THE ELUSIVE MEASURE OF DAMAGES FOR WRONGFUL TERMINATION OF AUTOMOBILE DEALERSHIP FRANCHISES

American Motors Sales Corporation was recently found liable for $20,000 in damages sustained by a small Rambler dealer as a result of American's wrongful non-renewal of its franchise. While the case, Garvin v. American Motors Sales Corp.,1 has been reversed, it is significant as the first and only reported case in which a court has been faced with the problem of formulating a measure of damages under the Automobile Dealers Franchise Act of 1956.2 From the beginning, aside from all problems of remedies, the act has been an enigma to courts and commentators. While it speaks generally of a duty on the part of manufacturers to act in “good faith” in performing, terminating or not renewing franchises, “good faith” is vaguely and restrictively defined as “the duty . . . to act in a fair and equitable manner . . . so as to guarantee [the dealer] . . . freedom from coercion, intimidation or threats of coercion or intimidation . . . .”3 The main object of this Note will be to assess the


Plaintiffs have been awarded verdicts in three other cases under the act. All but one of these have been set aside or reversed on appeal. In Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir. 1962), a lower court judgment in favor of plaintiff dealer was reversed; no consideration was given to lost future profits. In Milos v. Ford Motor Co., 206 F. Supp. 86 (W.D. Pa. 1962), aff’d, 317 F.2d 712 (3d Cir. 1963), cert. denied, 375 U.S. 896 (1963), the district court upset a jury verdict of $95,000. No record of its handling of the problem of lost future profits is available, but the plaintiff conceded that lost future profits were recoverable only from the date of termination to the date at which the franchise would, by its terms, have expired. In Globe Motors, Inc. v. Studebaker-Packard Corp., Civ. No. 60-502, W.D. Pa., June 7, 1962, the court upheld a jury verdict awarding the plaintiff dealer $35,000. Plaintiff held a franchise from defendant, and alleged that in order to drive it out of business the defendant had discriminated against it in allotting Studebakers.

The National Automobile Dealers Association reports that in a fourth case under the act (Childers & Venter, Inc. v. Willys Motors, E.D. Ky., 1960), a dealer received judgment on a jury verdict for $8,800. NATIONAL AUTOMOBILE DEALERS ASSOCIATION, A STATUS REPORT ON SUITS UNDER THE AUTOMOBILE DEALER'S “GOOD FAITH” ACT 1962. The association also reports that at least eight dealers have received out-of-court settlements, some for substantial amounts, of their claims under the act. Id. at 8-10; NATIONAL AUTOMOBILE DEALERS ASSOCIATION, SUPPLEMENT TO STATUS REPORT ON “GOOD FAITH” ACT 1962.


The key section of the act provides, in part, as follows:

An automobile dealer may bring suit against any automobile manufacturer . . . in any district court of the United States . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or conditions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, That in any such suit the
validity of Garvin's approach to the specific problem of damages in cases of terminations or non-renewals permitted under franchise agreements, but wrongful under the act. To this end, it is essential first to sketch the policy of the act and the problems of its substantive interpretation.

Prior to the act, franchise agreements were of short duration and were terminable at will upon notice. Franchises were enforced according to their terms, and the manufacturer's right not to renew or to terminate was not conditioned upon a duty to act in good faith. Restrained only by the desirability of maintaining good dealer relations, manufacturers were in an enviable

4. A termination may constitute a breach of the franchise agreement and entitle the dealer to damages regardless of the act. For purposes of this Note, however, whenever the lawfulness of a particular or hypothetical future termination or non-renewal is considered, it is assumed that the termination or non-renewal was or would be lawful under the franchise.

The act prohibits bad faith "in performing or complying with" as well as "in terminating, canceling, or not renewing" a franchise. See note 3 supra. It is not certain how the "performing or complying with" provisions will be interpreted. It would seem, however, that the act might authorize recovery by a dealer in two kinds of situations: (1) where the manufacturer has caused loss to the dealer (e.g., has allotted him an unfavorable selection of automobile) because of the dealer's refusal to comply with a coercive demand (see note 19 infra), and (2) where the manufacturer has made a coercive demand and the dealer has sustained loss as a result of his forced compliance. This Note is not concerned with the problem of damages in either of these situations.

5. Early franchise agreements provided that the manufacturer might terminate for "cause" or if it were not "satisfied" with the dealer's performance. Courts generally held that manufacturers could not terminate arbitrarily or in bad faith under such agreements. See, e.g., Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912). This led manufacturers to adopt franchises which were terminable at will upon short notice. Courts held that a manufacturer's right to terminate under such franchises was absolute. See, e.g., Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940). The introduction of short term franchises appears to have been a response to state legislation imposing restrictions on manufacturers' power to terminate but not upon their power not to renew. See Business Relations Institute, Automobile Dealer Franchise Agreements and Factory-Dealer Relations 23 (1948). For a more detailed discussion of the evolution of the franchise agreement in these respects, see Comment, The Automobile Dealer Franchise Act: A "New Departure" in Federal Legislation, 52 Nw. U.L. Rev. 253-57 (1957); and Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L.J. 1135, 1145-47 (1957).

position. Dealers had substantial investments in their businesses; since these investments were not readily convertible, termination was tantamount to "an economic death sentence." Armed with the power to terminate, manufacturers were in a position to assert absolute control over dealers' operations. Although many states had passed legislation designed to ameliorate this power imbalance, the effort had proved ineffective. Complaining that manufacturers were unfairly forcing them to buy unwanted cars and accessories and to make

7. When the act was passed the average dealer had an investment of $118,000 in his business. H.R. Rep. No. 2850, 84th Cong., 2d Sess. 3 (1956).

8. Kessler, supra note 5, at 1188.


All of the state statutes are in the form of licensing legislation. Generally, they provide only that violation justifies imposition of a criminal penalty and refusal or revocation of a license to do business in the state. Unless they are interpreted to afford dealers a private right of action (see note 10 infra), they may not give dealers as much protection as they purport to give them.

10. Surprisingly, there has been little litigation under the state statutes. This may be because only Virginia — Va. Code Ann. §§ 46.1-546-547 (1958) — has made explicit provision for a private cause of action, or because only eight of the statutes specifically cover instances in which a manufacturer fails to renew a franchise. Manufacturers may have discouraged litigation by not renewing rather than terminating franchises. The Wisconsin and Minnesota statutes, however, have been interpreted to afford dealers a private right of action. In Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955); Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc., 142 F. Supp. 469 (D. Minn. 1956). These courts found franchise provisions invalid as against public policy, which enabled them to hold that any wrongful termination was a breach of contract entitling the dealer to appropriate relief. Most of the other statutes, it would seem, are capable of a similar interpretation. Similarly, it is possible that courts will interpret those statutes which prohibit unfair "terminations" or "cancellations" to cover non-renewals as well. But see Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378, 381 (D.N.J. 1959).

Interestingly, the state statutes may figure significantly in litigation under the federal statute. It is believed that the federal statute will be interpreted to make unlawful a termination which is predicated upon the dealer's refusal to comply with an unlawful demand or with a demand that he do something not required by the franchise agreement. In jurisdictions which prohibit manufacturers from making certain kinds of demands (e.g., that the dealer construct a certain type of building), therefore, terminations as a result of dealers' refusals to comply with such demands may violate the federal statute notwithstanding the fact that the act demanded was required under the franchise agreement (as unmodified by state law).
uneconomic expenditures, dealers mounted a well-organized campaign in Congress for corrective legislation.\textsuperscript{11}

The measure which eventually became the Automobile Dealers Franchise Act was one of twenty pro-dealer bills before Congress in 1956 as a result of this campaign.\textsuperscript{12} As first passed by the Senate, it was sweeping in effect. "Good faith" was required of the manufacturer "in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise,"\textsuperscript{13} and was defined as "the duty . . . to act in a fair, equitable, and nonarbitrary manner so as to guarantee [the dealer] . . . freedom from coercion, intimidation, or threats of coercion or intimidation, so as to preserve all equities of [the dealer] . . . which are inherent in the nature of the relation created between such parties by the franchise."\textsuperscript{14} Fearing an interpretation which would require manufacturers to be mindful of dealers' profits in setting production schedules, creating new dealerships, and experimenting with new methods of distribution, all to the possible detriment of competition, the Department of Justice objected vehemently to the italicized language.\textsuperscript{15} To meet these and other objections, the bill was amended in the House to exclude the italicized language, to exclude the word "nonarbitrary,"\textsuperscript{16} and to include a section disclaiming an intent to "repeal, modify, or supercede directly or indirectly any provision of the antitrust laws of the United States."\textsuperscript{17}

As passed with these amendments, the act was still capable of an interpretation allowing recovery by any dealer whose franchise was unfairly or inequitably terminated.\textsuperscript{18} Such an interpretation, however, was made improbable by the

\textsuperscript{11} For a history of this campaign, see Kessler, \textit{supra} note 5, at 1171-73. Economic difficulties were at the heart of the dealer's discontent. Between 1951 and 1954, dealer mortalities as reported by Dun & Bradstreet had more than quadrupled and dealers' profits on sales as reported by the National Automobile Dealers Association had dropped nearly ninefold. \textit{Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce, Interim Report} 4 (Comm. Print 1955). The dealers pressed many specific complaints, and several bills were introduced to deal with these (see note 12 \textit{infra}), but the Automobile Dealers Franchise Act dealt only with the more general problem of the imbalance of power between dealers and manufacturers.

\textsuperscript{12} See \textit{Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 26, 64} (1956); McHugh, \textit{The Automobile Dealer Franchise Act of 1956, 2 Antitrust Bull.} 353 (1957). For a discussion of the general nature of these bills, see Kessler, \textit{supra} note 5, at 1172-73.

\textsuperscript{13} \textit{Id.} at 2, 242 (emphasis added).

\textsuperscript{14} \textit{Id.} at 128-30, 132-34, 246-75.

\textsuperscript{15} \textit{Id.} at 20. See also \textit{H.R. Rep. No. 2850, 84th Cong., 2d Sess.} (1956). While retention of the word might have rendered the act capable of an interpretation prohibiting arbitrary termination or non-renewals, this would not have come under any of the Justice Department's specific objections to the bill.


\textsuperscript{17} The Act defines "good faith" as "the duty . . . to act in a fair and equitable manner . . . so as to guarantee [the dealer] . . . freedom from coercion, intimidation, or
THE YALE LAW JOURNAL

act's legislative history and was quickly rejected by the courts. It is now clear that to be wrongful under the act a termination must be inconsistent with the manufacturer's duty to guarantee the dealer freedom from coercion and intimidation.19 A termination can be inconsistent with such a duty only if it threats of coercion or intimidation." 70 Stat. 1125 (1956), 15 U.S.C. § 1221(e) (1958). Professor Corbin, arguing that the "so as" clause is merely purposive and does not qualify the words "fair and equitable," interprets the act to allow recovery by dealers in cases of unfair termination. 6 CORBIN, CONTRACTS § 1266, at 59-62 & n.73.5 (1962). Professor Kessler first adopted this interpretation, arguing that the "so as" clause merely illustrates and does not define conduct which is not "fair and equitable," then rejected it. Compare Kessler, supra note 5, at 1183-84, with Kessler & Stern, Competition, Contract, and Vertical Integration, 69 YALE L.J. 1, 109 n.489 (1959). Corbin's interpretation has been accepted by at least one court. See Barney Motor Sales v. Cal Sales, Inc., 178 F. Supp. 172, 174 (S.D. Cal. 1959) (dictum). Cf Globe Motors, Inc. v. Studebaker-Packard Corp., Civ. No. 60-502, W.D. Pa., June 7, 1962. The great majority of courts, however, have rejected it. See note 19 infra.

Proponents of this interpretation have argued that an interpretation under which coercion or intimidation is a prerequisite of bad faith would render meaningless the act's provision making the failure of a dealer to act in good faith a defense against its claim for damages. See 70 Stat. 1125 (1956), 15 U.S.C. § 1222 (1958). While it is difficult to imagine a situation in which a dealer could "coerce" or "intimidate" a manufacturer within the meaning of the act, one should hesitate to place too much emphasis on this incongruity. It appears affirmatively that the defense was included as an inexpensive way to overcome objections to the act's lack of "mutuality" of obligations imposed upon dealers and manufacturers. See Comment, 52 Nw. U.L. Rev. 253 (1957). The legislative history shows almost conclusively that the "so as" clause was meant to qualify the words "fair and equitable." See H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956) ("The term 'fair and equitable' as used in the bill is qualified by the term 'so as . . . .'"); 102 CONG. REC. 14070 (daily ed. July 23, 1956).


Initial drafts of the act would not have qualified the manufacturer's obligation to guarantee dealers freedom from coercion, intimidation or threats of coercion or intimidation. During the hearings in the House, however, manufacturers expressed concern that they would be foreclosed by the act from making suggestions and recommendations to dealers. See, e.g., Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 26, at 566 (1956) (statement of Chrysler Corp.). To safeguard manufacturers in this respect, a proviso was included in the act "that recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." 70 Stat. 1125 (1956), 15 U.S.C. § 1221(c) (1958); see 102 CONG. REC. 14073-74 (1956) (remarks of Rep. Keating). Cf. Note, 25 GEO. WASH. L. REV. 667, 680 (1957).

The meaning of "coercion" and "intimidation" in this context has been the subject of considerable speculation. Coercion as defined by Webster is the "use of physical or moral force to compel to act or assent." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 439 (Merriam ed. 1961). It differs from intimidation in that the latter suggests "the act of making timid or fearful or inspiring or affecting with fear." Id. at 1184.

Conventional definitions, however, do not resolve the problem. It is customary in the automobile business for manufacturers to assume an active role in dealership management. Franchise agreements require dealers to submit detailed financial statements at regular intervals and manufacturer approval of most major dealership decisions. Factory repre-
results from the dealer's failure to do an act the manufacturer has attempted to coerce or to intimidate the dealer into doing. 20 On the other hand, where the act demanded of the dealer is required by an uncoerced and reasonable provision of the franchise, or where the dealer is, at the time of termination, in breach of such a provision the termination will not be found wrongful. 21 The extent to which manufacturers will be allowed to rely upon the dealer's non-performance of other franchise terms, however, has yet to be determined. Dealers have argued that the non-performance relied upon must relate to a franchise provision which is reasonable and which was not procured by coercion or intimidation. 22 While courts have thus far avoided consideration of this argument, 23 the legislative history of the act seems to militate against its adoption.

sentatives visit dealers frequently and keep a watchful eye upon such things as inventory levels and capital requirements. When a dealer's sales fall below estimates based upon local or regional averages, the manufacturer will generally suggest ways to increase sales. It would seem that it is not coercion or intimidation for a manufacturer to make a suggestion and to promise special benefits if the dealer accedes to it. Several courts have held that it is not coercion or intimidation for a manufacturer to demand that a dealer do an act which it is required to do under the franchise agreement. E.g., Milos v. Ford Motor Co., 317 F.2d 712, 717-18 (3d Cir.), cert. denied, 375 U.S. 896 (1963); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889 (N.D. Ga. 1963); cf. Garvin v. American Motors Sales Corp., 318 F.2d 518, 520 (3d Cir. 1963). It has been maintained that an act or course of conduct does not constitute coercion or intimidation unless it is wrongful in the sense of being tortious, criminal or violative of a contractual or moral duty without regard to the act. Kessler & Stern, supra note 18, at 106 n.478. Cf. RESTATEMENT, CONTRACTS § 492 (1932) (definition of duress).

21. Courts have taken three approaches to this problem: one has been to interpret the statutory terms "coercion" and "intimidation" to exclude a termination or non-renewal based upon a dealer's failure to comply with a demand that it perform an act required by the franchise. See note 19 supra and authorities cited therein. A second approach has been to interpret the act so as to limit its prohibition to coercion and intimidation which, objectively considered, is not "fair and equitable." See, e.g., Woodward v. General Motors Corp., 298 F.2d 121, 123, 128 (5th Cir.), cert. denied, 369 U.S. 887, rehearing denied, 370 U.S. 965 (1962). A third approach, less rooted in any particular interpretation of the act, has been to allow manufacturers a summary judgment or directed verdict where it appears that the dealer was in breach of its franchise at the time of termination or non-renewal. See, e.g., Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D. Cal. 1960).

22. No court, with the possible exception of the Court of Appeals for the Fifth Circuit in Woodward v. General Motors Corp., 298 F.2d 121 (5th Cir.), cert. denied, 369 U.S. 887, rehearing denied, 370 U.S. 965 (1962), has come out flatly and held that the dealer's non-performance of any valid and material franchise term will exculpate the manufacturer. Courts have avoided this issue by finding in each case that the franchise term relied upon by the manufacturer was "reasonable" as well as valid and material. See cases
tion.\textsuperscript{24} Probably, therefore, manufacturers will be able to rely upon non-performance of any term which is found valid under state law. The primary effect of the act, thus, should be to eliminate the manufacturer's leverage, possessed by reason of its contractual rights to terminate or not renew, to force dealers to perform acts the manufacturer does not wish to or cannot require of them by contract.

While the act seems to impinge upon the manufacturer's freedom of action in terminating dealerships only in the case of coercive demands not sanctioned by the franchise agreement, in operation the effect of the act upon the manufacturer may be more restrictive. Much pro-dealer state legislation prohibits specific practices thought unfair to dealers, whether or not incorporated into the franchise agreement;\textsuperscript{25} similarly, franchise clauses may be invalidated under general state law notions of unconscionability, adhesion, waiver, or estoppel.\textsuperscript{20} In either case a manufacturer's reliance upon these terms in the contract will be misplaced, and the manufacturer will lose his defense that the termination was permissible since the dealer was in breach of contract. A second limiting factor on the manufacturer's freedom to terminate franchises is the juridical risk that a court will mistakenly characterize an arbitrary termination permissible under the franchise agreement and state law as coercive, thus rendering the manufacturer liable under the act. To avoid this risk a manufacturer might cited note 22 \textit{supra}; Sam Goldfarb Plymouth, Inc. v. Chrysler Corp., 214 F. Supp. 600 (E.D. Mich. 1962); Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964).

24. It is only with regard to the \textit{written} terms of a subsisting franchise agreement that the act obligates manufacturers to act in good faith. 70 Stat. 1125 (1956), 15 U.S.C. § 1221(b) (1958); see \textit{Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary}, 84th Cong., 2d Sess., ser. 26, at 246, 264-65, 274 (1956). And the act does not extend protection to the dealer \textit{in the making} of the contract. See \textit{id. at} 238-41, 245.

While a conclusion that the act does not cover coercion or intimidation in the making of a franchise agreement means that a dealer \textit{may not rely} upon the act to challenge the \textit{validity} of a franchise term, it does not establish that it is "fair and equitable" or not "coercive or intimidatory" for a manufacturer to demand that the dealer \textit{comply} with such a term. It suggests, however, as does the action of the House in excluding the "equities" language contained in the definition of "good faith" first passed by the Senate (see text at note 14 \textit{supra}), that it was not Congress' intent to empower courts to discriminate among franchise terms on vague grounds such as "fairness" or "reasonableness." \textit{But see Note, 25 Geo. WASH. L. Rev. 667, 682-83 (1957) (franchise provision must be reasonable); Comment, The Automobile Dealers Franchise Act of 1956 — An Evaluation, 48 Cornell L.Q. 711, 723 & n.107 (1963) (franchise term must be fair; courts in measuring dealer's performance should not confine themselves to criteria set up in the franchise).}

Judicial rejection of a requirement of fairness and reasonableness would not necessarily work a hardship on dealers or lessen the effectiveness of the act, since traditional doctrines of adhesion or unconscionability (in cases involving unduly burdensome terms) and waiver or estoppel (in cases of discriminatory action) could be employed for the same ends. \textit{But see Alfieri v. Willys Motors, Inc., 227 F. Supp. 627 (E.D. Pa. 1964); Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964).}

25. See notes 9 & 10 \textit{supra}.

26. See note 24 \textit{supra}.
try to avoid all appearances of unexplained or unfair behavior. But in so doing he must be careful to avoid making demands on the dealer, for such demands might easily lead to a finding of coercion.

Although the substantive provisions of the act may place the manufacturer who terminates or fails to renew a franchise — even if the termination is arbitrary — in jeopardy of an adverse finding on the merits, the problems associated with formulating a remedy once a violation has been found may shift the risk of loss of the suit back to the dealer. Since the act speaks in terms of "damages . . . sustained . . . by reason of the . . ." wrongful termination, and since the manufacturer's liability arises out of a contractual relationship with the dealer, the most obvious remedy would be a monetary recovery based on contract measures of damages — either an expectation interest measured by loss of profits or by the difference in the market value of the dealership before and after termination or a reliance formula reimbursing the dealer for his past non-recoverable expenditures. Upon close examination, however, each of these possible monetary remedies has its pitfalls. The lost profits recovery is complicated not only by the usual problems of foreseeability and certainty, but also by the problem of determining the period of time over which loss of profits may be casually related to the termination. The reliance remedy, which fails to provide a comprehensive solution since in many cases the dealer will not have made substantial expenditures in reliance, is complicated by similar evidentiary problems. And while the market value before and after recovery seems relatively uncomplicated, it may result in recoveries which would not reflect the full extent of a dealer's expectation loss.

One ready alternative to damages is injunctive relief, a remedy not entailing the complicated issues of proof necessitated by the monetary formulas. Indeed, one court has implied that injunctive relief is available to a dealer who is a victim of a termination wrongful under the act. The injunctive remedy, however, is not entirely free from difficulty. Would an injunction bar only coercive terminations or non-renewals or would it operate, in effect, to bar future non-coercive terminations as well? If the latter, how long would the injunction run; would it preclude the manufacturer from ever terminating an inefficient or uneconomic dealership? What provision would be made for supervision

28. In the breach of contract context, it is standard doctrine that lost profits are recoverable only if their loss is proven with reasonable certainty and was foreseeable at the time of the formation of the contract. See, e.g., Restatement, Contracts §§ 330-31 (1932). On the certainty problem under the act, see notes 55-62 infra and accompanying text.
29. See notes 51-54 infra and accompanying text.
30. See note 89 infra and accompanying text.
31. See note 86 infra and accompanying text.
32. Bateman v. Ford Motor Co., 302 F.2d 63 (3d Cir. 1962); see also Sam Goldfarb Plymouth, Inc. v. Chrysler Corp., 214 F. Supp. 600 (E.D. Mich. 1962). Both cases involved motions for preliminary injunctions which were ultimately denied. The court's reasoning in Bateman, however, would support the granting of a final injunction.
by the court to insure that the manufacturer would not discriminate against
the dealer in such matters as the allotment of new cars.33 Even assuming that
an injunction could be properly framed, the act still speaks of a dealer recov-
ering "the damages by him sustained . . .,"34 and this language implies that, at
the very least, a dealer should have the option of suing for damages caused
by a wrongful termination.

In order to construct an appropriate measure of damages for the act, the
policies underlying the law of damages should first be examined. The standard
measure of recovery in contract actions is the expectation interest — to put
the promisee in as good a financial position as he would have occupied had
the promisor fully performed.35 But significant limitations are often placed
upon this theoretical formulation. The doctrines of foreseeability and certainty
may be conceptualized as limiting the amount of recovery in order to make
contract breaching possible and to encourage future contract making.36 The
requirement of certainty may also serve a second function, that of limiting
a jury's discretion and permitting supervision by the court over the amount
of the recovery.37 The law of contract damages, thus, represents a balance
between a policy of full compensation on an individualized basis and an opposing
concern for standardized and limited formulas of recovery which will not make
contract breaching too expensive.38 This tension in damage policies may be
transposed to the context of the Automobile Dealers Franchise Act. As drafted,
the act seems to contemplate a full expectation recovery by the wronged dealer.
Such a recovery, moreover, would accomplish the apparent policy of the act
to deter coercion and intimidation. On the other hand, while large recoveries
probably won't cause the abandonment of the franchise system,39 they may
have the effect of preventing termination of uneconomic or inefficient dealers-
ships. This wedding of the manufacturer to his current dealers may be aggra-
vated to the extent that the juridical risk of a manufacturer being mistakenly

33. Certain of the state statutes provide for injunctive relief. See notes 9-10 supra.
In at least one state case a final injunction has been granted. Kuhl Motor Co. v. Ford
Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955). No information has been secured con-
cerning how the court resolved problems of formulation and supervision there.
52 (1936).
36. See Patterson, Compulsory Contracts in the Crystal Ball, 43 COLUM. L. REV. 731,
739 (1943).
37. See note 62 infra.
38. Compare Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943), with Bush-
vick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940).
39. There are several references in the act's legislative history to the possibility that
the act might prompt manufacturers to give up the franchise system of distribution. See,
e.g., Hearings Before the Antitrust Subcommittee of the House Committee on the Judi-
cracy, 84th Cong., 2d Sess., ser. 26, 438 (1956). There have been reports that the Ford
Motor Company has recently bought out several dealer outlets. It is probable, however,
considering the success of manufacturers under the act, that this development has no re-
lation to the passage of the act.
found in violation of the act materializes. Thus any formulation of damages under the act should try to strike a balance between these competing policies, although not necessarily the same balance that has been adopted in standard contract actions.

In Garvin v. American Motors Sales Corp., the district court approached the problem of damages under the act by seeking to ascertain the profits lost to the dealer as a result of the manufacturer's failure to renew the dealer's franchise. The court held that the dealer was entitled to recover all the profits he would have earned over the period that the franchise would, "in the normal course of events," have continued in effect. To determine this period, the court suggested that the jury consider the dealer's "habits," his "attitude toward life," his "previous health," "the possibility he might die a natural death." The only evidence touching on any of these considerations was that the dealer was 60 years old and had a life expectancy, as shown by mortality tables, of 15.9 years. Although the court implied that it would have been


41. The court implied that the dealer might recover, in addition to lost profits, (1) $4,000 for parts and $7,000 for equipment rendered valueless by the non-renewal, (2) $10,000 for good will lost as a consequence of the non-renewal, and (3) $1,500 for rent payable on the unexpired term of his lease. Garvin v. American Motors Sales Corp., 202 F. Supp. 667, 672 (W.D. Pa. 1962), rev'd, 318 F.2d 518 (3d Cir. 1963). Since the evidence would have supported a recovery of no more than $18,000 lost profits for one year, the jury's award probably included certain of these additional components of loss. If the dealer was unable subsequent to non-renewal to sublet or make use of his business premises, recovery of the amount he remained obligated to pay under his lease might have been justified; this amount was not saved as a result of the non-renewal. For the same reason, perhaps, recovery of the $4,000 loss on parts might have been proper. Whether allowance of the entire $7,000 loss on equipment would have been proper, however, is open to question. It would seem to depend upon whether the dealer, in buying the equipment involved, justifiably relied upon the continuation of the franchise for the entire period of amortization. See note 89 infra and accompanying text. In no case, however, would recovery of the $10,000 loss of good will in addition to lost profits have been justified. See 5 CORBIN, CONTRACTS §§ 1035-36 (1964).

42. Garvin v. American Motor Sales Corp., 202 F. Supp. 667, 672 (W.D. Pa. 1962), rev'd on other grounds, 318 F.2d 518 (3d Cir. 1963). The court's formulation envisaged a determination of how long the dealer's franchise would have lasted had the manufacturer never made coercive demands and had strained relations between it and the dealer never come about as a result.

The court submitted separate verdict slips to the jury, one for damages sustained during the first year following non-renewal and another for damages sustained thereafter. Appendix to Brief for Appellant, pp. 179a-80a, Garvin v. American Motors Sales Corp., 318 F.2d 518 (3d Cir. 1963). It is only with respect to damages for the period following the first year after non-renewal that the court instructed the jury on such factors as whether the plaintiff would have wished to stay in business. Id. at 180a-84a. It may be that the court thought that the plaintiff was minimally entitled to the profits he would have earned had the manufacturer renewed the franchise for a term, here one year, equivalent to that which had expired, although it is not clear why this should be the rule.

43. Id. at 181a-82a.
44. Id. at 52a-53a.
permissible for the jury to infer that the franchise relationship would have continued in effect until the dealer's death, the jury chose to limit the dealer's recovery to one year.\textsuperscript{45}

Given the basis of the \textit{Garvin} formulation — that a dealer is entitled to recover all profits he would have earned but for an unlawful termination or non-renewal — it might initially seem that the period of recovery ought not be limited to that during which the particular dealer would have had the desire and ability to continue in business. Generally, dealerships do not perish upon the dealer's death or retirement; they are sold to another dealer acceptable to the manufacturer.\textsuperscript{46} If, upon death or retirement, the dealer or his estate would have sold the dealership for a price reflecting its future profit potential, the sale might be viewed as nothing more than an advance collection of profits which would have been earned thereafter. And since post- as well as pre-sale profits are lost as the result of the termination or non-renewal, it is arguable that the dealer's recovery ought to include the former as well as the latter. However, it is probable that a dealership cannot be sold for a price reflecting its profit potential. The dealership is not an asset that can be freely sold: the manufacturer must agree to issue a franchise to the buyer.\textsuperscript{47} It appears to be in the manufacturer's interest to keep the sale price down,\textsuperscript{48} and the manufacturer may not enfranchise a buyer who pays a price it considers unreasonably high. Thus the sale price of a dealership may not always reflect its potential future profits. What the manufacturer often allows is a generous valuation of the physical assets.\textsuperscript{49} This "cushion" over the value of the physical assets, while not equal to the potential profits of the enterprise, is a return from the sale of the dealership denied to the dealer whose franchise has been wrongfully terminated. If the amount of this expected "cushion" could be proven, it should be recoverable, but not as lost profits since it is not dependent upon or related

\textsuperscript{45} 202 F. Supp. at 672.
\textsuperscript{46} See Kessler, supra note 5, at 1188.
\textsuperscript{48} Where the price a buyer proposes to pay would leave him with insufficient capital to operate efficiently or to weather bad times, the manufacturer's interest in blocking the sale is obvious. Even where this is not the case, however, the manufacturer's interest is in minimizing the sale price. Manufacturers, in order to attract good dealers and maintain good dealer relations, want their dealers to earn a fair return on their capital investment.\textsuperscript{49} Manufacturers regard any excess of sale price over tangible asset value as "blue sky;" it is their general policy not to enfranchise any buyer who proposes to pay a price reflecting such an excess. Interviews with Richard Leckrone, Assistant Zone Manager, Oldsmobile Division, General Motors Corp., Mar. 30, 1964; and Paul Goodman, President, Globe Ford, New Haven, Conn., Mar. 25, 1964. Where the agreed upon sale price is reasonable considering the profitability of the dealership, however, it seems that the manufacturer may wink at a somewhat inflated computation. Telephone interview with Mr. Stephen S. Simmerman, General Counsel, National Automobile Dealers Association, June 11, 1964.
to the future profit potentiality of the franchise. The period for which lost profits are recoverable should thus be limited to the life or work expectancy of the dealer. 50

A serious problem as to the validity of Garvin's definition of the period during which lost profits are recoverable is suggested by those cases involving terminations in breach of franchise provisions requiring notice. In such cases, a dealer will not be heard to argue that had the manufacturer not terminated until the end of the notice period something would have happened during that period which would have caused the manufacturer not to terminate at all. The dealer may recover only the loss he has sustained as a direct result of the manufacturer's failure to give notice; i.e., his loss of profits during the notice period. 51 The basic reasoning of the notice cases is that the dealer's remedy should only be co-extensive with his rights under the contract; since the contracts involved are terminable at will, the courts reason that the dealer is entitled only to be given notice, and may only recover for the duration of the notice period. By parity of reasoning, it might seem that a dealer who has been terminated or not-renewed in violation of the act should be allowed to recover only those profits he would have earned before the manufacturer would have had the right under the act to terminate. 52 The act, as it has been in-

50. It should make no difference that the "dealer" is a corporation. A corporate dealer's franchise terminates upon the principal shareholder's death or retirement. See note 47 supra. Although the corporate entity may get a new franchise if its shares rather than its assets are sold to a buyer acceptable to the manufacturer, the principal shareholder rather than the corporation should be considered the real party in interest.

51. Chevrolet Motor Co. v. McCullough Motor Co., 6 F.2d 212 (9th Cir. 1925), is the only case involving an automobile dealership franchise which so held. Authorities in other areas are clearly supporting, however. See, e.g., Western Oil & Fuel Co. v. Kemp, 245 F.2d 633 (8th Cir. 1957); In re Petroleum Carriers Co., 121 F. Supp. 520, 525-27 (D. Minn. 1954); James v. Dayton Rubber Mfg. Co., 196 S.E. 298 (Ga. 1938); Freiburger v. Texas Co., 257 N.W. 592 (Wis. 1934).

The basis of the rule is not, it would seem, the unlikelihood that the manufacturer which has terminated without giving notice would not have terminated at all had it waited. The basis, rather, is that the dealer has no right against the manufacturer not to be terminated at the end of the notice period. It is no more relevant that the manufacturer would not have terminated than it would be in a case involving a buyer's breach of a contract for 100 widgets that but for the breach the buyer would have ordered an additional 100 widgets.

52. The rule limiting recovery of anticipated profits to the notice period (see note 51 supra) does not apply where a manufacturer has terminated in breach of franchise provisions requiring both notice and cause. In such a case, the dealer may recover anticipated profits for the balance of the stated term of the franchise or, if the term is indefinite, for a reasonable time. See Note, Contracts — Indefinite Duration of Exclusive Sales Agreements — Distributor's Right to Prospective Profits for a Reasonable Time, 40 N.C.L. Rev. 804 (1962). Courts differ, however, where the requirement of cause leaves the manufacturer's discretion substantially unrestricted. Compare Chevrolet Motor Co. v. Gladding, 42 F.2d 440 (4th Cir.), cert. denied, 282 U.S. 872 (1930) (lost profits allowed for one year where manufacturer could terminate upon 60 days notice "should . . . any question arise that threatens to interfere with [a] . . . mutually satisfactory business relationship." Id. at 444 n.1), with Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912)
terpreted, does not forbid capricious or arbitrary terminations or non-renewals. Unless restricted by the franchise itself, as will often be the case, the manufacturer has an ongoing right to terminate at any time; the only requirement is that the manufacturer not act coercively. Therefore, with respect to any coercive termination, the manufacturer might argue that it could have terminated the next instant in perfect conformity with the act and that the dealer lost no profits as a result of its having terminated sooner rather than later.

One way to respond to this line of argument, which eliminates lost profits recovery altogether, is to argue that the existence of the right to terminate is contingent upon coercion ceasing to be the motive for termination. A manufacturer, having attempted to terminate coercively, would not be free of his coercive motive, and would not acquire the right to terminate lawfully under the act until he no longer cared to terminate for the coercive reason or until some new non-coercive reason, itself sufficient to motivate termination, developed or until the dealer breached a provision of the franchise. Since in many cases it will be likely that the manufacturer will continue to desire termination for coercive reasons and it will be unlikely that the dealer will breach the franchise contract or that a sufficient non-coercive reason for termination will arise, this argument will often lead to a period of recovery equivalent to that suggested in Garvin—the duration of the franchise under a normal course of events ending with the death of the dealer or the sale of the franchise.

While this approach, which would limit recovery to that period during which the act imposed an obligation on the manufacturer not to terminate, seems to have a greater affinity to traditional concepts of contract damages, it is far from evident that it would promote the policies of the act to protect dealers from coercion. Indeed, this approach to damages might well frustrate the deterrent function of the act by denying all recovery. While severe difficulties of proof inhere in the Garvin approach, it is suggested that to demand of the dealer that he prove the manufacturer’s future motivations is to impose an intolerable burden on him.

Nor would shifting the burdens of proof to the manufacturer seem to be particularly useful. Proof of future motivations with the degree of certainty required by damage doctrine would still be quite difficult; were a court to shift the burden to the manufacturer on the issue of a lack of wrongful motive in the future, the likely failure in proof would allow the dealer to recover for the same period as in Garvin. But despite the difficulties in proof there seems

(lost profits recovery reversed where manufacturer could terminate upon 60 days notice if it became “dissatisfied”). See also Woodward v. General Motors Corp., 298 F.2d 121 (5th Cir.), cert. denied, 369 U.S. 887, rehearing denied, 370 U.S. 965 (1962). Courts which have allowed recovery in such cases may have thought that it would be unwarranted to speculate whether the manufacturer would have become “dissatisfied” in the future. If so, the rationale might carry over to cases arising under the act.

53. See notes 18 & 19 supra and accompanying text.
54. See notes 19 & 21 supra and accompanying text.
to be no reason to deny the manufacturer a chance to make a showing that his wrongful motive for termination would have been replaced in the future by a lawful one.

A second serious problem with the Garvin approach would result from an application of the certainty doctrine; how could it be determined with any degree of certainty how long a particular franchise relationship would have lasted but for an unlawful termination or non-renewal? It should not be assumed, as Garvin implies, that franchise relationships generally, or even often, endure until a dealer's death or disablement. Nor would it seem enough to instruct the jury to take into account the possibility that the dealer might, at some future time, have sold out or otherwise caused the franchise to lapse. There is the further possibility, ignored in Garvin, that before the dealer ended the franchise relationship, it would have been lawfully severed by the manufacturer. And how could a jury, knowing only the dealer's life expectancy, predict whether or when any of these things would have occurred? Proof that the dealership would have remained profitable during the period for which future profits are allowed presents a closely related certainty problem inherent in the Garvin formulation of damages. The volatile nature of the automobile

55. The generally destructive impact of the certainty limitation in such circumstances is demonstrated by Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912), which involved a five-year automobile dealer franchise terminable upon 60 days notice should the manufacturer become "dissatisfied." The jury found that the manufacturer was not "dissatisfied" when it terminated and thus that the termination was wrongful. The court, while allowing recovery of certain reliance expenses, reversed the jury's award of profits the dealer would have earned during the balance of the five-year term, holding that there was no basis for the jury's finding that the manufacturer wouldn't have become "dissatisfied" before the end of the term. Although recovery of lost profits has sometimes been allowed in such circumstances (see note 52 supra), this seems to have been due to the presence on those occasions of substantial reliance expenditures.

56. Whether this factor might in itself preclude recovery of lost profits under the act has been the subject of considerable controversy. See Kessler, supra note 5, at 1186, 1188 n.333; Note, 25 Geo. Wash. L. Rev. 667, 684 (1957); Comment, 48 Cornell L.Q. 711, 730-32 (1963); Note, 52 NW. U.L. Rev. 253, 267 (1957); Note, 9 Stan. L. Rev. 760, 773-74 (1957).

Where a middleman sues a supplier for loss of resale profits, it is generally required that he prove the number of sales lost as a result of the supplier's breach, the price at which these sales would have been consummated, and the cost at which these sales would have been made. See Comment, Lost Profits as Contractual Damages: Problems of Proof and Limitations on Recovery, 65 Yale L.J. 992, 1005-11 (1956). Prior to the act, contract cases involving terminations of automobile franchises required dealers to prove damages in this fashion. Because of the uncertainty of proof of this nature in the franchise context (see Kessler, supra at 1185-86), dealers were sometimes limited to recovery of profits they would have earned on the resale of automobiles already ordered by customers prior to termination. One court refused to go even this far, holding that the dealer was bound not only to prove that he had received orders but also that these orders had been accepted and were legally binding. Busam Motor Sales, Inc. v. Ford Motor Co., 104 F. Supp. 639 (S.D. Ohio 1952).

market and the possibility that the manufacturer might enfranchise additional competing dealers suggest that a showing of continued profitability would be difficult. Again, application of a rigid certainty rule might substantially preclude recovery of lost profits.

There are, however, compelling considerations which militate against the application of a strict certainty rule in the proof of lost profits under the act. In treble damage litigation under the antitrust laws the certainty rule has been reduced to the status of a best evidence rule. Not only does the act include references to and purport to supplement the antitrust laws, but there is also some evidence in the legislative history that the act may have been intended to liberalize the provisions of section 3 of the Clayton Act. Finally, 


The more liberal rule is thought to be applicable only in the antitrust context. Interestingly, however, the rule has been cited in other contexts. See, e.g., Spitz v. Lesser, 302 N.Y. 490, 494, 99 N.E.2d 540, 542 (1951).

58. The preamble to the act states that it is "an act to supplement the antitrust laws of the United States." 70 Stat. 1125 (1956). There is a further reference to the antitrust laws in the body of the act. See note 17 supra and accompanying text. In Schnabel v. Volkswagen of America, Inc., 185 F. Supp. 122, 129 (N.D. Iowa 1960), the court rejected an argument, based upon these references, that the service of process provisions of § 12 of the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. § 22 (1958), were applicable in cases under the act.

several of the commentators have viewed the act as a functional part of the antitrust law.60 It is thus probable that the antitrust liberalization of the certainty rule will be carried over into litigation under the act. The certainty rule, moreover, may be undergoing a general relaxation throughout contract law. In cases involving strong public policy or what may be characterized as immoral conduct, courts have sometimes weakened the bite of the rule.61 In part this possible withering of the certainty rule may be viewed as part of the general movement of contract law away from standardized formulas designed to limit juries and toward more individualized treatment of particular cases. A new balance is being formulated in contract cases removing old limitations on jury discretion and on the amount of recovery, and it would seem anomalous to maintain a rigid certainty rule as an absolute bar to recovery under the act.62 Finally, if the certainty rule is not relaxed, then recovery for wrongful termination or non-renewal may be precluded, thwarting the obvious legislative intent to allow damages and undercutting the protective and preventive features of the measure.63

If a court did accept a best evidence rule in place of a strict certainty requirement, a dealer would still have to do more than prove his life expectancy in order to show how long the franchise would have lasted but for the coercive termination.64 Statistics presumably could be compiled, showing the probable

60. See, e.g., Kessler & Stern, supra note 18, at 103-10; McHugh, The Automobile Dealer Franchise Act of 1956, 2 Antitrust Bull. 353 (1957).


62. The certainty limitation is analogous to the parol evidence rule in that it had its origin in a long standing and once strong distrust by courts of the jury system. McCormick, DAMAGES § 101 (1955); Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943). Although this element continues to find expression in the case law, the limitation's primary goal may be the same as that of the foreseeability limitation: "to encourage contract-making by minimizing the consequences of contract-breaking." Patterson, Compulsory Contracts in the Crystal Ball, 43 Colum. L. Rev. 731, 739 (1943). If true, the rigid application of the limitation in cases arising under the act would not be justified. It is unlikely, considering the quasi-tortious nature of conduct proscribed by the act, that a weakened limitation would discourage the making of franchise agreements. See 5 Cordan, CONTRACTS § 1008, at 75 (1951). To the extent that it might, however, the harm to the policy of encouraging contracts would be more than offset by the benefit to the policy of deterring coercion and intimidation.

63. While it is true that alternative remedies would be available, each has problems similar to that of the lost profits remedy. See notes 30-33 supra and accompanying text.

64. It is important to remember that the antitrust rule does not relieve a claimant of his burden of proof — he must still establish a probability that damages in an approximate amount were sustained. Under the act a dealer must prove how long his franchise would have remained in effect and the profits he would have earned during that period. Compare Mager v. Trunbull, 99 P.2d 434 (Wash. 1940), with Noble v. American Three Color Co., 74 N.Y.S. 764 (Sup. Ct. 1902). If the dealer's profit record affords no reasonable basis for a projection, either because he has been in business too few years or because his profits have been unnaturally depressed as a result of the manufacturer's bad faith
duration of a hypothetical franchise agreement involving a dealer who had been in business as long as the plaintiff, whose dollar volume was approximately the same, and whose location was similar.\textsuperscript{65} The norm thus derived might be accepted as \textit{prima facie} the period for which the plaintiff-dealer is entitled to recover lost profits. It would then be available to the manufacturer to show that the period would have been shorter by proving, for example, that the company would soon have gone out of business or discontinued production of the line of cars the plaintiff was authorized to sell, that the dealer would not have continued to perform adequately and that this would have caused the manufacturer to terminate or not renew, or even that the manufacturer would have cancelled for an arbitrary but uncoercive reason.\textsuperscript{66}

Aside from these evidentiary difficulties, there is the question of whether the dealer's duty to mitigate damages will place a limit on the amount of recovery. Prior to the decision in \textit{Garvin}, an affirmative answer would have seemed so clear as not to constitute a problem. In \textit{Garvin}, however, the court refused a request by the defendant that it charge the jury as follows:

In computing damages on the basis of net profits that the plaintiff would have made had his franchise been renewed for an additional year, you must deduct from such calculation the amount of any earnings that he may be able to prove what similar dealerships have been earning. \textit{Cf.} Fargo Glass & Paint Co. v. Globe American Corp., 201 F.2d 534, 540-41 (7th Cir. 1953). For other kinds of evidence which will be relevant in cases under the act, see Webster Motor Car Co. v. Packard Motor Car Co. 135 F. Supp. 4 (D.D.C. 1955), \textit{rev'd}, 243 F.2d 418 (D.C. Cir.), \textit{cert. denied}, 355 U.S. 822 (1957). On proof of lost profits generally, see \textit{Note}, \textit{The Requirement of Certainty in the Proof of Lost Profits}, 64 Harv. L. Rev. 317 (1950).

In the non-antitrust context, the requirement that profitability be proven with reasonable certainty often precludes recovery for more than one year. See, \textit{e.g.}, Hole v. Unity Petroleum Corp., 131 P.2d 150 (Wash. 1942). \textit{But cf.} 5 CoRBNn, \textit{Contracts} § 1024 (1951). While it is unlikely that such a restrictive approach will be followed in cases under the act, it is probable that dealers will generally not be able to recover anticipated profits for the entire period their franchises would have run but for termination or non-renewal.

\textsuperscript{65} Such an approach was suggested in \textit{Comment}, 52 Harv. L. Rev. 253, 267 (1957). Admittedly, the compilation of such statistics would be difficult. One might begin, however, by looking to past years and determining the average number of years dealers who were then the plaintiff's age maintained their franchises. The statistics thus derived might be refined by including in the sample only those dealers whose annual sales and whose location were similar to plaintiff's. Further refinement, however, might be impractical. While such factors as a dealer's competence and general health might be extremely relevant, it would obviously be impossible to take these into account in limiting the sample. For this reason, it is probable that any set of statistics would at best offer only a rough guide.

\textsuperscript{66} See text following note 54 \textit{supra}. An example of a case in which the manufacturer might be successful in this endeavor would be one in which it proved that it had an established policy of retaining no dealer who ever sold less than sixty cars a year and that the plaintiff-dealer would have been unable, because of new competition or some other factor, to continue making this required minimum number of sales.
any earnings he reasonably would have had if he had diligently sought or undertaken other employment for which he was suited.67

Had the court grounded its refusal on the fact, apparently true, that there was no evidence at trial either that the plaintiff had assets in his business that had been or could have been converted to other profitable use or that the plaintiff had secured or might reasonably have secured other profitable employment,68 its action would have been unobjectionable. Concededly, the burden of introducing such evidence was upon the defendant.69 The court, however, did not base its refusal on this ground. On the contrary, it rejected the defendant's mitigation argument as "not maintainable under any construction of the act and . . . contrary to the tenor and purpose of the act."70 If, as it seems, the court meant that the instruction requested by the defendant would be improper in any case arising under the act, its reasoning must be disapproved.

The invalidity of Garvin's apparent position in this respect is best shown by distinguishing two types of claims which will arise under the act: those for loss of employment earnings and those for loss of investment profits. It seems clear that traditional mitigation rules should apply to claims for loss of employment earnings, if such claims are allowed.71 By proveing that the dealer

67. Appendix to Brief for Appellant, pp. 148a-49a, Garvin v. American Motors Sales Corp., 318 F.2d 518 (3d Cir. 1963). The plaintiff testified that he had been unable to sell his equipment and that he had had to take his inventory of parts to a scrap heap. Id. at 48a-52a. There seems to have been no other evidence bearing on the question of mitigation.

68. Although it seems unlikely that no such mitigating factors should in fact exist.


70. 202 F. Supp. at 673.

71. Whether a dealer would be allowed to recover amounts he would have earned by devoting his own time and talent to the dealership is open to question. That he would not is suggested by cases involving construction and non-personal-service contracts where it is generally held that the reasonable value of services a claimant would have rendered personally had he completed performance should be deducted from his recovery of lost profits. Partridge v. Norair Engineering Corp., 301 F.2d 247 (D.C. Cir. 1962); Columbus Mining Co. v. Ross, 219 Ky. 98, 250 S.W. 1052 (1927). Contra Coonis v. City of Springfield, 319 S.W.2d 523 (Mo. 1958); Ryan v. Miller, 153 Ill. 138, 38 N.E. 642 (1894). Compare Apex Metal Stamping Co. v. Alexander & Sawyer, 48 N.J. Super. 476, 138 A.2d 568 (1958). Cases which have adopted this rule strongly imply but may not hold that such claimants could not sue separately for loss owing to the deprivation of the opportunity to employ themselves profitably; they may hold only that such loss is not recoverable as part of the claim for lost profits. Annot., 50 A.L.R. 1397 (1927). Although the rule has been applied in other contexts, it is generally thought to apply chiefly to construction contracts under which the contractor has full freedom to delegate performance. It seems that dealers are not allowed to delegate their minimal managerial obligations. See note 73 infra. Thus, a franchise contract contains elements of a personal service contract. While this may not be dispositive — cf. Partridge v. Norair Engineering Corp., supra; McMahon v. Bryant Electric Co., 121 Conn. 397, 185 Atl. 181 (1936)— there are other factors which
has earned sums in other employments or that he might reasonably have earned such sums had he sought another suitable occupation and that such earnings would have been impossible but for the wrongful termination, the manufacturer establishes that these sums were not lost as a result of its unlawful act. It may be difficult, of course, to prove that the actual or hypothetical earnings in question would have been impossible but for the termination. Franchise agreements no longer require dealers to work full time managing the affairs of their dealership. If the employment giving rise to the actual or hypothetical earnings in question would have been inconsistent with this obligation, a deduction should be made. The manufacturer might, for example, show that the employment would have been impossible by demonstrating that had the franchise continued in effect and had the plaintiff continued to devote the same amount of time to operations under it and to other established pursuits the number of hours in the day would have precluded his new employment. The manufacturer might, alter-
natively, show the impossibility of having both jobs by showing that they were geographically too disparate, or that the dealer's new employment was inconsistent with his duty of loyalty to the manufacturer's product.

As to claims for lost investment profits, the mitigation issue is more complex. Generally, some segment of the annual profits of a dealership is attributable to the dealer's investment. This investment is not totally eliminated by termination since the dealer's place of business and his office and garage equipment will still have some value. Presumably this could be put to profitable use or converted into cash by sale. Where, subsequent to termination, a dealer has profited by alternative investment of capital assets previously committed to operations under his franchise, this ought to reduce somewhat his recovery.

by their franchise agreements. Since a dealer's claim for loss of employment earnings is grounded upon the proposition that termination prevented him from using his time to his greatest advantage, it is the time he did devote to the dealership rather than the time he was obliged to devote to the dealership which ought to be considered. It is not relevant that the dealer would have been able to delegate certain of his customary tasks. The hypothetical allocation of damages between lost earnings and lost profits assumes that the dealer causes the dealership to "pay" him no more than the reasonable value of his services. Theoretically, it is either true that the dealer would have had to pay a delegate a like amount or that the lesser amount paid to the delegate would have resulted in inferior management and thus less profit to the dealership.

One should not be confused by the familiar doctrine that one who can delegate performance to others is under no "duty" to mitigate damages. See, e.g., Mt. Pleasant Stable Co. v. Steinberg, 238 Mass. 567 (1921); RESTATEMENT (SECOND), AGENCY § 455, at 373 (1958). That doctrine applies where only the reasonable value of services a claimant would himself have contributed to performance is included as part of the total cost of performance and is thus not included in lost profits. See note 71 supra.


77. It is probable, for example, that a Ford dealer could not become a Chevrolet dealer in the same city without violating his obligation to Ford to use his best efforts to promote the sales of Fords. If a dealer is terminated by Ford and subsequently obtains a franchise from Chevrolet, therefore, it would seem that his earnings as a Chevrolet dealer ought to be deducted from his recovery against Ford.

78. Where an employee, subsequent to his wrongful discharge, has engaged in a speculative venture involving an investment of capital as well as labor, earnings from that venture will, if enabled by the discharge, be deducted in mitigation of damages. Cockburn v. Trusts & Guarantee Co., 33 D.L.R. 159 (Ont. Sup. Ct. 1917), aff'd, 37 D.L.R. 701 (Cen. Sup. Ct. 1917); Griffin v. Oklahoma Natural Gas Corp., 132 Kan. 843, 297 Pac. 662 (1931). This rule has been criticized on the basis that were such a venture to result in a loss, the loss would not increase the employee's recovery. 5 COX, CONTRACTS § 1041 (1964); cf. Grinnell Co. v. Voorhees, 1 F.2d 693 (3d Cir. 1924). A sounder criticism would be that, inasmuch as the claimant might have refrained from embarking upon such a venture and not have had his recovery reduced at all, the rule may tend to encourage idleness. The argument that earnings should not be deducted unless they would have been deducted had the claimant remained idle, however, has traditionally been rejected. E.g., Williams v. Robinson, 158 Ark. 327, 250 S.W. 14 (1923); see 5 WILLISTON, CONTRACTS § 1359, at 3813 n.3 (rev. ed. 1937). Regardless of the merits of the rule as it has been applied, it would seem clearly appropriate where, as in the case of an automobile dealer, performance by the claimant would have involved a similarly speculative commitment of capital and labor.
However, the argument will generally be available to the dealer that there would have been no inconsistency between continuing the franchise and making the investment; that he had or could have borrowed sufficient additional funds to make the investment while leaving his investment in the dealership intact. Unless, as will not be likely, the manufacturer establishes that the new investment would have been inconsistent with the franchise or that the dealer had no credit or additional funds, the dealer's recovery should be lessened by an amount not in excess of the probable cost, over the period for which lost profits are recoverable, of this hypothetical financing. The deduction to which the manufacturer will be entitled, however, should not always be limited to profits actually made. Where it would have been more profitable for the dealer to have reduced his assets to cash and to have deposited the resulting sum in a bank, the deduction should be figured accordingly. That lesser

79. Earnings derived by an employee, subsequent to his wrongful discharge, from investments not enabled by the discharge are not deductible in mitigation of his recovery against the employer. See, e.g., Ritz v. Music, Inc., 189 Pa. Super. 106, 150 A.2d 160 (1959); Realty Acceptance Corp. v. Montgomery, 6 F. Supp. 593 (D. Del. 1934). Where the discharge has freed capital actually used to make the subsequent investment, it is not clear that a court would hear a claimant to argue that he could have borrowed the money and made the investment anyway. By analogy to the situation where an employee has undertaken a new employment not inconsistent with the employment from which he has been discharged, however, it is probable that the argument would be heard and, if true, prevail.

80. There would be many instances in which a manufacturer might be able to show that earnings from a subsequent investment were enabled by the termination or non-renewal. One would be where the dealer would not have been able, as a financial matter, to make the investment without the use of assets the retention of which in the dealership would have been necessary to generate the lost profits he is seeking to recover. To determine whether the dealer could have financed the new investment notwithstanding the termination, it would be necessary to determine what free assets the dealer had and what he could have borrowed. An interesting question would arise where the subsequent investment involved the use of the dealership's business premises but where this use was not necessary. Cf. Grinnell Co. v. Voorhees, 1 F.2d 693 (3d Cir. 1924).

Another instance where the manufacturer might be able to show that termination enabled the subsequent investment would be where the making of the investment necessitated the acquisition of contractual rights which could not have been obtained but for the termination. It is probable, for example, that Lincoln would not grant a franchise to an applicant already franchised to sell Chevrolets.

A third instance in which a manufacturer might prevail would be where the new investment necessitated a commitment of time which would have been impossible had the franchise not been terminated.

Another instance in which a manufacturer might prove that termination enabled the subsequent investment would be where the making of the investment would have violated the dealer's franchise obligation to use his best efforts to promote the sale of the manufacturer's product. See note 77 supra.

81. Where it would have been cheaper for the dealer to have made the subsequent investment by liquidating some other investment rather than by obtaining a loan, it is the profits he earned on that other investment that ought to be deducted.

82. This conclusion is not free from doubt. Had a terminated Chrysler dealer undertaken obligations under an Edsel franchise and sustained great losses, it might seem that
profits were actually earned results not from the termination but from the dealer’s having voluntarily chosen to invest his capital speculatively or poorly. A similar deduction should be made with respect to a dealer who has not, at the time of trial, made any alternative investment of his capital.\textsuperscript{83}

Thus far it has been assumed that a lost profits recovery is the only feasible damage formula applicable under the act. The lost profits measure would, however, require considerable speculation on the part of the trier of fact. To avoid these problems with a lost profits measure, Professor Kessler has proposed that the measure of damages be the difference between what the dealer could have sold his business for before and what he could have sold it for after termination.\textsuperscript{84} The proposed measure, which concentrates upon a paper loss directly attributable to the wrongful termination, has an advantage in that proof under it might be more definite. The amount for which the dealership might have been sold prior to termination might, as Professor Kessler suggests, be determined by capitalizing the dealership's annual earnings at a rate set with reference to the earnings-sale ratio customarily obtaining in sales transactions involving similar dealerships.\textsuperscript{85} The amount for which the dealership might have been sold after termination could be determined by expert
to have deducted from his recovery what he would have earned had he liquidated and made a riskless investment would have been to add insult to injury.

\textsuperscript{83} It might be argued that a dealer ought to receive no recovery if, subsequent to and as a result of the termination, he could have obtained a substitute franchise which probably would have been just as profitable. In the case of a breach of contract for personal services, it is the general rule that sums an employee would have been able to make in a substitute employment for which he was qualified, which was similar in kind and status to that from which he was discharged, and which would not have required him to leave the community, should be deducted in mitigation of damages. See, e.g., Restatement (Second), Agency § 455, comment d (1958). By analogy to this rule, the argument would seem to have merit. Mitigating against the argument, however, is the rule that where an attempt to recoup or minimize losses would have involved a risk of increasing loss, a claimant should not be penalized for his failure to make the attempt. See, e.g., 5 Corbin, Contracts § 1042 (1964); McCormick, Damages § 35 (1935); Restatement, Contracts § 336, comment a (1932). Were it assumed that operations under the substitute franchise would have involved no more than the continuance of a risk the dealer had previously assumed, the rule might not apply. Cf. William Goldman Theaters, Inc. v. Loew's, Inc., 69 F. Supp. 103 (E.D. Pa. 1946); Restatement, Contracts § 336, illustration 11 (1932).

\textsuperscript{84} Kessler, supra note 5, at 1188-89.

\textsuperscript{85} For discussions of valuation methods generally and the capitalization method in particular, see 1 Dewing, Financial Policy of Corporations 283-349 (4th ed. 1941); 1 Bonbright, The Valuation of Property 233-66 (1937); Dun's Review, Mar. 1964, p. 36. As determined by the capitalization method, the market value of a business is that sum of money which, if invested at the applicable capitalization rate, would yield an amount representing the business' annual earning capacity. Capitalization rates differ according to the speculativeness of the business involved. 1 Dewing, op. cit. supra at 335-36. Where the asset whose market value is sought to be determined has a limited earning life, a more accurate method of valuation is to calculate the present value of the income expected to be derived from the asset during its life and to add to this the present value of the sum which will be received at the end of the asset's life when the asset will be sold as scrap.
Professor Kessler, in making this proposal, seems to have assumed that upon sale unterminated dealers generally realize the value of their dealerships as going concerns. However, as franchise agreements are not assignable and automatically terminate upon a transfer of ownership, a dealer cannot sell his dealership as a functioning enterprise unless the manufacturer is willing to enfanchise the buyer. While it is likely that a dealer might be able to sell his dealership for more prior to than after termination, it is possible that the differential would not be substantial and that dealers' recoveries under the proposed measure might be less than under a lost profit formulation. Moreover, since the manufacturer may not exercise his control over the sales price of dealerships in an even-handed fashion, no certain ratio of sales price to profits would exist on which to base a capitalization rate. For this reason the Kessler formulation might, in practice, be confronted with evidentiary difficulties similar to that of the lost profits approach. While the proposed measure should be available to dealers as an option, it is doubtful that they would consistently choose to utilize it unless, because of the certainty requirement, the lost profits measure is ruled out as too speculative.

Professor Kessler's proposed measure might be amended to eliminate the distortion produced by the element of manufacturer control over sale prices. Thus, a dealer might be allowed the difference between the pre- and post-termination going concern or enterprise value of his dealership. If amended, however, the possible advantage of the proposed measure — relative definiteness of proof — would be further dissipated. The rate of capitalization appropriate to a calculation of pre-termination enterprise value would have to be determined by conjecture based upon earnings-sale price ratios revealed in sales of unfranchised businesses which involve what are found to be risks of similar magnitude. A determination of the risk factor in automobile dealerships would necessarily involve a determination of the likelihood of termination and the probable duration of the franchise. Proof under the proposed measure as amended would involve many of the same factual issues and thus would be no less speculative than the proof required under the lost profits

86. See notes 47-49 supra and accompanying text.

87. It is uncertain whether use of the measure would be optional. The measure is analogous to that often applied where a tort or breach of contract has prevented the exploitation of a valuable asset and where estimation of profits which have been lost as a consequence would be speculative. It appears that recovery of the rental value of the asset during the period its exploitation was prevented is allowed only when a lost profits recovery would be barred by the certainty requirement. See RESTATEMENT, CONTRACTS § 331(2) (1932); 5 CORBIN, CONTRACTS § 1029 (1964). In the case of a termination of an automobile franchise, however, the dealer would have had the choice, but for the termination, either to sell or to remain in business. It would seem, therefore, that he ought to have a choice in the matter of alternative remedies.
measures. And while the measure would obviate calculation of investment profits prevented and enabled by termination, if lost earnings are recoverable, it would still be necessary to calculate them separately.88 The suggested amendment, moreover, destroys the theoretical justification of the proposed measure of damages as it focuses on a loss which was not caused by wrongful termination. A dealer loses the difference between the going concern and tangible asset value of his dealership whenever his franchise relation with the manufacturer ceases. This loss cannot be avoided by prior sale and thus does not result from the manufacturer's having wrongfully terminated before he would otherwise lawfully have terminated or before the dealer would have chosen to end the franchise relationship on his own accord.

Where the lost profits measure is extraordinarily speculative, it would sometimes be possible to turn to the reliance measure of damages. But as this reliance formulation suffers from the very same evidentiary problems as the lost profits measure, it would not be as attractive an alternative to lost profits as is generally the case. Assuming that reliance expenditures exist, it will still have to be determined over how long a period of time in the future the dealer was justified in relying upon continuation of his franchise. If a new showroom had just been built at substantial cost with an expected life of thirty years, could the dealer claim that he relied on the existence of his franchise for that period of time? What if his life expectancy were only ten years and if the relevant data showed similarly situated dealers retained their franchises for an average period of fifteen years?89 In any event, as reliance expenditures will not be present in every case, the formulation provides no comprehensive solution to the problem of remedy under the act.

The lost profits measure of damages need result neither in the denial of substantial damages to dealers nor the subjection of manufacturers to the caprice of juries. Although relevant evidence will be speculative, it will establish a basis for approximating the probable loss a dealer has sustained. That this loss cannot be determined with exactitude should not relieve the manufacturer from liability for its unlawful act. As the alternative expectation measures also suffer from similar evidentiary difficulties, they seem to offer the court no

88. See note 71 supra.
89. For a discussion of the fate of the reliance doctrine in contract cases prior to the act which involved automobile dealer franchises, see Kessler, supra note 5, at 1186-87. The basic problem with the reliance measure in this context is its lack of an internal mechanism to produce recoveries reflecting the allocation of risks made by the parties. Cf. Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940). On reliance damages generally, see Fuller & Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 373 (1936); Note, 97 U. Pa. L. Rev. 731 (1949).

In some instances in which reliance damages might be appropriate, the dealer may be able to proceed under the "performing or complying with" provisions of the act and avoid the problems both of the validity and the applicability of the reliance doctrine. These provisions might be interpreted to allow recovery of any loss sustained by reason of the dealer's having made an expenditure (e.g., built a showroom) in forced compliance with a coercive demand by the manufacturer. See note 4 supra.
realistic means of escape. The lost profits measure is, moreover, particularly flexible in that it allows a court to submit the issue of damages to the jury with such limiting instructions as are appropriate in the context of the particular case and the policy of the act. If courts act reasonably to control the discretion of juries, recoveries should be sufficiently large to deter bad faith conduct on the part of manufacturers and sufficiently small to allow manufacturer's to terminate inefficient dealers without thereby assuming the risk of having to pay exorbitant damages should they mistakenly be found to have terminated wrongfully. In certain cases, no doubt, proof will be so speculative as to render the lost profits approach impracticable even under a best evidence approach to certainty. In many such cases — those, for example, which involve new dealers with no profit record — reliance damages may still be appropriate. And since the act has been construed to allow injunctive relief,90 where relief by way of damages is not available91 dealers will have the opportunity to utilize this remedy.

90. See note 32 supra.

91. A bill is now before the Senate which would amend the act to make explicit provision for injunctive relief and to allow dealers threefold damages. S. 2572, 88th Cong., 2d Sess. (1964). It is apparent that the latter aspect of the amendment would not solve the problem of damages which exists. If punitive damages are deemed advisable, it would be preferable to provide for a minimum recovery of, say, $10,000 which would follow automatically upon proof of wrongful termination or non-renewal. Such an approach was suggested in Comment, 52 Nw. U.L. Rev. 253 (1957).