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

The one dealer who received a final judgment as a result of litigation won 8,800 dollars. Willys Motors did not appeal the jury’s verdict against it.\(^{521}\) *Automotive News* describes most of the out-of-court recoveries as “nuisance settlements.”\(^{722}\) No information is available about many of these settlements; one of the conditions imposed by one manufacturer is that the dealer’s attorney not discuss the case.\(^{523}\) However, it is clear that some settlements are for very small amounts as compared to what the dealers alleged in their complaints. In three of the settlements made by Volkswagen, the dealers received only 9,000 dollars each, although two of them had alleged damages of over 1 million dollars and the third had asked for 300,000 dollars.\(^{524}\) Volkswagen’s representative termed the settlement as far cheaper than the cost of defending the suits.\(^{525}\) One of Chrysler’s settlements was for less than 8,000 dollars in a suit for 480,000 dollars.\(^{526}\) One of the sued distributor for wrongful termination. Reported opinion concerns whether distributor is a manufacturer under the provisions of the Good Faith Act).\(^{522}\) Childers & Venters, Inc. v. Willys Motors (E.D. Ky. June 6, 1960) in *NADA Magazine*, Nov. 1962, p. 68. A dealer received a judgment in another case, but it was only for termination benefits. In Walker v. Ford Motor Co., 241 F. Supp. 526, 529 (E.D. Tenn. 1965), the court, as a trier of fact found that the “plaintiffs were undoubtedly mistreated by the defendant’s personnel,” but that the conduct of Ford “did not rise to the dignity of coercion.” Ford, after terminating, refused to repurchase parts unless the dealer signed a release. See *Ford Motor Company*, *Ford Sales Agreement*, Ford Division § 23 (1962), which purports to give Ford this right. The court, without discussing why § 23 was against public policy and void, awarded the dealer his loss on selling his parts inventory and compensation for his services in selling it. The judgment was for $36,157.72, which Ford could reduce to $14,269.72 by repurchasing certain parts within thirty days.\(^{523}\) *Automotive News*, Dec. 11, 1961, p. 96, col. 5.\(^{524}\) *Automotive News*, April 20, 1964, p. 2, col. 5, at 8, col. 5.\(^{525}\) Childers & Venters, Inc. v. Willys Motors (E.D. Ky. June 6, 1960) in *NADA Magazine*, Nov. 1962, p. 68. A dealer attorney says that the case was settled; J. R. Townsend Co. v. White Motor Co., (S.D. Cal.) in *NADA Magazine*, Nov. 1962, p. 68 (dealer sued in 1957 for termination of franchise. Settled).\(^{526}\) *Waco Motors, Inc. v. Porsche, Inc.*, (S.D. Fla. Jan. 1961) in *NADA Magazine*, Nov. 1962, p. 68 (dealer-distributor sued for wrongful termination of franchise. Suit dismissed).\(^{527}\) *Wakeman Corp. v. F. W. D. Corp.*, (S.D. Fla.) in *NADA Magazine*, Nov. 1962, p. 69 (dealer sued for wrongful termination in 1962); *Synder v. Western Distributors, Inc.*, (S.D. Cal.) in *Automotive News* Nov. 16, 1961, p. 21, col. 6 (dealer’s franchise terminated and he sued, alleging pressure to stock more cars and increase facilities and that his sales were sufficient to comply with the contract); Barney Motor Sales, Inc. v. Cal Sales, Inc., 178 F. Supp. 172 (S.D. Cal. 1959) (Standard-Triumph dealer
American Motors settlements was for 3,000 dollars in a case where 100,000 dollars had been demanded.527

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

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

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

Some clues as to the answers to these questions might be found by considering a number of factors. At the outset, one must acknowledge the possibility that most of the 57 dealers were incompetent and undeserving. Certainly 57 is a very small percentage of the some 30,000 automobile dealers in this country, and one would expect some dealers to be below average. Litigation comes at the end of an elaborate filtering process designed to screen out any dealers with worthy cases: all of the 57 failed to obtain satisfaction from the internal review systems of their manufacturers. Of course, these internal review systems might operate in bad faith, as a mere cover for arbitrary and unfair actions by the manufacturers' local personnel. However, it is difficult to see why it would be in the long-term interest of a manufacturer to allow this to happen. If the internal review systems fail to screen out a worthy dealer's case, it is unlikely that the failure is a product of bad faith. Rather, it is likely that the internal review system will be applying different values from those applied by the decision maker (judge, jury, trade association, or disinterested academicians) who deems the dealer's case worthy.

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

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

i. RESOURCES AND STRATEGY

After the statute was enacted, the manufacturers were in a much better position to litigate than were individual dealers. In late 1956 and for several years thereafter, a dealer's lawyer who considered bringing suit faced the prospect of a difficult and time-consuming task. First, he could see a discouraging array of legal issues embedded in the language that emerged from the legislative compromises. Probably most significant from the standpoint of a dealer's chances of success was whether the act gave a dealer a cause of action where a jury found that a manufacturer had failed to "act in a fair and equitable manner" toward the dealer, or whether the act was limited to protecting a dealer against "coercion, intimidation, or threats of coercion or intimidation." Either reading was plausible.522 The consequences of the alternatives could differ importantly. On one hand, a general fairness test might allow a jury to review all of a manufacturer's decisions concerning a dealer to see if they coincided with the jurors' views of such things as "ethical" sales methods, fair allocations of scarce merchandise, loyalty through hard times, and personal problems of a dealer which affected his business. Typically

528 (ED. Mich. March 30, 1959) in NADA Magazine, Nov. 1962, p. 68. Material in NADA files indicates that the settlement was reached during the taking of depositions of Chrysler executives.
529 Letter from dealer's attorney.
530 Ibid.
531 Ibid.
522 See Note, 70 HARY. L. REV. 1279, 1248-50 (1957). This note, published before any of the cases were decided, suggested the possibilities.
this review would tend to favor dealers. On the other hand, a coercion-only interpretation would be more restrictive and favor manufacturers. As long as a manufacturer was not coercive, it could abide by its own standards of fairness without being subject to review in a Good Faith Act suit.

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

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

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

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

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

Letter from attorney.

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


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

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

71361, at 80355 (D. Colo. 1964), where the dealer still had his franchise despite the suit.

A dealer who has an immediate need for money will be disappointed by the results of many law suits. For example, the Milos case began on October 15, 1958, and certiorari was denied on October 23, 1963. Appendix for Appellant, p. 1a, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963). See also Automotive News, Aug. 7, 1961, p. 3, cols. 3-5.

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

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

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


Id., Oct. 16, 1961, p. 4, col. 5.

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

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

### Notes

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

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

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

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


548 A Ford franchise, for example, requires the use of an elaborate form on which are recorded the comparisons between a dealer's performance and those of other dealers. See Exhibit Y, Dealer Comparison Chart, reprinted in Brief for Appellant, p. 44, Kotula v. Ford Motor Co., 335 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965). Each Ford road man files a Dealer Contact Report on each meeting with a dealer. See Appendix for Appellee, pp. 139b, 141b, 143b, Milos v. Ford Motor Co., 317 F.2d 715 (2d Cir.), cert. denied, 375 U.S. 896 (1963). A chronological summary of all these reports makes an impressive summary of the relationship from the manufacturer's point of view. See id. at 145b-53b. Moreover the manufacturers often prepare charts comparing a dealer's sales with those of his zone and district. These too are useful in litigation. See id. at 256b-59b.

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

"Actually," Hammond [a cancelled Ford dealer who also is a graduate of the Columbia Law School] said, "there has been nothing of any significance decided by any court. The real damage and danger lies in the dealers' attitude—and the attitude the law not effective to achieve what Congress, NADA and the dealers all proudly assumed it would accomplish.

He contended that the factories are building this attitude by avoiding or settling the strong cases before they can be adjudicated in court and become a part of "case law." The few cases which have resulted in opinions thus far have been weak factually, he said.

"In this way they (the factories) have actively and consciously aided the shaping of the case law in a manner most favorable to them," Hammond continued, "while at the same time creating and fostering the impression among dealers that the good-faith law has failed to be effective to safeguard the dealers' interests."

Id. at col. 2.
to be incompetent and undeserving. In the first reported case construing the act,\textsuperscript{550} the dealer "left the conduct of his business to his twenty-one year old daughter and nineteen year old son and one mechanic" and failed to file monthly financial reports with the company as required by his franchise. In the second reported case,\textsuperscript{551} decided on the merits, the dealer's sales were far below those of other Ford dealers. He claimed his sales were poor because his neighborhood had deteriorated as a result of an influx of members of low-income groups. Yet the dealer stipulated that in a test of the area it was found that over 500 Fords had been sold to residents during a year but that the dealer had sold only nineteen per cent of them. In another case that prompted a precedent-setting appellate opinion,\textsuperscript{552} the dealer promised to obtain or build better facilities within two years in order to induce Ford to give him the franchise. He failed to carry out his promise because he was content\textsuperscript{553} to run a profitable\textsuperscript{554} low-volume operation\textsuperscript{555} from his small building originally constructed to house a Tucker dealership.\textsuperscript{556} No case to date has involved a clear picture of the kind of abuses described in the Senate hearings in 1955 and 1956.

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

\textsuperscript{551} Leach v. Ford Motor Co., 189 F. Supp. 549 (N.D. Cal. 1960). It should be noted that Leach said that the methods used by other dealers in selling to members of lower income groups were unethical; however, he was unable to press this point effectively. \textit{Automotive News}, Oct. 31, 1960, p. 3, cols. 1-2. If Leach was right that he was being compared with dealers serving lower income groups, the decisions of the Ford Motor Company and the court are reprehensible; there is no indication that the court considered this issue.


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

\textsuperscript{554} In 1956, Milos' dealership was $16,134 in addition to his salary. This was $291 per car and truck sold. Appendix for Appellee, p. 141b, Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 836 (1963).

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

\textsuperscript{556} A road man's Dealer Contact Report tells of a meeting with Milos: Dealer claims his present facilities are adequate for present sales volume. However when asked what his plans are to secure sales potential Dealer states he cannot handle more volume with present facilities. When confronted with these inconsistencies, Mr. Milos stated he had no intention of spending $0 to $40,000 for improvements nor did he care what place he was in sales-wise or how much of the market he was getting. When asked if he had changed his thinking since accepting the Ford franchise, Mr. Milos stated he never intended to go in debt just to get a sales potential. \textit{Id.} at 143b.


\textsuperscript{558} See, e.g., id. at 19a-20a.

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

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

\textsuperscript{559} \textit{Automotive News}, May 22, 1961, p. 4, cols. 3, 4.
groundwork for a vigorous contest in the Hammond case. The case is still pending.

ii. STATUTORY CONSTRUCTION

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

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

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

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

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

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

The dealers have pressed for a general fairness statute with a greater variety of arguments. They have attempted to make more of the structure of the statute itself. The definition of good faith speaks of acting "in a fair and equitable manner . . . so as to guarantee the one party freedom from coercion." A construction limited to coercion makes the phrases "good faith" and "fair and equitable manner" meaningless. If the act were to be limited to coercion, why didn't the draftsmen say so directly? Moreover, the act speaks of the dealer's duty to act in good faith. To define good faith as the absence of coercion makes this provision silly since few, if any, dealers could ever coerce a manufacturer.

The dealers have also turned to the House Report but have stressed its general statements of purpose. That report speaks of the inequality of economic power and the abuses found in the Senate hearings. These problems will not be solved by a construction limited to coercion.

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


578 See Appendix for Appellant, pp. 223a-24a, Globe Motors, Inc. v. Studebaker-Packard Corp., 326 F.2d 948 (5th Cir. 1964), where the court said: The Act provides a remedy in damages for a failure to act in "good faith" in "performing and complying" with the franchise as well as upon termination or failure to renew. Good faith imposes a duty on both parties to the franchise to act in a "fair and equitable manner" toward each other. Although the Act grants a dealer a right of action for bad faith on the part of the manufacturer "so as to guarantee the dealer freedom from coercion or intimidation, neither the language of the Act nor its purpose require that it be limited to cases involving force and compulsion. In this case although plaintiff was not coerced or intimidated in the sense of being forced to do something against its will, the evidence clearly presented issues of, elimination, of misrepresentation and intentional misleading, and of an intention to force plaintiff out of business once defendant had found a more desirable outlet for its cars. This court does not believe that Congress intended to limit the application of the Act to situations in which a dealer is forced to bow to arbitrary demands of the manufacturer under the threat of losing his franchise, although the same result can be achieved through the more subtle device of representations and promises which the manufacturer never intends to fulfill.

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

The extreme vagueness of the concept of good faith or bad faith used by Congress in the provision at hand is testimony to the fact that the intention was to control the dealer-manufacturer relationship in its essential premises (by allowing the trial court wide discretion in giving specific formulation to the immensely vague concept of "good faith") and to disregard the traditional legal implications of words which purported to, but in fact could not, signify the mutual intentions of the parties.
for the Second and Third Circuits construed the act as limited to coercion in several opinions\(^\text{588}\) that have been followed in other circuits since then.\(^\text{591}\) The Second and Third Circuit opinions largely do no more than adopt the manufacturers’ arguments, and there is no attempt to answer those of the dealers. The opinions quote the sentences from the House Report that mention coercion\(^\text{582}\) and the colloquy between Representatives Halleck and Celler,\(^\text{583}\) and they seem to rely heavily on Professor Kessler’s discussion of the statute.\(^\text{584}\) Since these decisions in the Second and Third Circuits, the matter does not seem to have been considered in detail in other courts; rather they are content to cite cases and regard the point as settled.\(^\text{588}\) Although any of the other circuits could take a different view or the Supreme Court of the United States could consider the point,\(^\text{588}\) a dealer who wants to argue for a general fairness statute now has a most difficult burden to carry.

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

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

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

In most of the reported cases the court proceeds by citing a statement in the House Report that certain conduct is not coercion and then asks whether or not the facts in the particular case differ from the conduct mentioned in the House Report.\(^\text{592}\) The most popular passage in the Report states that the statute does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer’s right to cancel or not to renew an inefficient or undesirable dealer’s franchise.\(^\text{593}\)

secondary allegation coupled with a more basic complaint.\textsuperscript{597}

What would a court do in the example just given? A manufacturer could argue there was no coercion involved within the meaning of the act. Kessler and Stern say a threat is illegitimate when "for X to exercise the sanction against Y is not lawful . . ."\textsuperscript{706} A manufacturer has a right under the selling agreement to terminate a dealer who fails to "promote vigorously and aggressively the sale of VEHICLES . . . and the sale of other COMPANY PRODUCTS, in the DEALER'S LOCALITY . . . and . . . develop energetically and satisfactorily the potentiality for such sales and obtain a reasonable share thereof . . ."\textsuperscript{599} It could argue that the dealer has a duty to promote the sale of all vehicles made by the company and that satisfactory development of the potential for sales means selling both the good and poor-selling models. A manufacturer must plan far in advance and run the risks of making more of an item than the public is eager to buy. When the manufacturer's planning is good the dealer has an opportunity to share in the benefits. Thus it is fair for a manufacturer to insist that a dealer likewise share in some of the losses caused by mistaken advance planning by helping to dispose of the inventory that had to be built far in advance of information about actual sales. No dealer could expect to be allowed to be only an order taker for the best-selling models and not to be required to help dispose of the others. Moreover, the manufacturer can point to the ever-handy House Report's statement that forcing a dealer to take unwanted cars "may in appropriate instances constitute coercion . . ."\textsuperscript{600} This means that in other instances, forcing does not constitute coercion, for the implication is clearly that not all forcing is coercive. Thus the demand was for performance of the contract and not unlawful.

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

\textsuperscript{594} See note 536 supra.

\textsuperscript{595} In the 49 instances where I have no knowledge of the nature of the actual dispute, the newspaper report says no more than that the dealer sued for wrongful termination or that the reported case deals with a procedural matter.

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


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

\textsuperscript{598} Kessler & Stern, Competition, Contract, and Vertical Integration, 69 YALE L.J. 1 (1959).

\textsuperscript{599} FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 2 (a) (i) (1962). Other franchises have similar provisions.

\textsuperscript{600} H.R. REP. No. 2560, 84th Cong., 2d Sess. 9 (1956). (Emphasis added.)

\textsuperscript{601} Whether a dealer had done his part to share the loss presents a dif-
not renew, why cannot it impose any condition it pleases on its decision not to exercise its right? In other words, the greater right (to cancel at will or not to renew) includes the lesser one (to impose any conditions on not exercising the right). 608

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

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

608 Of course, this is the old unconstitutional conditions argument in a different setting. It is no more persuasive here than in the constitutional area. The argument is not logically necessary. See French, Unconstitutional Conditions: An Analysis, 50 Geo. L.J. 234, 236-237 (1961).
611 See text accompanying notes 426-431 supra.
612 But see Zarbock v. Chrysler Corp., TRADE REG. REP. (1965 Trade Cas.)
Therefore the statute is unlikely to be of great benefit to a dealer who has been forced to take unwanted cars, trucks, parts, or accessories unless the case was flagrant and involved an unusually large loss—for example, one where the forcing went on for several years and involved many items. Yet the act may serve some deterrent function. Forcing unwanted items can be coercion, and the law brands coercion as wrongful. Losing several cases based on this theory could cost a manufacturer some of its dealers' goodwill and leave it vulnerable in another congressional hearing concerned with the "abuses of big business." If this type of consideration has force, the uncertainty about the meaning of the act might be cut both ways. In addition to presenting a dealer with a problem, it might induce a manufacturer to adopt a policy requiring its road men to do nothing that could be construed as a threat in order to push slow-selling items.

The second kind of case in which the meaning of coercion has been tested is the most common one.\(^1\) Here the dealer's franchise has been cancelled or not renewed, and he is unwilling to take the manufacturer's offer of termination benefits and just fade away. He wants a large sum of damages and perhaps a little vengeance as well. What does a statute limited to coercion offer him? The table listing the won-and-lost record indicates that the statute may not offer him much help. That conclusion becomes stronger when one considers what such a dealer would have to prove to establish coercion and a cause of action.\(^2\) First, he would have to prove a threat to terminate unless some action were taken. Secondly, he would have to convince a court that that threat was illegitimate—that terminating was "not lawful" under Kessler and Stern's definition. Finally, he would have to show that "by reason of" the coercion he suffered damage of a type covered by the statute.

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

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\(^1\) In Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378, 383 (D.N.J. 1959), the court said, "it is uncontradicted that during the last half of 1957 defendant's representatives never saw or were able to communicate with DePaolo personally on his premises. Under such circumstances they could hardly have threatened to coerce or intimidate him." This is true, but the franchise itself could contain a packaged threat which would be coercive if it were not legitimate.

\(^2\) See the argument of the Ford Motor Company:

The basic contract rights of the manufacturers are not lost or vitiating the Act. Their rights to "enforce" the contract through "threats" to terminate or fail to renew, if you will, have not been taken from them.

Manifestly, a party who has failed to perform a contractual obligation that is not contrary to public policy or otherwise guilt or intimidated in the legal sense if the other party exercises or threatens to exercise his contract rights to obtain performance.

price of keeping a franchise. Since there is no right to cancel for failing to make such contributions, this would be "not lawful" and coercive. However, the dealers who have sued have had to take much more difficult positions. They have had to argue that (1) although the manufacturer asserts a contract right to terminate because of a dealer's default, (2) in fact there was no default, and (3) hence that its demand is illegitimate. Such an argument can be based on a claim that the clause in the selling agreement which states the duty is invalid; that the dealer is not, in fact, in default; that his default is excused; or that the default does not give rise to a right to cancel. In other words, the dealer must build his argument that coercion has been used on many of the defenses which are traditionally classified as a part of the law of contracts. The courts have indicated that they will review terminations for alleged failures to perform duties imposed by the franchise. Thus they recognize the possibility, if not the likelihood, that a dealer could be coerced by a demand to perform an invalid duty written in the franchise, to perform more than his duties under the franchise, or to perform where he is excused. The courts have indicated they will review the franchise as written and as administered.

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

...
the manufacturer approve any buyer of a dealer's business and accept the buyer as a new dealer.\textsuperscript{629}

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

To what extent will the courts' review of the provisions in the franchises help the dealers? Probably not much. It is not surprising that the courts have found that the provisions in the franchises reviewed so far bear the stamp of sweet reasonableness. After all, the General Motors franchise was drafted to pacify a Senate investigating committee as well as to relieve strains in the relationship between General Motors and its dealers.\textsuperscript{630} The other manufacturers followed this lead. Ford, for example, goes to unusual lengths to explain why it imposes certain duties on dealers.\textsuperscript{631} The one major objection that dealers might make to the present franchises is that often provisions are vague or leave a great deal to the discretion of the manufacturers' field representatives.\textsuperscript{632} There is a somewhat amusing parallel between the manufacturers' complaints that both the federal and state statutes are unconstitutionally vague and the imprecise way the manufacturers draft the provisions in their own franchises. However, this point has not been considered by a court, and if it were raised, a judge might well find that most of the uncertain provisions have been clarified by practices of the manufacturer. It is unlikely that any clause in a current franchise will be overturned in a Good Faith Act case. The courts' review for reasonableness as written will not help dealers who try to invoke the statute in a termination case. At best, this review will be one more sanction pressing the manufacturers toward reasonableness when they redraft franchises in the future.\textsuperscript{632}

Most courts in Good Faith Act cases, after observing that a clause in the selling agreement is reasonable as written, turn to consider whether or not the franchise was administered legitimately.\textsuperscript{632} On one hand, there is the possibility of bad faith and plotting by a manufacturer's field men. On the other hand, absent bad faith, it is possible that a manufacturer might threaten cancellation when it did not have the right to do so and thus exert coercion.\textsuperscript{634}

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

\begin{itemize}
  \item \textsuperscript{629} See text accompanying notes 434-49 supra.
  \item \textsuperscript{630} The Industry Relations Committee of NADA included in its dealer-factory program for 1965, revisions of the standard franchises to grant more rights to the dealers. Automotive News, April 5, 1965, p. 1, cols. 2-3; at 78, cols. 3-4. However, no major changes were made in General Motors franchises when they were renewed this year. Id., Sept. 6, 1965, p. 3, cols. 3-4. Apparently, NADA was unsuccessful, but no added burdens were imposed on the dealers by the new language. However, the franchising of some General Motors dealers was contingent upon their agreeing to expand their facilities. Id.
  \item \textsuperscript{632} The court in Walker v. Ford Motor Co., 241 F. Supp. 526, 529-30 (E.D. Tenn. 1965), may disagree:
    \begin{itemize}
      \item The plaintiffs were undoubtedly mistreated by the defendant's personnel. It was insisted by the defendant that they employ salesmen and mechanics which they did not need; that they keep their doors open needlessly; and they were chastised on the basis of unsound quota analyses. Nonetheless, the "advice" given the plaintiffs by the personnel of the defendant did not rise to the dignity of coercion or intimidation, and the Court must reluctantly find and conclude that the defendant's action in terminating the plaintiffs' franchise was not an unlawful exercise of the franchise agreement. None of the facts are given in the opinion, but it appears that the case rejects the definition of coercion proposed by Kessler and Stern. See note 617 supra. The conduct of the Ford personnel appears to have been of the sort covered by the consideration doctrine relied on by Kessler and Stern.
    \end{itemize}
\end{itemize}
dislike by punishing others or seeking revenge. Manufacturers' personnel who see dealers and make decisions about the quality of their performance have some discretion, and discretion can be abused. For example, dealers' sales are measured by an elaborate formula. The dealer is assigned a "market potential"—an estimate by the manufacturer of what the dealer can sell in his area. The dealer's actual sales will be a percentage of this potential. This percentage is compared with the percentages of other dealers in comparable areas. Assume the potential for a particular dealer was one hundred cars but that only seventy were sold. Five comparable dealers sold eighty per cent of their potentials. Clearly judgment was involved in deciding that the potential for the dealer's area was one hundred cars, and it would be involved in deciding that seventy per cent achievement when others achieved eighty per cent warranted termination. It is possible that each of these choices could be made in bad faith to get rid of a dealer who was not liked by the official making the decision. Nonetheless, while a plot is conceivable, in most companies it would not be easy to "get" a dealer. Decisions must be reviewed by tiers of superiors. They would have to be conspirators too or be misled by the official who was plotting the overthrow of the dealer. There is a tendency to require a pattern of default by the dealer over time, and so the plotter would have to be patient. Finally, the plotter's desire for revenge would have to be strong enough to warrant taking the risks of getting caught.

To what extent does the Good Faith Act protect dealers from plots by revenge-seeking personnel of the manufacturers? The answer is that the protection supplied by the act is more apparent than real. It is likely that if a dealer proved a plot, he would have established that any threats made were illegitimate and coercive. The threatened alternative to doing the manufacturer's bidding would be termination and the manufacturer would have had no right to cancel if the decision that, say, the dealer's sales were not satisfactory was based primarily on a desire for revenge rather than on a good faith appraisal of the dealer's performance. On the other hand, a manufacturer's official could dislike a dealer intensely but still do no more than smile with malicious pleasure as the dealer put his neck in the noose by his own failures. For example, a Ford dealer with a market potential of one hundred cars might sell only ten, while comparable dealers sold eighty per cent of their potential and while the Chevrolet dealer in his area sold two hundred cars. One could not call a Ford representative's recommendation that the dealer be terminated an abuse of discretion even if making the recommendation gave the representative great pleasure. Hence there would be no coercion and no cause of action under the statute.

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

In February of 1960, nine months after the truck incident, the same general field manager told Kotula, "Look, Kotula, if it's the last thing I ever do, it will be to make you wish you were never a Ford dealer in your life. . . . Don't ever forget it, Mr. Kotula, that I will get you yet." In May of 1961, about two years after the original truck incident, the district sales manager recommended termination. He sent on a file containing reports of Kotula's alleged deficient sales and bad practices and attempts to aid him remedy the defects. Kotula showed that one of the reports talked of a visit to the dealership during business hours but said the meeting took place on a date which was a Sunday when the business was closed. Another report in the file was written on a form that had not yet been printed at the time it supposedly was written. He said this indicated that the termination file had been opened v. Ford Motor Co., 189 F. Supp. 349, 352 (N.D. Cal. 1960).

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

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

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

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

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centage of Fords sold to the percentage of Chevrolets was 114 per
cent, as Ford outsold Chevrolet that year. In 1960, Kotula sold
twelve Fords; the Chevrolet dealer twenty-two cars. In the
zone, Ford's percentage to Chevrolet's was 78 per cent.

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

Certainly, if the District officials intended to get rid of plain-
tiff as a dealer by reason of any personal ill will, spite, or re-
venge, as plaintiff contends, it seems inconceivable that they
would have waited some two and one-half years to carry out
their plans when the contract could have been cancelled by
the defendant at will without any cause on 120 days' notice.

[T]here were valid reasons for concluding that Kotula
was a submarginal dealer as a Ford representative.

The Court does not deem it necessary to determine whether
the jury was justified in deciding that plaintiff had estab-
lished by the greater weight of the evidence that the contract
was terminated on insufficient grounds.

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

649 In other words,

Moreover, to permit recovery on the evidence offered in this case
leads to only one conclusion—an automobile manufacturer cannot,
without liability, exercise its right to terminate a dealer for failing
to perform the obligations of the Sales Agreement if that dealer, de-
spite its failure to perform, can show some personal animosity be-
tween himself and one or more of the manufacturers' field offices.
Such a conclusion not only offends the purpose and the legislative
history of the Act, but also would place an intolerable burden upon
Appellee's business, which necessarily involves personal contact be-
tween thousands of employees and its seven thousand (7,000) dealers.

In order to guard against just such personal animosity as has been
alleged in this case, the Ford Motor Company has established, and
employed in this case, an elaborate and objective system of review
by levels of the Company other than the District Sales Office. As a
final measure of protection against arbitrary action by its sales per-
sonnel, review of dealer terminations by the Dealer Policy Board is
utilized.

with a sweeping ruling that may have far-reaching significance:

One additional and vital phase of the case requires comment. The
termination procedures provide that the notice of termination shall
advise the dealer of his right to appeal to the Dealer Policy Board.
This requirement was met—the notice informed plaintiff of his right
to request a conference with the Dealer Policy Board, which was
made up of top level officials of Ford. At plaintiff's request, the
Kotula's evidence could be explained by alternative hypotheses: (1) there was a plot that caused his termination, or (2) the local representatives disliked Kotula, and perhaps took some steps to get rid of him, but Kotula was a sufficiently bad dealer that a good faith judgment by the local representatives' superiors was made to cancel him. The local representatives may have been happy to see Kotula go, but others made the judgment in good faith upon at least plausible grounds.

Board gave him a hearing, and thereafter considered his complaints and objections, including his insistence that the termination was founded upon baseless and groundless charges. The Board also conducted an extensive and independent investigation which among other things developed the true number of vehicles sold by competing dealers to residents of their franchise territories. Based upon this investigation the Board ultimately decided that the franchise should be terminated. It communicated its findings to plaintiff, "outlining just where we had come out on our analysis of the registration information he had given us, and concluded that his performance was so unsatisfactory that the Company's notice of termination was proper and should be confirmed".

Thus, even if we assumed, which we do not, that there was sufficient evidence to warrant the finding that the termination file depicted a distorted and groundless record of inefficiency and that the causes alleged were mere pretext for defendant's arbitrary or capricious action, we would be required to go one step further and hold that the evidence was also adequate to warrant a finding that the Dealer Policy Board was a party to the wrongful scheme, and that it too acted in bad faith in its review, investigation and determination. To so hold would require resort to the remotest kind of speculation and conjecture.

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

Q. And you did not make such an investigation, did you?
A. Well, we had a problem in the question of registration, we felt very thoroughly. I knew what he had told us about the excuse tax situation and he had thought that was a problem with the District, and I had agreed with him on that. I had read the file with regard to the report on the tax incident and also read what some of the sales people had to say about him at later dates, and it didn't seem to me that he had the problems quite to the extent that merited or would necessitate our coming out there to enable us to conclude the matter.

Q. What is your answer, no? A. No.
Q. You say, "we made an investigation of these registrations." You mean that the Twin City District office made an investigation, do you not? A. I mean we asked basically the Division to arrange with the Twin City District office to check these out and give us a full and accurate report on their check-out, so that we could determine what they had done and determine if we thought it was accurate.
Q. When you say "we made the investigation," you don't mean to suggest to the Court and jury that the Dealer Policy Board itself made the investigation? A. No. We caused it to be made.


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

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

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

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

652 See text accompanying notes 434-49 supra.

653 The draftsmen of the Ford franchise have attempted to reach this result by contract: "Any determination to be made, opinion to be formed, or discretion to be exercised by the Company in connection with any provision of this agreement shall be made, formed or exercised by the Company's own officers and shall be final, conclusive, and binding and thereby herto." FORD MOTOR COMPANY, FORD SALES AGREEMENT, FORD DIVISION § 31 (1963). One can wonder whether or not the courts would give effect to this clause. Suppose a determination were made in bad faith. In any event, it provides one more argument a dealer's attorney must meet.
not shown to have been in bad faith; or (3) if the manufacturer's judgment is found to have been wrong by the trier of fact, then although it is not shown to be unreasonable or in bad faith, there is a breach.

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

The real issue in the case at bar is whether the defendant, both for its own survival in a highly competitive industry and in the interests of the car-buying public in a given locality, safely may terminate its sales agreement with an inefficient dealer—here a dealer who had effectively ceased selling automotive products—without being subject to a long and expensive trial under the amorphous concepts of the Act.

Is a jury now to review the defendant's (Ford's) distribution of automobiles to all its dealers over a three-year period and decide how many of each model should have been allotted to the plaintiff . . . in relation to other dealers in the country, both from a point of view of a sales quota in times of plenty and a production allocation in times of shortage? . . .

If during one of these years, there was a shortage of station wagons, how does the jury decide how the manufacturer should have allocated station wagons to dealers? If there were two dealers in [a particular town] . . . upon what basis will the jury determine that the defendant should have made allotments to each?

The manufacturers could make several arguments against allowing a jury to determine whether or not a manufacturer was right in determining that the dealer's performance was unsatisfactory or inadequate. Many are implicit in Ford's constitutional argument—a jury's bias in favor of a "small" dealer could color its view, a jury would lack experience needed to make these judgments, and the manufacturer could not act without running the risk that a jury would disagree. Moreover, insofar as the contract calls for satisfactory performance this means performance which satisfies the company—not a jury. A dealer could counter that in most contracts one accuses the other of being in default at his peril. The company said "satisfactory" but not "satisfactory to the manufacturer" or "adequate in the manufacturer's opinion." If the dealer succeeded with such an argument, the expanded definition of coercion would encompass most of the benefits to dealers provided by the rejected "fair and equitable" reading of the act. Jurors could review manufacturer decisions for correctness. To date few cases have dealt with the point even by implication. The trial court in the Kotula case assumed that there would be no cause of action under the act although the jury found "the contract was terminated on insufficient grounds." Other cases have commented on the manufacturer's decision as being reasonable or its "honest belief." It seems unlikely that the courts would accept this theory, yet the possibility remains.

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

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

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