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## DEALER PARTICIPATION IN AUTOMOBILE FINANCE CHARGES: A REPLY

PHILIP D. PECAR\*

No extensive rebuttal of Mr. Hardy's comment on dealer participation,<sup>1</sup> which apparently is inspired by a favorable reference in an *Indiana Law Journal* note to the activities of the Big Three of automobile financing,<sup>2</sup> will be attempted. However, certain clarification and renunciation of positions is necessary. Perhaps unintentionally, but with great specificity, Mr. Hardy intimates that the criticized note unequivocally approves the activities of the Big Three in all its endeavors. The brunt of the attack is borne by a two-sentence segment of the note, which merely summarized authoritative statements on the subject.<sup>3</sup>

The comment and the note fail to meet on a common ground. The note taken in its entirety at no point pretended to whitewash the Big Three of its "original sins." To the contrary, the author of the note attempted painstakingly to present both sides of a controversial issue, analyzing impartially, in his opinion, the advantages and shortcomings of dealer participation control; necessarily in such a study the roles of all parties must be considered.

In curing any impression of partisanship which the note conveyed, it must be emphasized that it clearly outlines the case of *United States v. General Motors Corporation*,<sup>4</sup> upon which Mr. Hardy relies so heavily for authority,<sup>5</sup> as well as the cases against the Ford and Chrysler corporations;<sup>6</sup> the fact that the automobile companies admitted certain abuses, as

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1. Hardy, *Another View of Dealer Participation in Automobile Finance Charges*, 30 IND. L.J. 311 (1955) (this issue).

2. Note, *Is Control of Dealer Participation a Necessary Adjunct to Regulation of Installment Sales Financing?*, 28 IND. L.J. 641 (1953), with special reference to the observation that "the Big Three has been instrumental in disinfecting the entire [automobile] industry of many abusive practices." *Id.* at 659.

3. See notes 12-14 *infra* and accompanying text.

4. Note, *supra* note 2, at 646-647 and n.32, 35 and 36.

5. Mr. Hardy consistently turns to that case to substantiate his claims. The *General Motors* case speaks for itself. Other studies conducted during the same period as the research leading to the antitrust case and reaching completion at about the same time provide much valuable information on the same subject. See PLUMMER AND YOUNG, *SALES FINANCE COMPANIES AND THEIR CREDIT PRACTICES* (1940), and FTC REPORT ON MOTOR VEHICLE INDUSTRY (1940).

6. Note, *supra* note 2, at 646-647 and n.32, 34 and 35.

is lucidly illustrated by the ultimate resolution of the cases into consent decrees, is set out in detail.<sup>7</sup> The note also enumerates some of the methods adopted by the automobile companies in their eagerness to monopolize all phases of automobile distribution, from manufacturing to selling to financing to insuring.<sup>8</sup> Furthermore, it underlines the great threat to the smaller financing companies from the activities of the Big Three.<sup>9</sup> The note even speculates as to the consequences of a continued governmental laissez faire policy as to dealer participation,<sup>10</sup> precisely designating Mr. Hardy's panacea, the statutory weapons of monopoly destruction, as a potential mode of attack.<sup>11</sup>

If the note stopped with a presentation of the industry's Big Three-instigated ills, clearly the nationals would have solid footing for an assault on the author's partisan offering. But the note proceeds to credit the large companies with taking an active position in "disinfecting the entire industry of many abusive practices." One example of this is presented by GMAC's "Six Percent Plan."<sup>12</sup> For years students of automobile financing have cried out for legislation compelling finance companies to itemize succinctly the individual charges which comprise the time sale price of an automobile. In recent years many states have adopted disclosure provisions. Yet in 1935 GMAC instituted their program, which attempted to teach the public to compute finance charges. Although the plan was ultimately throttled by a Federal Trade Commission declaration that GMAC was engaging in deceptive advertising, the Commission admitted that, if the plan were comprehended by the public, overcharges and "packs" could easily be detected. While the intended result of the plan may have benefited GMAC financially, at the same time a pioneer attempt had been made to educate the public to avoid abuses.

But this is not the sole contribution to the cleansing of the industry by the large companies. Although this comment is by no means a defense of the nationals, undisputed facts must be presented; the Big Three, over the years, consistently has maintained finance charges at lower levels than

7. *Id.* at n.35 and 36.

8. As to the manufacturers' coercion of their dealers to compel them to sell their automobile paper to the affiliated finance companies, see Note, *supra* note 2, at 646. That note also pointed out that the consent decree might prove completely ineffectual in the prevention of coercive practices. *Id.* at 647. This tends to agree with Mr. Hardy's opinion of the consent decree. Hardy, *supra* note 1, at 317.

The Note also details manufacturers' attempts to control the insurance aspects of automobile sales. Note, *supra* note 2, at 648-649 and n.37-43, 46, 47.

9. *Id.* at 655-659.

10. *Id.* at 660.

11. *Ibid.*

12. *Id.* at 644 n.18, 646, n.29. And see FTC REPORT ON MOTOR VEHICLE INDUSTRY 941-945 (1940).

have the independent finance companies,<sup>13</sup> while GMAC has offered the lowest dealer participation.<sup>14</sup> Construing Mr. Hardy's silence on that point as an admission, it may be assumed that he concedes that, at least on the surface, the nationals have kept finance charges and "kickbacks" low. He does, however, point out that this superficial picture is "gravely misleading."<sup>15</sup>

The *Journal* note made no effort to deal extensively with the "monopoly" aspects of the sales financing picture, but since Mr. Hardy uses that note as a springboard for the presentation of his solution to the financing problem, the termination of all relationship between General Motors and its acceptance corporation, certain flaws in his theory must be pointed out. He indicates that because of the associations between the manufacturers and the large financing companies, no comparison can be made between the rates of the nationals and the independents; this of course is because the manufacturer's acquisition methods keep costs to the nationals at a minimum. He also states that a high finance cost can always be concealed in the purchase price of the car.<sup>16</sup> This argument tacitly emphasizes the defect in Mr. Hardy's theory.

The automobile industry is a "brand name" industry. The current sale of any automobile can be directly attributed to years of reputation-building. Extensive advertising, intensive research and development, and the manufacture of marketable goods have created a demand for the products of certain manufacturers. Each company's product is unique in certain characteristics. This individuality of product makes for pricing freedom, limited only by competition. Mr. Hardy admits that there is enough leeway within the competition-imposed limits to allow for the inclusion of financing costs in the sales price of the automobile. If this is

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13. A 1938 study indicated that the national companies consistently extracted lower finance charges than did the smaller companies. Note, *supra* note 2, at 649 n.44. And see PLUMMER AND YOUNG, *op. cit. supra* note 5, at 211, Table 55.

14. Note, *supra* note 2, at 646 n.30. And see FTC REPORT ON MOTOR VEHICLE INDUSTRY 959, Table 160.

15. Mr. Hardy, *supra* note 1, at 315, states that the Big Three have sought to limit dealer participation because of their fear of entering the competitive bidding for automobile paper. This fails to explain recent activities of the nationals. For example, Universal Commercial Investment Trust Corporation took an aggressive part in the court battle over the constitutionality of Indiana's Retail Installment Sales Act, which attempted to limit dealer participation. CIT, intervening on behalf of the plaintiff, sought to enjoin enforcement of the limitation. The court agreed with the plaintiff that the limitation was a form of legislative price-fixing and declared it unconstitutional. *Department of Financial Institutions v. Holt*, 231 Ind. 293, 108 N.E.2d 629 (1952). For a discussion of this case see Note, *supra* note 2, at 650-654.

16. Mr. Hardy's comment, paraphrasing the court in the *General Motors* case, states that the "GMAC object and achievement was profit," Hardy, *supra* note 1, at 317, while the Note intimates that "augmentation of General Motors auto sales is a distinctive objective of the competitive policy of GMAC. . . ." Note, *supra* note 2, at 646.

so, and if the prime objective of manufacturer-controlled finance companies is to obtain large profits rather than to implement automobile selling, why do the manufacturers need affiliated finance companies at all? Why can they not secure those extra profits simply by raising the purchase price of the car, without increasing the complexity of their organization, by establishing subsidiary finance companies? The answer of course is that they could, easily enough, because of the uniqueness of their products. Therefore, to destroy the controlled finance companies, following this bit of logic, would only result in higher automobile sales prices, allowing the manufacturers to milk a segment of the market, which apparently has been neglected, the cash purchaser. In other words, the automobile manufacturers could, in today's market, at their desire extract higher prices from the cash as well as the time purchaser.

This comment does not pretend to offer a solution to the problem. At this point though, it is clear that the abuses infesting automobile financing are not due to the connections existing between certain manufacturers and finance companies, but instead are attributable to the peculiar nature of the automobile industry itself. As suggested, General Motors could maintain operations at the same profit level it enjoys today even without the affiliated finance company. To break the ties that bind the companies would fail to solve a difficult problem. Since the consumer is of primary concern in our considerations, attempts should be made to protect him. Even if the independent company were permitted to operate without competition from the manufacturers and their subsidiaries, as long as the manufacturer can increase automobile purchase prices, the consumer is left exposed to high charges, whether they are called finance charges or concealed in the purchase price of the automobile.

It is not the intention in this comment to call for price fixing or any facet of price stabilization in the automobile industry; competition itself may be sufficient to keep prices from reaching exorbitant levels. However, it should be stressed that the problem existing in the financing phase of automobile sales is directly attributable to the intrinsic nature of the automobile industry, and that an attempt to cure financing ills must be concentrated at the root of the industrial tree rather than at the base of a sickly branch.

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