturer is safe if it meets all four conditions. However, imposing this test probably would implement the sense of the transaction between manufacturer and dealer.[664] One can say that manufacturers are responsible for leading dealers to believe that termination for cause will not be for minor and easily cured defaults or for occasional lapses. This likely understanding and the practices of the courts in dealing with most contracts make it clear that a manufacturer would have a difficult time arguing for a right to apply its franchise literally. For example, all franchises require the dealer to display a sign of an approved type. All allow the manufacturer to cancel for failure to perform this duty. Could it expect to be able to cancel a dealer with a good sales record whose sign had been blown down in a storm and who had not replaced it a day later? If such a dealer were threatened with termination, it would be a threat to impose a sanction which the manufacturer did not have a right to impose, and this threat would be classified as coercion.

The good faith, reasonableness, or correctness test and the material breach approach of the *Woodard* case probably will never help the cancelled dealer. He would be helped if the judiciary adopted a reasonableness or correctness rule and allowed juries freely to substitute their judgment for that of the manufacturer. However, the language used in the opinions to date looks in the opposite direction. Likewise, the material breach approach has not been administered to allow jurors great freedom to "fight the giant corporation."[665] A review of the records in the cases before

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

663 *Cf.* RESTATEMENT, CONTRACTS §§ 275, 276 (1932).

664 See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1182 (1957).

665 In the *Garvin* case the district judge commented on the reasons for the jury's verdict for the dealer:

> Reduced to its simplest aspects, plaintiff was a dealer who, for more than thirteen years, faithfully represented the defendant and its predecessor companies, having developed a regular clientele who would

the courts of appeal discloses that the manufacturers have not allowed close questions of judgment as to adequacy or materiality to come to the courts. The internal review systems and the practice of giving "second chances" to dealers serve to screen out most clearly questionable decisions. The most significant function of these inchoate and vague doctrines may be to reinforce the manufacturers' own policies of economically rational treatment of dealers. At best, the doctrines may serve slightly to shift the decisions in the close cases before the internal review systems in favor of the dealers. There is now one more reason for a manufacturer's personnel to make a record that cannot be questioned.

Once a cancelled dealer proves a threat, and if he is able to establish that the threat is to impose an illegitimate sanction, he faces the final problems. He must show that, in the language of the Good Faith Act, "by reason of" the coercion he suffered "damages" of a type covered by the statute.[666] Suppose a dealer is told he must hire more salesmen and cut prices to achieve his market potential or lose his franchise. The dealer has sold eighty-five per cent of his potential while other comparable dealers have sold between eighty-eight per cent and ninety per cent of theirs; this is the first year that the dealer has been below the average of comparable dealers. A court and jury later decide that had the company cancelled when the threat was made they would have breached the selling agreement because the judgment of unsatisfactory sales performance was unreasonable and the default was not material. Thus arguably the threat was to impose a "not lawful" sanction and was coercive.[667] However, assume that after

> purchase new cars from him as occasion would permit, extending his every effort to make his business a success within his limitations. He was the chief executive officer, head salesman and repairman, enlisting regular customers to act as part-time salesmen who, in turn, would bring their friends to the dealership. He devotedly tried to comply with the modernization requirements of the defendant, employing bookkeepers or so-called accountants to formulate reports that were required, but was unable to meet the technical and detailed directives and exigencies of this mushrooming automobile manufacturer.
>
> Substantial reasonable inferences may be drawn from the evidence that the nonrenewal of the plaintiff's franchise was due to the fact that, for reasons personal to the defendant, it did not desire a small-town dealer such as the plaintiff to continue to represent this modernized and up-to-date company, that in the stampede for success defendant intimidated and coerced the plaintiff into complying with its then newly formulated directives while, had the defendant applied a persuasive and understanding approach to the problems of the plaintiff, he undoubtedly would still remain as a representative of the defendant company.

Garvin v. American Motors Sales Corp., 202 F. Supp. 667, 671-72 (W.D. Pa. 1962). However the Court of Appeals reversed, 318 F.2d 518 (3d Cir. 1963), on the ground that American Motors' demands were reasonable and thus not coercive. The Third Circuit's opinion did not consider the test of the *Woodard* case discussed in the text.

[666] 15 U.S.C. § 1222 (1964).

[667] See note 617 *supra*.

the threat is made, the dealer refuses to hire the salesmen and cut prices and is cancelled. As a result, he loses 50,000 dollars worth of investment in signs, automobiles, parts and accessories on hand, advertising contracts, and similar essential reliance expenditures. He claims he also lost 10,000 dollars a year net profit for the next five years. The manufacturer offers the dealer 45,000 dollars in termination benefits. The dealer rejects this and sues under the Good Faith Act. How much, if anything, can he recover?

It is possible to argue that the dealer suffered no loss "by reason of" the coercion since he was not successfully coerced, but refused to act. The dealer was not injured by the threat itself as he would have been had he cut prices and lost money. However, the act also allows recovery for "threats of coercion" as well as "coercion." One might read this to mean that a "threat of coercion" is the initial threat, while the coercion itself is the imposition of the illegitimate sanction which in the case posed caused the injury. Alternatively, one could say in the case that *but for* the threat (if the threat is the coercion), the termination which caused the losses would not have followed, and thus the losses were caused by the threat. No case has mentioned this minor difficulty. Undoubtedly the draftsmen of the act were more concerned with the dealer who gives in and does what is demanded since this was the case discussed in the hearings. When one attempts to apply the statute to the dealer who was terminated for refusing to give in, it does not fit neatly. If a court were to adopt the suggested narrow reading of the phrase "by reason of" in the statute, practically it would mean that the act could not be used in a termination case but only as a basis for recovery of losses caused by attempts to avoid termination—that is, by compliance with the threats. Since this would mean no recovery for one who proved a bad faith plot to cancel him, a narrow reading is unlikely. However, it is one more possibly troublesome point before a judge who reads statutes very literally.

Even if the "by reason of" phrase proves trouble-free, the final hurdle is presented by the word "damages." What can a dealer who lost his franchise because of coercion recover? The statute does not define the word "damages"[668] and the legislative history is of little direct help. A recent comment in the *Yale Law Journal*[669] outlines some of the many problems. The statute could be limited to compensation for certain out-of-pocket losses—parts, inventory, premises—caused by the termination,[670] or it could

[668] 15 U.S.C. § 1222 (1964).

[669] Comment, 74 YALE L.J. 354 (1964).

[670] In the *Milos* case Ford argued that the act did not provide for recovery of expectation damages:

> The Act's legislative history reveals that its purpose, with reference to a bad faith termination situation, is simply to protect the dealer's *investment*, not his future profit expectation. Protection of

cover the profits the dealer would have made had the coercion leading to termination not occurred. In either event, a major problem is certainty of proof. If a dealer seeks to recover the loss on a showroom he built a year before the coercion, which has a useful life of twenty-five years, how can he establish that had the coercion not taken place he would have recouped his investment? The dealer might have suffered a sales setback within five years and given the manufacturer cause to cancel. He might have died and thus ended the franchise. He might have sold at a loss to move to a warmer climate in his old age. To some extent, these were all risks he took in building. Should coercion shift all of them to the manufacturer? If the dealer seeks his lost profits in the future, again one cannot be sure he would have kept the franchise or have operated profitably. Professor Kessler has suggested the problem might be avoided by awarding the dealer the difference between what the dealer could have sold his business for before termination and what he could sell it for after.[671] However, the *Yale Law Journal* comment points out several difficulties with this,[672] turning on the fact that dealers cannot sell their businesses without manufacturer approval of the new dealer. Moreover, this approval will probably be withheld if the new dealer is paying too much for "good will." Thus the before and after figures are also highly speculative.

Those courts that have passed on the problem have done so without much discussion of why they are taking the approach they take. In *Garvin v. American Motors Sales Corp.*, the district judge instructed the jury to assess the damages suffered by failure to renew for one year and those "the plaintiff sustained from March 2, 1960, into the future as long as you find this plaintiff would have continued to work and represent this defendant and earn money as a result of his business operations."[673] He continued:

> Now you can't speculate on this thing. You can't say he might have had a profit from the business. You take into consideration the type of product that the manufacturer had; you take into consideration the facilities that the plaintiff had; you take into consideration his attitude toward his business, how he applied himself. Did he or did he not make money before? If he did make money before, how much did he make? What did the future hold for him? Did he have the facilities to carry on this business? What was the stage setting that he had in order to make himself money out of this franchise if it had been renewed and renewed from time to time into the period of his future that you find he would have continued to carry on and operate this business. Damages cannot be assessed or awarded upon guess, speculation, sympathy or conjecture.[674]

The judge also discussed considering the dealer's health and life expectancy,[675] but he said nothing about the manufacturer's right to cancel[676] and refused to instruct on mitigation.[677]

The district judge in *Kotula v. Ford Motor Co.* was even more loose in the instructions and evidence of loss he allowed to go to the jury:

> You have heard the testimony given by Mr. Kotula. He has expressed an opinion that his business, as I remember it, was worth some $42,000 in round figures.
>
> Now, what did he have there? He had a Ford agency subject to termination on 120 days' notice. He had tools and equipment. He had a going business. He had some good will, undoubtedly. Whatever good will may have attached to his business is a matter for one to consider in determining what his business was worth. He says that including good will, his business was worth some $42,000.
>
> Well, is that a reasonable figure? That, of course, is for you to determine.
>
> You certainly have a right to take into consideration what he made out of this business. It would seem to me that is an important factor in determining what his business is worth. If a business doesn't produce adequate profits, of course, that has an effect upon the value of the business.
>
> According to Mr. Kotula, his best year was 1959, and his net earnings were about $5,637.50. In 1960, his earnings were $3,434.70. In 1961, I have a figure of $4,715.87. . . . So you see, his net income in 1959, which was his best year, would be about $4,500 or $4,600. In 1960, his income would be about $2,400 or $2,500, and in 1961, if my figures are right, his income from the Ford business would be about $3,700.

their investment was all that the dealers sought. 84th Cong., 2d Sess. House, Committee on the Judiciary, Antitrust Sub-Committee, *Hearings . . . on H.R. 11360 and S. 3879* at 519 (1956).

There is no indication in the Act or its legislative history of a Congressional intent to provide for the recovery of loss of profits by a terminated dealer. On the contrary, the legislative history shows an intent not to guarantee in any way a dealer's future profits. For example, the original reference in the Bill to the "equities" of the dealer was deleted primarily because it might have been interpreted as a guarantee of anticipated profits. House Hearings, *supra*, at pages 20, 263. The fact that the Statute treats the termination of a franchise in precisely the same way that it deals with a failure to renew one buttresses the conclusion that expectancy damages by a terminated dealer are not recoverable under the act.

Brief for Appellee, p. 49, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963).

671 Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1188-89 (1957).

672 Comment, 74 YALE L.J. 354, 375-77 (1964).

673 Appendix for Appellant, p. 182a, Garvin v. American Motors Sales Corp., 202 F. Supp. 667 (W.D. Pa. 1962), *rev'd*, 318 F.2d 518 (3d Cir. 1963).

674 *Id.* at 182a-83a.

675 *Id.* at 181a.

676 *Id.* at 145a.

677 *Id.* at 148a-49a.

Well, you understand that he did salvage, so to speak, some of his assets and contends his net loss was about $16,600. Obviously, if that is a sound figure, you would have to first determine what the reasonable value of his business was in light of all the circumstances, and then determine what he obtained by way of selling out. He contends that he had some Ford tools on hand and that he has had difficulty in selling them, and contends they are worth about $500, as I remember it, which I suppose would be another deduction that should be considered.[678]

. . . . .

The Court: Counsel have called to my attention a little slip I made and I am glad to correct it. I wasn't aware of it. I told you that Mr. Kotula said that his business was reasonably worth $42,000 and that he recovered some $16,000 by way of sale of various items, and they tell me I said he claimed $16,000 by way of damages. That isn't correct. He is claiming some $25,000 by way of damages, because the difference between $42,000 and $16,000 leaves $25,000 in round figures. I think the exact figure is $25,925 that he claims.[679]

Kotula's opinion of the value of his business was the primary evidence supporting the 42,000 dollar amount. He included an item of 15,000 dollars for good will in his computation without much supporting argument.[680] The jury awarded Kotula 12,500 dollars but Ford's motion for a judgment n.o.v. was granted, and the decision was affirmed on appeal.[681]

There are significant potential problems when a dealer attempts to prove losses with reasonable certainty. However, the two cases discussed indicate that the courts have not given the matter much attention or have concluded that the policy of deterring coercion calls for great generosity in making assumptions to aid the dealer. If such generosity is not given in future cases, the act will offer even less protection to a dealer who has lost his franchise. If he is confined, say, to the profits he would have made for a month or two and only those reliance losses which were not his risks under the selling agreement, the balance over the manufacturer's termination benefits would seldom warrant a suit.[682]

---

678 Record, Vol. II, pp. 447-48, Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

679 *Id.* at 450-51.

680 *Id.* Vol. I, at 107-31, 191-93.

681 *Id.* Vol. II, at 463.

682 One dealer who settled his claim out of court said:

"The factory's attorneys came in before the trial and said to us 'Look, even if we admit every charge you make against us, what are your damages and how are you going to prove them?'

'You can't claim your overhead, because this is an expense you have whether you have the franchise or not. What else is there?'

So we settled."

Automotive News, Feb. 25, 1963, p. 3, cols. 3-5, at 49, cols. 1-2.

From all of this one can conclude that a dealer who alleges he was forced to take unwanted merchandise may face a number of difficult-to-meet arguments from a manufacturer, and the amount of loss likely to be involved probably will seldom be great enough to warrant suit. A dealer who alleges he resisted threats and lost his franchise as a result clearly faces an almost fantastic array of logical hurdles in front of recovery. Here what such a dealer will view as his loss will probably be a large amount, but he must be prepared to finance a difficult law suit, both as to evidence and establishing law. The judicial opinions give guidelines only insofar as they approve common practices of manufacturers on a case-by-case basis. It is difficult to generalize since the courts so frequently reach results without offering a careful justification for their action. To a great degree the approach taken by the courts explains the dealers' poor won-lost record, but the approach poses some potential problems for manufacturers as well.

2. THE STATE STATUTES

The state statutes also have been brought into play by dealers who thought the manufacturers were not complying with the requirements of fairness imposed by these acts. Two significant things have happened. First, the manufacturers have attempted to block application of these statutes. They have tried to have courts declare these laws unconstitutional, and they have also attempted to modify their business practices to avoid the impact of the legislation. Secondly, the statutes have been applied by administrative agencies and courts, and certain informal sanctions have developed. The effectiveness of the state statutes turns on the success of the manufacturers in side-stepping or killing them and on the norms developed in application.

a. The manufacturers' efforts to block application of the statutes

By far the most effective attack on the state legislation has been the manufacturers' challenge to its constitutionality before the courts. The factories assert that the statutes are unconstitutionally vague and uncertain (for example, it is a crime and a ground for revocation of licenses under many of the statutes "to induce . . . any automobile dealer . . . to do any . . . act unfair to said dealer . . . ."), that the statutes are an undue burden on interstate commerce, that they are special interest legislation applying only to groups which are not the subject of a reasonable classification by the legislature in the exercise of its police power, and even that these acts constitute bills of attainder and ex post facto laws.[683] The constitutional battles have been approached with

---

683 See, *e.g.*, Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S. 444 (1960), where all of these contentions were made.

great diligence by the companies. Top personnel have testified,[684] and every effort has been made to establish records that showed that the statutes were unreasonable (a reverse "Brandeis brief"). For example, in the Colorado suit a vice-president of General Motors testified that the statute "would have a devastating effect on our business in preventing us from soliciting and promoting our business with the dealers."[685] Moreover, the "big three" manufacturers supported each other's efforts in the various states by amicus curiae briefs.[686]

The Wisconsin administrative-licensing statute withstood this attack in 1955, but it was upheld by only a four to three vote, and there was no discussion of the vagueness issue in the majority opinion.[687] In 1965, Chrysler succeeded in overturning a particular provision of the Wisconsin statute on constitutional grounds in a case before the Circuit Court of Dane County,[688] and an appeal is now pending. The overturned section limited the right of manufacturers to add dealers in a city "where the presently enfranchised dealer or dealers have complied with agreed requirements of such manufacturer for adequate representation in such community or territory."[689] The Virginia administrative-licensing statute was upheld on federal due process grounds in a 1957 case, although the question of its validity under the state constitution was not reached.[690] In 1960, the Tennessee administrative-licensing act successfully passed a constitutional test, although two of its provisions were found invalid but severable.[691] The Supreme

684 See, *e.g.*, Automotive News, May 28, 1956, p. 4, cols. 4-5; *id.*, Feb. 25, 1957, p. 1, cols. 2-3, at 4, cols. 1-3.

685 Automotive News, May 28, 1956, p. 4, cols. 4-5.

686 See, *e.g.*, Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S. 444 (1960).

687 Kuhl v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955).

688 Forest Home Dodge, Inc. v. Karns, No. 116-029, Cir. Ct., Dane County, Wis., March 17, 1965. Actually, Circuit Judge Maloney said it was unnecessary to decide the constitutionality of the section because the commissioner's decision was invalid on three grounds relating to the interpretation of the statute and its application to the facts. However, he made it perfectly clear in four pages of discussion that he considered the provision unconstitutional:

> The public right to competition is not to be cast aside lightly at the simple behest of a class of citizens desiring special privileges. . . . This Court does not believe that we have as yet reached the stage in the advanced "progressive" thinking of administrative law that the Motor Vehicle Commissioner can constitutionally be clothed with the power to make the decision when one or the other of the three giants has a sufficiency of business, as was for all practical purposes done in this case.

Id. at 4.

689 WIS. STAT. § 218.01(3)(f) (1963).

690 E. L. Bowen & Co. v. American Motors Sales Corp., 153 F. Supp. 42 (E.D. Va. 1957).

691 Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S. 444 (1960).

Court of Tennessee overturned the sections that made it illegal and a ground for refusing or revoking a license (1) to induce a dealer to do any act that was unfair to the dealer and (2) to not allow dealers the right to determine the mode of transportation to be used in delivering new cars to them. The court viewed these two sections as arbitrary and capricious, stressing that "inducing" would cover pure salesmanship. The Minnesota penal statute withstood constitutional attack in 1956.[692]

The manufacturers' greatest success came in 1956, when they persuaded courts to overturn completely the administrative-licensing statutes of Colorado[693] and Arkansas.[694] In Colorado apparently the manufacturers won a lasting victory, but it took added effort to preserve that victory after the case was decided. The Colorado Automobile Dealers Association (CADA) tried to start the series of stages over again by proposing a bill to set up an administrative-licensing system which met the objections of the court. General Motors officials told Colorado dealers that passing a constitutional statute would compel General Motors to deal with nonfranchised dealers not covered by the act.[695] After a bill had been introduced, the CADA changed its position and joined the manufacturers in opposing it, explaining that there were dangers in extending government control over business.[696]

In Arkansas, the manufacturers' success before the court in 1956 was only one victory in a much longer war. The court declared the entire act invalid because it licensed franchised dealers but not used-car dealers—an arbitrary classification in the view of the court.[697] The dealers prevailed on the legislature in 1957 to pass another statute,[698] but in 1958 the Arkansas court found this one equally defective.[699] Still undaunted the dealers went back to the

692 Willys Motors, Inc. v. Northeast Kaiser-Willys, 142 F. Supp. 469 (D. Minn. 1956).

693 General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956).

694 Rebsamen Motor Co. v. Phillips, 226 Ark. 146, 289 S.W.2d 170 (1956). In Best Motor & Implement Co. v. International Harvester Co., 252 F.2d 278, 281 (5th Cir. 1958), the court said, "substantial questions . . . might exist as to its [the Louisiana administrative-licensing statute] validity." *But see* Louisiana Motor Vehicle Comm'n v. Wheeling Frenchman, 235 La. 332, 103 So. 2d 464 (1958).

695 Automotive News, March 4, 1957, p. 3, cols. 3-4.

696 *Id.*, March 11, 1957, p. 1, col. 4.

697 Rebsamen Motor Co. v. Phillips, 226 Ark. 146, 289 S.W.2d 170 (1956). Raymond Rebsamen, a Little Rock Ford dealer, led the opposition to enactment of the statute. He published a three-column advertisement in the *Arkansas Gazette* asserting that an administrative-licensing law would cause higher prices and was an interference with the natural laws of business. Automotive News, March 21, 1955, p. 3, cols. 3-5. Rebsamen was the formal complaining party in the suit attacking the constitutionality of the 1955 statute.

698 Ark. Acts 1957, No. 530, § 5.

699 Clinton v. General Motors Corp., 229 Ark. 805, 318 S.W.2d 577 (1958).

legislature for another statute and were successful.[700] Apparently the manufacturers tired of the game and changed their tactics to win a more final victory. Signatures were obtained to put the manufacturer-dealer-licensing statute on the ballot for a decision by the voters, and the statute was defeated in the 1961 election by better than a five to one margin.[701] It has been said that the campaign against the statute was financed and run by General Motors, Ford, and Chrysler, and that these firms formed an alliance with the state's used-car dealers who would have been barred from selling new cars by the legislation. There was a thorough advertising campaign built around the theme that a vote for the manufacturer-dealer-licensing statute was a vote for paying higher prices for new automobiles. The Arkansas Legislature can read the election returns, and the franchised dealers would have trouble if they attempted to have a fourth statute passed.

Where the manufacturers have not been able to overthrow the statutes on constitutional grounds, they have attempted to blunt the impact on their ways of doing business. At one time many manufacturers switched from indefinite duration franchises to one-year franchises.[702] Thus, they would seldom have to cancel a dealer and have their action subject to the requirement that their cancellations be fair, with due regard to the equities of the dealer and with just provocation. Rather than cancel, all a company had to do was to await the end of the year and fail to renew the franchise. Some dealer associations counterattacked to meet this device. The Wisconsin statute was amended to add the following: "The nonrenewal of a franchise or selling agreement without just provocation or cause shall be deemed an evasion of this section and shall constitute an unfair cancellation."[703] Many of the statutes passed during the early 1950's have similar limitations on nonrenewal and impose a similar kind of compulsory contract.[704]

Some representatives of dealer associations have charged that the manufacturers have used and still use another tactic to blunt the effect of the state statutes. If a dealer could not be cancelled, he could be induced to put on a high pressure sales campaign or to give up and resign his franchise "voluntarily" by adding another franchised dealer selling his make in his area—a so-called stimulator dealer. The Wisconsin Automotive Trades Association reacted to this device by successfully proposing an amendment to the Wisconsin legislation. It provided that "The

700 Ark. Acts 1961, No. 199.
701 ARK. STAT. ANN. § 75-1501-07 (Supp. 1963) states that the statute was defeated by referendum on November 6, 1962.
702 See BUSINESS RELATIONS INSTITUTE, AUTOMOBILE DEALER FRANCHISE AGREEMENTS AND FACTORY DEALER RELATIONS 23 (1948).
703 WIS. STAT. § 218.01(3)(a)(17) (1963).
704 See note 603 *supra*.

licensor shall deny the dealer application of a manufacturer in any community or territory where the presently enfranchised dealer or dealers have complied with agreed requirements of such manufacturer for adequate representation in such community or territory."[705] Dealer associations in other states may push for similar provisions[706] if this one is constitutional;[707] manufacturers view it with horror.

b. Application of the state statutes and the consequences

There are several types of state statutes which affect manufacturer-dealer relations. The most significant create either a licensing system administered by a specialized agency charged with enforcement or define crimes to be enforced by the local prosecutor system.[708] An official of an automobile manufacturer has said that there are serious risks "involved in attempting to determine in advance conduct that could be interpreted to violate the vague and imprecise terms commonly found in these statutes . . . ."[709] Moreover, manufacturers question the uses to which these statutes can be put.[710] They worry that the definitions of prohibited conduct are sufficiently vague to serve to mask a "dealer always wins" approach in administration. Many are administered by a group of dealers serving as a state commission. Even where the statute is applied by an independent agency, the dealers' lobby and state legislators representing dealers who are constitutents can exert pressure. Dealer representatives assert the statutes have been applied only to clearly unfair actions.[711] One's judgment of the merit of these evaluations must rest on partial and perhaps distorted evidence, since it is so difficult to get information about formal state administrative practice and even harder to discover the informal practices. However, I have been able to develop some information through letters, by interviews, by examining the records of an agency, and by reading an industry newspaper.

i. ACTION UNDER THE ADMINISTRATIVE-LICENSING STATUTES

The administrative-licensing statutes require manufacturers and their representatives to be licensed. Formal procedures are created for denying, suspending, or revoking licenses because of coercion, cancelling a franchise "unfairly, without due regard to the equities of said dealer and without just provocation . . . .," and the like. In several states, informal procedures have developed to

705 WIS. STAT. § 218.01(3)(f) (1963).
706 Interviews.
707 See note 688 *supra*.
708 See text accompanying notes 120-22 *supra*.
709 Letter.
710 *Ibid.*
711 Interviews.

mediate disputes. The available data about what has been done will be presented in a table and then specific cases will be discussed to illustrate the consequences of these statutes.

Table 3 indicates the information I have about the formal use of all of the state licensing statutes.[712] The information was supplied by state officials and dealer trade association representatives. It is not absolutely complete since some state officials did not answer, some trade association officials did not have complete information because they have not held their job for the entire life of the statute in their state, and some may have supplied erroneous information.

TABLE 3. FORMAL PROCEEDINGS UNDER ADMINISTRATIVE-LICENSING STATUTES

State and Year Passed	Number of Proceedings	Action Taken
1) Iowa (1937)	Unknown	Hearings in 1940's to deny licenses to dealers allegedly replacing dealers who were cancelled unfairly; results unknown.
2) Nebraska (1957)	Two	In one case board found dealer unfairly cancelled; settled pending appeal to courts. In one case board found for manufacturer as coercion not proved.
3) Oklahoma (1953)	One	Manufacturer's representative's license cancelled for coercion; reinstated while case pending on appeal; appeal dropped.
4) Rhode Island (1950)	One	Three manufacturer's representatives' licenses revoked for unfair cancellation of dealer.
5) Tennessee (1955)	Two	In one case board found manufacturer's termination to be fair. In one case board found unfair cancellation. Manufacturer's license to do business in a particular county suspended for ninety days.
6) Wisconsin (1937)	Seven	In all cases commissioner found termination with provocation and regard for the equities of dealer and so upheld manufacturers' actions.
7) Florida (1941)	None	
8) Kentucky (1956)	None	
9) Louisiana (1954)	None	
10) Mississippi (1954)	None	
11) North Carolina (1955)	None	
12) Utah (1965)	None	
13) Virginia (1944)	None	

712 For citations of the state statutes, see notes 125-55 *supra*.

Formal hearings have been held in six of the thirteen states with this type of statute, and manufacturers or their representatives have prevailed in nine cases and lost licenses in four. While a road man's lost license gives the dealer little more than vengeance, in two of the cases the companies' defeats aided the dealer more substantially. In one the dealer received a substantial settlement, and in another the manufacturer stopped termination proceedings and the dealer's franchise was saved.[713]

Almost all of this legislation provides that coercion to take unwanted cars, trucks, parts, and accessories is a ground for revoking the manufacturer's or its representative's license. The story of one license revocation hearing[714] may indicate that the state adminis-

713 Interviews. The license revocation procedure was perhaps not so effective in one case in Tennessee. Ford terminated the franchise of Cocke County Motor Company in 1958. The dealer took the case to the Tennessee Motor Vehicle Commission, and Ford challenged the constitutionality of the Tennessee administrative-licensing statute. It obtained an injunction prohibiting a hearing while the constitutionality of the statute was being determined. Automotive News, June 30, 1958, p. 4, col. 1. A chancellor declared the law unconstitutional, stating that "limiting the right of manufacturers to weed out inefficient dealers and those who fail to offer proper service to customers would certainly harm the public." *Id.*, Nov. 2, 1959, p. 2, col. 2. The Supreme Court of Tennessee disagreed and found all but two sections of the law constitutional. Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S. 444 (1960). The Tennessee Motor Vehicle Commission then held a hearing. The primary subject was the adequacy of Cocke County Motor Company's sales. Automotive News, Nov. 13, 1961, p. 42, cols. 4-5. The Commission found that the termination was not for cause and without due regard to the equities of the dealer. It suspended Ford Motor Company's license to do business in Newport, Tennessee, for 90 days. It felt that to take Ford's license to do business in the state would unfairly punish dealers outside of Cocke County. There was no appeal because the suspension would be over before a hearing was possible. "Most observers agreed that the suspension was a 'slap on the wrist,' aimed at Ford's policy of exhorting its dealers to outsell rival Chevrolet dealers." *Id.*, July 9, 1962, p. 1, cols. 4-5. In this case the commission could not take the local Ford representative's license because he had been transferred by Ford from Tennessee to Pennsylvania. *Id.*, Nov. 13, 1961, p. 42, cols. 4-5.

The dealer had been terminated in 1958, but had continued to operate as a Ford agency without a franchise until May of 1961 when the challenge to constitutionality became final. In 1964 the dealer brought a Good Faith Act suit, but the court ruled that the act's three-year statute of limitations had run. Walker v. Ford Motor Co., 241 F. Supp. 526 (E.D. Tenn. 1965).

While the dealer lost a franchise that had been held by his family for over thirty-five years, he did get to operate for an extra three years and make the profits he could during that time.

714 The discussion in the text is based on detailed reports in an industry paper. See Automotive News, Sept. 18, 1961, p. 1, cols. 4-5, at 4, cols. 1-2; *id.*, Sept. 25, 1961, p. 3, cols. 3-4, at 57, cols. 1-3; *id.*, Nov. 13, 1961, p. 3, col. 3; *id.*, Feb. 12, 1962, p. 1, col. 1, at 34-35, cols. 1-5; *id.*, Feb. 19, 1962, p. 3, col. 5, at 41, cols. 1-3; *id.*, March 12, 1962, p. 1, cols. 1-2, at 40, cols. 3-5; *id.*, July 16, 1962, p. 3, cols. 4-5, at 65, col. 1; *id.*, Nov. 18, 1963, p. 3, col. 5.

trators will follow the approach most favorable to dealers. This approach is the one I have previously described in discussing the federal Good Faith Act. A demand to take action or lose a franchise will be coercive if the dealer has not given the manufacturer cause to cancel as defined by the provisions of the franchise. Moreover, the manufacturer's judgments involved in determining cause will be reviewed for reasonableness. In this case a Ford dealer who held franchises in several cities including Tulsa, Oklahoma, complained to the Oklahoma Motor Vehicle Commission. He asserted that a Ford district sales manager in Oklahoma City had attempted to coerce him to order more cars "by threatening to cancel" his franchise to sell Fords in Tulsa. The dealer's story was as follows: there were two Ford dealers in Tulsa and three Chevrolet dealers. Under Ford's marketing plan, the complaining dealer was responsible for forty per cent of the sales in the city and the other Ford dealer was responsible for sixty per cent. In February of 1961, the district sales manager met with the dealer in a Tulsa hotel room. Slides and charts concerning the dealer's Tulsa operation and Chevrolet sales in the city were presented; the district sales manager said they showed the dealer was performing poorly. He said that the dealer needed twenty-four instead of twelve salesmen and objected to 10,000 dollars worth of purchases of parts from non-Ford sources. He demanded that the dealer increase sales twenty per cent to come up to the level of the Chevrolet dealer in Tulsa with the least sales. The dealer testified that the representative impliedly threatened to review the dealer's operation in Bartlesville, Oklahoma, if Tulsa sales did not increase. The dealer objected to the sales data and the demands, calling them "asinine." The Ford representative said that a replacement dealer or an additional dealer in Tulsa would be considered unless this dealership got a better share of the market.

On two occasions the district sales manager demanded that the complaining dealer order enough cars to have sufficient inventory to meet his monthly sales quota. This quota had been based on Ford's estimate of a 6,500,000 car sales year in 1961, although only 5,500,000 cars were sold in that year. The dealer refused to order, and the Ford representative said the dealer could be cancelled for inadequate sales. The dealer asserted that both Tulsa Ford dealers would have to be cancelled since his sales were so close to the other Tulsa dealer. At another meeting, the following conversation took place: "[Dealer]: If you're here to try to force me to order more cars, you're wasting your time. [Ford man]: Damn you . . . . you haven't tried to cooperate with me. I'm going to cancel you if it is the last thing I do."[715] The Ford representative later recommended that the dealer be terminated, and this recommendation was approved by one superior but disapproved by another once the commission's hearing started.

The commission next listened to the complaints of five former Ford dealers whom this district sales manager had recommended for termination. All said that he had demanded they catch the sales of Chevrolet in their area but had refused to consider why this was impossible in the short run because of their local situations. One dealer's profits were eighth among the 187 Ford dealers in Oklahoma although he was 135th in volume. Another dealer had represented Ford from 1923 to 1959. The district sales manager had told him to "beat Chevrolet—no matter how."[716] His successors were complying by "giving 'em away."[717]

The Ford district sales representative answered these charges. He claimed he "did nothing but follow the rules of procedure established by his superiors."[718] He reviewed the poor sales of the five former dealers but admitted they were all up against competition from areas other than their own. Finally, he turned to the complaining dealer's sales record. The dealer's master plan called for sales of 104 cars and thirty-four trucks a month in 1961, but his sales averaged sixty cars and thirty-four trucks a month for the first part of that year. He did not sell as many cars as the poorest Chevrolet dealer in Tulsa. He had been included in Ford's Penetration Improvement Program in 1956 and 1958. The district sales representative described this as the "ten worst dealers in Oklahoma" program, aimed at dealers who were most outsold by Chevrolet. He denied that any threat had been made or coercion used; rather the dealer had been warned that Ford was not satisfied.

The dealer then replied. While he conceded his 1961 sales were down, he said that the district sales representative had given little consideration to the reasons for this. The dealer said he had a great many unsold 1960 models which had been carried over into the 1961 model year. There was a business recession in Tulsa in 1961. He had to change managers at his Tulsa dealership since Ford gave his previous manager a loan to open a dealership in another city. In May of 1961, half his salesmen attended a Ford merchandising school at Ford's request. Moreover, the dealer claimed that his 1961 sales were only forty-two cars and eleven trucks below those of the other Ford dealer who was supposed to share the Tulsa market sixty per cent-forty per cent with the complaining dealer. The other dealer had also been on the Penetration Improvement Program. The other dealer had not been recommended for termination.

The Oklahoma Motor Vehicle Commission decided to revoke the license of the district sales manager. The commission chairman

715 *Id.*, Feb. 12, 1962, p. 1, col. 1, at 34, col. 3.

716 *Id.*, Feb. 12, 1962, p. 1, col. 1, at 35, col. 3.
717 *Ibid.*
718 *Id.*, Feb. 12, 1962, p. 1, col. 1.

stated, "There wasn't any doubt about it. [He] . . . very definitely overstepped the bounds of propriety in dealing with some of the dealers."[719] Ford called the decision unjustified and appealed to the Oklahoma District Court, challenging the constitutionality of the Oklahoma statute as well as the propriety of the findings.

In the end, everyone won a little. Over eighteen months later the appeal was dropped. The district sales manager was given a 1963 Oklahoma license,[720] but he was transferred out of Oklahoma by Ford. The dealer continued his Tulsa Ford franchise and still had it in 1965.[721] The commission avoided a constitutional challenge, Ford's representative received a license and some vindication, the representative left the area to satisfy the dealers, and the complaining dealer saved his business.

The significance of the administrative-licensing approach becomes clearer when the Oklahoma proceeding is contrasted with a dealer's difficulties in getting an effective remedy for coercion under the federal Good Faith Act. First, as I have noted, we cannot be sure that the federal courts will adopt Kessler and Stern's view that any threat to breach a franchise contract is coercive: the federal courts could demand that the threat be one fitting more neatly into orthodox duress concepts, which in turn require more than a threat to breach a contract. It is unlikely that a state administrator would feel bound by the technical requirements of the traditional law of duress. Indeed, the Oklahoma commission apparently viewed the term "coercion" as requiring no more than a showing of a threat to breach a contract—perhaps it required no more than a threat to act in an unreasonable manner.

We must speculate as to the commission's interpretation of the term "coercion" since there was no opinion defining it. However, taking the facts most strongly for the dealer—since the commission believed the dealer and not Ford's people—the Oklahoma case is a strong one for the dealer under the threat-to-breach-a-contract-equals-coercion position. The Ford man told the complaining dealer that he must meet a Chevrolet dealer's sales or be cancelled. Also he was told that he ought to order enough cars to have sufficient inventory to meet his monthly quotas or he might be cancelled for inadequate sales. Under the tests suggested in the discussion of the federal cases, the question then would be whether or not Ford had a legal right to cancel under these circumstances. If it did not, then the threat was to impose a "not lawful" sanction and was coercive. Would Ford have had a right to cancel? The Ford Sales Agreement requires a dealer to "develop energetically and satisfactorily the potentiality for . . .

[719] *Id.*, March 12, 1962, p. 1, cols. 1-2.
[720] *Id.*, Nov. 18, 1962, p. 3, col. 5.
[721] Interview.

sales and obtain a reasonable share thereof . . . ."[722] The criteria for satisfactory performance are a series of relationships: (1) the dealer's sales compared to registrations of Fords in his locality, (2) the dealer's sales as compared to "the fair and reasonable retail sales objectives" for sales in the locality set by Ford, (3) the dealer's sales as compared to the sales of competitive vehicles in the locality, (4) the dealer's performance on the first three criteria as compared to the performance of at least three comparable Ford dealers on these same criteria, and (5) the dealer's performance on the first three criteria as compared to the average of all Ford dealers in the zone, district, region, and nation.[723] The clause also provides, "In applying any criteria referred to in this sub-paragraph . . . consideration shall be given to the history of the Dealer's sales performance . . . *and special local conditions that might affect the Dealer's sales performance*."[724] Arguably, the Ford district sales manager misapplied this provision in the case of the complaining dealer and some of the five other dealers who testified. He apparently stressed only a few of the relevant ratios and gave little weight to or ignored all the others. He was concerned almost entirely with the ratio of Ford to Chevrolet sales and the ratio of dealer sales to sales objectives. He told dealers to beat Chevrolet or be cancelled (or his remarks could be so interpreted); but in the first eight months of 1961, Ford's percentage of Chevrolet sales nationally was only 84.2 per cent.[725] Apparently, few Ford dealers were beating Chevrolet that year. He demanded that the complaining dealer meet his monthly sales quotas, but they were based on the erroneous assumption that 1961 would be a 6,500,000 car year instead of a 5,500,000 car year as it was. He did not compare the complaining dealer's sales with other comparable dealers—most notably the other Tulsa Ford dealer. Finally, in all his actions he apparently ignored the franchise's direction to consider "special local conditions that might affect the Dealer's sales performance."[726] Therefore a decision to terminate would appear to be wrong or unreasonable. The representative's threats were to impose a sanction the company had no right to impose under its own contract; thus there was coercion.[727]

Of course, as always there is a counterargument. Unless Ford could show a history of poor performance as compared to comparable dealers including the other Tulsa Ford agency, Ford's best

[722] FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2 (a)(i) (1962).
[723] *Ibid.*
[724] *Ibid.* (Emphasis added.)
[725] 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).
[726] See note 724 *supra*.
[727] See note 633 *supra*.

argument would be that there was no showing of bad faith. It would argue that it had a contract right to make a judgment about the adequacy of the complaining dealer's sales, giving any weight it desired to each of the factors listed in the franchise. Thus the threats and demands were coupled with lawful sanctions and not coercive. Ford argued there were no threats at all, but apparently the commission accepted the dealers' stories. Here Ford was not helped by the proviso of the federal act which expressly allows "recommendation" and "argument"[728] because no such qualification appears in the state statutes.

One should contrast the position of the dealer in *Kotula v. Ford Motor Co.*,[729] a case brought under the federal act where similar merchandise forcing was proven. The dealer had a number of advantages in the Oklahoma license revocation proceedings. He was not seeking damages for the losses he could prove could be traced to coercion; he was attacking the Ford representative's license. This gave him far more leverage than a claim under the federal act for a relatively small amount of loss caused by forcing. The dealer could bring in five other dealers for a total picture of how the Ford representative acted. The commissioners understood the business and brought to bear their own informed ideas about the proper conduct of road men. The dealer gained more leverage from the open hearing which was attended by many Oklahoma Ford dealers; Ford had to be concerned with the reaction of its entire state dealer force to its policies.[730] The complaining dealer saved his franchise. One cannot tell whether or not the Ford internal review system would have made this judgment if the heat had not been on.

If the analysis offered is based on accurate factual assumptions,[731] a manufacturer cannot complain about the "bias" of the Oklahoma Motor Vehicle Commission which is composed of automobile dealers. Nor does it have much worry about guidelines for day-to-day operations. Field men can be told not to threaten to terminate when the major cause for dissatisfaction is that a Ford dealer's sales trail a rival Chevrolet dealer's sales in a year

[728] 15 U.S.C. § 1221(e) (1964) provides:
The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

[729] See pp. 129-33 *supra*.

[730] Automotive News, Feb. 12, 1962, p. 34, col. 1.

[731] The reason for the qualification is that the analysis is based on reports in *Automotive News*. See note 714 *supra*. While the reports probably are accurate, they may not include all the facts presented at the hearing.

where Ford is trailing Chevrolet nationally. To give such warnings, the Ford road man must be sure that the dealer trails his Chevrolet competitor significantly more than comparable dealers trail their competition. Moreover, field men can be told not to regard threats to terminate as normal devices for applying pressure to dealers but as real warnings where there is an intention to follow through and as warnings in the context of a good faith rehabilitation program. On the other hand, the facts available about this case are not completely clear. If the complaining Ford dealer were clearly in default on his franchise duties as fairly applied, one would have to re-examine the Oklahoma case. It could mean a road man cannot demand that a dealer comply except in the context of a rehabilitation program. It could mean that a road man can never demand that a dealer stock cars even if they are needed to satisfy a market potential. It could mean that to demand that a dealer "beat Chevrolet or else" is not permitted even if the dealer is in default. It could mean that dealers who are profitable cannot be threatened with termination although they have a very low sales volume. It could mean that licenses will be taken away where road men swear at dealers. It could mean that former important Oklahoma dealers[732] will be taken care of by their friends on the Motor Vehicle Commission. However, on the basis of the facts at hand, the case appears to be one where an overeager road man took over and pushed too hard too fast. Significantly, the complaining dealer still represents Ford in Tulsa. If he were as poor as Ford's road man alleged, one wonders why he has not given the factory a clear-cut case for termination in the last four years. Moreover, the dealer represented Ford in several Oklahoma cities. If he were such a poor dealer as to warrant cancellation, one wonders why the Ford representative's predecessors made such bad errors in giving him all these franchises in the first place.

The state administrative-licensing legislation also allows the licensing agency to suspend or revoke a manufacturer or its representative's license for cancelling a franchise "unfairly, without due regard to the equities of said dealer and without just provocation . . . ."[732a] This requisite goes a good deal beyond the provisions of the federal Good Faith Act as it has been construed. The standard in the state statutes could have quite broad application and give a dealer real "job security." However, it is very difficult to determine how the standard has been or will be applied. Manufacturers might well fear the chance of unfair decisions under this language, and only a course of administration could set guide lines.

[732] Automotive News, Sept. 25, 1961, p. 3, col. 3, at 57, col. 3. The dealer was Democratic National Committeeman from Oklahoma for eight years and was a candidate for governor in 1958.

[732a] See, *e.g.*, WIS. STAT. § 218.01(3)(a)(17) (1963).

Textual analysis indicates some of the possibilities. The first requirement for a valid termination is that it be for "just provocation." Can a manufacturer assert that it has complied if it cancels only for a dealer's failure to perform his duties as written in the franchise? Perhaps, but the phrase connotes more than "legal cause." At the least the franchise duty probably would have to be reasonable as written and as applied, and the violation probably would have to be material. For example, it seems unlikely that a good faith but unreasonable determination that sales were inadequate would be enough—the manufacturer might be provoked but would its provocation be "just"?

Although there is "just provocation," under these statutes that is not enough. The termination must also be with "due regard to the equities of said dealer . . . ." On one hand, this could mean that a manufacturer must take into account factors personal to the dealer and not related to the mutual profit of manufacturer and dealer. Why did the dealer default? What will the impact of cancellation be on him? Does the past conduct of the dealer give him a right to a greater period of default and more "second-chances"? For example, suppose a dealer had a good service record and had managed to stay in business selling a manufacturer's cars when they were unpopular nationally. The dealer has a heart attack and his sales fall off drastically because he cannot supervise the business as before. Cancellation will hurt him physically and psychologically as well as financially. Are these his "equities"? Or, on the other hand, are the "equities of said dealer" who has given a manufacturer just provocation financial only? The phrase may give him no more than a right to reasonable termination benefits, such as the repurchase of cars, parts, signs, and the like and help in disposing of the premises. While today all manufacturers grant such benefits in their franchises, when the first of the state statutes was drafted much less was offered.

While one can speculate,[733] these questions can be answered

[733] The need for speculation was unsuccessfully asserted by Ford in an argument that the Wisconsin administrative-licensing statute was unconstitutionally vague:

> What terms could be more vague, indefinite, and uncertain in meaning than "unfairly, without due regard to the equities of said dealer and without just provocation"? Does the statute mean that in applying these general and vague standards we consider a cancellation only from the dealer's standpoint, *i.e.*, as it affects him, or, are we entitled to take into consideration the factors which prompted the manufacturer? Does the phrase "without just provocation" refer only to a consideration of factors eminating from the dealer's side, or may it also include factors wholly foreign to the particular manufacturer-dealer relationship which may have prompted the cancellation?

Brief of Respondent, pp. 43-44, Kuhl v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955).

> It would seem that the legislature was not using the word "equities" as synonymous with "unfair" because the word "unfairly" precedes the term "without due regard to the equities of said dealer". Nor has the legislature attempted to define "unfair" or "without just provocation". The manufacturer has absolutely no standard to guide its actions in determining whether to continue or discontinue a dealership contract. For example, if a manufacturer were to have surveyed a certain area and concluded that its sales distribution system could be substantially improved by the elimination of a particular dealer or the replacement with another dealer, would such a termination be within the meaning of the statute? Does the statute contemplate only a consideration of the termination from the dealer's personal standpoint or does it contemplate a consideration also of the factors which motivated the manufacturer?
>
> Respondent submits that the language used by the legislature is obviously so general that it constitutes an invalid limitation upon the constitutional rights of freedom of contract.

Respondent's Brief on Rehearing, pp. 49-50, Kuhl v. Ford Motor Co., 270 Wis. 503a, 71 N.W.2d 428 (1955).

only by considering the practices of the various state agencies. However, the available information is no more than suggestive since relatively few cases have reached the formal stage under these statutes. One case in Tennessee and one in Rhode Island could be explained as involving decisions that the terminations were without "just provocation." In the Tennessee case, a Ford dealer had been terminated for failure to outsell a rival Chevrolet dealer. As we have seen, the Ford franchise as written requires the manufacturer to consider much more than this to find sales unsatisfactory.[734] In the Rhode Island case, the licenses of four Lincoln-Mercury representatives were revoked.

> When the representative from the attorney-general's department sought to determine if Ford had given consideration to a not-too-healthy economic situation in Woonsocket as a reason for the slow sale of cars, [the New England District Sales Manager for Lincoln-Mercury] . . . contended that *good management could overcome any economic condition.*[735]

Under the franchises in effect at this time, there was no mention of considering local conditions. Apparently, the Rhode Island commission insisted that, in practice, it be added to the definition of satisfactory sales for provocation to be just. Today Ford and all other manufacturers seem to agree as all franchises require consideration of local conditions.[736] Obviously, the New England

[734] See note 713 *supra*. In this case a United States District Court later stated: "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." Walker v. Ford Motor Co., 241 F. Supp. 526, 529 (E.D. Tenn. 1965).

[735] Automotive News, June 13, 1955, p. 2, col. 5, at 6, col. 1. (Emphasis added.)

[736] See, *e.g.*, "In applying any criteria referred to in this subparagraph 2(a), consideration shall be given to the history of the Dealer's sales performance, the availability of COMPANY PRODUCTS to the Dealer and special local conditions that might affect the Dealer's sales performance." FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2(a)(i) (1962).

district sales manager's statement was nonsense. Ford's real position was that a dealer assumed the risk of a local recession, and it is just this objective impersonal approach that the state statutes were designed to overturn.

My information on the "equities" language comes from a review of the transcripts of all of the formal hearings before the Wisconsin Department of Motor Vehicles.[737] In no case that went this far were the "equities" of the dealer a major factor. In all of them the commissioner viewed the provocation as "just" and very clear. Apparently, the commissioners have assumed that as the degree of provocation increases, the equities of the dealer decrease and do not present a problem. For example, suppose a dealer was cancelled for intentionally defrauding the manufacturer and his customers out of large amounts of money. The dealer's past loyal service and the impact of cancellation on his health as well as any worry about his lost reliance expenses will not weigh much now. The case the manufacturers have said they fear—the nice but inefficient dealer who will be terribly hurt by cancellation and who cannot be cancelled for his lifetime—does not appear in the department's hearing files.

Up to this point, *formal* proceedings under the state administrative-licensing legislation have been described. However, in many states the existence of the formal licensing system has prompted *informal* systems to develop. And indeed one would expect effective regulation to prompt compliance or pressures for compromise and settlement rather than formal hearings and judicial review. A detailed description of the practices in Wisconsin will be given and then there will be a report about what is known of similar practices elsewhere.

The life history of a dispute in Wisconsin involves an elaborate filtering process designed to screen out worthy cases and settle them.[738] Suppose a manufacturer is dissatisfied with a Wisconsin dealer's sales and is convinced that efforts to correct bad practices will be unsuccessful. In some cases, the manufacturer may take one of two steps. It may call the Department of Motor Vehicles and ask to discuss how to cancel the dealer and still keep its license in Wisconsin. At this stage the department will not discuss specific cases, but it will give general advice, stressing that it wants a detailed file on the dealer with clear evidence of poor performance.

Alternatively, the manufacturer's representatives will talk with Mr. Louis Milan, executive secretary of the Wisconsin Automotive

[737] Mr. Thomas Travers, a student in a seminar I offered, read transcripts of all hearings held by the Wisconsin Department of Motor Vehicles in proceedings to deny, suspend, or revoke licenses of manufacturers or their representatives because of alleged wrongful conduct.

[738] The discussion that follows is based on interviews.

Trades Association (WATA), and the man most responsible for the existence of the Wisconsin administrative-licensing legislation. The factory will give him a detailed report on the dealer's shortcomings. Often Mr. Milan will know the dealer's side of the story because of his continuing contacts with the members of his association. He will tell the factory representative whether or not he thinks it has a case for cancellation that complies with the Wisconsin statute. In many instances he has agreed that the manufacturer has good reason to cancel. If the dealer's sales are not in line with the sales of other dealers selling the same car in his zone (the immediate area of the state near the dealer), Mr. Milan believes that unless the dealer can prove that there is some good explanation, the factory has a right to cancel. The comparison with zone sales has been used as a standard for so long that it is customary and generally accepted by the dealers. However, Mr. Milan qualifies his acceptance of the zone-performance standard by insisting that the manufacturer consider why the particular dealer's sales fell behind those of dealers in his area. Two cases are common and both should excuse the dealer. A local industry may close, putting a substantial number of people out of work; or a drought or crop failure in a farm area may limit the income of a dealer's customers. Not only will people in the area put off purchasing new cars, but some may default on time sales and the dealer may have to pay the finance company the unpaid balance on repossessions of cars he sold during the previous two years. Secondly, a dealer's below-average sales should be excused where flaws in the manufacturer's distribution system are responsible for a large part of the trouble. At the beginning of the model year, metropolitan dealers tend to get many more of the best selling models than the small town or rural dealers. Moreover, special orders can be delayed and customers may cancel. The factory should not be able to set a high quota, offer little co-operation in getting cars to a dealer when he can sell them, and then blame the dealer for poor performance. Mr. Milan is not as ready to accept comparisons of a dealer's sales with those in his district or region (usually his state and an area like the Great Lakes States) since those ratios ignore all of the local factors.

Mr. Milan does not think the "due regard for the equities of said dealer" language of the statute gives the dealer help where his poor sales over a period of time are caused by ill health or where cancellation will have an unusually adverse effect on the dealer. If a dealer can get a fair allocation of cars and there are no circumstances that make potential customers unable to buy, a dealer must produce sales. If a dealer is sick, he must get a good manager or sell out. The equities of a dealer require consideration of the economic facts of his particular case and fair termination benefits or help in selling out to a replacement dealer.

Mr. Milan strongly believes that a dealer must perform a contract if there is "mutuality." The sales requirement in a franchise is one example; performing commitments is another. If a dealer has been given a second chance on condition that he will do things over and above the franchise, he must meet these commitments or he has no remedy. He said that one must read the statutory language in light of the indefinite standards imposed by the franchises of the 1930's and 1940's, and in light of the absence of termination benefits then. At that time dealers' sales were judged by generalized formulas such as the national average requirement (if Buick sold eight per cent of the cars in the nation, the Buick dealer in Stoughton, Wisconsin, had to sell eight per cent of the cars sold there) which did not take into account particularized factors such as local conditions or the factory's own part in a dealer's poor sales.

If Mr. Milan thinks that the factory's evidence is inadequate, the manufacturer may drop the matter, do a better job of gathering evidence, or urge the dealer to get out of business voluntarily and find a buyer for the dealership who will make a tempting offer. If Mr. Milan thinks that the factory has a case for cancellation, then it is free to proceed. At a minimum, it will not face a formal or informal amicus curiae brief from WATA before the department in a license revocation proceeding. Also the manufacturer may benefit from the chance to make the first presentation to Mr. Milan; the one making a charge has some advantage in persuasion.[738a] Of course, a manufacturer can choose not to seek advice from the department or Mr. Milan, and begin termination proceedings within its organization as it would in any other state.

Once the manufacturer's local personnel give the dealer notice that termination has been recommended to their superiors in the company, or even earlier if the dealer discovers what is likely to happen, the dealer usually will take some action. Most frequently he will meet with Mr. Milan. If Mr. Milan has seen the manufacturer's file, if the dealer's story does not add new facts, and if Mr. Milan thinks the cancellation is justified, he will advise the dealer to accept the inevitable. He will tell the dealer he has no case and advise him how to get the best settlement on termination benefits. This advice will usually end the matter because the dealers view Mr. Milan as the authority on the statute. However, if Mr. Milan disagrees with the factory's decision to terminate, often he will telephone the appropriate factory officials and discuss the case with them. Frequently, he can obtain at least a second chance for the dealer to improve. He has known many of these officials for years, and he can avoid bureaucratic channels and talk directly to the man with authority. Undoubtedly, a great

[738a] See Lana, *Three Theoretical Interpretations of Order Effects in Persuasive Communications*, 61 PSYCHOLOGICAL BULL. 314-20 (1964).

deal of his power comes from such personal relationships. He is willing to listen to the manufacturer's side and the factory official may change Mr. Milan's view about the merits of the dealer's case. If Mr. Milan cannot obtain relief by personal contact and he still thinks the dealer's case is worthy, he will advise the dealer how to pursue his legal rights. One important item of information given the dealer will be the names of attorneys with experience in dealer termination cases. If the case presents an issue of significance to WATA, it will enter the case as an amicus curiae; this has been done frequently, especially where the manufacturer has pressed for a restrictive construction of the statute or challenged its constitutionality.

Dealers may talk with officials of the Wisconsin Department of Motor Vehicles. The officials will describe its procedures for a license suspension or revocation and tell the dealer about his right to file a complaint. They will also stress that the department itself cannot give the dealer any relief but can only take licenses away or deny new ones to a dealer who has been selected to replace him. The dealer probably will know that this may be leverage enough to give him bargaining power in his negotiations with the manufacturer. While the dealer will be told of his right to file a complaint, department officials will suggest an informal approach first. The department does not view its major function as holding formal hearings and suspending or revoking licenses. Rather it is proud of its informal mediating activities which "both bring about better solutions and save the taxpayers' money." (Under the statute the state, rather than the losing party, pays the cost of formal hearings.)[739] A department official will write to the manufacturer stating the facts as alleged, that the case is apt to go to a formal hearing if nothing is done, but that the department would be glad to lend its good offices if the manufacturer wishes to come in and talk to the dealer. The manufacturers almost always accept the invitation; the department has a good deal of opportunity to make things difficult for an uncooperative factory, and all factories need the department's co-operation in many different kinds of matters.

Then the department will hold what is called a "prehearing conference," for which authority has been found in the Wisconsin Administrative Procedure Act.[740] Usually the manufacturer will send to the meeting officials from Detroit with authority to make decisions, one or more lawyers from its Detroit staff, and sometimes the local representative who made the decisions the dealer is

[739] WIS. STAT. § 218.01(5)(b) (1963).

[740] WIS. STAT. §§ 227.018, .06, .07 (1963). It is clear that the draftsmen of the Wisconsin administrative-licensing act did not contemplate this development since the Wisconsin Administrative Procedure Act was passed in 1943, about six years after the manufacturer-licensing provisions were enacted in 1937. See Wis. Laws 1943, ch. 375, at 670.

complaining about. The dealer and his lawyer will be present. Thus the dealer will be able to break out of the factory's chain of command and be represented by a lawyer fairly early in the decision-making process. Often these informal meetings become heated. Yet frequently communication between manufacturer and dealer is re-established because these arguments take place before representatives of the department who can and do ask searching questions which must be answered. The combatants are forced to deal with each other's arguments; the department officials can deflate untenable stands; and they can force both sides to make concessions. After an hour or two usually the parties will ask for a recess, leave the meeting room, and work out a settlement. The dealer may get another chance or he may be offered enough to prompt a "voluntary involuntary" termination. Usually this ends the matter. However, if the department were to think that a violation which was against the public interest had occurred, it would continue the case through a formal hearing although the dealer might have no interest in pursuing the matter. Obviously, the department could not do this too often without seriously imparing its mediation function.

What standards will the department apply in this mediation process? "The key question is what did the dealer agree to do when you look at the contract."[741] Accordingly, the department has looked primarily for "just provocation" rather than at "the equities of the dealer." While "just provocation" means cause under the terms of the franchise, the department also insists that a manufacturer's judgments be reasonable and the dealer's default material. "A dealer must be more than barely below the passing mark before termination is justified—you do not take away a man's life work unless the failure is clear, if the dealer is trying hard to perform."[742] The department accepts as evidence of inadequate sales a comparison between a dealer's percentage of his sales objective and the percentage of all dealers in his zone and between a dealer's percentage of the sales of a competing make and that of the other dealers selling his make. It is careful to see that the comparisons are meaningful. Sometimes a factory representative says, "we just can't work with that dealer." This is not enough; the manufacturer must show a specific cause.

The "equities of the dealer" concept enters in several ways. The department presses manufacturers to work to rehabilitate dealers and give them an opportunity to succeed. Moreover, it considers long and faithful service and attempts to induce a manufacturer to give it some weight. However, this factor is persuasive only where there is a chance that a dealer can perform if given another year or two. It does not serve to protect a dealer from the re-

741 Interview with department official.

742 *Ibid.*

quirement that he sell the percentage of his sales objective which most comparable dealers attain; it only serves to give him slightly more time to meet this standard where he has a chance of success.

If the department's prehearing conference does not produce a settlement satisfactory to the dealer, there will be a formal hearing on revocation or suspension of the licenses of the manufacturer, its representative, or both. It is not surprising that there have been so few formal hearings so far and that no formal hearing has resulted in a suspension or revocation. One would expect the manufacturer to have a strong hand at this stage: any case that gets this far probably has failed to be settled by Mr. Milan of WATA, the department's informal procedures, and any internal review of the manufacturer which took place.

These informal procedures, which likely exist only because of the potential exercise of the formal license revocation system, give Wisconsin dealers a great deal more bargaining power in settlement negotiations than dealers have in states where similar informal procedures do not exist. Moreover, one would expect that the existence of the informal process also acts to some degree as a deterrent; one would expect manufacturers to decide more close cases in favor of dealers in Wisconsin than elsewhere. Since the manufacturer has no clear line as to what is and is not permitted, the safe course is to do nothing that might be questionable. Unfortunately, this may be inconsistent with demanding the utmost efficiency from dealers and pushing them hard to get it.

Apparently the elaborate informal system found in Wisconsin is the most highly developed one existing. However, most of the states with administrative-licensing statutes have some similar practices. Table 4[743] shows what might be called the formal informal settlement systems which exist in states with these statutes—these are the informal procedures of the state officials who administer the acts.

743 The information in the table was obtained by letter and interview.

TABLE 4. INFORMAL PROCEEDINGS

	State	Number of "Proceedings"	Action Taken
1)	Florida	One	Dealer received settlement for termination benefits at a time when not provided for in the franchise.
2)	Louisiana	Approx. five cases went to hearing stage. (Also field investigators make informal contact with dealers and manufacturers' representatives and promote discussion.)	In four cases there were settlements favorable to the dealer. In one case the dealer could not prove allegations and case withdrawn.
3)	Nebraska	One	Case settled before hearings begun but after complaint.
4)	North Carolina	"A few cases"	Statutory rights used in negotiations resulting in settlements.
5)	Oklahoma	Approx. ten cases	Cases settled after complaints filed but before hearings.
6)	Rhode Island	"A few cases"	Statutory rights used in negotiations resulting in settlements.
7)	Virginia	No estimate possible. (Also field investigators make informal contact with dealers and manufacturers' representatives and promote discussion.)	Statutory rights used in negotiations resulting in settlements.
8)	Wisconsin	Three cases where hearings begun or complaints filed; three to four cases per year involving discussions with commissioner or "prehearing conferences."	Settlements.

Letters from administrative officials in several states also indicate the effect of their statutes: "While . . . it is not the intention that the Board shall be an arbitration body . . . in practice in many cases it works out that way, as many cases are resolved in the course of investigation or informal hearing."[744] "In all of these cases the Commission informally interceded along the same line of procedure as used in Wisconsin . . . ."[745] "The absence of formal complaints . . . may be attributed to efforts on the part of our field investigators and other parties concerned resulting in voluntary settlement and thus eliminating the possibility of a formal hearing."[746] Of course, in some states the administrative-licensing

[744] Letter.
[745] *Ibid.*
[746] *Ibid.*

statute is not enforced formally or informally and is a dead letter. In one such state, administration of the act was given to a state agency which is grossly understaffed and already charged with enforcing many statutes of clear importance. The legislature has never been willing to appropriate enough money to provide for enforcement.[747] The legislation thus has no more than some vague deterrent force—the statute is dormant today, but too gross a case might create the incentive to enforce the act.

In few of the states with administrative-licensing laws do the trade association managers play a role similar to Mr. Milan's in Wisconsin.[748] Some make telephone calls to factory officials; others help a dealer get a lawyer or assist the dealer in making a presentation before a factory's internal review system. One reason for the difference is that in many states the law is administered by a group of dealers who sit as the state commission. They can handle informal negotiations very effectively since they have an official position as well as personal contacts with the manufacturers.[749]

The manufacturers ought to have few serious complaints about the meaning of the Wisconsin statute as it has evolved through both the formal and informal procedures. Since failure to perform either the franchise commitments or promises beyond the franchise requirements is recognized as "just provocation" if those requisites are administered particularistically, one has fairly good guidelines and good evidence that no the-dealer-always-wins policy is being applied. In fact, one could even raise the opposite question. Have the formal and informal systems in Wisconsin fairly followed the language of the statute and fully considered all of the equities of the low-volume dealer? Perhaps he has an interest in "special interest" protectionist policies that is not being carried out by either the state agency or his trade association. While one who

[747] Interview with the dealers' trade association manager in the state.
[748] Interviews. The nearest practice to that found in Wisconsin was described by a dealers' trade association manager in another state with an administrative-licensing statute:

> Our Association does participate in solving problems between a dealer and his manufacturer. I have sat in on conferences. The Association has a committee of three of the most respected dealers. If there is a difficult situation between a dealer and the factory, the committee gets in touch with the factory and asks it to send a representative to talk with them. The factory and the dealer sit down and try to work things out. In three or four cases involving two different factories, things were settled to the satisfaction of both parties. Of course, the fact that the state has an administrative-licensing statute is influential in these settlements. This is a club over the head of the manufacturers, and the dealers know that they have protection. The dealers can get their story across.

Interview.
[749] This is the explanation given by a trade association manager in a state with an administrative-licensing statute which is administered by a commission composed of new-car dealers.

values the virtues of volume selling cannot feel too sympathetic toward him, the possibility of such an argument indicates that there have been no facts discovered in Wisconsin to indicate that manufacturers are being greatly harmed. However, the available information on practices in other states is not sufficient to rule out the possibility of protectionist policies prevailing over notions of due process, performance of commitments, and efficiency,[750] and to assure us that the manufacturers have reasonably clear guidelines.

ii. ACTION UNDER THE PENAL STATUTES

Several states have attempted to avoid the expense of creating an administrative agency to enforce a licensing measure but have made certain conduct by manufacturers against dealers criminal.[751] The enforcement has been entrusted to the state's generalized agencies—the local prosecutors. There is no evidence that the penal provisions of these statutes which outlaw coercion, unfair termination, or other practices have ever been applied against a manufacturer or his representatives. The attorneys general of several states with this kind of legislation wrote that they could discover no instance of their statute being enforced.[752] A violation of any of these statutes would not affect large numbers of people or offend strongly and widely held notions of morality. Therefore, a prosecutor is not likely to act on his own. A dealer is not likely to complain to a prosecutor, although in some cities a prosecutor might be willing to help a local dealer by arresting a road man. While arrest might give the dealer some revenge, it would be hard to translate it into leverage for keeping a franchise or getting a good settlement. Once the complaint is made and the

[750] One dealer trade association manager in a state with an administrative-licensing law described in one case the action of the agency administering that law as follows:

> The agency made a finding that the manufacturer had acted in bad faith. There was an injunction but things were settled quite quickly after that. The agency had a very poor case and the dealer knew it. It gave a quick and rather partisan decision for the dealer to help him out as much as it could in bargaining for a settlement. I doubt that the decision would hold up in court.

Interview. This was the only instance of this kind of favoritism that I discovered. Of course, it does emphasize that a "dealer always wins" policy is possible.

[751] The states are Minnesota, North Dakota, South Dakota, and Wyoming. See text accompanying notes 131, 134, 136, 144 *supra*. Most of the administrative-licensing statutes also make coercion, terminating a franchise unjustly without provocation and without due regard to the equities of the dealer, and the like criminal. See, *e.g.*, WIS. STAT. §§ 218.01(8)(a), (d) (1963). Query whether § 218.01(8)(d) is the exclusive penalty, or whether § 218.01(8)(a) also is applicable. The discussion in the text applies to the criminal aspects of these statutes as well.

[752] Letters. Two said they assumed that their statute was effective as a deterrent.

manufacturer's representative arrested, the dealer might have real difficulty in bargaining to drop the matter for a price. There are a number of legal sanctions to inhibit this kind of bargaining, and the effect on the manufacturer's officials might be to cause them to close ranks behind their wrongly imprisoned road man and to fight for principle. They might not treat the one responsible for the outrage kindly. Of course, the possibility of a prosecution is always present and counsel for a manufacturer cannot advise his sales staff with complete confidence.

iii. PRIVATE CIVIL ACTIONS BASED ON ANY OF THE VARIOUS TYPES OF DEALER-MANUFACTURER STATUTES

In several states dealers, in suits against manufacturers, have successfully asserted causes of action based on administrative-licensing, penal, or other types of statutes dealing with coercion and wrongful termination. The statutes do not provide for a private remedy but speak only of criminal penalties or revocation of licenses; the courts have "amended" the legislation to broaden the remedies available.

In *Kuhl v. Ford Motor Co.*,[753] the Supreme Court of Wisconsin broadened the state's administrative-licensing statute to allow not only a private right to sue but a right to an injunction against termination as well. In the *Kuhl* case, the dealer's franchise was cancelled because of his death. His estate sued for an injunction against termination, asserting the rights recognized by the legislature in the licensing statute. The trial court sustained Ford's demurrer, apparently on the theory that revocation or suspension of licenses was the sole remedy available. The supreme court reversed, finding a private cause of action to enforce the statutory right. The case was remanded for trial. The problems of writing a viable injunction against termination were avoided when the case was settled a year later.[754] Ford helped Kuhl Motor Company find a buyer for the dealership. The buyer was a Ford official.[755] Seven years later Ford bought out the dealership and closed it because there was an insufficient rate of return on the investment at the location.[756] The dealer's estate received more than termination benefits, but Ford had to keep alive an unprofitable location for two years while the litigation was pending.

The Minnesota penal statute has been similarly broadened by judicial action. It makes unlawful such things as coercion and

[753] 270 Wis. 488, 71 N.W.2d 420 (1955).

[754] Comment, 74 YALE L.J. 354, 362 n.33 (1964), states, "In at least one state case a final injunction has been granted. Kuhl Motor Co. v. Ford Motor Co. . . . . No information has been secured concerning how the court resolved problems of formulation and supervision there." The writer was mistaken about the result of the *Kuhl* case.

[755] Automotive News, Oct. 1, 1956, p. 53, cols. 5-6.

[756] *Id.*, Aug. 26, 1963, p. 6, col. 5.

cancelling or failing to renew a franchise "without just cause," but there is no provision for civil remedies. Minnesota trial courts have recognized a private cause of action in two cases, and dealers recovered damages in both.[757] In *Dahlberg Bros., Inc. v. Ford Motor Co.*,[758] a dealer sought an injunction against termination. The dealer alleged that its sales objectives were improperly increased in 1962 and that if there were a default, no opportunity to cure it was given before termination as required by the *Ford Selling Agreement*. The trial court granted a preliminary injunction. Ford asked the Minnesota Supreme Court to overturn the preliminary injunction as an abuse of discretion. It argued that under the selling agreement it had a right to terminate, and the injunction gave the dealer more than his rights under the franchise. Moreover, the Minnesota statute was a penal one and gave no authority to the courts to issue injunctions. The Ford brief also stressed the problem of continuing supervision. The Minnesota Supreme Court affirmed the trial court's order.[759]

Private civil actions give a dealer in a state with an effective administrative-licensing statute another but not essential weapon. In the states with penal statutes, private civil actions probably are essential if the legislation is to have anything but a remote deterrent effect since these are crimes which seldom will be prosecuted. However, an injunction is another matter. Of course, this is the best remedy of all from the dealer's standpoint. He keeps his dealership, and the manufacturer's conduct is supervised by a court of equity. Yet there are difficulties. On one hand, manufacturers do have a legitimate interest in maximizing sales, and this kind of judicial supervision takes off much of the pressure on a dealer to strive to sell as many cars as he can. In theory the injunction tells the manufacturer only to perform the contract; in practice, the potential sanctions against the manufacturer for nonperformance have been increased greatly. If it made a mistake about its rights and duties, it would be in contempt of court. On the other hand, the task given the court is not easy. The performances of both parties are not simple acts that either are or are not in compliance with the contract. There is a continuing relationship and the intervention of the court might remove much of the give and take normally involved since any alleged default can be referred to a judge. Yet damages are probably very inadequate, and arguably an injunction is the best of several bad alternatives.

One can draw several conclusions about these state statutes. Originally they were aimed at practices of the manufacturer

757 Interview. See Willys Motors v. Northeast Kaiser-Willys, 142 F. Supp. 469 (D. Minn. 1956).

758 137 N.W.2d 314 (Minn. Sept. 10, 1965).

759 *Ibid.*

which can best be described as the high-pressure, rule-from-the-top-downward system of management. The dealers' obligations were not spelled out with any precision, and thus it was hard to tell whether or not a particular dealer's performance was satisfactory. This helped create insecurity so that all dealers could be kept under pressure for renewed efforts. Dealers were told that they must sell their make's national average in their community. The dealer took the risk of recessions; he was told in effect to make every effort for there were no excuses. Finally, the risks of the major economic losses of termination were placed on him since the manufacturer offered little help if it cancelled. All of this is most rational under a theory of management based on constant pressure and fear.

In passing statutes and pressing for enforcement, the dealers have made two kinds of demands. The first is reflected by Mr. Milan's views. The manufacturer must consider performance in terms of the individual situation—outside forces can cause poor sales and the manufacturers' own poor distribution can be responsible too. If there are no excuses of this nature, however, the manufacturer can cancel. While this demand for particularity is consistent with maximizing the profit of both manufacturer and dealer, it runs counter to the pressure system of driving dealers. The second kind of demand implicit in these statutes is for protection against requiring performance that maximizes the profit of *both* parties. It stresses the virtues of the profitable small business and a certain ethic of merchandising.[760] The "reputable businessman" stresses service and loyalty, not price cutting and high-volume merchandising.[761] The statutes may contain some elements

760 Of course, one does not want to overlook the fact that even Mr. Milan's statute contains these elements. For example, WIS. STAT. § 218.01 (3)(f) (1963) says, "The licensor shall deny the dealer application of a manufacturer in any community or territory where the presently enfranchised dealer or dealers have complied with agreed requirements of such manufacturer for adequate representation in such community or territory." On one hand, this can be defended in terms of contract. If the present dealers have performed their contracts, a new dealer in the area takes away sales and hurts the established ones. Yet the statute also serves to protect some dealers from a kind of price competition which might be expected as the result of the efforts of a new, additional dealer to establish himself. It is at least theoretically possible that a third dealer is justified in a city which has two dealers who are selling the same make who have met agreed requirements. It is one thing to sell just enough to avoid termination; it is another thing to sell all the cars which reasonably can be sold.

761 In 1961, the Indiana dealers passed a resolution asking for reforms in the franchise. They called for an end to the system requiring dealers to sell about the same percentage of a planning potential as other dealers, a voluntary limitation on production by the manufacturers and the relocation of stimulator dealers who had recently been placed in areas to com-