prosecutor and judge in one person at the deportation hearing. Unfortunately, the Court has recently upheld this union of functions.[82] This practice should be abolished, and the hearing provisions of APA should be held applicable to deportation. If this is accomplished, and the courts continue the trend toward protecting the alien in the area of the Attorney General's discretion to suspend deportation, then a fair balance between the public's interest in removal of undesirable people, and the alien's interest in personal security will have been attained.

A CONSIDERATION OF THE LEGISLATIVE PROBLEMS IN AUTOMOBILE DEALER FRANCHISES

In the last three years, there has been a significant decline of automobile dealers' profits as a percent of sales.[1] Many dealers have gone into bankruptcy; many others have voluntarily quit.[2] The dealers allege that unless they are helped, the result will be a loss to the public of retail

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82. Marcello v. Bonds, 349 U.S. 302 (1955).

1.

Year	*Profits as a percent of sales*
1949	5.8%
1950	6.3%
1951	4.9%
1952	3.6%
1953	2.2%
*1954	0.6%
*1955	2.6%

HEWITT, AUTOMOBILE DEALERS FRANCHISES (unpublished thesis in Indiana University Library 1955) p. 228 citing figures compiled by the National Automobile Dealers Association, hereinafter referred to as NADA.

* The figure for 1955 is based on the period from January 1 through September 30. The figures for 1954 and 1955 are reported in The Wall Street Journal, Nov. 28, 1955, p. 22, col. 2.

In appraising the significance of these figures, it must be remembered that the profit on the dealership is computed after deduction of a salary to the dealer for managing the business. This is illustrated by the testimony of Harlow H. Curtice, president of General Motors, before Senator O'Mahoney's Antitrust and Monopoly Subcommittee. "(D)uring the post war period, G.M. dealers have had profits of over $5,000,000,000 after deducting over $1,000,000,000 of owners' salaries and bonuses." N.Y. Times, Dec. 3, 1955, § 1, p. 18, col. 4.

It is also important to note that this measure of profits does not take into account increased profits resulting from larger volume and higher prices.

Mr. Hewitt's thesis has been of great value in the preparation of this Note. He has compiled many important statistics and analyzed leading cases involving automobile dealers.

2. There were 43,079 dealers in 1950; 45,248 in 1953; 43,340 in 1955. Automotive Industries, March 15, 1955, p. 104.

From Oct. 1, 1952 through March 31, 1953, NADA reported over 3,200 dealers went out of business. HEWITT, *op. cit. supra* at 228.

Dun and Bradstreet figures show that there were 219 dealers' bankruptcies in 1953, the highest number since 1938. *Id.* at 229.

outlets and service facilities which are essential in the automotive economy.[3] Because negotiation with the manufacturers has done little to solve or alleviate their problems,[4] and the courts will not correct the inequities,[5] dealers are striving for legislation both on the federal and state level.[6] Their principal organization, the National Automobile Dealers Association[7] has succeeded in having introduced in Congress bills which would exempt certain agreements from the anti-trust laws.[8] In the state legislatures, the NADA is working for statutes which will force changes in the dealer-producer relationship.[9]

The dealers' difficulties stem from three factors: (1) competition among manufacturers; (2) competitive practices of dealers; and (3) the relationship between the manufacturer and the dealer. If legislation in the interest of the dealer is also to be in the public interest, it is necessary to analyze the problem in terms of its causes. A further problem lies in determining at which level, state or federal, appropriate measures can be taken.

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3. "Whereas, this condition if long continued, will result in a sharp decline in the number of distributors, jobbers, and retail dealers and a corresponding loss of availability of replacement part inventories, service facilities, shop equipment and personnel for the proper maintenance and repair of durable goods in the hands of the public. . . ." Preamble, SENATE ENROLLED CONCURRENT RESOLUTION No. 10 Indiana Acts, ch. 235, 1955. This resolution established a committee to study the selling agreements of manufacturers with their retail sellers.

4. Frederick J. Bell, executive vice-president of the NADA, testifying before the Senate Antitrust and Monopoly Subcommittee said that dealers have tried repeatedly to get manufacturers to agree on a franchise contract that would give the dealers more independence and more protection against short notice cancellation by the factories. But, the dealers have had little or no success "which indicates that the manufacturers have no intention of taking voluntary action that would remove the dealers from the condition of vassalage." The Wall Street Journal, Nov. 30, 1955, p. 24, col. 2.

5. See text at note 36 *infra*.

6. This appeal for legislative help is not unprecedented. The dealers were actively seeking assistance twenty years ago and succeeded in having several states pass statutes in their interest. See MISS. CODE ANN. §§ 8072-74 (1942) (enacted 1934); IOWA CODE ANN. § 322.3 (1946) (enacted 1937); WISC. STAT. § 218.01 (1953) (enacted 1937); NEB. REV. STAT. § 60-611 (Reissue 1952) (enacted 1937). In the 1940's other states enacted similar statutes. See FLA. STAT. ANN. § 320.60-70 (1953); VA. CODE § 46-534 (1950). Since World War II, other states have enacted legislation. There are today twenty states which regulate the dealer manufacturer relationship.

Dealers also succeeded in having the FTC make a major investigation of the automotive industry, the report of which was critical of the domination of the dealer by the producer. See FTC, *Report on the Motor Vehicle Industry*, H.R. Doc. No. 468, 76th Cong., 1st Sess. (1939).

7. See note 1 *supra*.

8. Three bills were introduced and assigned to the House Subcommittee on Commerce and Finance. H.R. 2688, 84th Cong., 1st Sess. (1955) ("bootlegging"); H.R. 6544, 84th Cong., 1st Sess. (1955) ("cross-selling"); H.R. 528, 84th Cong., 1st Sess. (1955) ("phantom freight"). See note 19 *infra*.

9. See note 3 *supra*.

The Effect on the Dealer of Competition Among the Producers

There is an earnest competition among the five[10] automobile producers to maintain and increase their share of the total demand for new cars. The competitive battle is chiefly waged by style changes rather than by price reductions. Style changes are supported by extensive advertising to influence the prospective buyer as to their prestige.[11] Restyling is expensive; the cost of tools and dies must be recovered before the style becomes obsolete regardless of how long the physical assets remain serviceable. High volume production is a competitive necessity if costs are to be recovered and a profit made before competition forces a style change.[12] An integral aspect of the manufacturer's success is a sales force capable of moving cars to the public in great volume. Nationwide coverage by a strong force of dealers is traditionally regarded as most important.[13] The producer wants dealers to contact every potential buyer; otherwise the sale may go to a competitor.

High volume production is the greatest source of conflict between manufacturer and dealer. The dealer's profit per unit goes progressively down as he must attract reluctant buyers by more advertising, by a larger sales force, by premiums,[14] and by discounts, either directly or indirectly through larger trade-in allowances. The dealer wants "production geared realistically to demand,"[15] but there is a question of how demand is to be determined. If the traditional method of distribution is to be retained, "demand" must lie at some point between the number of buyers who will seek out a dealer and offer full list price and the number who will buy only when the selling price is such as to jeopardize an enfranchised dealer's investment. The dealers complain that to retain their franchises they are pressured to order more cars than they can sell at a profit.[16] They charge that termination of franchises for continued refusal to expand volume is

10. General Motors, Ford Motor Co., Chrysler, Studebaker-Packard, and American Motors. The Willys Motor Co. indefinitely suspended automobile production in the early part of 1955.

11. There is a "follow-the-leader" aspect to American consumer demand. Many buyers want the same car as "everybody else is driving." As a result, the producers say the sight of a car on the road is more effective advertising than a picture of it on a billboard. The force of this consumer psychology is highlighted by the race between Chevrolet and Ford for sales leadership.

12. For the adverse effect on one major producer of waiting too long to change styles, see *Chrysler Takes the Bumps,* Fortune, April 1954, p. 127.

13. For a good discussion of the development of the automotive industry's distribution system, see SELTZER, A FINANCIAL HISTORY OF THE AMERICAN AUTOMOBILE INDUSTRY (1928).

14. This is the practice of offering an attractive piece of merchandise free with the purchase of a car.

15. HEWITT, *op. cit. supra* at 242.

16. See The Wall Street Journal, Dec. 7, 1955, p. 24, col. 3.

"wrongful."[17] Courts do not decide the issue because they hold that the manufacturer's right to terminate is "absolute."[18] If the legislators choose to modify the right, it must be remembered that the manufacturer has a legitimate interest in replacing dealers with others who he may expect to be more volume conscious.

The Effect on the Dealer of Competition by Other Dealers

"Bootlegging" and "cross-selling" are the two practices about which dealers most complain. The former is the practice of a franchised dealer selling his cars at wholesale to a used car dealer. The used car dealer with the advantage of low overhead then competes with the franchised dealer in another territory.[19] "Cross-selling" is the practice of a franchised dealer selling a car to a buyer located in the territory of another franchised dealer.[20] The dealer can sell to this buyer for less because he does not expect to have to perform on all preparatory and warranty expenses.[21]

Prior to 1949 most franchise agreements provided that a dealer could sell only to ultimate consumers; a dealer who sold outside his territory promised to pay a fee to reimburse the offended dealer. Attorney General McGrath expressed an opinion informally that these provisions

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17. *Ibid.*

18. Bushwick-Decatur Motors v. Ford Motors Co., 116 F.2d 675 (2d Cir. 1940).

19. Dealers complain that an important cause of bootlegging is the "phantom freight" charged by the producers. Phantom freight is the billing of a freight charge to the dealer based on the distance of the dealer from the main assembly point (usually Detroit), even if the car is actually delivered from a smaller assembly factory nearer to the dealer. The franchised dealer must pay the delivered price charged by the manufacturer, but the used car dealer buying from a "bootlegger" close to Detroit can have the car on his lot at a lower price and thus have a competitive advantage. See text at note 8 *supra*.

The problem of freight charges is, however, not that simple. If the dealer were billed actual freight charges, then the producer would have to charge a higher price for cars delivered from the smaller assembly plants because they are higher cost of operations. They must absorb the increased freight charges of all parts and sub-assemblies shipped to them; their overhead cost per unit is higher because of their lower volume. In charging a flat price plus freight for the finished car, the producer seeks to avoid billing every car at a different price depending on where it was finally assembled and to preserve flexibility in deliveries on dealers' orders.

The dealer would have a legitimate grievance if the manufacturers' freight charge were more than a competitive firm would charge for equivalent service. There are existing laws to prevent this. To be sure, the used car dealer in an outlying point can buy from a "bootlegger" near Detroit and have the car driven to his lot cheaper than it can be shipped by rail or truck, but the consumer purchasing from him buys an inferior car because of the distance it has been driven or towed. If many consumers do not discriminate against "slightly used" cars, then as a matter of policy the manufacturers could allow the dealer to choose on his orders between the present method and taking delivery at Detroit. This would allow the dealer maximum flexibility to meet competition in his area.

20. This is also referred to as a violation of the dealer's "territorial security."

21. It is also a way of moving a car at a discount with small chance of knowledge of the price reaching regular buyers in the territory.

constituted a restraint on trade in new cars.[22] As a result, the manufacturers eliminated the provisions in fear of criminal prosecution.[23]

The elimination of "bootlegging" and "cross-selling" would remove a major cause of dealer selling below list prices. The contention for elimination is essentially a retail price maintenance argument: List prices permit a retailer to make a reasonable profit so that he can continue in business and afford to give the service necessary for customer satisfaction. Under present practices, however, the consumer has a choice. He may bargain for a lower price on an open lot by foregoing the manufacturer's warranty and "authorized" pre-sale service or bargain for warranty and service from an authorized dealer.

Dealers complain of a practice by which some dealers "pad" list prices for purposes of conducting a "blitz sale."[24] This involves a representation that the selling price of a new car is a figure several hundred dollars above actual list price; the seller then offers trade-in values, premiums, or cash discounts much above normal to induce the buyer to believe that he is "getting a good deal." These sales are accompanied by an advertising campaigu that is disruptive to the normal business of other dealers in and around the territory.

Dealers are forced into these practices primarily to satisfy the producers' demand for large volume.[25] If a dealer ordered only the number of cars he believed he could readily dispose of in his territory, there would be little complaint about practices of other dealers. It is necessary to examine the peculiar relationship between manufacturer and dealer to discover why the dealer orders unwanted cars.

The Effect on the Dealer of His Relationship With the Producer

Contrary to common belief, the relationship between producer and dealer is *not* controlled by the terms of their franchise agreement. The manufacturer exercises his control by virtue of the wide disparity in economic positions. The written contract is merely a summary of the one-sided relationship which the dealer can expect once he has invested his

22. See The Wall Street Journal, Dec. 8, 1955, p. 22, col. 1.

23. *Ibid.*

24. In speaking before the annual meeting of the American Finance Conference at Chicago in November 1955, Frank H. Yarnall, president of the NADA, announced that NADA and the Better Business Bureaus were teaming up to halt "misleading and untrue advertising [which] has had more to do with the chaotic condition in our industry than any other single thing." The Wall Street Journal, Nov. 21, 1955, p. 4, col. 4.

25. See the Wall Street Journal, Dec. 8, 1955, p. 22, col. 2. But, in the same report, Harlow H. Curtice gives the rcason for "bootlegging" as being "the selfish desire of some dealers for quick, nominal profits at the expense of the public and other dealers."

time and money.[26] The automobile dealership is not flexible like the business of many other retailers who can push the product of one or another of various manufacturers.[27] Everything the automobile dealer does must be satisfactory to one manufacturer. The size of his investment, location and layout of show room, the stock of parts maintained, and efforts to sell are all subjects of reports and inspection.[28] In return the dealer receives the opportunity to make money as an authorized dealer. The manufacturer must enter the relationship in good faith,[29] but he reserves the right to terminate on short notice[30] without regard to the dealer's opinion of whether it is fair.[31] If the franchise agreement does not warn the dealer that his economic destiny is in the hands of the manufacturer, a long line of judicial opinions should.[32]

Good profits and modest fortunes have been made by successful dealers. They want to retain their franchises because they are usually profitable and investment in facilities and experience is not easily converted. Because there are only five producers, a dealer has limited freedom in changing from one manufacturer to another. *Fear of losing his franchise forces the dealer to accede to the demands of the producer.*[33] The dealer knows that failure to comply with the manufacturer's request may result in harassment or, ultimately, termination by notice or refusal to renew a contract which has expired by its terms.[34]

Terminated dealers have sued manufacturers for loss of prospective profits and for loss in the value of the investment. In recent times dealers

26. "But, generally speaking, the situation arises from the strong bargaining position which economic factors give the great automobile companies; the dealers are not misled or imposed upon, but accepted as nonetheless advantageous an agreement in form bilateral, in fact one-sided." Bushwick-Decatur Motors v. Ford Motor Co., 116 F.2d 675, 677 (2d Cir. 1940) (dictum).

27. Retailers of television, radios, refrigerators, and other household durables usually sell several different products and competing lines of any one product. Like auto dealers retailers of farm machinery and petroleum products are dependent on one manufacturer.

28. See,*e.g.*, Direct Dealer Selling Agreement (1953), Chevrolet Motor Division, General Motors Corporation, §§ 11-22.

29. Busam Motor Sales v. Ford Motor Co., 203 F.2d 469 (6th Cir. 1953).

30. Ninety days notice is common.

31. "Unfair? Those who desire to philosophize on the subject may do so. But we are confronted with the problem of construing the agreement, not in criticizing its terms." Myers Motors v. Kaiser-Frazer Sales Corporation, 178 F.2d 291, 301 (8th Cir. 1949) (dictum).

32. See notes 35, 36 *infra*.

33. See note 48 *infra*.

34. "In 1947, one of the officials of General Motors stated that state laws '(L)imiting the freedom of action by the factories in replacement of dealers was the reason General Motors switched to the one year franchise agreement.'" HEWITT, *op. cit. supra* at 248. But see note 48 *infra*. Most companies, however, have continued to use contracts of indefinite duration.

have been singularly unsuccessful. Suits have been based on tort or contract theories, but, under either, the losses have been held *damnum absque injuria.* Until the middle of the 1930's courts usually declared the franchise agreements illusory and, thus, unenforceable by either party.[35] The more recent cases hold that there is a contract but that the right of termination as provided in the agreement is absolute;[36] therefore, allegations that the termination was in "bad faith" or "without cause" are irrelevant.[37] Dealers have also sued for treble damages under the federal anti-trust laws[38] alleging that termination was made pursuant to an illegal restraint of trade.[39] This remedy is theoretically attractive but practically worthless; necessary litigation is too long and expensive for the average dealer.[40] The burden of proof is heavy, almost impossible.[41] Few cases ever reach a jury, and most end in a summary judgment[42] for the manufacturer. The conclusion follows that terminated dealers do not have a judicial remedy.

The Legislative Problem

It would not be in the public interest to enact legislation on the manufacturer-dealer relationship if its only purpose were to preserve the present method of distributing cars.[43] There is a natural sympathy, how-

35. Ford Motor Co. v. Kirkmyer Motor Co., 65 F.2d 1001 (4 thCir. 1933); see also case collected in Notes, 34 ILL. L. REV. 956 n. 14 958 (1940), 35 ILL. L. REV. n. 2 601 (1941).

36. Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir. 1940); Bushwick-Decatur Motors v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940); Biever Motor Car Co. v. Chrysler Corporation, 199 F.2d 758 (2d Cir. 1952).

37. *Cf.* Jones v. Lathrop-Meyer Co., 99 Ind. App. 127, 190 N.E. 883 (1934).

38. Sec. 4 of the Clayton Act, 38 STAT. 731 (1914), 15 U.S.C. § 15 (1952).

39. For a good discussion of the problem, see Note, 61 YALE L.J. 417 (1952).

40. "Pre-trial preparation demands research by highly skilled attorneys; the trial is long, susceptible to delay and procrastination; appeals and new trials are endless. Thus corporate offenders, possessed of vast resources, are often able to exhaut their opponents." *Id.* at 419.

41. First, the plaintiff must prove the defendant did in fact violate the anti-trust laws and that the public was thereby harmed. Allegations of harm to the plaintiff individually, without allegations of public harm are insufficient to state a cause of action. Federsen Motors v. Ward, 180 F.2d 519, 522 (10th Cir. 1950). Second, the plaintiff must prove that there was a causal connection between the illegal acts and the termination. This requires proof that termination was not for any other reason because the manufacturer has an absolute right to terminate except in pursuit of an illegal objective. This is a next-to-impossible burden. Third, the plaintiff must prove damages with a high degree of certainty because courts are impressed with the severity of threefold damages. Note 61 YALE L.J. 417, 419 (1952).

42. This applies to suits brought in tort or contract as well as under the anti-trust laws. See HEWITT, *op. cit. supra* at 8.

43. As long as demand continues, the public need for retail outlets and service facilities will be supplied by a parallel development of independent repair garages and dealers operating in a manner analogous to supermarkets; or the manufacturers may enter the retail field. *Cf.* Standard Oil Co. v. United States, 337 U.S. 293 (1949).

ever, for this, apparently independent, small businessman who is, in fact, economically tied to a dominant corporation and powerless to protect his interests when they become divergent from the interests of the corporation. He is important in the economy; his efforts and investment[44] distribute to the public its most important manufactured product. The existence of a power disparity which permits the weaker party to be subject to arbitrary or illegal actions is distasteful even if exercise of the power is uncommon. These factors justify study to determine whether legislation assisting dealers will further the public interest.

Attempts to balance power within our economy by legislative mandate have been of questionable success.[45] The immediate problem is further complicated by overlapping federal and state jurisdiction. The lessening of the disparity between producers and dealers may be accomplished by increasing the power of dealers so that they can more effectively bargain with the producers or by limiting the producer's power to act adversely to the dealer. There has been natural development along both these lines.[46] NADA has not developed sufficient power to demand bargaining over franchise terms but has influenced public opinion and secured governmental inquiry.[47] The manufacturer's freedom of action has been limited by the force of public opinion, as exemplified by General Motors' extension of dealer franchises.[48]

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44. NADA reports that the average investment for automobile dealers is over $100,000 and the aggregate is over $4,000,000,000. HEWITT, *op. cit. supra* at 227.

45. *E.g.*, National Industrial Recovery Act, 48 STAT. 195 (1933).

46. For a discussion of the theory of the development of power in the weaker party, See GALBRAITH, AMERICAN CAPITALISM, THE CONCEPT OF THE COUNTERVAILING POWER 115-157 (1952).

For a discussion of the development by corporations of a sense of responsibility to the public interest, See BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954).

47. The Federal Trade Commission's investigation of the motor vehicle industry in 1939 was instigated by the NADA. Note, 34 ILL. L. REV. 956, n. 5 957 (1940). Much attention has been given to the airing of dealers' complaints before the Senate Antitrust and Monopoly Subcommittee which is studying the need for changes in the anti-trust laws. *Congressional Record,* S. RES. 61, 84th Cong., 1st Sess. 101 CONG. REC. 2707 (daily ed. March 18, 1955). Significantly, a Senate Commerce Subcommittee is also studying dealers' problems arising from automobile "bootlegging." *Congressional Record,* S. RES. 13, 84th Cong., 1st Sess., 101 CONG. REC. 985 (daily ed. Feb. 4, 1955).

48. Harlow H. Curtice made a surprise announcement before Senator O'Mahoney's Antitrust and Monopoly Subcommittee to the effect that General Motors had extended the terms of all G.M. dealers from one year to five years because the public had been misinformed about General Motors' policies. The Wall Street Journal, Dec. 7, 1955, p. 24, col. 1.

General Motors retains, however, the right to terminate on ninety days' notice if the dealer does not operate his business to General Motors' satisfaction. See Direct Dealer Selling Agreement (1953), Chevrolet Motor Division, General Motors Corporation, § 25.

Perhaps more significant, as an indication of the feeling of the producers' responsibility, are the agreements to buy back certain parts, tools, and unsold cars even if the termination is by the dealer. General Motors and Ford also assume part of the dealer's obligation on an unexpired leasehold. *Id.* at §§ 27-28.

A few dealers have suggested that Congress enact a broad exemption from the anti-trust laws for dealer organizations so that they may bargain collectively over franchise terms.[49] Others advocate governmental control with production limitations.[50] NADA realistically[51] refuses to endorse such policies.[52] It has not been shown that the public interest is so identified with the present method of distribution that the system should be perpetuated by altering the anti-trust laws; nor is there evidence that government can determine demand better than the traditional combination of public choice and the profit motive.

There has never been federal legislation directly concerned with the producer-dealer relationship.[53] Currently, NADA is urging Congress to modify the anti-trust laws to allow prohibition of "bootlegging" and "cross-selling."[54] The Justice Department opposes passage of the bills[55] because they would permit each dealer to have a monopoly within his territory.[56] This legislation is not crucial to the manufacturer-dealer relationship. Enforcement of the prohibition would be in the hands of the producer. The modifications, if enforced, would assist the dealer in maintaining retail prices; but it is doubtful that the public interest would be served by any further departure from the policy embodied in the anti-

49. These were some of the suggestions received by Senator Monroney's Commerce Subcommittee in response to a questionnaire sent to 42,000 dealers. The Wall Street Journal, Oct. 14, 1955, p. 1, col. 6.

50. *Ibid.*

51. Numerically, dealers are not an important political force. See note 2 *supra.*

52. "If we seek the enactment of laws that would curb honest competition we are not merely short-sighted but greedy and unrealistic as well. Should we ever approach the Congress with pleas for the peacetime establishment of production controls we would be very foolish men, indeed, and our efforts would be foreordained to fail." Message to dealers by Frederick J. Bell, executive vice-president of NADA. NADA (official publication of the National Automobile Dealers Association), Jan. 1955, p. 23.

53. Automobile distribution has been regulated incidentally to general economic legislation in periods of emergency, such as the N.I.R.A., 48 STAT. 195 (1933) and production and credit regulation in World War II and the Korean War, *e.g.,* 55 STAT. 236 (1941).

In 1940, following the FTC's Report, Congressman Wright Patman agreed to introduce a bill prepared by a committee of the NADA which would have provided comprehensive regulation of the manufacturer-dealer relationship. In a referendum conducted among the members of NADA, however, the proposals were overwhelmingly disapproved. The bill was not introduced. See 63 HARV. L. REV. 1010, 1022 (1950).

54. See note 8 *supra.*

55. Also opposed are the Federal Trade Commission, the Commerce Department, and the Budget Bureau. These agencies have expressed concern that the precedents would lead to similar appeals by other groups. The Wall Street Journal, July 7, 1955, p. 18, col. 1.

56. If the fee imposed on a dealer for violating "territorial security" served only to cover the costs of the offended dealer for servicing necessary to maintain good will, it would not be a monopoly. The difficulty lies in setting a fee which does not deter dealers from selling to any purchaser.

trust laws of encouraging competition.[57]

Dealer groups have been successful in securing legislation in several states;[58] but the statutes have been largely unrealistic.[59] The common statutory scheme is to provide that all producers and dealers be licensed to do business. The manufacturer may lose his license if he coerces the dealer to take delivery of any unordered goods,[60] or to enter into any agreement unfair to the dealer,[61] or cancels the franchise "without due regard to the equities of the dealer and without just provocation."[62] The statutes differ as to whether the loss of license applies to the entire state[63] or only to the territory of the dealer affected.[64] Further, they differ as to whether the loss of license is for ninety days,[65] one year,[66] or forever.[67] The severity of some states' penalty makes enforcement impractical; the public would not accept the exclusion of one of the five producers from the state. In any event, the manufacturer can avoid these statutes by the simple expedient of making the franchise expire by its own terms after a short period[68] or by following a policy of non-cooperation which may cause the dealer to withdraw. The terms used in the statutes, "due regard to the equities," "unfair to the dealer," and "just provocation" are phrases without a legal definition. Because these standards are concerned with the effect upon the dealer rather than the manufacturer's pursuit of a legitimate interest, they do not appear to be synonomous with the term "good faith." If enforceable, these statutes are of questionable value to the dealer because a right of action is not usually provided.

The effectiveness of this statutory scheme is largely dependent on whether the manufacturers' policy is influenced by fear that adverse publicity will result from charges of violation. Wisconsin and Colorado have attempted to strengthen their statutes by providing that non-renewal

57. A Justice Department spokesman, testifying before the House Commerce Subcommittee, said: "It has never been the purpose of the anti-trust law to preserve the status quo, or to guarantee protection against impairment of capital which might result from competition in the form of new products or new methods of sale." The Wall Street Journal, July 7, 1955, p. 18, col. 1.

58. See note 6 *supra*.

59. There are no reported cases of dealers obtaining judicial relief by virtue of the statute.

60. *E.g.*, WISC. STAT. § 218.01(3)(a) 15 (1953).

61. *E.g.*, WISC. STAT. § 218.01(3)(a) 16 (1953).

62. *E.g.*, WISC. STAT. § 218.01(3)(a) 17 (1953).

63. MISS. CODE ANN. § 8071.3 (Supp. 1954).

64. WISC. STAT. § 218.01(8)(d) (1953).

65. IOWA CODE ANN. § 322.6(7) (1946).

66. WISC. STAT. § 218.01(8)(d) (1953).

67. Many statutes do not specify the length of time for license revocation, *e.g.*, MISS. CODE ANN. § 8071.3 (Supp. 1954), supplementing MISS. CODE ANN. § 8072 (1942).

68. See note 34 *supra*.

without just provocation or cause constitutes an unfair cancellation and an evasion of the law.[69] In addition the Colorado statute allows an injunction in such a case to force the manufacturer to continue the relationship.[70] If constitutional, these provisions are severe; they change a privilege granted by the manufacturer into a vested right enforceable against him. Traditionally, the law has been reluctant to grant specific performance of the terms of a business relationship.[71] The accepted policy has been to let a party terminate the relationship by paying damages for any injury caused by the termination.

Moderation is required in adjusting economic relationships because it is impossible to foresee all the results which will follow in a complex economy. This is particularly important at the state level because of constitutional limitations on regulations of commerce,[72] impairment of the obligations of contract,[73] and restrictions on the liberty of persons.[74]

Whether legislation is enacted on the federal or state level, a standard must be established by which a manufacturer's conduct can be measured and a sanction imposed to enforce the policy. If the reason for a statute is to prevent arbitrary action which injures the dealer and, consequently, disrupts the economic community, the best sanction is to give a right of action to the dealer. *This compensates the very person the law seeks to protect.*[75] Determining a measure of damages is difficult; it is a question on which there is considerable disagreement among courts. Reliance damages[76] are seldom a good criteria because termination often takes place after a dealer has had an opportunity to recoup his investment. When loss of profits is the measure, it must be determined whether loss of potential profits can be taken into account only until the contract would expire by its own terms, or during the period of notice provided by the contract, or during a reasonable period of notice.[77] Perhaps a more satisfactory measure is the difference between the selling price of the dealer-

69. WISC. STAT. § 218.01(3)(a) 17 (1953).

70. This provision was added in 1955 as an amendment to the dealers licensing law. COL. REV. STAT. §§ 13-11 (1953). General Motors filed suit Oct. 28, 1955 in a federal court asking that the amendment be declared an unreasonable regulation of private business transaction. General Motors alleges that without liberty of contract it will be unable to maintain an aggressive dealer organization. See the Wall Street Journal, Oct. 31, 1955, p. 3, col. 4.

71. RESTATEMENT, CONTRACTS § 377 (1932).

72. U.S. CONST. art. 1, § 8, cl. 3.

73. U.S. CONST. art. 1, § 10, cl. 1.

74. U.S. CONST. amend. XIV § 1.

75. HORACK, LEGISLATION 195 (1954).

76. See Fuller and Perdue, *The Reliance Interest in Contract Damages,* 46 YALE L.J. 52, 373 (1936-37).

77. The controversy is illustrated by the majority and dissenting opinions in Chevrolet Motor Co. v. Gladding, 42 F.2d 440 (4th Cir. 1930).

ship and the fair market value as determined by independent appraisers.[78] There is precedent for this method.[79]

The basic problem lies in determining a standard of conduct. Legislation could be enacted requiring that all franchise agreements be contrued in terms of good faith.[80] This would allow the manufacturer to terminate if he acted to further a legitimate interest, but it would give a right to damages if termination resulted from dealer resistance to demands which are arbitrary or made in pursuance of objectives proscribed by the anti-trust laws.[81] Such a statute would make termination and other aspects of the relationship a jury issue. This would be an advantage to the dealer who, as a small businessman, would attract the sympathy of the jury; but there would be many reversals on appeal. The principal difficulty with a good faith statute is that it forces the courts to review the day-to-day decisions of business. Courts are not trained for this role. It is difficult to estimate the extent to which a businessman will be hampered by knowledge that every decision may have to be justified in detail at some later time; it may be too great a price for eliminating possible arbitrary action.

An alternative approach[82] is to provide that a producer must give

78. The dealership as a going concern is a good measure because its value is composed of all elements adversely affected by termination: the physical assets, the good will, and the present value of prospective profits. The application is limited, however, because there are many instances when the "new" dealer does not want the plant of the "old" dealer or the "old" dealer plans to convert his physical assets to another use.

79. *Cf.* Gelfert v. National City Bank of New York, 313 U.S. 221 (1941). The Court upheld the validity of a New York statute which directed judges to determine the fair market value of the property when there was a foreclosure sale of mortgaged premises. A deficiency judgment was limited to the difference between the amount of the debt and the fair market value. The Court pointed out that traditionally, equity will set aside a sale if there are "circumstances against its fairness such as chilled bidding." *Id.* at 232. There is an analogy to the sale of a dealership because it is an involuntary conversion for the dealer and the bidding is chilled because the only person who will bid is one to whom the manufacturer will grant a franchise.

80. See Note, 63 HARVARD L. REV. 1010, 1019 (1950). This is an excellent note on the subject of dealers' franchises.

81. As to the proscription on forcing the dealer to use certain finance companies, see United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618, *rehearing denied,* 314 U.S. 710 (1941). As to forcing the dealer to use parts and accessories supplied by the manufacturers, see General Motors Corp. 34 F.T.C. 58 (1942).

These problems are still current. Senator O'Mahoney's Antitrust and Monopoly Subcommittee received testimony to the effect that General Motors continues to use its dominant position to compel dealers to use G.M.A.C. financing and "genuine" G.M. parts. See The Wall Street Journal, Nov. 21, 1955, p. 4, col. 3; see also The Wall Street Journal, Nov. 22, 1955, p. 26, col. 1; Nov. 23, 1955, p. 11, col. 2; Nov. 28, 1955, p. 3, col. 1; Nov. 29, 1955, p. 4, col. 2; Dec. 5, 1955, p. 3, col. 1.

82. Continued focusing of public attention on the problem may accomplish better results than legislation. After a five week public study of General Motors, Senator O'Mahoney indicated that, in his opinion, the auto makers should take further steps toword giving the dealers greater independence. He expressed the hope that this could

dealers a substantial period of notice before termination.[83] To prevent avoidance of the statute, it would be necessary to provide further that during the entire period of the franchise relationship, including the notice period, the manufacturer must deal in good faith. Good faith should be defined and limited to the readiness of the manufacturer to deliver as many cars in proportion to the number ordered as are provided to dealers in similar territories both within and without the state.[84] This is sufficiently objective so that variation from the standard can be readily proved. The express terms of the statute should give dealers a right to sue for breach of good faith.[85] If a dealer received notice of termination or if he elected to terminate,[86] he would have the opportunity to make a profit during the notice period or the equivalent in damages. This scheme[87] gives the dealer a chance to liquidate or convert his investment and make arrangements for a new enterprise. It removes the fear of imminent termination, yet leaves the producer free to adjust his sales organization as he sees fit with a minimum of restriction.

VALIDITY OF MINIMUM WAGE DETERMINATIONS AND A CONSIDERATION OF THE NEED FOR THE WALSH-HEALY ACT

The Walsh-Healy Public Contracts Act,[1] enacted in 1936, gave the Secretary of Labor power to prescribe minimum wages[2] for industries

be achieved voluntarily. See the Wall Street Journal, Dec. 12, 1955, p. 3, col. 1.

83. The minimum period should be six months. Perhaps this is not long enough because dealers usually make their profits in the first half of the model year; consequently, if notice of cancellation were received at the end of the first six months of the model year, there would be little opportunity for a profit during the notice period.

84. This would not require the manufacturer to deliver on all orders accepted from the dealers, but it would require the manufacturers to treat each dealer equitably if total orders received were in excess of ability to supply.

85. Under this good faith requirement the manufacturer would be liable to the dealer for reducing shipments of cars as a means of coercing a dealer. The manufacturer could still terminate if he believed his policies would be better carried out by another dealer.

86. The right to profits during the notice period would accrue to the dealer who terminated only if the manufacturer failed to give his orders the same treatment accorded other dealers' orders. He would also be entitled to damages for loss of profits caused by a previous failure to similarly honor orders.

87. It would be necessary to phrase the statute so that the manufacturer could not coerce the dealer to bargain away his rights. Similarly, it must be phrased so that the dealer's right can not be lost by a term of the franchise agreement. Most franchises provide for interpretation under the laws of Michigan; therefore, a state statute which instructs the courts on interpretation can be avoided.

1. 49 Stat. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1952). The act bears the names of the two Massachusetts congressmen who sponsored it.

2. Before the passage of the act, the Federal Government was in the untenable position of urging the betterment of labor conditions, on the one hand, and of hamper-