SPECIAL INDUSTRY RELATIONSHIP STATUTES: PMPA, AUTO DEALERS, BEER DISTRIBUTORS AND HEAVY EQUIPMENT DEALERS

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SPECIAL INDUSTRY RELATIONSHIP STATUTES:  
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I. INTRODUCTION

Laws governing the relationship between automobile dealers and manufacturers, brewers and beer distributors, refiners and gasoline dealers and manufacturers and equipment dealers have both striking parallels and instructive variations to relationship laws in business format franchising. Indeed, regulation of the relationship between automobile dealers and manufacturers pioneered the concept of good cause for termination or nonrenewal and the policy of leveling the playing field between franchisors and franchisees long before business format franchising was ubiquitous. Furthermore, relationship laws in these special industries are far more pervasive than in business format franchising. The Federal Petroleum Marketing Practices Act applies in all states and territories; 49 of the 50 states have automobile legislation; virtually all states regulate the distribution of beer, wine and spirits; and 45 states regulate either farm equipment dealers or heavy equipment dealers.

Although the theme of “good cause for termination with an opportunity to cure” is pervasive in special industry laws, other concepts that can be instructive to business format franchisors and franchisees are also contained in these statutes. For example, the notion of a “change in competitive circumstances” appears in a number of automobile statutes; repurchase of equipment is common in heavy equipment statutes; the notion that a franchisor should buy out the franchisee on nonrenewal is explored in the PMPA; and beer statutes specifically address the consequences of mergers and acquisitions as methods for termination.

The pages that follow present a thorough, if not exhaustive, review of the special industry laws, with a view toward the ways in which they can inform and enhance practice in business format franchise law.

II. PETROLEUM MARKETING LAWS

A. History/General Overview of Petroleum Marketing Laws

The Petroleum Marketing Practices Act (“PMPA”) was created to protect independent gasoline marketers by preventing the bigger oil companies from unfairly ending or refusing to renew franchises for arbitrary and discriminatory reasons. To this end, the PMPA controls when and how a petroleum franchisor can terminate the franchise relationship; it does not regulate any other aspect of that relationship.

The PMPA differs from broader state franchise protection, registration and disclosure laws and the Federal Trade Commission

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2 Richard Newmeq, Annotation, Termination or nonrenewal of franchise to sell motor fuel in commerce under Petroleum Marketing Practices Act, 53 A.L.R. Fed. 348, 2 (West 2013) (“In enacting the PMPA Congress sought to remedy a situation which had led to numerous complaints by franchisees of unfair terminations or nonrenewals of franchises for arbitrary and even discriminatory reasons.”).

3 Id.

4 Mac’s Shell Serv. v. Shell Oil Prods. Co. LLC, 559 U.S. 175, 186 (2010) (“In enacting the PMPA, Congress did not regulate every aspect of the petroleum franchise relationship but instead federalized only the two parts of that relationship with which it was most concerned: the circumstances in which franchisors may terminate a franchise or decline to renew a franchise relationship.”).
("FTC") regulations on franchise disclosures, which typically regulate the inception of the business format franchise relationship as well as its termination. In fact, the FTC rule expressly exempts petroleum franchise relationships covered by the PMPA, in recognition of the fact that unfair termination and "nonrenewal," which was covered by the PMPA, was a bigger issue than disclosure.

Yet, despite the PMPA's restrictive effects, the 1978 law had the support of the major oil companies, because it brought a measure of uniformity where there was a patchwork of state laws governing petroleum franchise terminations. In addition, the PMPA makes sense, allowing petroleum franchisors to end the franchise relationship under certain circumstances, such as when a franchisee fails to pay a franchisor money that the franchisor is owed or when a franchisee fails to operate the premises for seven consecutive days.

1. Prior to 1978 Enactment of PMPA

Congress debated the PMPA for years before it was enacted. What ultimately spurred the legislation was the passage of a series of state laws enacted to protect franchisees – largely viewed as having unequal bargaining power against the larger oil companies. The legislative history of the PMPA contains several examples of oil companies exerting unequal bargaining power. Congressional hearings confirmed that petroleum distributors had been forcing franchisees to comply with marketing policies by threatening to end or to not renew franchise agreements. In addition, what was perceived as "unjust" terminations by petroleum franchisors was considered a pervasive problem in the mid-1960s. The legislative history of the PMPA indicates that petroleum refiners wanted to increase profits by eliminating competition from independent retailers by operating their own stations and, thereby, controlling the price of gasoline. In order to do that, however, they needed to terminate existing franchises, which they were able to do by using language in the franchise agreement. Courts, applying contract law, generally upheld "terminable at will" clauses for petroleum franchises as being freely bargained for by the parties. Antitrust cases produced similarly unsatisfactory results for

5 16 C.F.R. § 436.8.


7 J. Michael Huey et al., Review of Florida Legislation; Article: Curbing Predatory Practices in Florida's Petroleum Marketing Industry, 13 FLA. ST. U.L. REV. 923, 935 (1985) (discussing the PMPA, "[t]he major oil companies lobbied for such legislation to avoid a variety of different state laws; retail dealers also supported this effort.").

8 Id.

9 15 U.S.C. § 2802(c)(8), (c)(9).

10 Theresa L. Kruk, Annotation, Pre-emptive scope of § 106(a) of Petroleum Marketing Practices Act, 103 A.L.R. Fed. 698, 2a (West 2013) (citing Nassau Boulevard Shell Service Station, Inc. v. Shell Oil Co., 875 F2d 359 (1989)).

11 Lorin M. Kleeger, Comment, Judicial Interpretation Of The Petroleum Marketing Practices Act: Conflict And Diversity, 32 EMORY L.J. 273, 277 (1983) ("Franchisees attempted to prevent termination of their franchises on various legal theories, including the argument that terminations could only be effected for 'good cause.'").

12 Id. at 280.

13 Id. at n.29 ("The refiners were able to terminate the franchises virtually at will because of provisions in the contracts.")
franchisees. As a result, states began enacting their own laws, requiring “good cause” – defined as a franchisee’s failure to substantially comply with duties imposed by the franchise agreement – before a franchisor could terminate a franchise. However, the state laws failed to address the problem in a uniform manner – until the enactment of the PMPA.

2. PMPA

a. Purpose

The PMPA went into effect on June 19, 1978. The law’s general purpose was “to provide for the protection of franchised distributors and retailers of motor fuel… and to prevent deterioration of competition in gasoline marketing.” To insure uniformity, the law pre-empts any state petroleum marketing franchises law that is not the same as the PMPA.

b. Scope

The scope of the PMPA is limited to termination and nonrenewal of franchises. The law allows a franchisor to terminate an existing franchise in the middle of the franchise agreement or fail to renew a “franchise relationship” at the conclusion of the period stated in the agreement for a reason recognized by the law, but only if the franchisor provides written notice to the franchisee. In 2010, the Supreme Court of the United States, in Mac’s Shell Serv. v. Shell Oil Prods. Co. LLC declined to expand the PMPA’s reach to encompass constructive terminations, discussed in detail below. The Court reasoned that the scope of the PMPA was drafted narrowly so that it could address what Congress was most concerned with – “the imposition of arbitrary and unreasonable new terms on a franchisee that are designed to force an end to the petroleum franchise relationship.” The PMPA, according to the Court, was not enacted to “govern every aspect of the petroleum franchise relationship.”


15 Id. at n.25 (explaining that antitrust actions are situation specific, difficult to prove, time-consuming and costly).

16 Kleeger, supra note 11, at 279.

17 Id. at 282.

18 See 15 U.S.C. § 2806 (“no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title.”).


20 559 U.S. 175 (2010).

21 Id. at 194.

22 Id.
B. Petroleum Marketing-- Relationship Laws: Special Requirements and Protections

1. Requirements

a. The Petroleum Franchise

The term “franchise,” is defined under the PMPA as “any contract” between a “refiner and a distributor,” a “refiner and a retailer,” a “distributor and another distributor,” or a “distributor and a retailer,” where the refiner or distributor permits the retailer or distributor to use a trademark “in connection with the sale, consignment, or distribution of motor fuel.”

A franchise also includes any contract under which a retailer or distributor is allowed to occupy “leased marketing premises” that are used to sell or distribute motor fuel. In addition, a franchise includes any contract pertaining to the supply of motor fuel and “the unexpired portion of any franchise, which is transferred or assigned.”

(i) Three Components:

Courts have interpreted the concept of “franchise,” as defined under the PMPA, to consist of three components: 1) a contract to use the refiner's trademark; 2) a contract for the supply of motor fuel to be sold under the trademark; and 3) a lease of the premises at which the motor fuel is sold.

Where a petroleum franchisee alleges that a franchisor has wrongly failed to renew the parties' franchise relationship, under the PMPA, the franchisee must demonstrate that at least one of the three essential franchise components has been discontinued.

(ii) “Franchise Relationships” & Secondary Arrangements

“Franchise relationships,” which are distinct from “franchises,” also are covered by the law. The definition of “franchise relationship” under the PMPA is “the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.”

A franchise relationship encompasses the broad relationship that exists between a franchisor and franchisee. The concept applies in circumstances where the franchise, or contract, may no longer exist but there is still a viable relationship between the parties that is protected by the PMPA.

However, the PMPA does not cover all “secondary arrangements” or other agreements between the franchisor and franchisee, such as a mini-market or convenience store. Whether

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25 Id.
such relationships are covered by the PMPA – and thus exempted from the FTC regulations –
depends on how closely connected the relationship is to the gasoline agreement. The court in
Smith v. Atlantic Richfield Co.,\(^3\) held that the “critical question is whether the Convenience
Store Agreement is essential to plaintiff’s motor fuel franchise.”\(^3\)

**b. Prohibits Actual Termination/nonrenewal Except:**

The starting point for the PMPA is a blanket prohibition against termination and
nonrenewal.\(^3\) The PMPA defines “fail to renew” and “nonrenewal” as “a failure to reinstate,
continue, or extend the franchise relationship.” Also, “termination” includes cancellation.\(^3\)
However, the term “failure” does not include failures that are only technical or unimportant to
the franchise relationship or failure for a cause beyond the reasonable control of the franchisee\(^3\) or
failure based on a provision of the franchise which is illegal or unenforceable.\(^3\) The law then
provides exceptions – such as failure to comply with franchise provisions\(^3\) – and procedures for
ending a franchise relationship with proper notification.\(^3\) In this manner, the PMPA strikes a
balance between the interests of the franchisor and the franchisee.

**(i) Grounds Enumerated in 15 USC §§ 2802(b) or (c)**

The PMPA lists circumstances under which termination is permitted. The list can be
divided into two categories: “[1] franchisee misconduct and [2] legitimate franchisor business
decisions.”\(^3\) The first category includes: failure to comply with “reasonable” and materially
significant franchise provisions;\(^3\) failure to make a good faith effort to carry out franchise
provisions after being given a chance;\(^3\) failure to take prompt action to correct operational
problems that the franchisor has identified after receiving numerous customer complaints;\(^3\)

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31 Id. at 268. See also Rosedale Plaza Group, LLC v. BP West Coast Products LLC, 665 F. Supp. 2d 1118, 1132
(E.D. Cal. 2009) (quoting Atlantic Richfield extensively in holding that, “Whether termination and/or nonrenewal of the
motor fuel franchise because of Rosedale’s refusal to execute the AM/PM agreement violates the PMPA depends
upon the degree of interdependence and interrelationship between the AM/PM Agreement and the Gas Agreement”).


34 An economic decline and a drop in gasoline sales volume does not constitute a cause beyond the reasonable
control of a franchisee. 62B Am. Jur. 2d Private Franchise Contracts § 459, n.5 (citing Cantrell v. Exxon Co. U.S.A.,
a Div. of Exxon Corp., 574 F. Supp. 313 (M.D. Tenn. 1983)).


Appellee in this case. One of the authors, A. Christopher Young, is a partner at Pepper Hamilton LLP.


40 § 2802(b)(2)(B).

41 § 2802(b)(3)(B).
failure to operate the marketing premises in a “clean, safe, and healthful manner;”42 fraud or criminal misconduct by the franchisee;43 bankruptcy;44 destruction of the premises or failure to pay bills on time;45 failure to operate the premises for seven consecutive days;46 or being convicted of a felony.47

The other category of permissible franchise termination or nonrenewal – based on franchisor business decisions – includes: a franchisor’s decision to leave the geographic market area;48 good faith failure to agree on changes or additions to the franchise agreement;49 conversion of the property to a use other than the sale of motor fuel;50 material alteration of the property;51 sale of the premises;52 unprofitability of the franchise;53 loss of the underlying lease;54 and loss of the franchisor’s right to grant the trademark.55 Generally, the law reflects an intent to allow franchisors to exercise “reasonable business judgment.”56 The language is broad enough to provide flexibility so that franchisors can respond to changing market conditions. At the same time, the law seeks to prevent “the appropriation of hard-earned goodwill which occurs when a franchisor arbitrarily takes over a business that the franchisee has turned into a successful going concern.”57

Under the PMPA, a petroleum franchisor’s business decisions are subjectively reviewed. In Brach v. Amoco Oil Co., the Seventh Circuit Court of Appeals specifically examined

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42 § 2802(b)(3)(C).
43 § 2802(c)(1).
44 § 2802(c)(2).
45 § 2802(c)(7), (8).
46 § 2802(c)(9).
47 § 2802(c)(12).
48 Patel, supra note 38 (citing § 2802(b)(2)(E)). But see Pride v. Exxon Corp., 911 F.2d 251, 255 (1990) (holding withdrawal provisions of PMPA do not apply to unbranded motor fuel, so that franchisor’s withdrawal from particular market did not violate PMPA.).
49 § 2802(b)(3)(A).
50 § 2802(b)(3)(D)(i)(I).
51 § 2802(b)(3)(D)(i)(II).
52 § 2802(b)(3)(D)(i)(III). However, the franchisor’s purpose cannot be to convert the property to direct management by its own employees or agents and – in the context of termination or failure to renew – the franchisor must have made either a bona fide offer to sell the property to the franchisee, or, if applicable, have provided the franchisee a right of first refusal on an offer made to a third party. See, e.g., Patel, supra note 38, at 452. There are a number of PMPA cases that discuss the franchisee’s right of first refusal. Because of the general nature of this article, a more lengthy analysis is impractical.
53 § 2802(b)(3)(D)(i)(IV).
54 § 2802(b)(2)(C).
55 § 2802(b)(2)(C).
56 Brach v. Amoco Oil Co., 677 F.2d 1213, 1220 (7th Cir. 1982).
57 Id. (citing 123 Cong. Rec. 10385 (1977) (remarks of Rep. Conte)).
§ 2802(b)(2)(C) allowing termination and nonrenewal upon “(t)he occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable.” The court determined that Congress intended courts to apply a two-pronged test: 1) that the franchisor determination be made, subjectively, in “good faith,” and 2) that the determination be made “in the normal course of business.”

(ii) Provide Notice Under 15 USC § 2804

Assuming that a franchisor has a legitimate reason for terminating or failing to renew a franchise, the franchisor must also provide adequate notice and, in some cases, allow a franchisee an opportunity to correct or cure any improper conduct. Under § 2804, a franchisor must generally provide notice at least 90 days prior to the effective date of termination or nonrenewal unless that time period is not reasonable, in which case the law provides for other time periods. Whether notice has been timely given is based on the particular facts of a case. Also, notices must contain a statement of intent to terminate or not to renew, the effective date of termination or nonrenewal and a PMPA summary statement. Although § 2804(c)(1) states that notification shall be in writing, courts have held that notices of failure to operate marketing premises in a proper manner do not need to be in writing.

c. Constructive Terminations and Nonrenewals

As discussed earlier, the Supreme Court in *Mac’s Shell* declined to expand the PMPA to allow a claim for constructive termination or nonrenewal. The decision, however, was based on the facts of the case – where franchisees claimed that, by eliminating the rent subsidy, petroleum franchisors had “constructively terminated” their franchises. The Court held that “a necessary element of any constructive termination claim under the Act is that the franchisor’s conduct forced an end to the franchisee’s use of the franchisor’s trademark, purchase of the franchisor’s fuel, or occupation of the franchisor’s service station.” That was not the case for the *Mac’s Shell* franchisees. The Court similarly rejected a claim for “constructive nonrenewal” holding that the “franchisee that chooses to accept a renewal agreement [even under protest] cannot thereafter assert a claim for unlawful nonrenewal under the Act.”

58 677 F.2d at 1222 (citing 15 U.S.C. §§ 2802(b)(3)(D), 2805(e)(1)(A) and 2802(b)(3)(A)).

59 *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 478 (3d Cir. 1987); see, e.g., 15 U.S.C. § 2802(b)(3)(B) (allowing for termination where a franchisor receives numerous bona fide customer complaints if “(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and (ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints”).

60 Newmeg, *supra* note 2, at 2.


63 559 U.S. 175, 180 (2010).

64 *Id.* at 182.

65 *Id.* at 190.

66 *Id.* at 191.
same time, the Court did not foreclose the possibility that a constructive termination could occur under another set of circumstances.

In *Al’s Service Center v. BP Products North America, Inc.*, the Seventh Circuit Court of Appeals acknowledged the Supreme Court’s “skepticism” of constructive termination in *Mac’s Shell*. The holding in *Al’s Service Center* was ultimately consistent with the Supreme Court’s holding that a constructive termination cannot occur unless a franchisor’s conduct forced an end to one of the three necessary elements of the franchise – the trademark, lease agreement or sale of motor fuel. However, the opinion by Judge Richard A. Posner noted, albeit in dicta, the Court’s “refus[al] to say whether constructive termination is a proper ground for a violation of the [PMPA].” Posner nonetheless reasoned that, “without a doctrine of constructive termination, there would be... a big loophole in the [PMPA].”

2. **Protections/Remedies**


   (i) **Federal Subject Matter Jurisdiction**

   Section 2805(a) of the PMPA confers jurisdiction on the federal courts and creates a civil cause of action against franchisors for violating the PMPA. Under § 2805, a civil action “may be brought, without regard to the amount in controversy ... in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business.” However, courts have held that the PMPA does not have “complete preemptive effect,” where a federal law explicitly prohibits or displaces state regulation in a given field. Because the PMPA does not have complete preemptive effect, a preemption defense to state-court claims does not confer federal question jurisdiction. As the Eighth Circuit Court of Appeals concluded in *Johnson v. MFA Petroleum Co.*, “[c]omplete preemption only applies where a federal statute so completely preempts a particular area that any civil complaint raising this select group of claims is necessarily federal.”

   (ii) **Equitable Relief**

   Section 2805(b)(1) also provides that “the court shall grant such equitable relief as the court determines is necessary ... including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.” However, although franchisees may seek declaratory judgment, it is unclear whether the same relief is available to franchisors. The court

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67 599 F.3d 720, 726 (7th Cir. 2010).
68 Id. at 727.
69 Id. at 726-27.
70 Id.
71 The section also contains a one-year statute of limitations.
72 See, e.g., *Kudlek v. Sunoco, Inc.*, 610 F. Supp. 2d 218, 225 (E.D.N.Y. 2009) (holding that, because the Petroleum Marketing Practices Act did not have complete preemptive effect, the court could not find that plaintiffs had “artfully pled” federal claims in disguise). One of the authors, A. Christopher Young, represented Defendant, Sunoco, in this matter.
73 701 F.3d 243, 247 (8th Cir. 2012) (internal quotations omitted).
in *Winks v. Feeney Oil Co.* held that the Act does not provide the same relief for franchisors.\(^{74}\) However, the court in *State Oil Co. v. Alayoubi* held just the opposite,\(^{75}\) criticizing the decision in *Winks* and determining that declaratory relief is available for franchisors.\(^{76}\)

To obtain a preliminary injunction, the PMPA has a lower standard than under Rule 65 of the Federal Rules of Civil Procedure, where a probability of success on the merits and irreparable harm must be shown.\(^{77}\) Instead, under the PMPA, a court “shall” grant a preliminary injunction if a franchisee shows: 1) that the franchise has been terminated or not renewed; 2) there are sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and 3) the court determines that on balance, the hardships imposed upon the franchisor by the issuance of the preliminary injunction will be less than the hardship that would be imposed upon such franchisee if the injunction were not granted.\(^{78}\)

(iii) **Shifting Burden of Proof**

Under § 2805(c), the franchisee has the burden of proving that the franchise relationship was terminated or not renewed; however, the franchisor has the burden of establishing, as an affirmative defense, that such termination or nonrenewal was permitted under the PMPA and that the franchisor complied with the applicable requirements of the Act. To establish a claim, a franchisee must first demonstrate: “(1) the existence of a franchise relationship; (2) his status as a franchisee; and (3) the nonrenewal of the franchise relationship by the franchisor.”\(^{79}\) In *Mac’s Shell*, discussed above, part of the Supreme Court’s holding — in rejecting the plaintiff’s “constructive nonrenewal” claim — was that the franchisees could not establish their “threshold burden” of showing nonrenewal of the franchise relationship.\(^{80}\) The court held that, “[w]hen a franchisee signs a renewal agreement — even “under protest” — there has been no ‘fail[ure] to renew,’ and thus the franchisee has no cause of action under the Act.”

Once the franchisee establishes its threshold burden, the burden shifts to the franchisor to show that its actions were permitted by the PMPA.\(^{81}\) However, the Fourth Circuit Court of Appeals in *Kadala v. Amoco Oil Co.* held that a franchisor’s burden is that of “going forward with...”

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\(^{75}\) 907 F. Supp. 1233, 1235 (N.D. Ill. 1995) (citing *Texaco Refining and Marketing Inc. v. Davis*, 835 F. Supp. 1223, 1231 (D. Or. 1993) (holding that there is subject matter jurisdiction over a declaratory judgment action brought by a franchisor to establish rights under the PMPA), aff’d, 45 F.3d 437 (9th Cir. 1994), cert. denied, 514 U.S. 1127 (1995)).

\(^{76}\) Id. at 1235 n.1.

\(^{77}\) Kruk, supra note 10, at 2b (citing *Nassau Boulevard Shell Service Station, Inc. v. Shell Oil Co.*, 875 F.2d 359 (2d Cir. 1989)).

\(^{78}\) 15 U.S.C. § 2805(b)(2). See, e.g., *Gulf Oil Ltd. P’ship v. Semerci*, 2013 U.S. Dist. LEXIS 13510, at *16 (E.D.N.Y. Jan. 30, 2013) (granting an injunction where the defendant franchisees had failed to purchase gasoline, pay rent, or otherwise comply with their obligations under the franchise agreements. Court found that, under the PMPA, the plaintiff would likely be able to terminate the franchise relationship).


\(^{80}\) 559 U.S. 175, 191-92 (2010).

\(^{81}\) *Ceraso v. Motiva Enters., LLC*, 326 F.3d 303, 316 (2d Cir. 2003) (citing *Four Corners Service Station, Inc. v. Mobil Oil Corp.*, 51 F.3d 306, 310 (1st Cir. 1995); *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1569 (11th Cir. 1987)).
the evidence.”82 The court rejected the franchisee’s contention that a franchisor cannot meet this burden without making “an affirmative presentation of evidence at trial.”83 Instead, the court held that a burden to proceed “is not a substantive rule; nor does it mandate inflexible, formalistic rituals of proof. Once a trial court has before it all the evidence necessary to decide a question, the sequential presentation of evidence does not matter.” The appeals court then found that the trial court had not erred in finding that the franchisor had acted in good faith, under § 2802(b)(3)(A).84

(iv) **Damages**

Under § 2805(d), actual and exemplary damages as well as attorney and expert witness fees may be awarded to franchisees who prevail, under the PMPA. Specifically, the section provides that: “in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of [§ 2802, 2803, or 2807],” the court can award exemplary damages as well as reasonable attorney and expert witness fees, “unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.” The same section also provides that the court may require the franchisee to pay reasonable attorney and expert witness fees, “if the court finds that such action is frivolous.”

(v) **Attorneys’ Fees**

In awarding attorneys’ fees the courts have examined who the prevailing party is and – where the franchisor is the prevailing party – whether the suit, under the PMPA, was frivolous. In *Lippo v. Mobil Oil Corp.*,85 the court held that because the franchisee sustained its initial burden of proving termination or nonrenewal and the franchisor failed to make out its affirmative defense, the franchisor cannot contend that the franchisee did not prevail on its PMPA claim. As a result, the court awarded the franchisee its attorneys’ fees.86 However, the court in *Baldauf v. Amoco Oil Co.*, declined to award attorneys’ fees where the franchisor was the prevailing party because – although the franchisor’s imposition of drastic changes in the renewal terms of the franchise was permissible under the PMPA – such action on the part of the franchisor “takes this case out of the realm of frivolous litigation.”87

In *Chevron U.S.A., Inc. v. M&M Petroleum Servs.*, the court held that a franchisee who brought a frivolous counterclaim could be required to pay the franchisor’s attorneys’ fees.88 In *Chevron U.S.A.*, the franchisor had sought a declaratory judgment against one of its franchised dealers who responded with a counterclaim that was found to be frivolous and the product of perjury and other misconduct.89 The court held that if the franchised dealer had merely

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82 820 F.2d 1355, 1357 (4th Cir. 1987).
83 Id.
84 Id. at 1358.
85 776 F.2d 706 (7th Cir. 1985).
86 Id. at 721.
88 658 F.3d 948, 949 (9th Cir. 2011).
defended Chevron’s suit, it would not have been held liable for attorneys’ fees, however, “in affirmatively bringing a counterclaim that was reasonably found to be frivolous [the franchised dealer] opened itself up to liability for attorneys’ fees.”

(vi) Preemption of State and Local Laws 15 USC § 2806

Some states have enacted franchise protection laws that cover aspects of the franchise relationship other than termination or nonrenewal. For example, responding to a perceived loophole in the PMPA that allows a franchisor to sell the underlying real property to a third party without making a bona fide offer or a right of first refusal to the franchisee under § 2802(b)(3)(D)(iii) so long as the PMPA franchise continues, some states now require that franchisors make bona fide offers for purchase to the franchisee or provide the franchisee with a right of first refusal on any offer by a third party. These and other laws have been challenged on grounds that they are preempted by the PMPA.

Although, under § 2806, the PMPA explicitly preempts state law with respect to terminations and nonrenewals, the courts are divided on exactly how to interpret the preemption clause. The PMPA specifically preempts any provision of any state law or regulation “with respect to termination … or to the nonrenewal … of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.”

The First, Second and D.C. Circuit Courts of Appeals have held that state and local laws are preempted only if those laws directly address the grounds for, procedures for, or notification requirements with respect to the termination or nonrenewal of a petroleum franchise. However, courts within the Fourth and Eighth Circuit Court of Appeals take a more expansive view of the PMPA, holding that the intended effect of § 2806(a) is to pre-empt any state-law provision that “relates to” or affects the termination or nonrenewal of a petroleum marketing franchise unless the state-law can be characterized as being “independent” of the termination or nonrenewal.

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89 Id.

90 Id.

91 See Patel, supra note 38, at 453 (finding that where a franchisor sold the premises but took a leaseback from the buyer and renewed the franchise, the franchisor was not required to give the franchisee a right of first refusal.).


93 Kruk, supra note 10, at 3, 4.


95 Kruk, supra note 10, at 3, 4. See, e.g., Bellmore v. Mobil Oil Corp., 783 F.2d 300, 304 (2d Cir. 1986) (“state law is also preempted by Congressional legislation ‘to the extent that it actually conflicts with federal law.’ An actual conflict exists where ‘compliance with both federal and state regulations is a physical impossibility.’”).

96 Kruk, supra note 10, at 3, 4. See, e.g., Jimenez v. BP Oil, Inc., 853 F.2d 268, 272 (4th Cir. 1988) (holding that with respect to preemption, “[t]he central inquiry is whether Congress intended that federal regulation supersede state law with respect to the regulated subject matter.”).
(vii) No Waiver of Protections/Requirements of PMPA

Under § 2805(f)(1), “[n]o franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive – (A) any right that the franchisee has under this title [15 USCS §§ 2801 et seq.] or other Federal law; or (B) any right that the franchisee may have under any valid and applicable State law.” The subsection was added to the PMPA in 1994 and, since then, there do not appear to be any cases that specifically discuss whether arbitration clauses are permissible under the PMPA. The same year that § 2805(f)(1) was added, the Ninth Circuit Court of Appeals did hold that arbitration clauses cannot be used to circumvent the protections of the PMPA. In *Graham Oil Co. v. ARCO Prods. Co.*, the Ninth Circuit did not specifically mention § 2805(f)(1), but held that because “the arbitration clause employed by [the franchisor] compels [the franchisee] to surrender important statutorily-mandated rights afforded franchisees by the PMPA, we hold that the clause contravenes the Act.” The arbitration clause in *Graham* prohibited exemplary damages, the award of attorneys’ fees and the PMPA’s one-year statute of limitations. The court held that the unfavorable provisions were not severable from the arbitration clause. The court based its decision to strike the entire arbitration clause, “in part upon the fact that the offensive provisions clearly represent an attempt by [the franchisor] to achieve through arbitration what Congress has expressly forbidden.”

However, other circuits – outside of the context of the PMPA – have held that arbitration agreements that violate public policy by foreclosing statutory remedies are not entirely invalid. In *Faust v. Command Ctr., Inc.* the U.S. District Court for the Southern District of Iowa noted a circuit split on the issue. Citing *Graham*, the court in *Faust* explained that while the Ninth and Eleventh Circuits have invalidated arbitration agreements that foreclose statutory remedies, “the Eighth Circuit law remains to the contrary – such waiver does not effect the validity of the agreement to arbitrate itself and, at least at this juncture, this Court’s role extends only to determine whether a valid agreement to arbitrate exists, not to determine whether public policy conflicts with the remedies provided in the arbitration clause.”

3. Crossover Concepts

Despite the PMPA’s narrow scope, some concepts, including “constructive termination” of a franchise relationship, have crossover application to general franchise law.

First, the PMPA is a model for a uniform law governing termination and nonrenewal of franchise relationships. The law has been on the books for over thirty years and its provisions have been the subject of hundreds of published opinions from the federal judiciary including the

97 43 F.3d 1244, 1247 (9th Cir. 1994).
98 Id. at 1247-48.
99 Id.
100 Id. at 1249.
102 Id. (citing *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244 (9th Cir. 1995) and *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998)).
103 Id.
United States Supreme Court. PMPA decisions are considered persuasive authority in analyzing other franchise laws. The Supreme Court’s decision in *Mac’s Shell*, for instance, specifically addressed “constructive termination” under the PMPA; however, it could have broad ramifications for state franchise laws in other industries.\(^{104}\) Indeed, some courts have since applied the *Mac’s Shell* holding to “constructive termination” claims under state franchise laws, but have held open the possibility of “constructive termination,” claims where a franchise relationship does, in fact, end. In *Bell v. Bimbo Foods Bakeries Distrib.*,\(^{105}\) the U.S. District Court for the Northern District of Illinois cited Judge Posner’s opinion in *Al’s Service Center* in holding that, “a constructive termination should qualify as a ‘termination’ under the Illinois Franchise Disclosure Act.”\(^{106}\) However, the court also cited *Mac’s Shell* for the proposition that a “necessary element” of any constructive termination claim is conduct on the part of the franchisor that forces an end to the franchise.\(^{107}\)

Similarly, the PMPA’s treatment of arbitration provisions can be a model for other franchise laws. Courts have cited the Ninth Circuit PMPA decision in *Graham Oil Co. v. ARCO Prods. Co.* for the proposition that an arbitration agreement may not require a plaintiff to forfeit statutory rights.\(^{108}\) Also, by enacting the specific language of § 2805(f)(1),\(^{109}\) Congress has seemingly ended the debate as to whether an arbitration clause is valid and enforceable under the PMPA and has made clear that petroleum franchisees can challenge the termination and nonrenewal of their franchises in federal court.

Finally, the PMPA is a model for limited regulation of a specific substantive area of the franchise relationship that can coexist with and does not necessarily supersede state franchise laws.\(^{110}\) Unlike federal laws that completely preempt state laws such as ERISA, the PMPA has limited preemptive effect allowing state and federal laws and regulations to effectively govern other aspects of the franchise relationship.

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\(^{104}\) See, e.g., Robert K. Kry, *Mac’s Shell and the Future of Constructive Termination*, FRANCHISE LAW JOURNAL (Fall 2010).

\(^{105}\) 2012 U.S. Dist. LEXIS 90987 (N.D. Ill. July 2, 2012). *See also Pai v. DRX Urgent Care, LLC*, 2014 U.S. Dist. LEXIS 27071, at *21 (D.N.J. Mar. 4, 2014) (citing *Mac’s Shell* in holding that “termination is considered ‘constructive’ not because there is no end to the relationship, but because it is the plaintiff who formally puts an end to the particular legal relationship, as opposed to the defendant.”).


\(^{107}\) *Id.*

\(^{108}\) *See, e.g., Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 171 (2d Cir. 2002) (citing *Graham* that “in the context of the Petroleum Marketing Practices Act… an arbitration agreement may not require a plaintiff to forfeit a statutory right to attorneys’ fees.”).

\(^{109}\) Stating “[n]o franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive – (A) any right that the franchisee has under this title [15 USCS §§ 2801 et seq.] or other Federal law; or (B) any right that the franchisee may have under any valid and applicable State law.”

\(^{110}\) *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 248 (8th Cir. 2012).
III. BEER DISTRIBUTION

A. A Comparison Between Beer Distribution Relationships and Traditional Franchise Relationships

Laws concerning relationships among participants in the chain of beer distribution have significant similarities with, and differences from, general business format franchise laws. In several ways, state beer franchise laws resemble state franchise relationship laws. Both define the franchise relationships similarly. Both beer distribution laws and business format franchise laws seek to protect franchisees or distributors against oppressive conduct in the ongoing relationship and against being terminated without good cause. The most significant contrast between the two types of laws is the absence in beer distribution of any federal or state law or regulation requiring presale registration and disclosure of terms, or cooling off before a distribution agreement is entered into. That is, beer distribution has no counterpart to the FTC Franchise Rule,111 or to state franchise registration and disclosure laws.112

Like business format franchising, power in individual beer distribution relationships can be imbalanced, typically perceived to favor brewers.113 Larger, powerful brewers tend to dominate the industry.114 States regulate the relationships between those who brew or import beer into the state (brewers) and those who receive, warehouse and distribute beer to retailers (distributors).115 This regulation is similar to relationship statutes that protect franchisees in

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111 16 C.F.R. § 436.1 et seq.

112 This difference is ironic. This is because states are restricted by the dormant Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, from enacting laws that unreasonably burden interstate commerce. See e.g., McBurney v. Young 133 S. Ct. 1709, 1719 (“Our dormant Commerce Clause jurisprudence significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce.”). Yet at least 15 states have enacted laws that slow the process of offering and selling a business format franchise. (California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, Wisconsin). In contrast, the Constitution, in the 21st Amendment, grants states “broad power to regulate liquor.” Granholm v. Heald, 544 U.S. 460, 493 (2005) (though state regulation of alcohol is still “limited by the nondiscrimination principle of the Commerce Clause”).

113 See e.g., Brown-Forman Corp. v. Alcoholic Beverages Control, 841 N.E.2d 1263, 1266 (Mass. App. 2006) (noting that Massachusetts’ law was enacted in part, “to redress economic imbalances in the relationships between wholesalers and their suppliers.”).

114 See e.g., Steve Hindy, Don’t Let Big Brewers Win Beer Wars, CNN (Dec. 12, 2012), www.cnn.com/2012/12/12/opinion/hindy-beer-wars (visited May 29, 2014) (noting for example, that Anheuser-Busch controls about 47% of the U.S. beer market.). See also Glaesner v. Beck/Arnley Corp. 790 F.2d 384, 388 (4th Cir. 1986) (noting “restrictions on terminations have been legislated in order to protect those distributors with comparatively little bargaining power. A national supplier or franchisor is likely to possess greater resources than an individual dealer, distributor, or franchisee” and noting as an example, that South Carolina thus regulates dealer terminations in beer distribution.); Postal Instant Press v. Sealy 43 Cal. App. 4th 1704, 1715 - 1716 (1996) (“The relationship between franchisor and franchisee is characterized by a prevailing, although not universal, inequality of economic resources between the contracting parties. Franchisees typically, but not always, are small businessmen or businesswomen . . . seeking to make the transition from being wage earners and for whom the franchise is their very first business. Franchisors typically, but not always, are large corporations. The agreements themselves tend to reflect this gross bargaining disparity.”).

115 See e.g., Coors Brewing Co. v. Oak Beverage, Inc. 549 F. Supp. 2d 764, 770 (E.D. Va. 2008) (noting that New York’s Alcoholic Beverage Control Law was enacted “to provide a more equitable framework for the business dealings between beer brewers and importers and their wholesalers” and to protect wholesalers “from arbitrary termination and denial of the appointment of their successors.”). David R. Scott, Brewing up a New Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Should be Changed, 3 Wake Forest J.L. & Pol’y 417, 418 (2013).
traditional business format franchise relationships.

Business format franchising is governed by a patchwork of different regulatory schemes. An FTC trade regulation rule applies nationwide, mandating presale disclosure and cooling-off before a franchise relationship may be established.116 Because the rule applies nationwide, in a sense, the federal government has the lead in franchise regulation. But the force of the FTC Rule is limited because there is no right of private enforcement117 and the FTC has limited resources to enforce its rule. About a fourth of the states have enacted their own franchise registration and presale disclosure laws.118 About 21 states have laws regulating the ongoing franchise relationship or at least requiring good faith or restricting some perceived acts of unfairness in some elements of the franchise relationship.119 As a result in many states there is no state law regulation of the offer or sale of a franchise, and while the FTC Rule applies, there is no right of action for violation of the rule.120

In contrast, in beer distribution, states take the primary role in regulation.121 All 50 states regulate the sale and distribution of beer within their borders.122 Because of brand consolidation in the beer industry, many states address the distribution of beer separately from wine and liquor, making beer distribution a particularly regulated industry.123 Differences between states in their statutes, regulations, licensing schemes, taxes and control processes result in a somewhat complex legal landscape for brewers, distributors, retailers and attorneys who advise them.

To better understand the nature of beer distribution laws as compared to traditional

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116 16 C.F.R. § 436.1 et seq.

117 Courts have held there is no private cause of action for violations of the FTC Rule. See e.g., Morrison v. Back Yard Burgers, Inc. (8th Cir. 1996) 91 F.3d 1184, 1187 (the court held that plaintiffs could not attempt to support their state fraud claim with evidence of a knowing violation of 16 C.F.R. § 436.1 because “there is no private cause of action for violations of the Federal Trade Commissions Act, 15 U.S.C. §§ 41 et seq.; see also Banek Inc. v. Yogurt Ventures U.S.A. Inc. (6th Cir.1993) 6 F.3d 357; United Consumers Club, Inc. v. Bledsoe (N.D. Ind. 2006) 441 F. Supp. 2d 967, 987-988.

118 California, Hawaii, Illinois, Indiana, Maryland, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, Washington, Wisconsin.

119 Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Rhode Island, Virginia, Washington and Wisconsin. These laws range from comprehensive franchise relationship laws such as California’s Franchise Relations Act (CAL. BUS. & PROFS. CODE §§ 20000 et seq.) to isolated statutes requiring good cause to terminate a franchise, as contained in § 705/19 of the Illinois Franchise Disclosure Act.

120 See note 119.

121 Federal regulations pertaining to beer principally concern the location, construction, equipment, operations and qualifications of breweries, to facilitate federal taxation of alcoholic beverages, 26 U.S.C. Secs. 5001 et seq.; 27 C.F.R. § 25.1 et seq., labeling and prohibition of certain distribution practices.

122 See Scott, Brewing Up a New Century of Beer: How North Carolina laws Stifle Competition in The Beer Industry and How They Should Be Changed, 3 Wake Forest J.L. & Pol’y, 418 (“Virtually every state has adopted a three-tier distribution system, as well as a franchise law regulating the relationships between brewers and wholesalers.”).

franchise laws, it is useful to be informed about the unique history of the regulation of beer and other alcoholic beverages.

B. **Historical Overview of American Beer Distribution Laws**

Beer and alcohol are at the heart of American culture. The Puritans sailed to Massachusetts with 42 tons of beer and only 10 tons of water.\(^{124}\) In the early 1800s "the price of the native spirits was exceedingly low ... and the consumption was enormous."\(^{125}\) The result was not pretty. "Drunkenness was widespread."\(^{126}\) A "repulsive image of the saloon" emerged.\(^{127}\) This image "fanned the prairie fire toward temperance."\(^{128}\)

Most Americans are aware that the nation experienced an era of Prohibition.\(^{129}\) Not as many know the history of the brewing industry’s three-tiered regulatory scheme. Prior to the 18\(^{th}\) Amendment, states exerted regulatory power over the brewing industry. At that time the industry was divided mainly between brewers and retailers, with only a few wholesalers.\(^{130}\) Brewers and producers sold their products directly to retailers.\(^{131}\) Often brewers held ownership interests in taverns,\(^{132}\) known as “tied houses.”\(^{133}\) This structure led to anti-competitive practices and unscrupulous marketing aimed at increasing consumption.\(^{134}\)

Temperance societies emerged, seeking to combat unscrupulous tactics, the prevalence of taverns and excessive consumption.\(^{135}\) By the late 1800s, local temperance societies and a


\(^{125}\) Samuelson, *The History of Drink, A Review, Social, Scientific and Political* (Trubner & Co., London 1880) p. 204 (noting that in one year distillation and consumption exceeded 25 million gallons; and in 1817 the quantity distilled was about 25 million gallons. "Nor were these all the spirits which were consumed in the United States for we find that as early as 1790 about 3,679,000 gallons were imported." Id. at 205).

\(^{126}\) Id. at 205.


\(^{128}\) Id. at 167.

\(^{129}\) Scott, *Brewing Up a new Century of Beer: How North Carolina Laws Stifle Competition in The Beer Industry and How They Should Be Changed*, 3 Wake Forest J. L. & Pol. 417, 418 (2013) ("Most Americans are aware of the Prohibition years."). The Prohibition Era is generally considered to be the period of time between 1920 when the 18\(^{th}\) Amendment took effect, outlawing alcohol sales in the United States, and adoption in 1933 of the 21\(^{st}\) Amendment, which repealed the 18\(^{th}\) Amendment. *See e.g., U.S. v. Costello* 171 F. Supp. 10, 16 (S.D.N.Y. 1959) (noting this period); *State v. Mallan*, 950 P.2d 178, 218 (Haw. 1998) (same).

\(^{130}\) Scott, *Brewing Up a new Century of Beer: How North Carolina Laws Stifle Competition in The Beer Industry and How They Should Be Changed*, 3 Wake Forest J.L. & Pol’y at 421. ("Before the 1920s, the brewing industry was primarily divided between brewers and retailers, with only a few wholesalers.")

\(^{131}\) Id.

\(^{132}\) Id.


\(^{134}\) 3 Wake Forest J.L. & Pol’y at 421.
federation of churches evolved into the Anti-Saloon League, among the most powerful political organizations in U.S. history. The League was successful in pushing for local and state regulation of saloons and influenced the movement toward national prohibition. Anti-drink ardor coupled with wartime regulation, led to ratification of the 18th Amendment, which outlawed the manufacture, distribution and sale of alcoholic beverages in the United States.

1. The Prohibition Era

Through the 18th Amendment, states shared concurrent power with the federal government to enforce the ban on the manufacture, sale and transportation of alcoholic beverages. Despite concurrent power, and what had been a states’ rights movement toward prohibition, the federal government took the lead in enforcing Prohibition. The National Prohibition Act, known as the Volstead Act, became effective in 1920.

But soon it became evident that federal control was not working. Alcohol consumption increased, as did violence and corruption. Prohibition also produced an enormous financial drain due to lost tax revenues. America ultimately soured on Prohibition, and it was

135 Samuellson, *The History of Drink, A Review, Social, Scientific and Political*, supra at 239-240 ("In 1834, the number of temperance societies had increased to about 7,000, reckoning two millions of members, and a thousand ships were sailing without spirits on board."). See also Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Cal. L. Rev. 161, 168 (1991) ("By 1835, eight thousand temperance societies claimed 1.5 million members, which represented about twelve percent of the free population of the United States, and possibly as many as one in five adults.").


137 See id. at 175 "By 1916 dry members of Congress outnumbered their wet colleagues by two to one."

138 Id.

139 Id. at 32.

140 U.S. Const. amend. XVIII, § 2 (1919, repealed 1933); See also *United States v. Lanza*, 260 U.S. 377, 381 (1922) ("[The second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits.").

141 Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating The Federal Interest*, 79 Cal. L. Rev. at 175, fn. 98 ("Congress passed title I of the Volstead Act…[t]he Volstead Act placed primary authority to enforce prohibition with the Commissioner of Internal Revenue.").

142 Id.

143 Id. "Within 3 years, 30 prohibition agents had been killed, and the number of saloons in New York City alone increased from 15,000 to 32,000."

144 Id. at 5-6. "Alcohol consumption increased during Prohibition by 11.64 percent per capita, and the bootleg activity fueled corruption and violence among mobsters that led to individual groups aligning together into larger and more powerful crime families which the U.S. government would then spend years trying to dismantle."


2. **Post- 21st Amendment and the Three-Tier Beer Distribution System**

The 21st Amendment granted states primary authority to regulate distribution of alcoholic beverages within their borders. States exercised their broad authority to prevent the return of pre-Prohibition tied-houses. Thus, the three-tier system of alcohol production, distribution and sale was established to maintain separation between brewers, distributors and taverns or saloons as they were known at the time, bars as they are known today. Since its adoption, virtually every state has enacted a law seeking to maintain three-tier distribution, as well as franchise laws regulating the relationships between brewers and wholesalers.

Since the three-tier system sought to address anti-competitive business practices of pre-Prohibition tied-houses, the regulations in this system focus on relations between the participants in each of the three tiers. The regulatory structure seeks to create stability, healthy competition, and fair business relations between participants.

The three tiers are (1) brewers/suppliers (top tier), (2) distributors/wholesalers (central tier), and (3) retailers, bars, taverns or saloons (bottom tier). These tiers equate to (1) manufacturers, (2) distributors or wholesale resellers, and (3) retailers or retail resellers in a typical chain of distribution for any products. This system provides a framework in which producers (brewers) sell their products only to wholesale distributors. The structure isolates brewers from having substantive business relations with retailers, and thus keeps them from obtaining interests in the retailer. A premise of this system is the idea that keeping distribution levels separate and independent reduces incentive to promote excessive consumption and thus reduces consumption. Thus, wholesalers sell to retailers. And retailers are finally able to sell the product to consumers. In many states, importers are treated the same as or similar to brewers, placing importers in the top distribution tier. Recently, the U.S. Supreme Court ruled...
that the three-tier distribution system is “unquestionably legitimate.”

3. **Post-Prohibition Federal Regulation**

Though the 21st Amendment gave states primary authority to regulate distribution of alcoholic beverages, post-Prohibition also paved a new path for federal legislation and regulation. New federal legislation sought to prevent the pre-Prohibition Era “social and political evils.” Legislative initiatives were accomplished through the regulation of production, purity and alcoholic content of alcoholic beverages, as well as revenue and enforcement.

In 1935, the Federal Alcohol Administration Act (the “FAA Act”) was enacted. The Federal Alcohol Control Administration was created as a division of the Treasury Department’s Office of Alcohol, Tobacco, and Firearms to carry out the Act’s provisions. Some notable provisions of the Act prohibit suppliers from requiring retailers to deal exclusively in the supplier’s product, arranging for pre-Prohibition tied-houses, or engaging in consignment sales. Today, the Treasury Department’s Alcohol and Tobacco Tax and Trade Bureau enforces the FAA Act and its prohibitions.

C. **State Regulations Under the Three-Tier System: License vs. Control**

State schemes establishing the three-tier system vary. However states regulate distribution principally in one of two ways: through licensure or control.

Eighteen states are considered “control” states. These states exert control over part or all of the distribution of alcohol within their borders. Control states have some licensing requirements, but what distinguishes these from license states is that at some point in the distribution process, these states obtain a direct interest in revenues obtained through

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157 Id.


159 27 U.S.C. Secs. 201 et seq.


165 Id.
distribution by taking an ownership stake as distributors or retailers of the product. These states also exert greater control over the conditions of sale and promotion of alcohol within their borders. By way of example, Pennsylvania and Utah are sometimes referred to as “sole importers” as they permit alcohol beverages to be sold only through state-owned stores.

As another example, in Alabama, the State, through its Alcohol Control Board, operates a chain of retail stores selling the majority of alcohol purchased in the state. Alabama permits each county in the State to elect whether that County will be “wet” thereby allowing beer and other alcohol subject to laws of the state, or “dry” thereby prohibiting the sale in the county of alcoholic liquors and beverages. Where a county elects to allow alcohol and liquor, cities within the county may decide whether to allow or exclude alcohol or liquor within such cities. Wholesalers can sell only to licensees of the state Alcoholic Beverage Control Board. Wholesalers and distributors must file monthly reports of purchases. Wholesale licensees must be granted exclusive sales territories by their suppliers. But price maintenance is prohibited. The law imposes other requirements and prohibitions, among them a requirement for written agreements, prohibition against selling the same brand of a product to a wholesaler other than the one granted exclusivity in the geography, or coercion to accept a product that was not ordered.

The 32 license states, or open states, on the other hand, regulate alcohol distribution using a hierarchical licensing system through which the states approve and sell different licenses to businesses in each tier.

While the licensing systems in the license states provide accountability and an additional source of revenue for those states, they are often convoluted and difficult to figure out. Even though numerous states have such laws, there is no uniformity among the states. It is common

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166 The 18 “Control” states are members of a national association, the National Alcohol Beverage Control Association (“NABCA”), whose mission is to support the member states’ efforts to protect public health and safety and ensure responsible and efficient systems for alcohol beverage distribution and sales. The association’s website, [www.nabca.org](http://www.nabca.org), is an additional resource for information on Control states and their procedures, as well as analytical and statistical data.

167 AL. ADMIN. CODE § 20X4.01

168 AL. CODE § 28-2-1(l)(a).

169 AL. CODE § 28-2-1(b)(l)(a).

170 AL. CODE § 28-3-9.

171 AL. CODE § 28-8-2.

172 AL. CODE § 28-8-3.

173 AL. CODE § 28-9-4

174 Id.

175 Id.

176 Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington and Wisconsin
for states to require brewers, distributors and retailers to hold multiple licenses.

Under a typical licensing scheme, brewers who brew beer in another state, but wish to sell it in the license state, must obtain a manufacture’s license, or register with a regulatory body before signing a distribution agreement with a distributor to distribute its beer. Beer distributors/wholesalers are required to purchase a beer wholesaler’s license, which allows for the distribution of beer only, but must purchase an additional license to distribute distilled spirits or wine. There are usually numerous types of retail licenses, as well as separate licenses for craft brewers and special events. Licenses may be required by statute, while others may be required by rule or regulation, which makes it even more difficult to ensure compliance. Nebraska’s Liquor Control Act, for example, provides for fifteen different types of licenses, but one must also check that state’s regulations before distributing.

D. Relationship Laws: Special Requirements and Protections

Historically, an imbalance of power has existed between contracting parties in both the beer distribution and franchising contexts. To address this problem in the beer distribution context, many states have passed legislation aimed at balancing power in favor of distributors by requiring good faith dealings between the parties to distribution agreements. In some ways these laws resemble the relationship laws in business format franchising. For example, Texas, Illinois and Utah have statutes regulating relationships between brewers and distributors.

In addition to the similar protections to address the imbalance of power found in both the beer distribution regulations and franchise regulations, an additional array of statutes, rules and regulations seek to balance power in favor of distributors. These statutory requirements and protections include: 1) inventory purchasing requirements; 2) inventory repurchasing requirements; 3) protections relating to transfer; 4) protections relating to termination; 5) territory protections; and 6) dispute resolution protections.

1. Inventory Purchasing Requirements

Several states allow brewers to impose inventory purchasing requirements upon a distributor. However, most of the same state statutes specify that brewers cannot require

177 NEB. REV. STAT. § 53-123.01.
179 NEB. REV. STAT. § 53-123.03.
180 NEB. REV. STAT. § 53-123.02.
181 NEB. REV. STAT. § 53-123.14.
182 NEB. REV. STAT. § 53-123.
183 TEX. ALC. BEV. § 102.71 et seq.
186 IDAHO CODE § 23-1103(2)(b); T. C. A. § 57-5-503(2)(B); LSA-R.S. 26:803(4)
distributors to accept delivery of any beer not ordered. And, the allowable inventory purchase requirements will only pass muster if made in good faith. For example, in Idaho, inventory purchase requirements are only permissible if the requirement is generally applied to other distributors in the same state and similarly situated distributors in adjoining states having an agreement with the brewer. Thus, although statutes allow brewers to impose inventory purchase requirements, with the qualified statutory language the enforceability of such statutes is questionable.

2. **Inventory Repurchase Requirements**

Inventory repurchasing requirements are another statutory protection for distributors. Similar to some franchise statutes, many states have statutes governing the repurchase of inventory under beer distribution contracts, particularly upon termination. In *Esber Beverage Co. v. LaBatt*, the Ohio Supreme Court analyzed Ohio Revenue Code 1333.85(D) holding that the manufacturer must compensate the distributor in accordance with its statutory duty “on termination of a franchise, the successor manufacturer must repurchase the distributor’s inventory and must compensate the distributor for the diminished value of the distributor’s business that is directly related to the sale of the product terminated by the successor manufacturer, including the appraised market value of the distributor’s assets devoted to the sale of the terminated product and the goodwill associated with that product.”

As in *Esber*, some states not only require brewers to repurchase inventory sold to distributors but require repurchase at the actual cost to the distributor. Thus, statutory language often guarantees the brewers will be bear the losses pertaining to inventory.

3. **Transfer Protections**

Most states also limit brewers’ ability to prevent distributors from transferring their distribution rights under distribution agreements. Typically, states allow brewers to require distributors to provide them written notice and obtain their prior approval before transferring any substantial portion of the distribution rights licensed under the distribution agreement to another distributor, or in advance of a change of ownership or control of the distributor. However, in Oregon, and in most license states, brewers may not withhold consent or unreasonably delay a distributor transfer if “… the transferee meets reasonable standards and qualifications required by [the brewer] which are nondiscriminatory and are applied uniformly to all [distributors]...”

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187 IDAHO CODE § 23-1103(2)(b); T. C. A. § 57-5-503(2)(B)
188 T. C. A. § 57-5-503(2)(B)
189 IDAHO CODE § 23-1103(2)(b);
190 LA. REV. STAT. § 32:1270.5(b); CAL. BUS. & PROFS. CODE § 20035.
191 See *Esber Beverage Co. v. LaBatt USA Operating Co. LLC*, 138 Ohio St. 3d 71, 74 (2013).
192 *Id.* at 74-75.
193 FLA. STAT. § 563.022(20)(b).
194 See ALA. CODE § 28-9-5(3) (providing that a distributor is prohibited from transferring control of its distribution business without providing the supplier a notice of intent to transfer and receiving the supplier’s prior approval).
Similarly situated.”195 In addition, most states allow distributors and their owners to transfer, bequeath or devise their interest in the distribution business, and the distribution agreement, without the need to obtain the brewer’s consent, and sometimes without notice.196

The transfer related protections provided to beer distributors tend to exceed those afforded to franchisees in most jurisdictions, although a few states do extend transfer protections to franchisees by statutory provisions that resemble those commonly provided to beer distributors.197

4. Termination Protections

Protecting distributors against termination or nonrenewal without good cause is, perhaps, the most significant protection states provide beer distributors. Oregon law provides that good cause exists for a brewer to terminate a beer distribution agreement when the distributor fails to comply with a provision of the written agreement that is both reasonable and material to the business relationship.198 Other states, such as Wisconsin, limit the definition of good cause, and thus the right of the brewer to terminate the agreement, to instances in which the distributor has committed fraud, been convicted of a felony, filed for bankruptcy or knowingly distributed the brewer’s products outside of its exclusive territory.199

Many state statutes ban brewers from unilaterally modifying, not renewing or terminating any beer distribution agreement. In Beverage Distributors, Inc. v. Miller Brewing Co.,200 the court examined Ohio’s Alcoholic Beverages Franchise Act and extended the interpretation of the statute regarding termination holding that a joint venture does not present just cause for termination; therefore, defendant could not unilaterally terminate plaintiff’s distribution contract.201 Moreover, most state statutes require good faith in terminating distribution agreements. The Iowa statute states that “the supplier shall have the burden of proving that it acted in good faith [in any proceeding related to the wrongful amendment, modification, termination, cancellation, discontinuance, nonrenewal of the distribution agreement.]**202 Termination and nonrenewal restrictions are interpreted broadly and good cause is universally

195 OR. REV. STAT. § 474.045.
196 See MICH. COMP. LAWS ANN. § 436.1403(16) (providing that suppliers shall not interfere with, or prevent, the transfer of the distributor’s business or interest to a designated member (the inheriting spouse, child, grandchild, parent, brother, or sister of a deceased individual who owned an interest in the distributor)). See also ARK. CODE ANN. § 3-5-1110(a)(1)(A) (providing “consent or approval of the supplier shall not be required of any transfer of the wholesaler’s business to a designated member (the spouse, child, parent, brother, or sister of a deceased individual who owned an interest, including a controlling interest, in wholesaler)).”
197 Arkansas, California, Hawaii, Iowa, Michigan, Minnesota, Nebraska, New Jersey, Washington.
198 OR. REV. STAT. § 474.
199 WIS. STAT. ANN. § 125.33(10)(b-c)).
201 See Beverage Distributors, Inc. v. Miller Brewing Co., 690 F.3d at 794 “the Act is designed in part to protect distributors from certain practices of beverage manufacturers…there is clear legislative intent to deny manufacturers the ability to terminate franchises…”
202 IDAHO CODE ANN. § 23-1107(2).
interpreted narrowly in the beer distribution context. As a result, beer distribution agreements take on a perpetual duration, more or less, in many states.

In addition to limiting the grounds upon which a brewer may terminate a distribution agreement, states usually demand that brewers comply with stringent procedural requirements before terminating or not renewing distributors,\(^{203}\) including notice of default and an opportunity to cure.\(^{204}\) The typical cure period required by the states is 90 days, albeit some states, require brewers to either notify or obtain permission from a regulating commission before they terminate the distribution agreement,\(^{205}\) even though the distributor has failed to cure its defaults.

Even though 17 states have franchise relationship laws, not all of those 17 specifically protect franchisees against termination or nonrenewal without good cause. Delaware, Hawaii, Iowa, New Jersey, Rhode Island and Wisconsin require that franchisors have good cause for not renewing franchise agreements,\(^{206}\) but others place less onerous restrictions on the franchisor’s right to not renew. In general the definition of good cause for nonrenewal in the franchise context tends to be rather broad, and in “good cause” states, as well as other states addressing the nonrenewal issue, franchisors may usually refuse to renew a franchise agreement if the franchisee fails to satisfy certain notification obligations regarding the franchisee’s intent to renew, the agreement specifies it is not renewable upon expiration or the franchisor provides the franchisee with some advance notice it will not renew. This is a far cry from the perpetual-term inherent in most beer distribution agreements.

Certain protections provided by the states to beer distributors against arbitrary early termination of their agreements resemble those contained in franchise relationship laws. Most of these states require the franchisor to have good cause to terminate a franchise agreement before its expiration, although the definitions of good cause used by the states vary somewhat. For example, the laws of Minnesota, Nebraska, New Jersey, Rhode Island and Wisconsin provide that good cause exists for a franchisor to terminate the franchise agreement anytime the franchisee fails to substantially comply with the franchisor’s reasonable requirements.\(^{207}\) However, other states, such as California, provide that “Good cause shall include, but not be limited to, the failure of the franchisee to comply with any lawful requirement of the franchise agreement after being given notice thereof and a reasonable opportunity, which in no event shall be more than 30 days, to cure the failure.”\(^{208}\) Filing for bankruptcy, failing to comply with the franchisor’s “System” in a way that may damage the franchisor’s reputation, under reporting sales or selling unauthorized products are just a few examples of acts that may constitute good cause for a franchisor to terminate a franchise agreement.

\(^{203}\) See Specialty Beverage Co., Inc. v. Virginia Alcoholic Beverage Control Bd. 51 Va. App. 154, 160, 165 (2008) (the brewery’s letter to beer distributor informing distributor that brewery intended to terminate its distributor agreement based on distributor’s alleged failure to meet the performance standards of the agreement, timely pay monies due to brewery, and operate its business in accordance with agreement, failed to identify the specific conditions to which the reasons related, and thus was not a valid notice of intent to terminate under the Beer Franchise Act.).

\(^{204}\) Id. at 164-65.

\(^{205}\) See 4 Del. Admin. Code 46.

\(^{206}\) Fundamentals Of Franchising 203 (Barkoff & Selden eds., 3d ed. 2008).

\(^{207}\) Id.

\(^{208}\) CAL. BUS. & PROF. CODE § 20021.
Finally, many states have statutes providing distributors with the right to recover damages, typically treble damages, from brewers that have terminated, not renewed or refused to consent to the transfer of a distribution agreement without good cause. In addition, states generally impose mandatory venue requirements, requiring that any disputes between a brewer and a distributor be brought in the jurisdiction in which the distributor has its primary place of business, and most void all choice of law provisions in distribution agreements that specify that any law other than that state’s laws shall govern the beer distribution agreement.

But the remedy that primarily differentiates beer distribution laws from most franchise laws is the legal right beer distributors have to reasonable compensation upon termination of the beer distribution agreement by the brewer, for any reason. Idaho law requires: “In the event that an agreement is terminated, canceled or not renewed by a [brewer], the distributor shall be entitled to reasonable compensation for the laid-in cost to the distributor of the inventory of the [brewer’s] products, including any taxes paid on the inventory by the distributor, together with a reasonable charge for handling of the products.” In general, reasonable compensation payments are equivalent to one to three years’ worth of the beer distributor’s profits, calculated as one hundred percent of the beer distributor’s gross margins on each case of the brewer’s products sold to customers, multiplied by the number of cases of product actually sold by the beer distributor to customers during the twelve months prior to the termination. If the brewer terminates a beer distribution agreement in bad faith, or for any reason other than good cause, the brewer must also pay the distributor the fair market value of “all assets, including ancillary businesses, relating to the transporting, storing and marketing of [brewer’s] products” and the goodwill of the distributor’s business. Clearly, these protections go a long way toward shifting the balance of power back toward distributors in the beer distribution relationship.

In the franchising context, the remedies available to wrongfully terminated franchisees vary substantially from state to state. Wrongfully terminated franchisees may recover damages, such as lost profits and unrecovered expenses, but may also recover payments for goodwill, attorneys’ fees and punitive damages according to the facts and the laws governing the franchise agreement. In some states, franchisors may be required to repurchase inventory if they wrongfully terminate a franchisee. While all states have anti-waiver provisions that require that their own laws shall govern any beer distribution agreement relating to the distribution of beer within their own borders and require venue for any dispute relating to such agreements be brought in a court within their states, only some states provide anti-waiver and venue protections relating to franchise agreements to franchisees. Therefore, the level of protection from, or recourse pertaining to, any wrongful acts committed by franchisors that is available to franchisees depends entirely upon the state in which the franchisee is located and which state’s laws govern the injured franchisee’s agreement. And, as previously discussed, in

209 See N.M. STAT. ANN. § 60-8A-9 (E).
210 IDAHO CODE ANN. § 23-1110(1).
211 IDAHO CODE ANN. § 23-1110(2).
212 See CAL. BUS. & PROF. CODE § 20035.
213 See MD. CODE ANN. BUS. REG. § 14-226 (providing that franchisors may not require prospective franchisees to release the franchisor from liability under Maryland law); See also MINN. STAT. ANN. § 80C.21 (providing that any condition or provision purporting to bind the franchisee to waive compliance or has the effect of waiving compliance with the Minnesota franchise laws or any rule or order thereunder is void).
states without any franchise relationship laws, franchisees must rely on injunctive relief, common law fraud and breach of contract remedies to address a franchisor's wrongful acts. Accordingly, then, it is clear that beer distributors are substantially better protected with regard to dispute resolution protections and remedies for wrongful acts.

5. Territory Protections

States protect distributors by allowing, and often even requiring, brewers to grant distributors an exclusive sales territory for their brands. As an example, Subsection 401(1) of Michigan’s Beer Franchise Code requires that “[A Supplier] shall grant to each of its [distributors] an exclusive territory, as agreed upon by the [distributor and supplier], within which the [distributor] shall be the exclusive distributor of the specified brand or brands of the [supplier].” While this practice raises some monopolistic concerns, the practice strengthens distributors, makes it easier for states to regulate the movement and sale of beer and to collect taxes.

This differs substantially from franchising, however, considering franchisors may grant exclusive territories to their franchisees, but are not required to do so. The fact that states generally require brewers to provide distributors with an exclusive territory in which no competitors may distribute the brewer’s beer, but franchisors are not required to provide exclusive territories to their franchisees, and typically do not, demonstrates the degree to which beer distributors enjoy even greater legal protections than do franchisees.

6. Dispute Resolution Protections

Similar to franchise statutes, dispute resolution procedures are another statutory protection found in the beer distribution arena. In North Carolina, if a dispute arises under a beer distribution contract, and such dispute is likely to lead to litigation, the Commission “may require the parties to participate in mediation in an effort to resolve the dispute.” In the franchising context, franchisor imposed binding alternative dispute resolution is often statutorily prohibited. For example, in Oregon, a franchisor is prohibited from requiring disputes between franchisor and franchisee to be submitted to arbitration or to any other binding alternative dispute resolution procedure. Some states even disregard forum-selection clauses agreed upon by the parties, allowing distributors to bring suit in state or federal court.

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214 See Little Beverage Co., Inc. v. De Prez, 777 N.E.2d 74 fn. 4 (2002) (“Texas statutorily…mandates exclusive territories. TEX. ALCO. BEV. CODE § 102.01(h).); See also State v. Ruiz Wholesale Co., 901 SW 2d 772, 776 (1995) (“a distributor who has purchased beer from another distributor may distribute and sell the beer only within a territory for which the manufacturer of the brand has designated that it may be sold by the general, local, or branch distributor making the purchase.”).

215 MICH. COMP. LAWS ANN. § 436.1401.

216 N.C. STAT. § 18-B-1309.

217 OR. REV. STAT. § 650.165(3).

218 See SKI Beer Corp. v. Brewery, 612 F.3d 705 (2010) fn. 5 (“If the brewer or wholesaler who is a party to an agreement pursuant to this Act fails to comply with this Act or otherwise engages in conduct prohibited under this Act, the affected party may maintain a civil suit in court if the cause of action directly relates to or stems from the relationship of the individual parties under the agreement, provided that any such suit shall be filed in a State or federal court of competent jurisdiction located in Illinois.”).
E. The Future of Beer Distribution Relationships

While beer distributorship arrangements are distinctly different from traditional franchise arrangements, there are certain commonalities. The three-tier system of beer distribution can trace its origins to the Prohibition Era and the 21st Amendment, but modern beer laws governing beer distribution relationships between brewers and distributors are similar to franchise relationships laws. Brewers resemble franchisors in that they tend to hold a majority of the power in the business relationship. Accordingly, we can expect more and more states to pass relationship laws aimed at further balancing power in favor of distributors, as we continue to see in franchising, and to require good faith dealings between the parties in each of these contractual arrangements. Considering that trend, for those doing business in the beer distribution industry or in franchising, it is essential to remain cognizant of the complexities of and differences among the statutes involved at every step.

IV. AUTOMOBILE DEALERSHIP LAWS

A. History and Overview of Automobile Dealer Laws

Legal disputes between car manufacturers and dealers are almost as old as the industry itself.219 Prior to 1940, automobile dealer agreements typically had a duration of one year and were subject to unconditional cancellation by the manufacturer. The dealer did not have the right to transfer ownership without the manufacturer's permission, and the dealer was expressly prohibited from selling outside of its territory.220 Dealer efforts to redress manufacturer abuses were based largely upon contractual theories and the antitrust laws.221 Following a significant contraction in the industry and a decline of one-third in the number of dealerships during the Great Depression,222 Wisconsin passed the first automobile manufacturer-dealer statute in 1937. That statute prohibited the manufacturer from terminating a dealer "without due regard to the equities of said dealer and without just provocation," and from using the threat of termination as a means of coercing concessions from a dealer.223 By 1955, 19 states had enacted legislation regulating some aspect of the manufacturer-dealer relationship.224 In 1956, Congress enacted the Federal Automobile Dealer's Suits Against Manufacturer's Act (the "Dealer's Act").225 Since that time, the remaining states have enacted automobile dealer legislation.

The Dealer's Act provides a federal claim if the manufacturer breaches the dealer agreement or terminates it without "good faith." "Good faith" is defined narrowly so that dealers


220 See cases cited supra note 219.

221 See Brown & Conwill, Automobile Manufacturer-Dealer Legislation, 57 Colo. L. Rev. 219 (1957); see, e.g., Rea v. Ford Motor Co., 560 F.2d 554, 1977-2 Trade Cas. (CCH) ¶ 61560 (3d Cir. 1977).


223 1937 Wis. LAWS, 377, 378; see Wis. Stat. § 218.01.

224 Brown & Conwill, supra note 221, at 219.

have a heavy burden in order to recover.

State legislation typically reaches a much broader range of conduct than the Federal Dealer's Act, including termination, nonrenewal, transfer, encroachment, warranty administration and a host of operational issues. Some states provide special tribunals for the adjudication of dealer disputes, while others provide for expedited provisional remedies, such as the issuance of an automatic injunction against termination pending adjudication.

**B. Constitutionality of Dealer Legislation**

There are no reported cases challenging the constitutionality of the federal Dealer's Act. State automobile laws, however, have been challenged on commerce clause, due process, supremacy and equal protection grounds.

The most common challenge is on commerce clause grounds—that the state statute (which may be pervasive) impairs existing contracts. Generally, if such a statute is applied only prospectively, it is not an unconstitutional impairment of contracts. Further, if a dealer agreement is renewed or extended after a new law is passed, the new law will apply without any constitutional difficulty. On the other hand, if the agreement predates the statute, the law may be subject to attack as an unconstitutional impairment of contracts.

Statutes that provide that state motor vehicle boards shall have a minimum number of dealer members, but no manufacturer members, may be unconstitutional under the Due Process Clause if such boards have power to decide manufacturer-dealer disputes.

Although attacks upon the validity of state regulatory statutes as anticompetitive have in the past been turned down, it is arguable that anti-encroachment statutes may be unconstitutional under the Commerce or Supremacy Clauses. In general, however, state automobile statutes do not impose an unconstitutional burden upon interstate commerce.

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227 *Chrysler Motors Corp. v. Thomas Auto Co., Inc.*, 939 F.2d 538 (8th Cir. 1991); *Northshore Cycles, Inc. v. Yamaha Motor Corp., U.S.A.*, 919 F.2d 1041 (5th Cir. 1990).


C. **The Federal Dealer’s Day in Court Act**

Section 1222\(^{232}\) spells out the elements of a claim under the Dealer’s Act:

1. **the plaintiff must be an automobile dealer as defined by the Act;**\(^{233}\)

2. **the defendant must be an “automobile manufacturer” or one who “acts for” and is “under the control of” a manufacturer;**\(^{234}\)

3. **the manufacturer must either (a) have failed to comply with a written franchise or (b) have terminated a written franchise;**\(^{235}\)

4. **the manufacturer’s action was not done in “good faith”;**\(^{236}\)

5. **the manufacturer’s prohibited conduct must have caused injury to the plaintiff.**

1. **Definitions**

The Act contains several definitions that effectively control entitlement to relief and that have been an area of extensive litigation. The most important definitions are for “automobile dealer,” “automobile manufacturer,” “franchise” and “good faith.”

a. **Automobile Dealer**

The plaintiff in a Dealer’s Act suit must be an “automobile dealer:” one who has a franchise with the manufacturer.\(^ {237}\) When the signatory is a corporation, it will usually be the “dealer”\(^ {238}\) although some cases have held that individual principals were so intertwined with a corporate dealer that they could be treated as one with it under the Dealer’s Act.\(^ {239}\)

b. **Automobile Manufacturer**

Section 1221(a) defines automobile manufacturer as:

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\(^{233}\) 15 U.S.C.A. § 1221(c).


\(^{237}\) Id.


Any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.240

The definition has two aspects: the definition of automobile as "cars, trucks, or station wagons;" and the meaning of a "person" who "acts for" and is "under the control" of an automobile manufacturer "in connection with the distribution of automobiles."

The Act excludes snowmobiles,241 motorcycles,242 and motor homes.243 The definition of "manufacturer" requires that the defendant be a party to the dealer agreement. Thus, either the manufacturer must sign, or it must be a person "who acts for and is under the control of such manufacturer ... in connection with the distribution of said automotive vehicles." Thus, an automobile dealer's claim against a finance company was dismissed because the finance company was not an automobile manufacturer.244 In some cases, automobiles are distributed by distributors that may or may not be independent of the manufacturer. A manufacturer who was a distributor and does not sign the agreement may not be subject to the Dealer's Act. If the distributor who has executed the written agreement with the dealer is not under the manufacturer's control, the distributor will not be the proper defendant. As a result, the dealer may have no remedy under the Dealer's Act.

c. "Franchise"

The Dealer's Act requires that the franchise upon which the dealer sues be a written agreement.245 This definition has served as a statute of frauds to bar dealer claims based upon a series of writings that do not purport to fix the legal rights and liabilities of the parties.

d. "Good Faith"

Section 1221 of the Dealer's Act states that "good faith" shall mean the:

duty of each party to any franchise, and all offices, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, that recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.246

Good faith under the Dealer's Act does not mean good faith in the ordinary sense or in the sense of the common-law obligation of good faith and fair dealing. Lack of good faith under the Dealer's Act is demonstrated only by coercion, intimidation, or threats. One case has defined good faith as "more than unfair or inequitable conduct;" it is "coercive and intimidating conduct on the part of the manufacturer."

2. **Claims Under the Dealer's Act**

The heart of the Dealer's Act is contained in 15 U.S.C.A. §1222, which provides for a right of action in favor of the dealer and against a manufacturer for failing "to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise." There are basically two types of claims: bad faith failure to comply with the agreement, or bad faith termination (or nonrenewal).

a. **Bad Faith Failure to Comply with Agreement**

As a general rule, a manufacturer is entitled to require that a dealer comply with the terms of the franchise agreement. If, however, the manufacturer imposes requirements that are not in the franchise agreement, or demands compliance with contract terms in an unreasonable and coercive manner, then there may be liability under the Dealer's Act. Within the broad contours of the dealer agreement, a number of practices have been attacked:

Manufacturers' systems for allocation of automobiles to dealers have given rise to claims under the Dealer's Act. While the mere existence of an allocation system does not violate the Act, manufacturer efforts to coerce a dealer to sell vehicles that it did not want stated a claim

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248 Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 1978-1 Trade Cas. (CCH) ¶ 61857 (9th Cir. 1978).


252 Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676, 1979-1 Trade Cas. (CCH) ¶ 62711, 50 A.L.R. Fed. 236 (9th Cir. 1979); Ed Houser Enter., Inc. v. General Motors Corp., 595 F.2d 366, 1979-1 Trade Cas. (CCH) ¶ 62505, 54 A.L.R. Fed. 304 (7th Cir. 1978).

253 David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc., 504 F.2d 52, 56, 1974-2 Trade Cas. (CCH) ¶ 75257 (4th Cir. 1974); Rea v. Ford Motor Co., 497 F.2d 577, 585, 1974-1 Trade Cas. (CCH) ¶ 75029 (3d Cir. 1974).


256 R.D. Imports Ryno Indus., Inc. v. Mazda Distrib. (Gulf), Inc., 807 F.2d 1222, 1227, 1986-2 Trade Cas. (CCH) ¶ 67414 (5th Cir. 1987).
under the Dealer's Act. 257 If it can be shown that the manufacturer deliberately withheld cars in order to drive the plaintiff out of business, then there might be a violation of the Act. 258 This, however, may depend upon proving the manufacturer's motive. 259 Similarly, curtailment of car deliveries as a means of enforcing wrongful demands, such as fixing prices, violates the Dealer's Act. 260

In general, Minimum Sales Requirements ("MSRs") are not inherently discriminatory or coercive, and the burden is upon the plaintiff to show that they are a "tool of coercion." 261 Although one case has questioned MSRs that were based upon average sales figures, 262 no court has held that they were violative of the Dealer's Act in and of themselves. However, selective enforcement of an MSR may be in violation. 263

Many claims under the Dealer's Act have been premised upon the contention that the manufacturer unlawfully invaded the dealer's territory. 264 To the extent that these claims are based upon oral statements or representations by the manufacturer's agents, they are barred by the Dealer's Act's requirement of a writing. 265 But if placement of additional dealers in the plaintiff's territory is an instrument of coercion, there might be a violation of the Dealer's Act. 266

b. Bad Faith Termination

Under the Dealer's Act, the manufacturer has the right to terminate the dealer agreement in accordance with its terms. 267 Accordingly, an automobile dealer may be terminated for failure

258 Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 576, 1986-1 Trade Cas. (CCH) ¶ 66993 (3d Cir. 1986); Junikki Imports, Inc. v. Toyota Motor Co., 335 F. Supp. 593, 595, 1972 Trade Cas. (CCH) ¶ 73911 (N.D. Ill. 1971); Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc., 806 F.2d 953, 959-960, 1986-2 Trade Cas. (CCH) ¶ 67360 (10th Cir. 1986).
266 Garvin, 318 F.2d at 520; Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645, 647 (3d Cir. 1964).
to meet its minimum sales requirement,268 heed manufacturer's recommendations,269 devote full
time to the business,270 or comply with promotional programs.271

The manufacturer's threat to cancel or terminate the dealer for failure to comply with its
franchise obligations is not a violation of the Dealer's Act.272 Also, it is not a violation of the
Dealer's Act for the manufacturer to ask the dealer voluntarily to terminate the franchise,273 or to
suggest that the dealer let himself be bought out by another dealer.274

Where termination has been found to be a violation of the Dealer's Act, the act of
termination was a threat or a sanction to compel other unlawful conduct.275 For example, where
the manufacturer threatened the dealer that it would be terminated for a refusal to take cars not
specified in the franchise agreement, and then in fact terminated the dealer, there could have
been a violation of the Dealer's Act.276

Nonrenewal, in and of itself, is not a violation of the Dealer's Act,277 but may arise in
circumstances that raise a question whether the nonrenewal is a tool of coercion or intimidation,
usually when the manufacturer wants the dealer to renew upon new or different terms.278

c. Transfer

It is not a violation of the Dealer's Act for the manufacturer to refuse to consent to a
transfer of the franchise to another owner.279 In general, automobile franchises are recognized
as personal service contracts,280 and therefore, the manufacturer's insistence that individuals

270 Kotula, 338 F.2d at 737.
272 Victory Motors of Savannah, Inc. v. Chrysler Motors Corp., 357 F.2d 429, 432 (5th Cir. 1966).
273 Id.
274 Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 445, 1979-2 Trade Cas. (CCH) ¶ 62784 (9th Cir. 1979).
275 See Buono Sales, Inc. v. Chrysler Motors Corp., 449 F.2d 715, 724, 1971 Trade Cas. (CCH) ¶ 73702 (3d Cir. 1971).
276 Sherman, 601 F.2d at 445-446.
277 See, e.g., Frank Chevrolet Co. v. General Motors Corp., 419 F.2d 1054, 1056, 1970 Trade Cas. (CCH) ¶ 72998 (6th Cir. 1969).
278 David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc., 504 F.2d 52, 1974-2 Trade Cas. (CCH) ¶ 75257 (4th Cir. 1974).
279 Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683, 685, 1976-1 Trade Cas. (CCH) ¶ 60925 (6th Cir. 1976).
named in the agreement as owner or managers remain in those positions is not coercive. On the other hand, although making a suggestion to a dealer to merge with another dealer is not a violation of the Act, insisting that the manufacturer's nominee have a certain percentage ownership interest may be a violation.

3. Defenses

There are two major affirmative defenses to a Dealer's Act claim. First, the Dealer's Act contains a three-year statute of limitations. The limitations period begins to run when the manufacturer takes the action that results in the dealer's injury. One case has suggested that the limitations period does not begin to run until the dealer knows the full extent of the damage that he has sustained. The second affirmative defense is unique to the Dealer's Act; the statute provides that a dealer that itself acts in bad faith may be barred from relief.

4. Damages

A dealer who prevails in establishing liability of the manufacturer is entitled to recover damages. Damages include "lost profits," which include the profits that would have accrued to the dealer but for the manufacturer's wrongful termination. The measure of profits under the Dealer's Act is the measure of net profits lost.

D. State Automobile Laws

All states (except Alaska), as well as the District of Columbia and Puerto Rico, now have statutes concerning the relationship between automobile manufacturers or distributors and automobile dealers. Typically, these statutes address the manner of, and terms for, termination, cancellation, or nonrenewal of the dealer relationship. Limitations on the manufacturer's

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281 Sherman, 601 F.2d at 445.


287 Id.

288 See, e.g., Am. Motors Sales Corp. v. Semke, 384 F.2d 192, 199 (10th Cir. 1967); Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 566, 1970 Trade Cas. (CCH) ¶ 73392 (2d Cir. 1970).


290 See, e.g., CAL. VEH. CODE § 3060; CONN. GEN. STAT. § 42-133v(d); FLA. STAT. § 320.641; 1211/2 ILL. REV. STAT. 754(d)(6); TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(3).
power to restrict transfers of dealerships,\textsuperscript{291} and curbs upon the manufacturer's freedom to place new dealers in an existing dealer's market area\textsuperscript{292} are not unusual. Virtually all states also regulate many operating aspects of the relationship, including administration of warranty claims, preparation and delivery obligations of the dealer, allocation and delivery of automobiles, and the like.\textsuperscript{293}

Automobiles and automobile dealers have been heavily regulated by the states in other respects for many years; automobiles are licensed;\textsuperscript{294} dealers are licensed;\textsuperscript{295} dealers are subject to specialized laws, such as odometer and consumer legislation.\textsuperscript{296} Most states have administered these laws through existing administrative structures, such as state motor vehicle departments, dealer advisory boards, and licensing commissions.\textsuperscript{297} In many states, the state motor vehicle department or board administers the manufacturer-dealer laws in one or more respects.\textsuperscript{298} Significantly, each statute is unique and must be consulted itself as a primary source. There is no uniform law or FTC rule to draw upon for guidance in this area.

1. **Definitions and Requirements**

In order for a state automobile dealer act to apply, the required statutory definitions must be satisfied. While dealers in “typical” automobiles are usually covered, there can be wide variation in whether the laws cover other types of vehicles, such as mopeds\textsuperscript{299} or motorcycles and all terrain vehicles.\textsuperscript{300} Montana includes dealers who service, but do not sell, new motor vehicles.\textsuperscript{301} In contrast, Missouri excludes from the “dealer” definition those who service, but do not sell motor vehicles.\textsuperscript{302} Connecticut defines a “motor vehicle” as a “self propelled vehicle” intended primarily for use on public highways, but excluding tractors and farm equipment.\textsuperscript{303}

\textsuperscript{291} CONN. GEN. STAT. § 42-133; FLA. STAT. § 320.643; ILL. REV. STAT. ch. 1211/2, par 754(e)(4); TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(6).

\textsuperscript{292} CAL. VEH. CODE §§ 3062, 3063; CONN. GEN. STAT. § 42-133dd; FLA. STAT. § 320.642; ILL. REV. STAT. ch. 1211/2, par 754(e)(8).

\textsuperscript{293} See, e.g., CAL. VEH. CODE § 3065; CONN. GEN. STAT. §§ 42-133bb, 133cc; ILL. REV. STAT. ch. 1211/2, pars 754, 756; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02.

\textsuperscript{294} See, e.g., MO. REV. STAT. § 301.020.

\textsuperscript{295} See, e.g., MO. REV. STAT. § 301.253; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 4.01; WIS. STAT. § 218.01(2).

\textsuperscript{296} See, e.g., ALA. CODE § 8-19-5; MO. REV. STAT. § 301.252; WIS. STAT. § 218.01(6).

\textsuperscript{297} See, e.g., TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 2.01-3.05; WIS. STAT. § 218.01(1a).

\textsuperscript{298} See, e.g., CAL. VEH. CODE § 3066; CONN. GEN. STAT. § 42-133dd; FLA. STAT. §§ 320.60 to 320.70; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 2.01.

\textsuperscript{299} WIS. STAT. § 218.0101(23).

\textsuperscript{300} VAMS 407.818(15).

\textsuperscript{301} MCA 4-201.


\textsuperscript{303} CGSA 42-133r(7).
A dealer in one line of cars may not be a dealer in another line of the same manufacturer,304 and finance companies usually are not “franchisors”.305

The scope of the franchise agreement to which the state statutes apply may be broader than the written agreement between the manufacturer and dealer. The Illinois Motor Vehicle Franchise Act, for example, applies to all written or oral agreements, including a franchise offering agreements for the sales of goods, services or advertising, leases or mortgages on real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, construction or installation contracts, as well as all other such agreements in which the manufacturer has direct or indirect interest.306 Missouri, like many other states, defines an automobile franchise as one in which the dealer is substantially reliant upon the manufacturer for the supply of franchised new motor vehicles, parts, and accessories.307 The term “substantially reliant” means that the court must look to the disparity of bargaining power between the franchisor and the franchisee, and whether the terms of the agreement or the nature of the business requires the franchisee to make a substantial investment in goods or skills that will be of minimum utility outside the franchise.308

2. Termination and Non Renewal

Virtually all states regulate the manner in which an automobile manufacturer may terminate or decline to renew a dealer agreement. Like most franchise relationship statutes, state automobile statutes typically have two requirements: a minimum notice period and a requirement that the termination or nonrenewal be based upon good cause. Some statutes also require that the termination be made in good faith.

The procedures for giving notice of termination or nonrenewal are reasonably simple: The notice usually must be in writing, provide an opportunity to cure, and state the reasons for termination. The remedies of the dealer upon receiving notice vary from state to state. For example, in several states, dealers may protest termination to a state board or administrative body that adjudicates whether the termination was in accordance with the state statute.

The New Jersey Franchise Practices Act contains an “automatic stay” pursuant to which a manufacturer is stayed from terminating an automobile dealer’s franchise upon institution of an action to enjoin termination.309 California law310 requires that a franchisee protest a notice of termination within 30 days after receiving a 60-day notice or 10 days after receiving a 15-day notice. Where a franchisee failed to comply with the timing requirements, the New Motor Vehicle

306 ILL. REV. STAT. ch. 121/2, part 758.
307 MO. ANN. STAT. § 407.815(2).
310 CAL. VEH. CODE § 3060(a) and (b).
Board of California had jurisdiction to determine whether a protest was timely filed or not.\footnote{Automotive Mgmt. Group, Inc. v. New Motor Vehicle Bd., 20 Cal. App. 4th 1002, 24 Cal. Rptr. 2d 904 (6th Dist. 1993).}

Some states recognize constructive termination, which is a termination effected by the manufacturer's conduct, not by an official notice of termination. Thus, a motor vehicle dealer adequately alleged that it had been constructively terminated without good cause in violation of the Georgia Motor Vehicle Dealer Law where it alleged that the dealership was no longer operating due to the franchisor's fraud.\footnote{Jay Auto. Group, Inc. v. Am. Suzuki Motor Corp., R.I.C.O. Bus. Disp. Guide (CCH) ¶ 12176, 2012 WL 425984 (M.D. Ga. 2012).}

3. Good Cause

Good cause may be defined specifically by statute or left to judicial interpretation.\footnote{CONN. GEN. STAT. § 42-133v(f); TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(3); CAL. VEH. CODE § 3061; FLA. STAT. § 320.641(1)(a); MASS. GEN. L. ch. 93B, § 4(3)(e)(4); TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(3).} Some state statutes do not use the term “good cause;” for example, Wisconsin prohibits termination or nonrenewal "unfairly, without due regard to the equities of the dealer and without just provocation."\footnote{Wis. Stat. § 218.01(3)(a)17.} These terms refer to concepts of basic fairness, impartiality, and justice, not to any concept of investment or equity in the dealership.\footnote{Seymour v. Carpenter, 51 Wis. 413, 8 N.W. 251 (Wis. 1881).}

Another approach to good cause is to define what it is not. In Connecticut, for example, the following conduct by the dealer does not constitute grounds for termination: the dealer's failure to meet sales quotas suggested by the manufacturer; refusal to sell a product at a price suggested by the manufacturer; refusal to keep premises open and operating during hours documented by the dealer to be unprofitable or beyond 10 p.m. and before 6 a.m.; refusal to meet unreasonable minimum standards or marketing guides including capital, inventory, facility, and personnel requirements; or refusal to give the manufacturer or distributor financial records that are not related to the dealer's obligations under the agreement.\footnote{CONN. GEN. STAT. § 42-133v(f).} Many state statutes also provide that good cause exists for termination or nonrenewal when the dealer fails to comply with reasonable and material provisions of the franchise.\footnote{See also TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(3) (manufacturer's desire for greater market penetration does not constitute good cause).}

Some states do not define good cause specifically but enumerate factors to be taken into account in determining whether good cause exists. Such factors include the business transacted by the dealer as compared to the business available; investment necessarily made and obligations incurred by the dealer; welfare of termination; whether the dealer is serving the public; whether the dealer fails to fulfill warranty obligations; adequacy of the dealer's service facilities, equipment, parts, and personnel as compared to other dealers; and the extent of the dealer's failure to comply with the franchise agreement.\footnote{ALA. CODE § 8-20-5.2; N.C. Gen. Stat. § 20-305(6)(a); CONN. GEN. STAT. § 42-133v(f).}
Judicial glosses upon good cause for termination have read the term to include management disputes between officers of the dealership, the dealer's failure to comply with cash and equipment provisions of the agreement, and the dealer's being "out of trust" with its bank;\(^{319}\) shooting another person;\(^{320}\) failing to sell any motorcycles for 2 1/2 years;\(^{321}\) substandard sales and refusal to relocate;\(^{322}\) misrepresenting the identities of automobile buyers in order to obtain discounts;\(^{323}\) transferring ownership of the dealership without the manufacturer's consent;\(^{324}\) falsifying documents in order to win a sales contest;\(^{325}\) closing the dealership for seven consecutive days in violation of the dealer agreement;\(^{326}\) and misrepresenting fleet sales as retail sales.\(^{327}\)

The manufacturer's right to terminate or fail to renew on the basis of the dealer's breach of the dealer agreement is in many states circumscribed by a limitations period, typically of 180 days; if the manufacturer does not give notice of termination within 180 days of learning of the breach, it may not terminate on that ground.\(^{328}\)

4. **Good Faith**

Some states require that the termination be carried out in good faith as well as for good cause;\(^{329}\) the good-faith requirement may be applied to other aspects of the manufacturer-dealer relationship as well. "Good faith" usually is defined in the same way that it is defined in the Uniform Commercial Code\(^ {330}\)--meaning "honesty in fact." It may also mean the "observation of reasonable commercial standards of fair dealing."\(^ {331}\)

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\(^{319}\) *Nagle Motors, Inc. v. Volkswagen N. Cent. Distrib., Inc.*, 51 Wis. 2d 413, 187 N.W.2d 374 (Wis. 1971). A dealer is "out of trust" when it fails to repay inventory loans to a bank or financial institution in accordance with the agreement requiring repayment.


\(^{325}\) *Id.*


\(^{328}\) See, e.g., * Ala. Code § 8-20-5(b)(1); N.C. Gen. Stat. § 20-305(6)(a).*


\(^{330}\) See * UCC § 1-201(19). See N.C. Gen. Stat. § 20-286(17). See also Ill. Rev. Stat. ch. 1211/2, par 754(b).*

\(^{331}\) See, e.g., * Ala. Code § 8-20.*
5. **Compensation**

Many state automobile dealer statutes require that the manufacturer provide some form of compensation to the dealer upon termination. The amount and type of compensation varies as do the circumstances under which compensation may be granted. At a minimum, the manufacturer is usually required to repurchase the dealer’s current car inventory plus unused and undamaged parts, supplies, and special tools. A number of states also require the manufacturer to pay a dealer who is terminated under certain circumstances (usually circumstances indicating that termination was not at the dealer’s request or the dealer’s fault) the value of one or more year’s rent for the dealer’s premises.

6. **Transfer**

At common law, the franchise agreement will govern the transferability of the franchise and assignability of the agreement. Usually, the agreement will provide that it is not assignable in the absence of the manufacturer's consent or will recite that it is a contract for the personal services of the dealer or dealer principal.

State automobile dealer statutes may limit the effect of these provisions, particularly with respect to disposition of the dealership upon the death of the dealer or principal, or with respect to transfers to qualified transferees during the dealer or principal's lifetime. For example, section 322(a)12 of the Iowa Dealer Act, which states that notwithstanding the terms of an agreement or franchise, that the franchisor will give effect to a franchisee’s agreement to sell an automobile dealership, trumped a franchisor's contractual right of first refusal.

The second area of regulation of transfers concerns transfers of the dealership during the term of the franchise and the dealer or dealer principal's lifetime. These statutes provide

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332 See, e.g., ALA. CODE § 20-5(f); CONN. GEN. STAT. § 42-133w; MASS. GEN. L. ch. 93B, § 9; N.C. GEN. STAT. § 20-305(5)(d).

333 See, e.g., CONN. GEN. STAT. § 42-133w.

334 For example, in North Carolina, the manufacturer is required to pay the rental value of the premises to the dealer only when termination is not a voluntary termination or the result of insolvency, license revocation, conviction of the dealer of a crime involving moral turpitude, or loss of the dealer's right to occupy the premises. N.C. GEN. STAT. § 20-305(6)(e)(2).

335 See, e.g., CONN. GEN. STAT. § 42-133x(a), (b); N.C. GEN. STAT. § 20-305.


337 ALA. CODE § 8-20-4(3)(n); CONN. GEN. STAT. § 42-133y; ILL. REV. STAT. ch. 1211/2, par 754(e)(10); MASS. GEN. L. ch. 93B, § 4(3)(i); N.C. GEN. STAT. § 20-286(18); TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(6); WIS. STAT. § 218.01(3c).

338 ALA. CODE § 8-20-4(3)(k); FLA. STAT. § 320.643; ILL. REV. STAT. ch. 1211/2, par 754(e)(6); MASS. GEN. L. ch. 93B, § 4(3)(i); TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(6).


340 ALA. CODE § 8-20-4(3)(k); FLA. STAT. § 320.643; ILL. REV. STAT. ch. 1211/2, par 754(e)(6); MASS. GEN. L. ch. 93B, § 4(3)(i); TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(6).
that a manufacturer may not refuse to consent to a transfer of the dealership to a qualified and willing buyer. In most states providing for rights to succession of the dealership, disputes between the manufacturer and dealer over proposed transfers are resolved by an administrative tribunal, such as the board of motor vehicles. For example, the Texas Motor Vehicle Commission Code provides that notwithstanding the terms of any franchise agreement, an automobile distributor shall not fail to give effect to a transfer by a dealer, unless it is demonstrated to the Commission after complaint or protest that the result of the sale will be detrimental to the public or representation of the manufacturer or distributor. Where a manufacturer refused to allow a dealer to transfer his dealership and the dealer did not protest to the Commission, the district court did not have jurisdiction of the matter. Rather, the Commission had the exclusive jurisdiction.

7. Operations

The manufacturer's standards for operating the dealership are the subject of most state automobile statutes. These include the dealer's duties to prepare and deliver automobiles to customers, the dealer's obligations to perform warranty work, the manufacturer's manner of distributing cars, the day-to-day relations between the manufacturer and dealer, and arrangements for financing of automobiles.

a. Delivery and Preparation Obligations

Many states require each manufacturer to specify in writing to its dealers the dealer's delivery and preparation obligations with respect to new vehicles, and in some states, to file schedules of such obligations with the state motor vehicle board. Other states simply require that the compensation paid for such work be fair or reasonable.

b. Warranty Obligations

In most states, it is unlawful for the manufacturer to refuse to compensate dealers fairly or reasonably for warranty work, or to discriminate in the payment of warranty claims. The manufacturer must notify the dealer of its warranty policies and in some states file a copy of

341 See ILL. REV. STAT. ch. 1211/2, par 757; ILL. REV. STAT. ch. 1211/2, par 754(d); WIS. STAT. § 218.01(3c).

342 TEX. REV. CIV. STAT. ANN. Art. 4413(36), § 5.02(b)(8).


344 See, e.g., ALA. CODE § 8-20-6; CAL. VEH. CODE § 3064(a); CONN. GEN. STAT. § 42-133s; ILL. REV. STAT. ch. 1211/2, par 755; MASS. GEN. L. ch. 93B, § 5; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(9); WIS. STAT. § 218.01(3)(a)22.

345 See, e.g., CAL. VEH. CODE § 3064(a); MASS. GEN. L. ch. 93B, § 5; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(9); WIS. STAT. § 218.01(3)(a)22.

346 See, e.g., FLA. STAT. § 320.696.

347 See, e.g., CONN. GEN. STAT. § 42-133s; FLA. STAT. § 320.696; ILL. REV. STAT. ch. 1211/2, par 756(b); MASS. GEN. L. ch. 93B, § 6; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(9); WIS. STAT. § 218.01(3)(a)22.

348 See, e.g., CAL. VEH. CODE § 11713.3; CONN. GEN. STAT. § 42-133cc(9).

349 See, e.g., CAL. VEH. CODE § 3065; CONN. GEN. STAT. § 42-133s.
its warranty reimbursement schedule with the motor vehicle board, which may determine whether it is reasonable or not. In addition, many states require that warranty claims be approved or denied within a specified period, usually 30 days, of receipt by the franchisor.

c. **Allocation Systems**

Allocation systems and practices in distributing cars are another area of concern at the state level. It is unlawful in some states for a manufacturer to withhold or fail to deliver cars, parts, or accessories within a reasonable time and in reasonable quantities after the dealer's order; or to implement or change an allocation system that is arbitrary or capricious.

d. **Regulating Day-to-Day Activities**

Limitations upon the manufacturer's control over day-to-day dealer operations generally take two forms: prohibitions upon the manufacturer's coercion or intimidation of the dealer, and general declarations that certain manufacturer conduct is unlawful.

The types of conduct that the manufacturer may not coerce or intimidate include coercing the dealer: to order or accept any motor vehicle or other product that it has not voluntarily ordered; to order any car with particular features that are not included in the standard list price of the motor vehicle; to order any products for customers; to participate in advertising campaigns, contests, or promotional campaigns at the dealer’s expense; to do any act "prejudicial" to the dealer by threatening to cancel the agreement; to perform any act that would be financially detrimental to the dealer or that would impair its goodwill; to obtain or provide installment financing through a particular source; to refrain from acquiring other franchises; or to change locations or make substantial alterations to the premises.

Other limitations upon the manufacturer's power to establish terms of operation of the dealership to the dealer include: restrictions upon delivery by the manufacturer of unordered vehicles, parts, or accessories; the manufacturer's control over the capital structure of the dealership; requirements that the dealer prospectively assent to a release, assignment or estoppel that would relieve the manufacturer from liability; increasing or decreasing prices in proscribed ways; discrimination in inducements for sales by the dealer to the state or its political subdivisions; denying dealers the right of free association; competing directly with dealers; engaging in predatory practices; and selling cars to unlicensed dealers. Regulations in California are perhaps more extensive than in other states; it has regulations regarding such

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350 See, e.g., CAL. VEH. CODE § 3065.

351 Id.

352 See, e.g., Id.; CONN. GEN. STAT. § 42-133s; ILL. REV. STAT. ch. 1211/2, par 756; MASS. GEN. L. ch. 93B, § 6; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(9).

353 See generally ALA. CODE § 8-20-4; CONN. GEN. STAT. § 42-133cc; ILL. REV. STAT. ch. 1211/2, par 754; MASS. GEN. L. ch. 93B, § 4; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02; WIS. STAT. § 218.01(3)(a).

354 See, e.g., ALA. CODE § 8-20-4; CAL. VEH. CODE § 11713.2; N.C. GEN. STAT. § 20-305(2); COLO. REV. STAT. §§ 12-6-118; 12-6-120; ILL. REV. STAT. ch. 1211/2, par 754(c). See also CAL. VEH. CODE §§ 18400 to 18413; FLA. STAT. §§ 545.01 to 545.12.

355 See, e.g., ALA. CODE § 8-20-4; CAL. VEH. CODE 11713.3; CONN. GEN. STAT. § 42-133cc; ILL. REV. STAT. ch. 1211/2, par 754(e); MASS. GEN. L. ch. 93B, § 4; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02; WIS. STAT. § 218.01(3)(a).
matters as signs identifying the location of automobile dealerships, the size of display areas, the maintenance and location of business records, and other matters.356

e. **Automobile Financing Arrangements**

A number of states place restrictions upon the manufacturer's freedom to arrange vehicle financing at either the wholesale or retail level.357 Dealers typically finance their purchases of cars through finance companies or banks, and retail purchasers similarly finance their automobile purchases from the dealers. Some manufacturers have wholly owned finance companies (or arrangements with independent finance companies) that may assist dealers or consumers in making these arrangements.

State statutes that regulate manufacturer involvement in the financing of automobiles seek to curb the perceived abuse to dealers of the manufacturer's power over financing as well as over the supply of cars. Thus, many statutes forbid the manufacturer from coercing dealers to do business with a particular finance company or from conditioning the sale of automobiles upon the dealer's agreement to make financing arrangements through a particular company.358

8. **Encroachment**

Anti-encroachment or “elbow-room” statutes restrict the manufacturer's freedom to appoint new dealers within a specified proximity of existing dealers. The purpose of such statutes is to prevent oversaturation of an area with dealers in a particular line of cars.359 A manufacturer's assignment of a territory is an essential aspect of the franchise relationship and, therefore, part of a motor vehicle agreement under Wisconsin law.360 Most states having such regulations provide that no new appointment may be made, if protested by an existing dealer, unless the motor vehicle board decides that the appointment is for good cause.

Anti-encroachment statutes typically protect a dealer's "market area," a defined term that may vary, depending upon the statute. Some statutes define the market area in terms of an area around an existing dealer,361 while others define it in terms of the radius around the proposed new dealership.362

356 **See** CAL. VEH. CODE §§ 408.00 to 410.01. *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) (South Carolina Code Annotated § 56-15-40(k)(3) makes it unlawful for a manufacturer to require a motor vehicle dealer to ascend to a release. The language of the Act provides that the dealer must be required to agree to the release; therefore, a trial court ruling that a release was invalid on its face was erroneous and was reversed.).

357 **See, e.g.,** FLA. STAT. § 320.64(11); Mass. Gen. L. ch. 93B, § 4(3)(l); Wis. Stat. § 218.01(7).

358 **Id.**


361 **See, e.g.,** ALA. CODE § 312 (10 or 20 miles depending on population); COLO. REV. STAT. § 12-6-102(4) (area set forth in dealer agreement); CONN. GEN. STAT. § 42-133r(14) (greater of 14 miles or area defined in franchise); ILL. REV. STAT. ch. 121/2, par 752 (10 or 15 miles depending on population); MASS. GEN. L. ch. 93B, § 4(3) (area in which dealer made two-thirds of sales); TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 4.06(c) (in county or within 25 miles of an existing dealer); Wis. Stat. § 218.01(1)(x) (10 miles). But See FLA. STAT. § 320.842 (“community or territory”).

362 CAL. VEH. CODE § 507.
Typically, in states that have anti-encroachment statutes, a manufacturer must notify all existing dealers within any relevant area into which the proposed dealer is to be located of the proposal for the new dealership; sometimes, the motor vehicle board must also be notified. The affected dealers may make a formal protest to the board (or in some states, a court), in which case the board holds a hearing on whether the new appointment is justified.

The usual standard for determining whether a new dealership should be added in the territory is good cause. Many statutes specify factors that should be taken into account in determining good cause with respect to placement of a new dealer. Some statutes may not apply to reestablishment of dealerships at a location previously served by a dealer.

9. Private Rights of Action

State dealer laws usually expressly provide that a dealer has a private right of action to recover damages for a manufacturer's wrongful termination and, in some cases, other violations of state statutes. Some jurisdictions, however, do not provide for private rights of action. Thus, although the Louisiana Motor Vehicle Act prohibits a manufacturer from coercing dealers into any agreement, engaging in any unfair practices with respect to dealers, and terminating dealerships unfairly and without just cause, it does not include a private right of action, and there is no implied private right under the statute. In some states, such as Florida, treble damages and attorney's fees may be awarded, and other states provide at least for awards of attorney's fees. However, unless the statute specifically provides for

363 See, e.g., CAL. VEH. CODE § 3062; COLO. REV. STAT. § 12-6-120(a); CONN. GEN. STAT. § 42-133dd(a); N.C. GEN. STAT. § 20-305(5); TEX. MO. VEH. COMM. GENL. R. 67.02; WIS. STAT. § 218.01(3)(f).

364 CAL. VEH. CODE § 3062 (dealer protest required within 15 days); CONN. GEN. STAT. § 42-133dd(a) (20 days); N.C. GEN. STAT. § 20-305(5) (dealers required to protest within 30 days of notice); TEX. MO. VEH. COMM. GENL. R. 67.02 (15 days); WIS. STAT. § 218.01(3)(f) (30 days).

365 ALA. CODE § 8-20-4(3)(1); CAL. VEH. CODE § 3063; CONN. GEN. STAT. §§ 42-133dd(c), (d); ILL. REV. STAT. ch. 1211/2, par 762; MASS. GEN. L. ch. 93B, § 4(3); N.J. REV. STAT. 56:10 to 56:19. For example of how these factors have been applied, see Northside Lincoln Mercury, Inc. v. Ford Motor Co., 603 F. Supp. 2 (D. Minn. 1983), aff'd, 742 F.2d 451 (8th Cir. 1984) (need for dealership convenient to southern and eastern areas of city, existence of established "auto row" on avenue which served area and existence of different markets); House of Suzuki v. U.S. Suzuki, 5 N.J.A.R. 481 (N.J. Admin. Ct. 1983) (new dealer prohibited where existing dealer derived 75% of its business from existing dealer's area, existing dealer was rendering adequate and convenient service, and new dealership would adversely affect existing dealer).


367 See, e.g., ALA. CODE § 8-20-11; CONN. GEN. STAT. § 42-133ee; FLA. STAT. § 320.697; ILL. REV. STAT. ch. 1211/2, par 763; MASS. GEN. L. ch. 93B, § 12A; TEX. REV. CIV. STAT. ANN. ART. 4413(36) § 6.06; WIS. STAT. § 218.01(9).

368 See, e.g., ALA. CODE § 8-20-11; CONN. GEN. STAT. § 42-133ee; FLA. STAT. § 320.697; ILL. REV. STAT. ch. 1211/2, par 763; MASS. GEN. L. ch. 93B, § 12A; TEX. REV. CIV. STAT. ANN. ART. 4413(36) § 6.06; WIS. STAT. § 218.01(9).


370 Fla. Stat. § 320.397. See ILL. REV. STAT. ch. 1211/2, par 63 (treble damages for willful or wanton violations); WIS. STAT. § 218.01(9); Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of N. Am., Inc., 32 F.3d 528 (11th Cir. 1994).

371 ALA. CODE § 8-20-11; CONN. GEN. STAT. § 42-133ee; FLA. STAT. § 320.697; ILL. REV. STAT. ch. 1211/2, par 763; WIS. STAT. § 218.01(9).
punitive damages, a dealer may not recover them on the basis of the statute; he must allege and prove an independent tort. 372

10. State Tribunals

In many states, the state motor vehicle board is an administrative body with quasi-judicial powers over automobile dealer matters. Such boards may have power to hear and determine a wide range of complaints, including complaints of wrongful termination or nonrenewal, 373 dealer preparation and warranty reimbursement schedules, 374 whether there is good cause for refusal to transfer the dealership 375 or establishment of a new dealer. 376 In Iowa, for example, the department of inspections and appeals may determine in the first instance whether a franchisor has good cause to terminate or refuse to renew a franchise, or appoint an additional dealer. That department's decision is subject to review only by the department of transportation, whose decision is final and nonappealable. 377 Where state law vests exclusive jurisdiction to hear certain disputes in such a state tribunal, a court may not have jurisdiction. 378

The authority of state motor vehicle boards to determine certain questions may be limited. For example, the Nebraska board has no authority to determine whether a dealer is entitled to reimbursement for warranty work, 379 and the Florida board does not have authority to interpret arbitration clauses. 380 In contrast, the Illinois Motor Vehicle Review Board has exclusive jurisdiction to determine whether there is good cause for termination of a motor vehicle dealer's franchise. 381

There are two significant issues concerning the jurisdiction of motor vehicle boards that are usually not dealt with in the statutes. First, does the dealer's failure to comply with the procedural requirements for making a complaint to the board constitute a waivable defect? The question is important since the time in which the dealer must act to file a complaint is usually quite short, and the procedural requirements may be complex, or at least less than obvious. 382

373 See, e.g., CAL. VEH. CODE § 3066; FLA. STAT. § 20.641; TEX. REV. CIV. STAT. ANN. Art. 4413(36) § 5.02(3); WIS. STAT. § 218.01(2)(b)2.
374 See, e.g., CAL. VEH. CODE § 3066.
375 See, e.g., Id.; FLA. STAT. § 320.643.
376 See, e.g., CAL. VEH. CODE § 3066; CONN. GEN. STAT. § 42-133dd; FLA. STAT. § 320.642; N.C. GEN. STAT. § 20-305; WIS. STAT. § 218.01(2)(f).
381 Crossroads Ford Truck Sales, 2011 IL 111611.
382 See, e.g., FLA. STAT. § 320.641(3) (complaint must be filed in triplicate).
In some states, failure to follow the procedural requirements is a jurisdictional defect that deprives the board of power to decide the matter.383

The second important issue is whether the dealer’s failure to pursue a remedy before a state motor vehicle board deprives him of the right to proceed before a court for injunctive relief or damages. A related issue is whether adjudication of the fairness of a termination before a board, especially when the ruling is adverse to the dealer, bars litigation of such issues in subsequent proceedings. A proceeding before a motor vehicle board to protect a motor vehicle manufacturer’s requirement that a dealer contribute financially to an advertising campaign could not be removed to federal court because the state motor vehicle board was acting in regulatory and administrative capacity rather than as a court.384

V. FARM AND HEAVY EQUIPMENT STATUTES

A. Introduction

Forty-five states have statutes that specifically protect dealers in farm implements or heavy equipment. The range of products specifically covered within these categories varies widely. Farm equipment may, for example, include garden equipment, generic equipment like tractors, or may be restricted to equipment used in agriculture. Heavy equipment may include or exclude construction equipment, road-building equipment, forestry equipment or mining equipment. Definitions vary widely and have been construed to cover a variety of pieces of equipment.

The protections afforded are varied. Most statutes provide for manufacturer repurchase of equipment upon termination. Many prohibit termination without good cause; some protect the rights of the dealer to transfer; and some address operational issues.

B. Definitions of Farm Equipment and Heavy Equipment

The California Act385 is one of the broadest. It covers the retail distribution, sale, and rental of all-terrain vehicles and equipment and implements, or attachments used for, or in connection with, agriculture, construction, utility activities, mining, forestry, and lawn and garden maintenance.386 In contrast, under Colorado Law,387 “equipment” includes machines designed for or adapted and used for agriculture, horticulture, floriculture, livestock, grazing, light industrial, utility, and outdoor power equipment but not earthmoving or heavy construction equipment, mining equipment, or forestry equipment.388

386 CAL. BUS. & PROF. CODE §§ 22901 (j)(1)(A) - (D), (j)(2).
The Connecticut Act,389 while similarly broad, excludes single-line dealers engaged in the retail sale and service of industrial, forestry, and construction equipment. In contrast, the Florida Act390 defines “equipment” narrowly as “tractors or farm implements which are primarily designed for or used in agriculture.”391

When disputes arise as to the coverage of an act, the courts use conventional methods of statutory construction. For example, the definition of “outdoor power equipment” in the Tennessee Power Equipment statute was ambiguous, but upon resort to aids of construction, the court concluded that the scope of the law dealt with tools to simplify or magnify work and did not apply to recreational equipment.392 On the other hand, it was not clear under this statute whether a van was industrial equipment.393 The Louisiana Repurchase Act394 applies to “farm, construction, heavy industrial material handling, utility, and lawn and garden equipment.” When there was a dispute as to whether a piece of machinery was “utility” equipment, the court looked to the statutory definition of “utility,” which included public gas, electric, water, sewer, telephone, or related services. Accordingly, heating, ventilation, and air-conditioning equipment did not fall into any of these categories.395

The term “horticultural” did not apply to equipment for home use or personal use, as opposed to agricultural use, and therefore, a dealer in gardening and mowing equipment could not avail itself of the repurchase provisions of the Nebraska Act.396

C. Prohibitions

The range of prohibitions under equipment statutes is very broad. Some statutes are quite narrow, and require only that the manufacturer repurchase the dealer’s inventory on termination. Others are far broader, governing termination, transfer, pricing and operational issues. Principal prohibitions include:

- The manufacturer or supplier may not terminate, cancel, or fail to renew a dealer's agreement or substantially alter that dealer's competitive circumstances without good cause and prior written notice of the supplier's intent.397

389 CONN. GEN. STAT. ANN. §§ 42-345 to 354 is entitled the “Farm, Forestry, Yard and Garden Equipment Dealers and Suppliers Act.”

390 FLA. STAT. ANN. §§ 686.40 to 418 (2004) is entitled the “Agricultural Equipment Manufacturers and Dealers Act.”

391 FLA. STAT. ANN. § 686.402(6).


397 ALA. CODE § 8-21A-2(7); see also ARK. CODE ANN. §§ 4-72-310(b)(3)(A), (b)(4); Southern Implement Co., Inc. v. Deere & Co., 122 F.3d 503 (8th Cir. 1997); COLO. REV. STAT. § 35-38-104(2)(a) - (b); MD. COD. ANN. COM. LAW §§ 19-
- Many statutes provide for prohibition against unreasonable restraints on transfer.
- The supplier may not discriminate in prices.\textsuperscript{398}
- Upon termination or nonrenewal, the supplier will repurchase inventory, usually at a prescribed percentage of the purchase price.\textsuperscript{399} The repurchase option is frequently available to heirs of a deceased dealer.
- Several statutes incorporate “no waiver” clauses that prohibit the supplier from requiring that the franchisee agree to a provision that would waive compliance with the act.\textsuperscript{400}

Some statutes include additional or unique protections. For example, it is unlawful under South Carolina law for a manufacturer or distributor of machinery, implements, outdoor power equipment, or mechanical devices used in farming, construction, or industry “to engage in an action that is arbitrary, unconscionable, or in bad faith and that causes damage to any of the parties, the equipment dealer, or to the public.”\textsuperscript{401}

South Dakota makes it a Class 1 misdemeanor for a manufacturer or distributor to coerce a dealer, or attempt to coerce a dealer, to make unwanted purchases of merchandise or expenditures.\textsuperscript{402} It is also a Class 1 misdemeanor for a manufacturer or distributor to cancel a dealer “unfairly, without due regard to the equities of the dealer and without just provocation.”\textsuperscript{403} A manufacturer who violates the foregoing provisions is liable to the dealer for damages caused by the violation.\textsuperscript{404}

The Idaho Act provides that agreements may not be amended or supplemented unless the same amendment or supplement is imposed on all similarly situated dealers in the state. An aggrieved dealer may obtain injunctive relief or monetary damages, including costs and attorney's fees.\textsuperscript{405}

\textsuperscript{398} See, e.g., ALA. CODE § 8-21A-3,(1) – (13); ARK. CODE ANN. §§ 4-72-310(b)(3)(A), (b)(4); \textit{Southern Implement Co., Inc. v. Deere \\& Co.}, 122 F.3d 503 (8th Cir. 1997); CAL. BUS. \\& PROF. CODE § 229092(a) - (m); COLO. REV. STAT. § 35-38-104(2)(a) - (b).

\textsuperscript{399} ARK. CODE ANN. § 4-72-301(3); \textit{Capital Equipment, Inc. v. CNH America, LLC}, 471 F. Supp. 2d 951 (E.D. Ark. 2006); COLO. REV. STAT. § 35-38-106(1); CONN. GEN. STAT. ANN. §§ 42-347(a) - (b), 42-348(a) - (d); ILL. COMP. STAT. 815/715-1 to 11; IND. CODE §§ 15-7-7-1 to 18; KAN. STAT. ANN. §§ 16-1001 - 1007; NEV. REV. STAT. ANN. §§ 597.112 - 118; S.D. CODIFIED LAWS §§ 37-5-5, 37-5-9.

\textsuperscript{400} See, e.g., CAL. BUS. \\& PROF. CODE § 22902(a) - (m); GA. CODE ANN. § 13-8-15.

\textsuperscript{401} S.C. CODE ANN. § 39-6-50.

\textsuperscript{402} S.D. CODIFIED LAWS §§ 37-5-1, 37-5-2.

\textsuperscript{403} S.D. CODIFIED LAWS § 37-5-3.

\textsuperscript{404} S.D. CODIFIED LAWS § 37-5-4.

\textsuperscript{405} IDAHO CODE ANN. §§ 28-24-101 to 107.
The Alabama Act provides that any dealer may bring an action against a supplier in court for damages sustained by the dealer as a result of supplier's violation of any part of the law, together with the actual costs of the action, including, but not limited to, reasonable attorneys' fees along with any consequential damages sustained by the dealer. 406

D. “Good Cause”

Equipment statutes contain a wide variety of definitions of “good cause” or its equivalent. While these statutes parallel business format relationship laws in defining “good cause” in terms of bankruptcy, defaults under the agreement, abandonment or failure to pay, 407 they give more leniency to the dealer where sales performance is at issue.

For example, under the Minnesota Agricultural Equipment Dealership Act, a manufacturer may measure a dealer's performance by achievement of market share if the dealer, after receiving notice from the manufacturer that its requirements for market penetration, based on the manufacturer's experience and comparable marketing areas, consistently fails to meet the manufacturer's requirements. However, where a manufacturer notified a dealer in January and March of a requirement to be achieved that year, the notification was unreasonable because it came too late. In addition, the manufacturer's requirement that the dealer increase its market share by 500% in one year was unreasonable on its face. 408 Under Oregon law, if the reason for termination is the retailer's failure to meet marketing criteria, the supplier must give one year's written notice, which provides the retailer one year to meet the criteria. 409

The South Dakota Act specifically prohibits certain reasons for termination. A manufacturer or distributor does not have good cause to discontinue a dealership, or establish an additional dealership with the same-line make in the community, simply because: (1) there is a change of executive management or ownership of the dealer unless such a change would be detrimental to the representation or reputation of the manufacturer's product; (2) the dealer refuses to purchase or accept delivery of machinery or parts unless such equipment is necessary for the operation of the machinery; (3) the sole fact that the manufacturer desires further market penetration; (4) the fact that the dealer has an interest in the sale of another line-make of machinery; or (5) refusal by the dealer to participate in any national advertising campaign. 410

Under the Maine Power Equipment Dealer Law, a manufacturer did not have good cause for terminating the franchise relationship simply by changing the trademark of the equipment sold; good cause existed only if the manufacturer actually discontinued production of the equipment. The statute could not be interpreted to require that only a change in trademark would constitute good cause because that would be inconsistent with the intent of the statute, which shows a clear intent to protect franchisees. A court rejected a dealer's contention under


407 See, e.g., Md. CODE ANN. COM. LAW §§ 19-101 to 103; N.Y. GEN. BUS. LAW §§ 696-a to 696-c; S.C. CODE ANN. § 39-6-50(3)(a) - (e).


409 OR. REV. STAT. ANN. §§ 646.447 - 449.

410 S.D. CODIFIED LAWS § 37-5-14.
the same law that a manufacturer's termination of the dealer was unlawful when similarly situated dealers had not been terminated. The Act required that, if a franchisor terminated on the basis of a service-related deficiency, it give the dealer advance notice of the deficiency and an opportunity to cure. Where a manufacturer terminated for falsification of warranty claims, the default was not service related, and therefore, no opportunity to cure was required. On the other hand, the statute stated that there was good cause for termination when a manufacturer discontinued production of the franchised goods; hence, a verdict in favor of the franchisee for wrongful termination on this basis was reversed.

VI. Conclusion

Legislation is an imperfect tool and reflects political strengths and weaknesses, compromises and idiosyncrasies in the choice of language. Nonetheless, the broad strokes of special industry legislation teach that the sky does not fall when states enact laws governing franchises. Much of the regulation of the automobile industry was enacted when that industry was dominated by the "big three" automakers. Likewise, the oil, beer and equipment industries have grown notwithstanding pervasive legislation.

What does special industry legislation teach us about business format franchising? Most obviously, it shows that there are a number of ways of legislatively easing transitions when long term contracts and substantial capital investments are at stake. Provisions for repurchase of inventory or takeover of premises make the draconian prospect of termination or nonrenewal—particularly in the case of system-wide changes (as opposed to franchisee fault) far more palatable. Likewise, particularized laws in the beer industry with respect to mergers and acquisitions serve as an example to how franchisors might do with similar circumstances in their industries. Automobile anti-encroachment statutes stand as a laboratory for handling encroachment issues.

While these legislative examples may point the way for policymakers, judicial decisions are instructive for litigators and those involved in planning for franchisors and franchisees. For example, the Supreme Court's decision on constructive termination under the PMPA contains principles that may be applicable to relationship statutes generally. On the other hand, the Maine Supreme Court's decision rejecting a change in trademark as a "termination" is a cautionary note for franchisor consolidations.

Whether it is legislation or judicial decisions, the richness of ideas and concepts in special industry legislation can only enhance and diversify the practice of law in business form franchising.


412 FMS, Inc. v. Volvo Const. Equipment N. Am., Inc., 557 F.3d 758 (7th Cir. 2009).
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