LEGAL ISSUES ARISING FROM DEALER AND DISTRIBUTOR RELATIONSHIPS

Rossell Barrios
Goldman Antonetti & Córdova, P.S.C.
San Juan, Puerto Rico

Kerry L. Bundy
Faegre & Benson, L.L.P.
Minneapolis, MN

Ronald K. Gardner
Dady & Garner, P.A.
Minneapolis, MN

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I. INTRODUCTION

Products and services are delivered to the marketplace through many different channels of distribution. The systemized buyer-seller relationships that exist between manufacturers and their distributors and dealers comprise one of these channels. Manufacturers often enter into contracts with distributors or dealers, in which the rules of the relationship are set out. Typically, a distributor-dealership agreement grants a license to a distributor or dealer to purchase and stock an inventory of the manufacturer's product and resell it to retailers or to the general public. Strictly speaking, a dealer is a retailer—someone who purchases from either the manufacturer or a wholesaler and resells to the public. A distributor, on the other hand, is engaged in the wholesale distribution of a product—someone who purchases from a manufacturer and sells to retailers, rather than to the general public. In practice, the terms are sometimes used interchangeably, and, because the same legal concepts apply to each relationship, this paper will not distinguish between the terms distributor and dealer.

The relationships between manufacturers and their dealers often involve legal principles nearly identical to those that govern the franchise relationship. Just as disputes may arise between franchisors and franchisees, so too may disputes arise between manufacturers and dealers. This paper will first explore the similarities and differences between dealer and franchise relationship statutes, and will then survey the law applicable to dealer relationships in the construction and agricultural equipment, alcoholic beverage, petroleum product, and motor vehicle industries. Thereafter, the paper will take an in-depth look at litigation and counseling issues relating to termination, nonrenewal, transfers, remedies, damages, and other critical issues that manufacturers and their dealers routinely face.

II. SUMMARY OF DEALER RELATIONSHIP STATUTES

A. Overview

While several specific industry laws exist in many states, general or industry-specific dealer relationship statutes are not commonplace in state statutory schemes. Without such statutes, a dealer may have no guaranteed protections against adverse actions taken by the manufacturer throughout the course of the dealership relationship. When difficulties arise between a dealer and the manufacturer, the dealer often mistakenly believes that the common law provides the only source of relief. However, a dealer may easily be covered under many franchise relationship statutes, even though the parties, and often their attorneys, never even considered the possibility that a “franchise” relationship was at issue. Franchise relationship statutes can have a broad, and often unexpected, reach, depending upon how the individual state statute defines “franchise.” Nineteen states, along with Puerto Rico, have general franchise relationship statutes that may provide dealers with protections in their relationships with manufacturers.

1 The authors thank Dady & Garner law clerk Rachel Myers and Goldman Antonetti & Cordova’s Victor Quinones for their assistance in preparing this paper.

The common law and franchise relationship statutes are not the only sources of protection for dealers. A few states do have relationship statutes that explicitly include “dealerships” within their scope, and there are also federal and state laws that protect dealers in a variety of specific industries, such as beer, wine, liquor, farm implements, heavy and industrial machinery, motor vehicles, gas, and oil.

B. Key Similarities and Differences Between Dealer and Franchise Relations Statutes

Dealer and franchise relationship statutes have many things in common. Both govern specific contractual relationships, and both dealer and franchise relationship statutes generally provide dealers and franchisees with protections against certain actions by their manufacturers and franchisors. Dealer and franchise relations statutes impose requirements that manufacturers and franchisors must fulfill before they can lawfully terminate or fail to renew a dealership or franchise, or refuse to grant a transfer of the dealership or franchise.

The major difference between dealer and franchise relationship statutes is the scope of their applicability—the result of the inherent difference between the definitions of franchises and dealerships. The definition of “dealership” is much broader than that of “franchise,” but, as previously mentioned, it is possible for state franchise relationship laws to apply to the dealer relationship. The specific language of individual state franchise relationship statutes will determine whether dealers are able to receive the protections of franchise relationship laws.

While each state’s franchise relationship law has a different definition of the term “franchise,” most definitions require the presence of the following three elements:

1. The relationship must involve the use of a trademark;

2. There must be either a “community of interest” between the franchisor and the franchisee, or the franchisor must provide the franchisee with a “marketing plan”; and

3. The franchisor must charge the franchisee a fee.4

It is possible for these three elements to exist in a dealer relationship, thus making the dealership indistinguishable from a franchise and causing the dealership to be subject to franchise regulation. In order to understand whether a dealer would be covered by a franchise relationship statute, it is important to examine how courts have interpreted each of the three elements required for a franchise.

CODIFIED LAWS, §§ 37-5A-1 to -87 (Michie 2006)), Virginia (VA. CODE ANN. §§ 13.1-557 to -574 (Michie 2006)); Washington (WASH. REV. CODE §§ 19.100.010-.940 (2006)); and Wisconsin (Wis. STAT. §§ 135.01-.07 (2006)). Puerto Rico also has a franchise relationship statute, which can be found at LAWS OF P.R. ANN. tit. 10 § 278 et seq. (2005).

3 See, e.g., Wis. STAT. ANN. §§ 135.01-.07.

4 FUNDAMENTALS OF FRANCHISING (Rupert M. Barkoff & Andrew C. Selden eds., 2004).
1. **Trademark**

The first element required of a franchise relationship is that it must involve the use of a trademark. States vary on their interpretations of how this element is satisfied—some states require that the operation of the franchisee’s business must be “substantially associated” with the franchisor’s trademark. In Illinois, for example, a franchisee’s business must be “substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate.” If the franchisee is permitted or required to identify its business to its customers primarily under the trademark, or otherwise uses the franchisor’s mark “in a manner likely to convey to the public that it is an outlet of the franchisor,” this element is satisfied. The “[m]ere absence in the franchise agreement of permission to use the franchisor’s name or mark will not alone negate “substantial association.” Therefore, to avoid applicability of franchise laws, the manufacturer would need to make sure that dealers were not using its name and marks. However, because dealers are generally authorized to use the manufacturer’s trademark, this element is rarely in play when a dealer attempts to be defined as a “franchisee.”

In other states, the trademark element is satisfied where the franchisor’s trademark simply identifies the goods or services sold. In Rhode Island, actual use of the trademark is not required—only that the franchisee be “allowed” to have its business associated with the franchisor’s marks. Therefore, in Rhode Island, a dealer who simply sells products under a manufacturer’s trademark could be considered to be associated with the manufacturer.

It would be possible for a dealer to satisfy the trademark-use element in both jurisdictions—those that require substantial association and those that require identification of the goods and services sold.

2. **Community of Interest/Marketing Plan**

While a “community of interest” is typically interpreted far more broadly than a “marketing plan,” it is possible for a dealer to fall within each of these definitions and satisfy the second element required of a franchise.

Washington and Minnesota have defined the phrase “community of interest” to mean a continuing financial interest of the parties in the operation of the “franchisee.” In New Jersey, which requires a “community of interest,” a distribution arrangement which required the dealer to make substantial investments specific to the franchised business was deemed to satisfy the

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5 ILL. COMP. STAT. § 705/3(1)(b).
6 ILL. ADMIN. CODE tit. 14, § 200.103.
7 Id.
8 Id. The Illinois Regulation addressing the trademark element states, “A contractual prohibition on use of the franchisor’s name or mark must be policed and enforced to insure that the name or mark is not being substantially used without the franchisor’s knowledge.” Id.
9 R.I. GEN. LAWS § 19-28.1-3(g)(1)(C). See also IOWA CODE § 523H.1.3a(1)(c).
10 See Martin Investors, Inc. v. Vander Bie, 269 N.W.2d 868 (Minn. 1978).
Since a dealer has to make substantial investments in the purchase of goods from the manufacturer, and because a manufacturer’s earnings will often be based on the volume of the dealer’s purchases or sales, a dealer may successfully argue that a continuing financial interest exists in the dealer relationship.\(^1\)

Maryland determines whether the “marketing plan” element has been met by examining a list of factors, including:

1. Price specification, special pricing systems, or discount plans;
2. Sales or display equipment or merchandising devices;
3. Sales techniques;
4. Promotional or advertising materials or cooperative advertising;
5. Training regarding the promotion, operation, or management of the business; and
6. Operation, managerial, technical, or financial guidelines or assistance.\(^1\)

It is important to note that not every one of these factors must be present before a “marketing plan” will exist. In California, the franchisor is not even required to give marketing suggestions to the franchisee. The mere availability of such suggestions upon request is sufficient to satisfy this element.\(^1\) These broad definitions could encompass almost any dealer relationship, thereby satisfying the “community of interest”/“marketing plan” element.

3. Franchise Fee

A franchise fee is generally defined as any fee or charge that the franchisee is required to pay for the right to do business under the franchise agreement.\(^1\) While a franchise fee has been broadly interpreted, it generally does not include payment for a reasonable quantity of goods for resale at a bona fide wholesale price.\(^1\) The franchise fee requirement is the most frequent roadblock to applying franchise relationship statutes to dealers. However, creative lawyers have convinced many courts that what might otherwise not be seen as a “traditional fee” meets the statutory definition.\(^1\)


\(^1\) See W. Michael Garner, BRANCH. DISTR. LAW & PRAC. (2003).

\(^1\) Md. REGS. CODE tit. 02, § 02.02.08.02(B).

\(^1\) Cal. Dept. of Corps., Guidelines for Determining Whether an Agreement Constitutes a “Franchise”, Release No. 3-F (Revised), 3 (Feb. 21, 1974) (“If the franchisor is his advertising to prospective franchisees claims to have available a successful marketing plan, the element of a marketing plan presumably will be present.”).

\(^1\) FUNDAMENTALS OF FRANCHISING, supra, n. 2.

\(^1\) See, e.g., 815 ILL. COMP. STAT. ANN. 705/3(14).

\(^1\) Current Tech. Concepts, Inc. v. Irie Enters., Inc., 530 N.W.2d 539 (Minn. 1995).
While most state relationship statutes include these three elements in their franchise definition, some do not. For example, in Arkansas, Connecticut, Missouri, and New Jersey, “franchise” is defined without the requirement of a fee. In these states, it is significantly easier for dealers to fit within the “franchise” definition and receive the protections of franchise relationship laws.

It is possible for a dealer to satisfy the statutory elements required of a franchise, but that it is not always the case. Often, a dealership will be removed from the scope of franchise relationship statutory protections because of a lack of one of the three elements. Dealer agreements, which define the relationship between the dealer and the manufacturer, often do not involve a business format, and for that reason, fail to be considered franchises. It is true that suppliers sometimes license the right to use a trademark to the dealer, and will provide some type of marketing guidance, but rarely do dealers get the type of comprehensive marketing assistance that franchisees do. Also, dealers usually do not pay any obvious fee for the right to sell the supplier’s product.

18 Arkansas defines a franchise as:

a written or oral agreement for a definite or indefinite period in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic within an exclusive or nonexclusive territory or to sell or distribute goods or services within an exclusive or nonexclusive territory at wholesale or retail, by lease agreement, or otherwise.

ARK. CODE ANN. § 4-72-202(1)(A). Note also that this extremely broad definition of “franchise” does not contain the requirement of a marketing plan or a community of interest.

19 In Connecticut, a franchise is defined as:

an oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor . . . and (2) the operation of the franchisee’s business pursuant to such plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate . . . .

CONN. GEN. STAT. § 42-133e(b).

20 Missouri defines franchise as:

a written or oral arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise . . . .

MO. REV. STAT. § 407.400(1).

21 In New Jersey, a franchise is:

a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.

N.J. STAT. ANN. § 56:10-3(a).
C. **Industry Specific Statutes**

When the protections of franchise relationship statutes or general dealer relationship statutes are unavailable, special industry laws may still afford dealers significant protections. Among the industries subject to such laws are petroleum, automobiles, farm implement, construction and/or industrial equipment, and beer, wine, and liquor.

1. **Beverages (Beer, Wine, Liquor)**

Forty-five states have laws that govern the relationship between liquor, beer, or wine manufacturers/importers and distributors. The extent of protection varies considerably from state to state. Generally, though, these statutes protect against wrongful terminations or nonrenewals, preserve exclusive territories, and restrict the manufacturer/importer’s power to restrict transfers of the distributorship. These types of relationship statutes are unique in that they may provide distributors with exclusive territories.

2. **Agricultural Equipment**

Many states also have statutory protections for dealers of farm implements and related equipment. Primarily, these statutory provisions provide protections related to termination and nonrenewal of agricultural equipment dealers. Here are some examples:

- The North Dakota Century Code § 51-07-01.1 states that farm implement manufacturers, wholesalers, and distributors may not terminate, cancel or fail to renew any contract with retailers of those products who stock parts or whole goods without good cause.

- The Minnesota Agricultural Equipment Dealership Act, Minn. Stat. §§ 325E.01-.07, requires good cause for cancellation, failure to renew or substantial change in the competitive circumstances of farm equipment dealerships.

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23 See id.

24 Id.

25 Id.

26 Alaska, Hawaii, Nevada, New Jersey, and Wisconsin are the only states that do NOT have statutes concerning the relationship between farm implement and other equipment dealers and their manufacturers or distributors.

27 Specifically, the section states,

Any manufacturer, wholesaler, or distributor of merchandise and tools covered under section 51-07-01, excluding automobile dealers, truck dealers, or parts dealers of the automobiles or trucks, that enters a contract with any person engaged in the business of retailing the covered merchandise by which the retailer agrees to maintain a stock of the covered merchandise may not terminate, cancel, or fail to renew the contract with the retailer without good cause.

N.D. CENT. CODE § 51-07-01.1.
South Dakota Codified Laws § 37-5-3 requires that a manufacturer may not cancel a farm, tractor, or implement dealership "unfairly, without due regard to the equities of the dealer and without just provocation."  

Additionally, many of these dealership statutes provide that upon the termination of an agricultural equipment dealer, the manufacturer is required to repurchase all inventories at the fair wholesale market value.  

3. Industrial or Construction Equipment

Several states' farm implement and equipment laws also apply to industrial or heavy equipment. The Georgia Multiline Heavy Equipment Dealer Act is a separate statute that specifically applies to dealers of "heavy equipment," which is defined as:

[S]elf-propelled, self-powered, or pull-type equipment and machinery, including diesel engines, weighing 5,000 pounds or more and primarily employed for construction, industrial, maritime, mining, or forestry uses.

Under the Georgia Act, heavy equipment dealers cannot be terminated or nonrenewed without good cause and 120 days' written notice. Also, the supplier or manufacturer may not unreasonably refuse consent to a transfer. Minnesota has a similar statute, which specifically

28 Specifically, the section states,

No farm equipment manufacturer, directly or through an officer, agent, or employee may terminate, cancel, fail to renew, or substantially change the competitive circumstances of a dealership agreement without good cause. "Good cause" means failure by a farm equipment dealer to substantially comply with essential and reasonable requirements imposed upon the dealer by the dealership agreement, if the requirements are not different from those requirements imposed on other similarly situated dealers by their terms.

MINN. STAT. § 325E.062, subd. 1.

29 The full text of the statute reads,

It is a Class 1 misdemeanor for any manufacturer, factory, branch, distributor, or distributor-branch, or any field representative, officer, agent, or representative of any of them, unfairly, without due regard to the equities of the dealer and without just provocation, to cancel the franchise of any dealer.

S.D. CODIFIED LAWS § 37-5-3.

30 See N.D. CENT. CODE § 51-20.2-02 ("Dealers may recover value of merchandise or parts from distributor in certain cases," including termination.); Wis. Stat. § 135.045 ("If a dealership is terminated by the grantor, the grantor, at the option of the dealer, shall repurchase all inventories sold by the grantor to the dealer for resale under the dealership agreement at the fair wholesale market value.").

31 These states include Alabama, Arkansas, Florida, Indiana, Maine, Maryland, Mississippi, Montana, New Mexico, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Texas, and Utah.

32 GA. CODE ANN. § 10-1-730.

33 Id. at § 10-1-731(2).
applies to “heavy and utility equipment,” and extends its coverage to construction equipment, trucks, and mining and forestry equipment.

4. Motor Vehicles

All states, as well as the District of Columbia, have statutes concerning the relationship between automobile manufacturers and automobile dealers. While each state’s automobile dealer statute is unique, these statutes address a similar range of issues in the dealer relationship. The manner of and terms for termination, cancellation or nonrenewal of the relationship are consistently central concerns. Limitations on the manufacturer’s power to restrict transfers of dealerships, and curbs upon the manufacturer’s freedom to place new dealers in an existing dealer’s market area—an area often defined by statute—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, and allocation and delivery of automobiles. Moreover, the Federal Dealers’ Day in Court Act provides a federal cause of action for an automobile dealer against a manufacturer if the manufacturer fails to act in good faith in the performance or termination of a written agreement.

5. Petroleum Products

Dealer-manufacturer relationships in the petroleum industry are governed principally by the federal Petroleum Marketing Practices Act (“PMPA”). The PMPA’s primary purpose is to protect petroleum franchisees and dealers from arbitrary or discriminatory terminations and nonrenewals. Several states also have laws that apply to the relationship between gasoline suppliers and their dealers, but the PMPA expressly preempts state laws that cover its subject matter—termination and nonrenewal.

III. APPLICABILITY

Industry-specific statutes generally require manufacturers to follow protocols that are much more protective of the dealer than the procedures set forth in the dealer agreements. For instance, many dealer agreements do not require good cause for termination, while most industry-specific statutes do. Whether the industry-specific statute applies to the relationship at issue may determine the legality of the manufacturer’s conduct. Issues surrounding the applicability of industry-specific statutes generally focus on whether: (1) the equipment or product at issue falls within the definition of the statute; (2) that state’s industry-specific statute applies to the dealer at issue; and (3) the statute applies to pre-existing agreements.

A. What Products are Covered

The definitions in industry-specific statutes are often broad and imprecise, leading to arguments over whether the statute covers the relationship at issue. For instance, what items

34 Minn. Stat. § 325E.068.
35 Id. at § 325E.068, subd. 2.
constitute products covered by the statutes is a frequent topic of debate.\textsuperscript{38} Another determinate factor may be whether the dealer needs to be selling wholesale or retail.\textsuperscript{39} There may also be an issue over applicability if the dealer only sells parts of the equipment covered by the statute, but not the equipment itself.\textsuperscript{40} In Lake Charles Diesel, Inc. v. General Motors Corp., for example, the court held that the Louisiana Farm, Industrial, Utility and Lawn and Garden Equipment Dealer Law did not extend to a dealer that contracted to maintain a stock of a manufacturer's parts, because the law required the dealer to sell both repair parts and equipment.\textsuperscript{41} This ruling was outcome determinative because the court then held that the agreement's termination provision that required no more than a three-day, no-cause written notice of termination did not violate Louisiana law.\textsuperscript{42}

**B. What Dealers are Covered**

Another issue that may arise is whether a particular state's statute covers the dealer at issue. Typically, if the dealer is located in the state of the statute, absent a choice of law provision, the dealer's home state statute will apply in determining whether the termination was lawful.

If the dealership agreement has a choice of law provision designating application of some state's law other than where the dealer is located, the court will need to determine whose law applies and whether the dealer is protected under that law. If a dealer wants the protection of his home state's statute, the court will determine whether that statute contains an anti-waiver provision that requires application of the statute irrespective of the contractual choice of another state's laws.\textsuperscript{43}

\textsuperscript{38} See Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376 (7th Cir. 2003) (Maine power equipment, machinery and appliance law applied to construction equipment dealership because statute was broad and protected any franchisee selling electric or gas powered equipment machinery or appliances, but Montana's Farm Implement Dealer law did not apply to construction equipment, even if used by farmers); Power & Telephone Supply Co., Inc. v. Harmonic, Inc., 268 F.Supp.2d 981 (W.D. Tenn. 2003) (fiber optic equipment included as "industrial equipment" under the Tennessee Farm Implements, Industrial Equipment, and Motorcycles Dealer Act); Diesel Mach. Inc v. BR Lee Indus., Inc., 12,481 (D.S.D. 2002); Fontenelle Equip., Inc. v. Pattlen Enters., Inc., 629 N.W.2d 534 (Neb. 2001). John Deere Co. v. Gamble, 523 So. 2d 95 (Ala. 1988) (Alabama Farm Equipment Dealers Act applied to consumer products such as lawn mowers because the affected dealer also handled farm equipment supplied by others). See also, 1984 Mich Pub Acts 341: Farm equipment includes lawn and garden equipment, construction equipment, materials handling and earth moving equipment. Nebraska Equipment Business Regulation Act applies to dealers of equipment. Equipment is defined as a machine designed for or adapted and used for agriculture, horticultural, livestock, grazing, forestry or industrial purposes. “Horticultural” does not apply to equipment for home use or personal use (as opposed to agricultural use) and therefore a dealer in gardening and mowing equipment was not governed by the statute.


\textsuperscript{40} See Lake Charles Diesel, Inc. v. General Motors Corp., 328 F.3d 192 (5th Cir. 2003).

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} See, e.g., Power & Telephone Supply Co., Inc. v. Harmonic, Inc., 268 F. Supp. 2d 981 (W.D. Tenn. 2003) (choice of law provision in a dealer agreement choosing California law was trumped by the Tennessee Farm Implement Act, which provided that any contractual term restricting the procedural or substantive rights of a dealer, including a choice of law or forum clause was void).
Conversely, there are times when a dealer physically located outside of a particular state may want to seek protection under that statute. The court will need to determine whether the state statute at issue covers the specific dealer. For instance, whether the Wisconsin dealer statute applies to a given dealer depends on the nature and extent of the dealership's development of, investment in, and reliance on the Wisconsin market.\textsuperscript{44} Courts deciding whether the statute applies to dealers who do not reside in Wisconsin have gone both ways.\textsuperscript{45} Relatedly, if a dealer is located outside of the state designated as the “choice of law” in the dealership agreement, courts have split on whether the dealer is entitled to the protections of the designated state’s laws. The majority of courts have held that parties cannot contract to allow a dealership law to extend beyond a state’s borders.\textsuperscript{46} A minority of courts, however, have held otherwise.\textsuperscript{47}

C. When Does the Statute Apply to Existing Relationships

Many dealer protection statutes have been enacted recently, and whether they can be retroactively applied has frequently become an issue. The Contracts Clause of the U.S. Constitution prohibits the impairment of existing contracts. It provides that: “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.”\textsuperscript{48} The Supreme Court has developed a three-part test to determine whether application of a state statute results in an unconstitutional impairment of a contract:\textsuperscript{49} (1) whether the state law has operated as a substantial impairment of a contractual relationship; (2) whether the state has a “significant and legitimate public purpose behind the regulation,” such as the “remedying of a broad and general social or economic problem”\textsuperscript{50} (this guarantees that the state is exercising its police power, “rather than providing a benefit for special interests”),\textsuperscript{51} and (3) “whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption.”\textsuperscript{52}

\textsuperscript{44} Baldwin Co. v. Tri-Colver, Inc., 606 N.W.2d 145 (Wis. 2000).

\textsuperscript{45} Generac Corp. v. Caterpillar, Inc., 172 F.3d 971, 976 (7th Cir. 1999). See, e.g., A.M. Capen’s Co., Inc. v. Am. Trading Corp., 202 F.3d 469 (1st Cir. 2000) (distributor with rights to sell in Puerto Rico but no place of business, assets or employees there was not covered by Puerto Rican law); L-O Distrib., Inc. v. Speed Queen Co., 611 F. Supp. 1569 (D. Minn. 1985) (dealer whose principal place of business was Minnesota, but whose territory included portions of Wisconsin, was situated in Wisconsin within the meaning of the WFDL).

\textsuperscript{46} Ward’s Equip. Inc. v. New Holland North Am., Inc., 493 S.E.2d 516, 520-21 (Va. 1997) (finding Michigan Franchise Investment Law did not apply to terminated distributor where the distributor did not conduct its business in Michigan, despite the parties’ designation of Michigan law in the distributorship agreement); See Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376 (7th Cir. 2003) (Illinois franchise act did not apply to equipment dealers located outside of state despite Illinois choice of law clause).

\textsuperscript{47} Hobin v. Coldwell Banker Residential Affiliates, Inc., 744 A.2d 1134, 1137 (N.H. 2000) (applying California law to franchisee with place of business in New Hampshire because the contract specified California law.)

\textsuperscript{48} U.S. CONST. art 1 sec. 10, cl. 1.


\textsuperscript{50} Linton v. Comm’r Of Health and Environment, State of Tenn., 65 F.3d 508, 517 (6th Cir. 1995).

\textsuperscript{51} Energy Reserves Group, Inc., 459 U.S. at 412.

\textsuperscript{52} Id.
Courts have uniformly declared unconstitutional the retroactive application of a dealer law to a termination effected in accordance with the existing dealer agreement.53

IV. TERMINATION

Many issues arise when a manufacturer decides to terminate its relationship with a dealer. “Termination” or “cancellation” is the process of ending a dealership during its intended term. Most dealership agreements establish when termination may occur. However, several special-industry protection statutes require the parties - - and judges, juries and arbitrators - - to look beyond the contract to ensure that the termination is not only contractually proper, but also in accordance with the governing state statutes.

A. Procedure

State statutes typically contain three requirements that manufacturers and franchisors must follow before lawful terminations or nonrenewals of dealers and franchisees can occur: (1) a minimum notice period; (2) an opportunity to cure defects; (3) and either “cause” or “good cause” to end the relationship. If manufacturers or franchisors do not adhere to the statutory requirements, the termination or nonrenewal of a dealer or franchisee may be deemed ineffective.

1. Notice of Default

Most states that prohibit a manufacturer from terminating a dealer, except for good cause, also require that the dealer must first be given notice of any defaults or deficiencies in performance.54 In other words, the dealer must be made aware of the reasons for its termination. State dealer and franchise relationship statutes prescribe the amount of notice that must be given. This time period varies from state to state, but typically ranges anywhere from 30 to 90 days. For example, under the Wisconsin Fair Dealership Law “a grantor shall provide a dealer at least 90 days’ prior written notice of termination.”55

Statutes applicable to dealer relationships may also impose additional requirements relating to the form, delivery method, and content of the notice. For example, the California Franchise Relations Act requires that all notices of termination:

(a) Shall be in writing;

53 Cloverdale Equip. Co. v. Manitowoc Eng’g Co., CCH 11,468 (6th Cir. 1998) (denied as unconstitutional retroactive application of statute to implied dealer agreement); Gulfside Distrib., Inc. v. Becco, Ltd., 985 F.2d 513 (11th Cir. 1993) (Florida’s constitution prohibited retroactive application of beer distribution statute to existing agreement); Rolec Inc. v. Finlay Hydrascreen USA Inc., 917 F. Supp. 67 (D. Me. 1996) (retroactive application of franchise law unconstitutional).

54 See, e.g., In re Matterhorn Group, Inc., 2002 WL 3152896 (Bankr. S.D.N.Y. 2002) (finding franchisor violated the New Jersey Franchise Act when it gave franchisee just 15 days’ notice of termination when the Act required 60 days' notice); L.B. Smith, Inc. v. Cedar Rapids Inc., Bus. Franchise Guide (CCH) ¶ 12,436 (M.D. Pa. 2002) and ¶ 12,482 (M.D. Pa. Dec. 16, 2002) (temporary restraining order granted because termination probably violated heavy equipment dealer laws of six states by not providing proper notice or good cause. Preliminary injunction against termination issued because capital-intensive nature of business required notice and opportunity to cure before termination).

55 Wis. Stat. § 135.04.
(b) Shall be posted by registered, certified or other receipted mail, delivered by telegram or personally delivered to the franchisee; and

(c) Shall contain a statement of intent to terminate or not renew the franchise:

(1) Together with the reasons therefore, and

(2) The effective date of such termination or nonrenewal or expiration.\(^{56}\)

With the varying notice periods and additional notice requirements, it is important for manufacturers to consult all potentially governing state statutes before attempting to terminate a dealer.

When a manufacturer fails to comply with the statutory notice requirements, it may be held liable for a violation of the law and may be prevented from terminating the dealer.\(^{57}\) A manufacturer’s failure to give reasonable notice can also be a breach of contract and the implied covenant of good faith and fair dealing.\(^{58}\)

2. Opportunity to Cure

Once a dealer has been given notice of termination, it is typical for dealer statutes to provide the dealer with an opportunity to cure the defaults or deficiencies listed in the notice. Some states specify minimum, and maximum, cure periods.\(^{59}\) Other states merely provide that the franchisee be afforded a “reasonable” time to cure.\(^{60}\) Often, the length of the cure period is dependent on the reasons for termination. For example, under Wisconsin law, a dealer typically has 60 days to cure any claimed deficiency justifying termination.\(^{61}\) However, a dealer is not afforded a cure period if the reason for termination is the occurrence of an assignment for the benefit of creditors or bankruptcy.\(^{62}\) Additionally, if the reason for termination is nonpayment of sums due under the dealership, a dealer only has ten days to cure and remedy the default.\(^{63}\) If the dealer sufficiently rectifies the deficiency within the cure period, the notice will be void and

\(^{56}\) CAL. BUS. & PROF. CODE § 20030.

\(^{57}\) See Designs in Med., Inc. v. Xomed, Inc., 522 F. Supp. 1054, Bus. Franchise Guide (CCH) ¶ 7733 (E.D. Wis. 1981) (granting dealer’s request for a preliminary injunction and enjoining termination of the dealer until the manufacturer first complied with the requirements of the Wisconsin statute).


\(^{59}\) See ARK. CODE ANN. § 4-72-204(b) (providing that franchisor provide franchisee with at least 30 days to cure any alleged deficiency in performance); see also IOWA CODE ANN. § 537A.10.7(b) (same); Md. CODE ANN., Com. Law § 11-1303(a)(1) (same); Mich. Comp. Law Ann. § 445.1527(c) (cure period need not exceed 30 days); Minn. Stat. Ann. § 80C.14, subd. 3(a) (60 days cure period); Wis. Stat. Ann. § 135.04 (same).

\(^{60}\) CAL. BUS. & PROF. CODE § 20020; HAW. REV. STAT. ANN. § 482E-6(H).

\(^{61}\) Wis. Stat. § 135.04.

\(^{62}\) Id. Other occurrences in which a cure period is not allowed include criminal conviction, abandonment, bankruptcy, endangerment to public safety, and repeated defaults. See, e.g., Minn. Stat. Ann. § 80C.14, subd. 3(a) and (b); Iowa Code Ann. § 537A.10.7(c).

\(^{63}\) Wis. Stat. § 135.04.
termination can not lawfully occur.\textsuperscript{64} It is important to note that even where there is a statutorily prescribed cure period, strict compliance with that period may not always be sufficient to terminate the franchise. For example, in Al Bishop Agency v. Lithonia-Division of National Service Industries, Ltd., the 60-day statutory cure period was found inadequate because it was impossible to cure the default within that amount of time.\textsuperscript{65}

The dealer’s failure to cure will result in the dealer’s ultimate termination. However, a complete cure within the cure period by the franchisee may be unnecessary. It is enough to avoid termination that the dealer takes reasonable steps to rectify the claimed deficiencies.\textsuperscript{66}

3. Termination “For Cause”

If a statute applies to the relationship at issue, it is likely that a manufacturer is required to have “good cause” for termination. The statutes that require termination “for good cause” state that the manufacturer must tell the dealer the reasons for termination, and a franchisor may generally only terminate or fail to renew a franchisee if a “good cause” showing is made. However, in certain jurisdictions there may not be a requirement that there be particular reasons for termination or that the reasons be good.

Statutes that require good cause may prescribe what constitutes cause and what does not. For example, the Wisconsin Fair Dealership Law,\textsuperscript{67} which provides that a manufacturer may not “terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause,”\textsuperscript{68} defines “good cause” as:

(b) Failure by a dealer to comply substantially with essential and reasonable requirements imposed upon the dealer by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement; or

(c) Bad faith by the dealer in carrying out the terms of the dealership.\textsuperscript{69}

Some state statutes do not require the manufacturer to show cause or provide notice before a dealer’s termination or nonrenewal may occur. Several state statutes will automatically assume the manufacturer has good cause for termination or nonrenewal, and will deprive the dealer of notice if the dealer commits certain acts, as listed in the statute. For example, the Illinois Franchise Disclosure Act of 1987 provides that a manufacturer has good cause for

\textsuperscript{64} Id.

\textsuperscript{65} Al Bishop Agency v. Lithonia-Div. of Nat’l Serv. Indus., Ltd., 474 F. Supp. 828 (E.D. Wis. 1979) (even though statute prescribed a 60 day cure period, and granting dealer 60-days to cure was “sufficient in a technical sense,” it was “wholly inadequate: in a practical sense,” because curing the default (bringing annual sales level up in 60 days) was impossible); Mankato Implement, Inc. v. J.I. Case Co., 1991 WL 327432 (D. Minn. 1991) (unreported) (same).

\textsuperscript{66} Id.

\textsuperscript{67} Wis. Stat. Ann. § 135.01-.07.

\textsuperscript{68} Id. at § 135.03.

\textsuperscript{69} Id. at § 135.02(4).
termination or non-renewal, and is therefore not required to provide notice and an opportunity to cure in situations where the franchisee:

1. makes an assignment for the benefit of creditors or a similar disposition of the assets of the franchise business;
2. voluntarily abandons the franchise business;
3. is convicted of a felony or other crime which substantially impairs the goodwill associated with the franchisor’s trademark, service mark, trade name or commercial symbol; or
4. repeatedly fails to comply with the lawful provisions of the franchise or other agreement.

Statutes often do not contain exhaustive lists of what constitutes “good cause.” Rather, additional lawful bases for termination exist in the dealership agreement and at common law.

B. Bases for Termination

Absent an applicable state protection statute, the terms of the dealership agreement will usually govern the parties’ termination rights and obligations. Typically a dealership agreement will set forth the bases for terminating an agreement. Provisions in agreements for termination on notice without cause are, unless trumped by contravening statutory or common law protections, usually enforced. Below are some common examples of situations in which manufacturers have been found to have good cause for terminating the dealer.

1. Failure to Pay

Many times the reason for termination is simple: the dealer owes the manufacturer money. This may result from failure to make timely payments for rent, advertising fees, product, or taxes. Typically, courts will find that these failures constitute good cause to terminate. The

70 The assignment of the franchisee’s assets for the benefit of creditors, along with the institution of insolvency or bankruptcy proceedings by the franchisor also establish good cause for termination. Ark. Code Ann. § 4-72-202(7)(F); Cal. Bus. & Prof. Code § 20021(a); Iowa Code §§ 523H.7(3), 537A; Minn. Stat. § 80C.14, subd. 3(b)(1), (2); Miss. Code Ann. § 75-24-53; Mo. Rev. Stat. § 407.405; Neb. Rev. Stat. § 87-404; Wash. Rev. Code § 19.100.180(2)(j); Wis. Stat. § 135.04.


72 See also Ark. Code Ann. § 4-72-202(7)(E); Minn. Stat. § 80C.14, subd. 3(a)(3).

73 Ill. Comp. Stat. § 705/19.

74 George R. Darche Assoc., Inc. v. Beatrice Foods Co., 538 F. Supp. 429 (D. N.J. 1981) (termination upon 60 days’ notice in accordance with terms of the agreement was enforceable).

75 See, e.g., McDonald’s Corp. v. C.B. Mgmt. Co., Inc., 13 F. Supp. 2d 705 (D.C. Ill. 1998) (failing to make timely payments for rent, royalty fees, and real estate taxes constituted good cause); Two Men & A Truck/Intl., Inc. v. Two
one caveat for manufacturers is that they should be careful to require timely payments, as some courts have held that if the dealer has continually made late payments that the manufacturer has accepted, a further failure to pay on time may not constitute good cause to end the relationship.76

2. Failure to Meet Goals

Many dealer agreements set forth performance objectives that the dealer must achieve each year. These goals may be based on sales quotas, market share, or revenues. The failure of a dealer to meet these goals may create good cause to terminate, particularly if the minimum levels or quotas are reasonable and the shortfall was more than de minimis.77 Manufacturers, in defending such terminations, can argue that the intent of the dealer protection statutes is not to protect unproductive dealers. On the other hand, dealers may want to investigate whether similarly situated dealers have been terminated for failing to meet their performance goals, as some dealers have successfully argued that termination under these circumstances was improper discrimination.78

3. Injury to Goodwill

If a dealer’s operations injure the manufacturer’s goodwill, that will generally constitute good cause to terminate the relationship. Instances of injuring a manufacturer’s goodwill include illegally overcharging for the manufacturer’s products;79 violating the in-term non-compete covenant;80 and taking actions that jeopardize the manufacturer’s trademark,

Men & A Truck/Kalamazoo, Inc., Bus. Franch. Guide (CCH) 11,170 (W.D. Mich. 1996) (failure to pay royalties and advertising fees was good cause to terminate); Foley Equip., Inc. v. Krause Plow Corp., 456 N.W.2d 121 (N.D. 1990) (failure to pay royalties was material obligation under agreement and termination was proper).


77 Fred Lavery Co. v. Nissan North America, Inc., 99 Fed. Appx. 585 (6th Cir. 2004) (holding that good cause existed where an automobile dealer did not meet performance goals that were in the dealership agreement); Rolscreen Co. v. Pella Products of St. Louis, Inc., 64 F.3d 1202 (8th Cir. 1995) (manufacturer did not breach agreement when termination for sub-par performance); Roth v. New Holland North America, Inc., 300 F. Supp. 2d 881 (S.D. Iowa 2004) (finding that a manufacturer of construction and farm equipment had good cause to terminate a dealership agreement because of the dealer’s failure to meet market share objectives which were put in place for all similarly situated dealers); L-O Distributors, Inc. v. Men & A Truck/Kalamazoo, Inc., Bus. Franchise Guide (CCH) ¶ 8430 (finding that good cause existed where dealership had continued poor performance; further holding that the "[Wisconsin Fair Dealership Law] is intended to prevent the arbitrary and capricious termination of dealerships, and not to afford tenure to nonproductive dealers"); Al Bishop Agency, Inc., 474 F. Supp. 828 (finding good cause to terminate a dealership agreement where the dealer failed to meet sales goals that were in line with other dealers and where the product in question was "the most important line produced" by the manufacturer).

78 Open Pantry Food Marts of Wisconsin, Inc. v. Howell, Bus.Fran.Guide (CCH) ¶ 8072 (Wis.Cir.Ct.1983) (no good cause for termination because nineteen of twenty-three franchisees had a negative net worth that was worse than plaintiff and franchisor had not enforced the net worth provision against them resulting in discriminatory treatment).

79 Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237 (Law Div. 1976) (finding that an oil company terminated its dealership agreement for good cause to protect its good will where dealer was illegally overcharging for gas).

reputation, or relationship with customers or the public.81 Some of these breaches, such as misuse of the manufacturer’s trademark, are so severe that the applicable statute may allow the manufacturer to terminate the agreement with little or no prior written notice.

4. **Withdrawal from the Market**82

At times, a manufacturer may decide to withdraw from the market as a whole, from a particular geographic market, or from a product line. Very few state statutes incorporate market or product withdrawal into the definition of good cause for lawful termination of a dealership agreement.83 The issue then becomes whether a court can interpret good cause to include market withdrawal. There is little uniformity among the courts that have addressed this question.

Several cases have held that market withdrawal constitutes good cause for termination of a dealership agreement when the manufacturer undertakes a non-discriminatory withdrawal from a product market84 or where the withdrawal was made for “legitimate business considerations.”85

On the other hand, a few courts have held that market withdrawal does not constitute good cause for termination because the statutes at issue did not explicitly state that market withdrawal constituted good cause.86

Product withdrawal terminations have also yielded mixed results. Courts have grappled with whether a manufacturer’s decision to discontinue product lines can be deemed “product withdrawals,” and even if they are, whether those withdrawals constitute “good cause” under the applicable dealer termination statute.87 Most courts have found these to be fact

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83 But see, e.g., California’s Petroleum Distributors Law, which includes in its definition of good cause for dealership agreement termination, “withdrawal of the franchisor from the ‘marketing location’”; the Georgia Multiline Heavy Equipment Dealer Act includes market withdrawal in its definition of good cause); and Me. Rev. Stat. § 1363(3)(C)(4) (good cause when manufacturer discontinues production or distribution of franchised goods).


86 See Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., 386 F.3d 581 (4th Cir. 2004) (fact issue whether Volvo possessed good cause to terminate dealer agreement based on market withdrawal where parties disputed whether the Arkansas statute provided that market withdrawal may constitute good cause and whether Volvo did in fact withdraw the product or merely rebranded it); Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376 (7th Cir.
questions for a jury. At times, a manufacturer may not terminate the dealer, but will merely stop delivering the product that has been withdrawn. In these instances, dealers have sued, challenging the withdrawal as an unlawful termination. The results in these cases are equally mixed. Some courts have held that if only one of several product lines held by a dealer is terminated (because the product is being withdrawn from the market), there is no termination of the dealership, and the issue of good cause and product withdrawal does not arise. Other courts have ruled that a product line could be considered a franchise within itself, notwithstanding the larger product market of which the dealer may be a part, and thus, the manufacturer could be liable for unlawful termination based on market withdrawal.

5. Economic Circumstances of the Manufacturer

Sometimes, a manufacturer will want to undertake changes in its distribution channel short of withdrawing from the market. For instance, a manufacturer may want to discontinue its relationship with independent dealers to sell direct or move to big-box retailers. Typically, the manufacturer’s justification relates to economic concerns and/or increased efficiencies, not performance failure by the dealers. Whether termination can be lawful based on economic motivations of the manufacturer is hotly contested. In many cases, courts have held that a manufacturer’s economic circumstances could constitute good cause for termination if certain factors were met. For instance, in Morley-Murphy Co. v. Zenith Electronics Corp., the manufacturer of consumer electronic products declined to renew a 58-year-old distributorship agreement as part of a nationwide plan to shift from independent distributors to direct marketing. The U.S. Court of Appeals for the Seventh Circuit held that the manufacturer’s economic circumstances could constitute good cause for termination if the manufacturer could show "(1) an objectively ascertainable need for change, (2) a proportionate response to that need, and (3) a nondiscriminatory action." The Seventh Circuit based much of its ruling on Ziegler Co., Inc. v. Rexnord, Inc., where the Wisconsin Supreme Court allowed a manufacturer to restructure its distribution system as a result of economic losses. The Wisconsin Supreme Court observed that "the Wisconsin legislature could not have intended to impose an eternal and unqualified duty of self-sacrifice upon every grantor that enters into a distributor-dealership agreement," and thus held that a “grantor’s economic circumstances may constitute good cause to alter its method of doing business with its dealers, but such changes must be essential, reasonable and nondiscriminatory.”


88 Id.


91 Morley-Murphy Co. v. Zenith Electronics Corp., 142 F.3d 373 (7th Cir. 1998).

92 Id. at 378.

93 433 N.W.2d 8 (Wis. 1988).

94 Id. at 11.
Additionally, economic circumstances may not need to rise to the level of economic duress to constitute good cause for termination of a dealership agreement. In *Petereit v. S.B. Thomas, Inc.*[^95] the U.S. Court of Appeals for the Second Circuit held that a bread manufacturer’s plan to realign its distribution network in order to augment sales was good cause for resulting distributor terminations within the meaning of the Connecticut Franchise Act.[^96] The court found that the language of the Act was open enough to allow a manufacturer’s legitimate business decision to try to increase sales to satisfy the good cause requirement.[^97] The Second Circuit also noted that legitimate business decisions do not have to result as a response to unprofitability to constitute good cause, rather, “[w]hen the franchisor demonstrates that its business decision is legitimate and made in good faith . . . a court should not replace the grantor’s decision with its own.”[^98]

On the other hand, multiple courts have come to the conclusion that economic justifications do not constitute good cause for termination of a dealership agreement. These cases have focused on the limited definition of “good cause” in the state statutes at issue. For example, in *Karl Wendt Farm Equip. Co., Inc. v. International Harvester*[^99], the U.S. Court of Appeals for the Sixth Circuit held a farm equipment manufacturer liable for terminating a dealership agreement when it sold its farm equipment division because of an extreme downturn in the market. Although the defendant had been losing two million dollars per day, the court held that under Michigan law, the mere lack of profit under a contract was not sufficient to warrant an impracticability defense.[^100]

### 6. Other Bases

State legislatures (and courts) have found several other reasons for termination that constitute “good cause,” conviction of a crime that is relevant to the franchised business,[^101]

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[^99]: 931 F.2d 1112 (6th Cir. 1991).
[^100]: 63 F.3d 1169 (2d Cir. 1995).
[^96]: Id. at 1185.
[^97]: Id.
[^98]: Id.
[^95]: Id.
[^97]: Id.
[^98]: Id.
institution of insolvency or bankruptcy proceedings;\textsuperscript{102} loss of the right to occupy the premises of the franchised business;\textsuperscript{103} failure to pay the franchisor monies due;\textsuperscript{104} fraud, misrepresentation or conduct that reflects materially and adversely on the operation or reputation of the franchise system;\textsuperscript{105} failure to comply with applicable federal, state or local law;\textsuperscript{106} seizure of premises by government or creditor;\textsuperscript{107} and danger to public health or safety.\textsuperscript{108} Similar to the impairment of goodwill, some of these breaches are so severe or incurable that the applicable statute allows the manufacturer to terminate the agreement with little or no prior written notice.

\section{C. Constructive Termination}

There are circumstances where a dealer may claim that even though it has not received an express termination notice, the manufacturer has acted in such a manner that the relationship has constructively terminated. These circumstances are created by common law and are typically not covered by the industry-specific statutes.\textsuperscript{109}

Dealers usually claim constructive termination as an implied cause of action when manufacturers take action that destroys the value of the dealer’s business, yet falls short of an actual termination. Claims for constructive termination are often based on the grantor’s actions to create additional competition or to change the terms controlling the agreement between the parties. Types of conduct that dealers often claim result in a de facto or constructive termination include the manufacturers’ assignment of existing dealerships, appointment of additional distributors in the existing territory, establishment of company owned stores, and realignment of distribution routes.\textsuperscript{110}

Typically, to have a claim for constructive termination, a dealer must show that the manufacturer made a change in the competitive circumstances of the dealership that had a discriminatory effect, or that the manufacturer’s actions were intended to eliminate the dealer or conducted pursuant to the franchise”); Miss. Cod Ann. § 75-24-53 (“criminal misconduct”); Mo. Rev. Stat. § 407.405 (“criminal misconduct”); Neb. Rev. Stat. § 87-404(2)(a) (conviction “directly related to the business conducted pursuant to the franchise”); N.J. Rev. Stat. § 56:10-5(2) (conviction “directly related to the business conducted pursuant to the franchise”); Wash. Rev. Code. § 19.100.180(2)(j)(iv) (convicted of violating any law “relating to the franchise business”).


all dealers from the state. 111 It will not be enough to show that the manufacturer made bad business decisions. However, it might be enough if the dealers can show that the bad decisions were a cover for an intent to terminate the dealers and take over the markets they had developed.

Some courts have held that constructive termination can be shown by significant economic loss. 112 In Peteret v. S.B. Thomas, Inc., the Second Circuit, upon remanding the case to the district court for a determination of what constitutes constructive termination, provided this guidance:

[I]t appears that something greater than a de minimis loss of revenue—and less than the stark scenario of driving a franchisee out of business—must be shown in order to justify a finding of constructive termination. 113

Constructive termination may also be found when a franchisor’s actions result in a substantial decline in franchisee net income. The analysis will be strictly financial, factually dependent and determined case-by-case. 114

Several federal courts have addressed constructive termination claims under the PMPA. 115 Each has held that a cause of action for constructive termination requires a violation of at least one provision of the Act. 116

D. Substantial Change in the Competitive Circumstances

Several state statutes that prohibit manufacturers from terminating a dealership without good cause also prohibit manufacturers from substantially changing the competitive circumstances of a dealership agreement without good cause. 117 Although not a “termination” or “constructive termination,” this standard protects a dealer from a material change that “significantly diminishes its viability, its ability to maintain a reasonable profit over the long term or to stay in business.” 118 Whether the challenged change rises to this level is a function of the particular facts in each case. Conduct that has been found to satisfy the definition of substantial change includes:


112 Peteret v. S.B. Thomas, Inc., 63 F.3d 1169.

113 Id. at 1183.

114 See also Bert Smith Oldsmobile, Inc. v. GMC, 2005 U.S. Dist. LEXIS 23283 (D. Fla. 2005) (no de facto or constructive termination claim under Florida’s motor vehicle franchise statute because no facts to show that one party unilaterally modified the terms of the contract in a manner that “substantially interferes with the other party’s ability to obtain the benefits of the contract.”).


change in competitive circumstances includes: (1) change of distributorship from exclusive to non-exclusive; (2) installation of other distributorships within the territory; and (3) imposition of certain programs that substantially harm the franchisee. Some courts have held that if a non-discriminatory system-wide change is implemented, there is not a substantial change in the competitive circumstances.

On the other hand, there must actually be a change, and it must have a negative effect on the existing dealer agreement. For instance, if the dealer can pass along the costs to its customers and can benefit from the increased efficiencies, there may not be a “substantial change in the competitive circumstances,” even if there is an increased fee and some remodeling required.

Finally, some courts have held that if the change is a non-discriminatory change that is based on an objectively ascertainable need for change, and is a proportionate response to that need, good cause exists even though the change might be a “substantial change in the competitive circumstances.” These changes are usually system-wide, made uniformly to the entire distribution channel.

E. Equal or Disparate Treatment

Dealer statutes often prohibit manufacturers and suppliers from discriminating among their dealers in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or any other business dealing. If a manufacturer does classify or discriminate among its dealers, it has the burden of proving that the classification or discrimination is reasonable, based on dealerships granted at different times, and not necessarily arbitrary. Additionally, a manufacturer’s decision to discriminate among its dealers will not be viewed as good cause for a termination or nonrenewal. The Wisconsin Fair Dealership Law specifically provides that a manufacturer’s requirements are not reasonable if

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120 East Bay Running Store, Inc. v. Nike, Inc., 890 F.2d 996, 1000-1 (7th Cir. 1990) (athletic apparel supplier’s new policy prohibiting sale of certain shoes by mail or telephone was not a substantial change in competitive circumstances where policy applied to all retailer’s nationwide and was not underhanded attempt to drive dealers out of business); Remus v. Amoco Oil Co., 794 F.2d 1238 (7th Cir. 1986) (gasoline franchisor’s non-discriminatory imposition of a “discount for cash” program did not change its franchisees’ competitive circumstances.). See also Re/Max N. Cent., inc. v. Cook, 160 F. Supp. 2d 1004, 1008 (E.D. Wis. 2001), aff’ed, 272 F.3d 424 (7th Cir. 2001) (although examining effect of changes, notes that when a franchisor makes a system-wide non-discriminatory change, the franchisor does not violate the WFDL even if the change significantly harms a particular franchisee’s profitability).


122 Morley-Murphy Co., 142 F.3d 373 (remanded to determine whether grantor’s circumstances qualified as good cause for imposing new distribution system); Wis. Music Network, Inc. v. Muzak Ltd. P’ship, 5 F.3d 218 (7th Cir. 1993) (new terms proposed in license agreement were essential, reasonable and non-discriminatory, and therefore, licensor had good cause to require licensee to acquiesce in direct negotiation program without violating WFDL).

123 See, e.g., WASH. REV. CODE § 19.100.180(2)(c).
they are “discriminatory as compared with requirements imposed on similarly situated dealers either by their terms or in the manner of their enforcement.”

F. Burden of Proving Good Cause

The burden of proof is typically on the manufacturer to show good cause for termination of a dealership. However, a few states have placed the burden on the dealer to show that the termination was not for good cause. In addition, at least one state has placed the burden on different sides depending on the industry involved.

G. Extra-Contractual Issues that may Arise when Dealer Challenges Termination

Typically, in termination cases, the dealer will allege that the contract at issue consists of more than the written dealership agreement. The dealer may attempt to use parole evidence, custom and practice, or course of dealing to impose conditions on termination that may not otherwise exist. Additionally, the dealer may attempt to argue that the agreement has been modified. In combating these claims, the manufacturer will need to rely on the integration and merger clauses in its dealer agreement, as well as the provision prohibiting oral amendments.

V. NONRENEWAL

Termination of a dealer may occur at any point before expiration of the term of the dealership agreement. Renewal or nonrenewal, on the other hand, occurs when the agreement reaches the end of its term. Although state relationship laws often include both termination and

124 Wis. Stat. § 135.02(4)(a).

125 See e.g., La. Rev. Stat. § 26:805; Minn. Stat. § 325E.0681, subd. 1; Mont. Code § 30-11-802; R.I. Gen. Laws § 31-5.1-4(d)(4); Wis. Stat. § 135.03; Scuncio Motors, Inc. v. Subaru of New England, Inc., 555 F. Supp. 1121, 1132 (D.R.I. 1982) (finding that defendant met its burden when it showed the dealer would not expand facilities to keep pace with the increasing sales of the manufacturer’s vehicles); Van Riper v. Ford New Holland, 862 P.2d 47 (Mont. 1993) (placing the burden of proof on the manufacturer); River Valley Ctr., Inc. v. Interstate Cos., 680 N.W.2d 99, 104 (Minn. Ct. App. 2004) (holding that under M.S. § 325E.0681, subd. 1, the equipment manufacturer has the burden of proving good cause); Crown Bev. Co. v. Dixie Brewing Co., 695 So. 2d 1090, 1091 (La. Ct. App. 1997) (holding that the burden is placed on beer supplier to show good cause).

126 See e.g., Crowley Beverage Co. v. Miller Brewing Co., 862 F.2d 688, 689 (8th Cir. 1988) (holding that under the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat. §§ 325B.01, the distributor “bore the burden of establishing that [the manufacturer] did not have good cause to terminate the distributorship); Power & Tel. Supply Co. v. Harmonic, Inc., 268 F. Supp. 2d 981, 988-89 (D. Tenn. 2003) (placing the burden on the retailer to show the supplier terminated the parties’ agreement without good cause).

127 Compare River Valley Ctr., Inc. v. Interstate Cos., 680 N.W.2d 99, 104 (Minn. Ct. App. 2004) (holding that under the Minnesota Heavy and Utility Equipment Manufacturers and Dealers Act, Minn. Stat. § 325E.0681, the equipment manufacturer has the burden of proving good cause); with Crowley Beverage Co., 862 F.2d 688, 689 (8th Cir. 1988) (holding that under the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat. §§ 325B.01-17, the distributor “bore the burden of establishing that [the manufacturer] did not have good cause to terminate the distributorship).

128 See e.g. Cromeens, Holloman, Sibert, Inc., 349 F.3d 376.
nonrenewal provisions, relationship statutes have devised particular ways to deal with renewal issues.\textsuperscript{129}

A. Notice Requirements

Almost all states’ general statutes regulating dealership relationships include an express requirement to notify the dealer that the dealership agreement will not be renewed.\textsuperscript{130} A common denominator in these statutes is the requirement of prior written notice stating the grounds for nonrenewal within a specified period. The advance notice period ranges from 60 to 180 days and may be reduced under some statutory nonrenewal grounds. Another common requirement is allowing the dealer the opportunity to cure any breach of the agreement.

Mississippi and Missouri require a 90-day advance notice, but the manufacturer is not compelled to state the grounds for its decision not to renew.\textsuperscript{131} On the other hand, New Jersey requires a manufacturer to list all reasons for nonrenewal, although it does not grant the dealer an express right to cure defaults.\textsuperscript{132} Hawaii not only requires written notice of non-renewal, but also an opportunity to cure any default within a reasonable time.\textsuperscript{133} Puerto Rico does not specifically require notice of nonrenewal beyond what the parties’ agreement requires.\textsuperscript{134}

Due to the particular mechanics of nonrenewal, several other jurisdictions provide distinct notice and cure requirements for failing to renew, as opposed to termination of a dealership. In some jurisdictions, dealers are entitled to longer notice periods for a failure to renew than for termination of the agreement before its expiration. For example, in Minnesota, manufacturers must give 90 days written notice to terminate the dealership agreement, but 180 days notice of nonrenewal. In addition to the extended notice period, the Minnesota relationship statute also provides that a dealer must be given opportunity to operate for a sufficient period to recover the “fair market value of [the] franchise as a going concern.”\textsuperscript{135} Fair market value will be determined from the date of the failure to renew the dealership. If the failure to renew a dealership agreement is based on good cause for termination, as defined in the law, and the dealer has failed to cure within the 60-day cure period, then the extended notice period and compensation clause will not apply.\textsuperscript{136} In sum, to refuse renewal, other than for cause, a manufacturer would be liable unless it gives an extended notice and a sufficient term of operation to recover the value of the dealership.

\textsuperscript{129} For a pointed discussion of the legal issues presented by renewal of dealer agreements, see also Robert B. Calihan et al., \textit{Franchise Transfer, Succession and Renewal Issues}, International Franchise Association 34th Annual Legal Symposium, Vol. I, Tab 6 at 42 (May 2001); and the following section of this paper on transfers.

\textsuperscript{130} The statutes of Alaska, South Dakota and Puerto Rico have no express prior notice requirements for non-renewal. Hawaii’s relationship law requires notice of non-renewal within an unspecified period of time.

\textsuperscript{131} MISS. CODE ANN. § 75-24-53; MO. REV. STAT. § 407.405.1.

\textsuperscript{132} N.J. STAT. ANN. § 56:10-5.

\textsuperscript{133} HAW. REV. STAT. § 482E-6(2)(H).

\textsuperscript{134} P.R. LAWS ANN. tit. 10 § 278a et seq.

\textsuperscript{135} MINN. STAT. § 80C.14, subd. 4. See also Hughes v. Sinclair Mktg., Inc., 389 N.W.2d 194 (Minn. 1986).

\textsuperscript{136} Id.
Other state statutes also allow a dealer to recoup, at least in part, its investment related to the dealership that has not been renewed. The Hawaii relationship statute, which imposes compensation requirements on a manufacturer in the event of termination or nonrenewal of a dealership, may also require a manufacturer to compensate a dealer for loss of goodwill in the case of nonrenewal. That obligation is triggered when a manufacturer “refuses to renew a franchise for the purpose of converting the franchise’s business to one owned and operated by the franchisor.”

Alaska’s relationship statute provides for the repurchase of inventory, reimbursement of expenses and purchase of the business directly affected by the termination or nonrenewal of a dealership agreement.

In the event of deficient nonrenewal notice by the manufacturer, many relationship statutes expressly allow the dealer to enforce its rights through a civil action for damages and equitable remedies. The question that most often arises when a manufacturer fails to provide adequate notice of nonrenewal, however, is whether a term dealership agreement will, by legislative fiat, automatically renew for an additional term. In other words, assuming a state relationship law requires 180 days advance notice of nonrenewal, what happens if the manufacturer gives notice of less than 180 days? Assuming an agreement with a ten year term, would it automatically renew for another ten years, or would the original dealership term simply extend for the amount of time that the notice period given by the manufacturer fell short of the legal requirement?

Interpreting the federal PMPA, a state appellate court has held that insufficient notice of nonrenewal will result in renewal of a new full-term agreement. In Wirkkula v. Unocal, the manufacturer’s failure to provide timely notice of nonrenewal under the PMPA resulted in a new franchise term of three years.

In a case decided under the Maryland Motor Vehicle Dealer Law, General Motors Corp. v. Bannings Beltway Pontiac, the manufacturer announced the termination of a dealership agreement about to expire, albeit effective 90 days later. The notice, however, was provided less than 90 days before expiration of the agreement. The dealer argued that the notice was defective. The court did not agree because, although the manufacturer was required to provide 90-days notice of nonrenewal, that notice was not required to be at least 90 days before expiration of the contract. One important consideration in this case, however, was that the parties’ contract did not provide for automatic renewal and that Maryland’s Motor Vehicle Dealer Law did not expressly tie the 90-day notice requirement to the expiration of the contract.

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137 HAW. REV. STAT. § 482E-6(3).
138 See the remedies section of this paper.
139 See, e.g., MO. REV. STAT. § 407.410.
142 MD. CODE ANN. TRANSPORTATION §§ 15-207 et seq. The statute contains only a 90-day nonrenewal notice requirement.
term. In any event, the only remedy available would have been an additional term no longer than necessary to meet the 90-day notice requirement because the agreement “contained no automatic renewal clause, and the statute does not expressly impose such provision as a matter of law.”

In *Upper Midwest Sales Co. v. Ecolab, Inc.* several dealers alleged that they had not been given proper notice of nonrenewal when their dealership agreements expired. The court interpreting the Minnesota relationship statute explained that even if a manufacturer had violated the 180-day advance notice provision, the only relief a dealer could obtain would be 180 additional days of continued operation under the dealership agreement. Another court reached a similar conclusion interpreting the Rhode Island motor vehicle dealer law. In *Dunne Leases Cars & Trucks, Inc. v. Kenworth Truck Co.*, a dealer received a notice of nonrenewal two days before the expiration of the dealership agreement. The notice extended the dealership beyond the original expiration date by 60 days to guarantee a total of 60-days notice. The Rhode Island Supreme Court validated the manufacturer’s notice, holding that, to comply with the then-60 day statutory notice, a dealership agreement had to be extended by whatever period was necessary to accommodate the statutory period. Some commentators agree with this solution to the automatic renewal question.

Because jurisdictions differ with regard to the consequences of a manufacturer’s failure to provide timely notice of nonrenewal, manufacturers and dealers must be mindful that, in addition to clear contract drafting, both parties should carefully study the statutory notice requirements of nonrenewal in their respective jurisdictions. Even though a manufacturer may later prevail in litigation, notwithstanding having provided deficient notice, breach of the notice requirement could result in unnecessary litigation costs.

**B. Bases for Nonrenewal: Comparison with Termination**

Although state relationship laws often include both termination and nonrenewal provisions, they may be treated the same or differently depending on the jurisdiction. This section examines the bases for nonrenewal and also highlights some of the key distinctions between various states’ termination and nonrenewal standards.

Under various state relationship statutes requiring good cause for nonrenewal, the bases for nonrenewal are similar to those that justify termination. The Hawaii relationship statute combines its termination and nonrenewal good cause requirement into one section, which states that “it shall be unfair . . . for a franchisor to . . . [t]erminate or refuse to renew a franchise except for good cause . . . .” Wisconsin takes a similar approach in mandating the same grounds to “terminate, cancel, fail to renew or substantially change the competitive

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144 773 A.2d at 592.
145 557 N.W.2d 236 (Minn. Ct. App. 1998).
146 R.I. GEN. LAWS § 31-5.1-1.
147 466 A.2d 1153 (R.I. 1983).
149 HAW. REV. STAT. § 482E-6(2) (H).
circumstances of the [dealership]. Moreover, the federal Automobile Dealer Franchise Act proscribes the failure by a manufacturer “to act in good faith . . . in terminating, canceling, or not renewing the franchise . . . .”

Another example is Puerto Rico’s Law 75, which establishes that “no [manufacturer] or grantor may terminate such relationship, or directly or indirectly perform any act detrimental to the established relationship, or refuse to renew said contract on its normal expiration, except for just cause”. As with termination, good cause for nonrenewal will be found only upon nonperformance by the dealer of any of the essential obligations of the dealership agreement, or any action or omission on its part that substantially and detrimentally affects the distribution of the products. Law 75, however, neither declares per se unlawful all attempts to condition renewal nor overturns the doctrine that parties’ agreements must generally be respected. The Puerto Rico federal court, interpreting Law 75, has allowed parties to stipulate in their initial contract certain conditions for renewal, as long as the conditions are not “contrary to law, morals, or policy.” While Law 75 protects dealers from unilateral refusals to renew absent just cause, it does not protect dealers “from their own follies which lead to the preconceived expiration of distribution agreements.” It is not clear whether the Supreme Court of Puerto Rico would follow the same reasoning.

In one specific instance, the Puerto Rico Supreme Court has determined that the manufacturer’s own circumstances might justify termination or nonrenewal of a dealership. Market withdrawal pursuant to an impasse in negotiations to renew a dealership agreement may constitute good cause as long as it is not arbitrary, prior notice is given, and the withdrawal is not aimed at reaping the goodwill or clientele established by the dealer. According to the U.S. Court of Appeals for the First Circuit, a bona fide impasse between the parties may constitute good cause to end or not renew a trial arrangement to distribute even without withdrawing from the Puerto Rico market, provided the manufacturer acted in good faith.

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150 WIS. STAT. ANN. § 135.03.
152 P.R. LAWS ANN. tit. 10 § 278(a).
153 P.R. LAWS ANN. tit. 10 § 278. Failure to pay royalties, perform a payment plan to work out royalty defaults, or to tender a renewal fee, have all been found to constitute good cause. See Tatan Mgmt. v. Jacfran Corp., 270 F. Supp. 2d 197, 205 (D.P.R. 2003).
154 Vulcan Tools v. Makita USA Inc., 23 F.3d 564 (1st Cir. 1994); Nike Int’l Ltd. v. Athletic Sales, Inc., 689 F. Supp 1235, 1238-1239 (D.P.R. 1988);
155 Id.
156 P.R. LAWS ANN. tit. 10 § 278(a).
Other states that require good cause to terminate a dealership agreement do not necessarily require cause for electing not to renew an agreement. The relationship statutes of Mississippi and Missouri only require notice of the manufacturer’s intention not to renew. Although many states have, in fact, adopted good cause requirements for refusing to renew dealerships, the applicability of the requirements generally depends upon the facts and circumstances of the particular case.

Other jurisdictions that require good cause provide different grounds for refusing to renew, as opposed to terminating, a dealer contract. In Arkansas, a manufacturer may not “fail to renew a franchise except for good cause or except in accordance with the current policies, practices, and standards established by the franchisor which in their establishment, operation, or application are not arbitrary or capricious”. Ostensibly nondiscriminatory and rational practices of dealership renewal would pass muster under Arkansas law.

In some jurisdictions good cause requirements may be broadly construed. In Delaware, for example, a manufacturer’s failure to renew for the dealer’s failure to comply with certain terms imposed as a condition to renewal will be deemed in violation of Delaware law only when those terms bear no reasonable relationship to the manufacturer’s business risk or are so one-sided as to be oppressive. Obviously, the reasoning underlying the Delaware law is that imposing reasonable conditions to renew is not the same as refusing to renew.

Along these same lines, a Wisconsin court held that a manufacturer’s renewal agreement, which contained remodeling, advertising, and fee requirements different from those in the parties’ initial agreement, did not constitute a substantial change in the competitive circumstances such that it would run afoul of Wisconsin Fair Dealership Law. Moreover, in In Re/Max North Central, Inc. v. Patricia Cook, a manufacturer offered a renewal agreement that instituted changes in the dealership’s organizational structure. The dealer claimed, among other things, that this provision changed her competitive circumstances in violation of Wisconsin’s Fair Dealership Law. A federal district court disagreed, and the Seventh Circuit affirmed. The Seventh Circuit recognized that, although the Fair Dealership Law provides that a manufacturer cannot fail to renew and cannot substantially change the competitive circumstances of a dealership without good cause, manufacturers are not prohibited from making systemwide, nondiscriminatory changes in response to market conditions. According to the Seventh Circuit, the manufacturer is entitled to maintain uniform contract terms with its dealers and to rewrite dealership agreements in an orderly fashion. In yet another case interpreting the Wisconsin relationship statute, the state Supreme Court determined that a manufacturer’s economic circumstances may, in some instances, constitute good cause for not renewing a dealership agreement.


165 272 F.3d 424 (7th Cir. 2001).

166 See id. at 432.

167 See Ziegler Co. Inc. v. Rexnord Inc., 433 N.W.2d 8 (Wis. 1988).
C. When Agreement has no Right of Renewal

In the overwhelming majority of jurisdictions, when a dealership agreement expressly negates any right to renew upon expiration, a right of renewal will not often be implied, either under a statute or at common law. Under certain circumstances, several state laws allow manufacturers to refuse renewal without good cause. These jurisdictions take the view that manufacturers are not required to grant perpetual dealerships. Rather, these statutes honor the parties’ freedom to contract for a fixed term. One major exception is Puerto Rico’s Law 75. Renewal is required regardless of how the contract reads, insofar as just cause is required for either termination or nonrenewal, even if there is no contractual right to renewal. The renewal period is indefinite until the manufacturer can prove just cause, the dealer voluntarily relinquishes the dealership agreement, or the manufacturer withdraws from the market. The just cause requirement is implied in every dealership agreement and the rights of Act 75 cannot be the subject of an anticipatory contract waiver.

Likewise, in Nebraska, a dealership agreement may not allow a manufacturer to refuse to renew the agreement without good cause, but the state’s relationship statute does not mandate perpetual dealerships because it states that “[t]his section shall not prohibit a franchiser from providing that the franchise is not renewable or that the franchise is only renewable if the franchiser or franchisee meets certain reasonable conditions.” A manufacturer is free to decide its fate by conditioning renewal or providing in the agreement for nonrenewal. On the other hand, failure to take such measures will subject a manufacturer to Nebraska’s good cause requirement.

In Missouri Conrad Liquor Co. v. Brown Forman Corp., the U.S. District Court for the Western District of Missouri considered whether, under the Missouri relationship law, a manufacturer could terminate a dealership agreement without good cause. The Missouri law did not expressly address the issue. The defendant, a liquor manufacturer, contended that the relationship law was unconstitutional because it unduly restricted the manufacturer’s ability to put an end to the distribution relationship. In ruling the law constitutional, a Missouri federal court adopted a limited construction of the Missouri law provision that a liquor distributor may not “unilaterally . . . refuse to continue . . . any franchise unless the supplier has first established good cause for such . . . noncontinuance.” The court noted that the law was not as draconian as the manufacturer asserted, finding that the good cause requirement would not apply to a....

168 Charles S. Modell and Genevieve A. Beck, Franchise Renewals—You Want Me to Do What?, 22 Franchise L.J. (Summer 2002), at 7. But see P.R. LAWS ANN. tit. 10 § 278a (prohibiting non-renewal without good cause “[n]otwithstanding the existence in a dealer’s contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no [manufacturer] or grantor may terminate . . . .”).

169 P.R. LAWS ANN. tit. 10 § 278a.

170 Id. at § 278c.

171 NEB. REV. STAT. § 87-404.


173 MO. REV. STAT. § 407.413.
“failure to renew an agreement with a fixed term.”\textsuperscript{174} Under this interpretation, a manufacturer is free to refuse to renew a distribution agreement for a fixed term without a right to renew.

Minnesota’s law requires “good cause” to terminate or refuse to renew a dealership agreement, but does not require a manufacturer to have good cause for nonrenewal if the agreement has a fixed term, provided the dealer receives timely notice and has had an opportunity to recover fair market value of the distributorship.\textsuperscript{175} In \textit{U.S. Surgical Corp. v. Oregon Medical \& Surgical Specialties, Inc.},\textsuperscript{176} a New York federal court explained the critical difference between termination and nonrenewal under Minnesota law:

The Minnesota Franchise Act permits the termination or non-renewal of a franchise agreement when the contract has expired. The Franchise Act clearly contemplates that franchises may have fixed terms, and may come to an end at the conclusion of such term.

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In sharp contrast to the “good cause” required to terminate a franchise during the term of the franchise agreement [citation omitted], non-renewal or termination without cause incident to the end of the contract term are sanctioned by the Minnesota Franchise Act and the regulations promulgated thereunder.\textsuperscript{177}

In Minnesota, parties are free to agree on a fixed term dealership agreement and the manufacturer may refuse renewal by giving timely notice to the dealer—if the dealer has had an adequate opportunity for recoupment.

\textbf{D. When Agreement Conditions Renewal}

Besides allowing manufacturers to disclaim a right to renewal in the dealership agreement, many relationship statutes also contemplate the imposition of conditions to renew. For example, the Nebraska Franchise Practices Act expressly permits a manufacturer, in the event that the dealership agreement provides for renewal, to specify the conditions under which it will be granted.\textsuperscript{178}

Other statutes may not expressly provide for conditional renewals but courts interpreting them have recognized their validity. Under the Wisconsin Fair Dealership Law,\textsuperscript{179} for example, courts permit manufacturers to condition renewals, provided that the conditions are reasonable and do not discriminate among dealers. Although the Wisconsin statute provides an express

\textsuperscript{174} 1990 U.S. Dist. LEXIS 3373 at pp. 2-3 n.1.

\textsuperscript{175} See \textit{Minn. Stat.} § 80C.14, subd. 3,4. See also \textit{Sofa Gallery v. Stratford Co.}, 872 F.2d 259 (8th Cir. 1989); \textit{Best Vendors Co. v. Air Express, Inc.}, 2002 U.S. Dist. LEXIS 18679 (D. Minn 2002) (stating that the recoupment doctrine applies to contracts having no definite duration).

\textsuperscript{176} 497 F. Supp. 68 (S.D.N.Y. 1980).

\textsuperscript{177} Id. at 72.

\textsuperscript{178} \textit{Neb. Rev. Stat.} § 87-404.

\textsuperscript{179} \textit{Wis. Stat.} §§ 135.01.
protection against substantial changes in competitive circumstances, courts interpreting this law repeatedly have held that it does not prohibit a manufacturer from imposing new and different terms and provisions upon renewal.\textsuperscript{180} Thus, in Bresler’s 33 Flavors Franchising Corp. v. Wokosin, a case where the manufacturer had a right under the dealership agreement to condition renewal, the Wisconsin Supreme Court allowed an offer of renewal under new terms, finding that the terms did not constitute a substantial change in competitive circumstances.\textsuperscript{181} Moreover, in Ziegler Co. v. Rexnord, Inc.,\textsuperscript{182} the manufacturer offered the distributor, whose distribution agreement had expired, the opportunity to continue doing business as its sales representative instead of acting as a distributor. This changed the distributor’s compensation structure among others aspects of the initial agreement. The Wisconsin Supreme Court had to decide: “whether a grantor . . . may modify its method of doing business with its dealers . . . to accommodate its own economic problems, or whether it must subordinate those problems . . . in all aspects and permanently if the dealer wishes to continue the dealership”.\textsuperscript{183} The court held that a manufacturer would not violate the law if it conditions renewal of a distribution agreement as long as the conditions “are essential, reasonable, and nondiscriminatory,”\textsuperscript{184} and remanded the case to the trial court to apply the foregoing standard.

As mentioned earlier in this section, courts interpreting Puerto Rico’s Law 75 have also to some extent upheld conditioning renewal. In Tatan Mgmt. v. Jacfran Corp., a federal court held that conditional renewals are allowed as long as the conditions are not “contrary to law, morals, or policy.”\textsuperscript{185} In that case, the agreement between the parties provided for renewal if the dealer: (1) “Fully performed all of the terms and conditions of this Agreement” and were not “in default of this Agreement;” (2) executed “the then current standard form of franchise agreement, or the most recent form;” (3) gave Jacfran [the manufacturer] written notice of its decision to renew “not more than twelve months nor less than three months prior to the expiration of the initial term;” (4) executed “a release of any claim [Tatan] may have against Franchisor in form and substance satisfactory to it;” (5) renovated its location to Jacfran’s “then-current standards of service, image, safety, sanitation and repair;” and (6) paid a $25,000 franchise renewal fee.\textsuperscript{186} The court doubted the lawfulness of requiring execution of the standard form agreement, as it would allow the manufacturer to alter the terms of the agreement unilaterally, and reasoned that the execution of the release clashed with Law 75’s provision that the rights conferred by the statute cannot be anticipatorily waived.\textsuperscript{187} However, the court ruled all the other conditions lawful and stated that the manufacturer could opt not to renew if the franchisee refused to comply with those lawful conditions.\textsuperscript{188}

\textsuperscript{180} Modell & Beck, \textit{supra} n. 165, at 5.
\textsuperscript{181} 591 F.Supp. at 1536-1538.
\textsuperscript{182} 433 N.W.2d 8 (Wis. 1988).
\textsuperscript{183} \textit{Id.} at 11.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} 270 F. Supp. 2d at 205.
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id.} at 206.
\textsuperscript{188} \textit{Id.}
The PMPA also provides for conditional renewals. The Act, which generally prohibits the nonrenewal of a dealership agreement unless the manufacturer complies with notice requirements and bases its decision on one of the grounds set forth in the statute, expressly permits nonrenewal if the parties fail “to agree to changes or additions to the provisions of the franchise if . . . such changes or additions are the result of determination made by the franchisor in good faith and in the normal course of business.” Moreover, “no 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 subchapter or other Federal law; or (B) any right that the franchisee may have under any valid and applicable State Law.” In interpreting the PMPA, federal courts have stated that the statute plainly contemplates that manufacturers will have substantial flexibility in changing the terms of the dealership upon renewal.

E. When Agreement is Silent about Renewal

In many jurisdictions, a statutory or common law right to renew dealership agreements that do not address renewal will not be implied. For instance, the Maryland Fair Distributorship Act avoids imposing requirements on a manufacturer choosing not to renew a distributorship agreement when the agreement is silent on the right to renewal. The Maryland statute states that “[n]otwithstanding any other provision of this section . . . [t]he notice and cure provisions of this subtitle do not apply to a termination of a distributorship at the natural expiration of the specified term of a written contract that does not contemplate renewal options exercisable by either party.” By using the term “contemplate,” this provision of the Maryland statute encompasses both the agreements that expressly negate a right of renewal, as well as those silent on the subject. Thus, in those instances, no renewal is required by law.

Still, in some other jurisdictions, it is not clear whether statutory provisions on renewal apply when the dealership agreement is silent on the subject. Commentators disagree on whether those provisions only apply when the agreement expressly contemplates renewal or whether they also apply when renewal is not mentioned at all.

The Maryland statute may be compared with the New Jersey Franchise Practices Act, which establishes a very limited definition of “good cause” in failing to renew a dealership agreement: “good cause for . . . failing to renew a franchise shall be limited to failure by the

190 Id. at §2805(f)(1).
191 Valentine v. Mobil Oil Corp., 789 F.2d 1388 (9th Cir. 1986).
192 Tractenberg et al., supra n. 145, at 198; Modell & Beck, supra n. 165, at 7.
193 MD. CODE ANN. TRANSPORTATION §§ 11-1301.
194 MD. CODE ANN. TRANSPORTATION § 11-1303(e). The Maryland statute’s provisions requiring notice and curing parallel the statutes whose provisions require “good faith” in other states. See also GMC v. Bannings Beltway Pontiac, 773 A.2d 584, 592 n.5 (2001).
195 Modell & Beck, supra n. 165, at 4-5; Calihan et al., supra n. 126, at 44-45; Becker & Boxerman, supra n. 158, at 64.
196 N.J. STAT. ANN. §§ 56:10-1.
franchisee to substantially comply with those requirements imposed upon him by the franchise.\textsuperscript{197} Courts have strictly enforced this requirement. A good faith reason for ending a relationship is not sufficient to refuse renewal, absent breach by the dealer. As a New Jersey court explained:

The plain meaning of the language, supported by the legislative history, sharply curtails a franchisor’s right to end the franchise in the absence of a breach by the franchisee. Thus when the franchisee has complied with the terms of the agreement, the franchiser does not possess an unrestricted authority to close out the arrangement in accordance with its terms.\textsuperscript{198}

Another New Jersey court has noted:

With the advent of the New Jersey Franchise Act, once a franchise relationship begins, all that a franchisee must do is comply substantially with the terms of the agreement, in return for which he receives the benefit of an ‘infinite’ franchise—he cannot be terminated or refused renewal.\textsuperscript{199}

Thus, in New Jersey, the very decision to enter into a dealership relationship is, practically speaking, a decision to remain in business as long as the dealer substantially complies with the dealership agreement and the statute. It is clear that such a statutory right to renewal will control where the dealership agreement is silent on the matter.\textsuperscript{200}

VI. TRANSFER/SUCCESSION

Transfers of dealerships may also lead to litigation between manufacturers and dealers. Transfers generally occur when the dealer wishes to sell his or her dealership, and delegate the duties under the dealership agreement to others—either family members or arms-length third parties. Most franchise relationship laws, and some dealer relationship laws, govern transfers as well as terminations and nonrenewals.

A. Change in Control or Ownership

It is generally the case, pursuant to typical written agreements as well as applicable protection statutes, that the transfer of a dealership to a financially-qualified family member or spouse of a deceased dealer (\textit{i.e.}, succession of the franchise) is permitted under the law.\textsuperscript{201}

\textsuperscript{197} Id. at § 56:10-5.
\textsuperscript{199} Dunkin’ Donuts of Am., Inc. v. Middletown Donut Corp., 495 A.2d 66, 76 (N.J. 1985).
\textsuperscript{200} Puerto Rico’s Law 75 requires renewal of franchises except for good cause which is defined as the “nonperformance of any of the essential obligations of the dealer’s contract on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the [manufacturer] or grantor in promoting the marketing or distribution of the merchandise or service”. LAWS OF P.R. ANN. tit. 10 § 278. Wisconsin has a similar provision. See WIS. STAT. §§ 135.02(4). Along with New Jersey, these jurisdictions have been traditionally regarded as so called “evergreen jurisdictions”, where absent a material breach or good faith withdrawal from the market, the dealer is entitled to the dealership for in perpetuity. See Tractenberg, supra n. 145, at 200. Wisconsin courts, however, have constantly been expanding the definition of good cause to accommodate the manufacturer’s business interests. See Morley-Murphy Co., 142 F.3d 373; Tractenberg, supra n. 145, at 200-201.
\textsuperscript{201} See CAL. BUS. & PROF. CODE § 20027; IND. CODE § 23-2-2.7-2(3).
Many other written agreements and applicable protection statutes provide that, in addition to
dealership succession rights, the dealer may transfer his or her interest in the dealership upon
the manufacturer’s prior written approval and the proposed transferee’s compliance with the
manufacturer’s standards for dealers generally. Courts have generally enforced such
provisions, so long as the manufacturer’s transfer requirements are reasonable and uniformly
imposed upon all similarly-situated dealers.

In some states, certain changes in ownership are deemed not to be transfers requiring
the manufacturer’s consent, and the manufacturer may not “interfere” with such dispositions. In
Iowa, for example, transfers to a surviving spouse, heir, or managing partner upon the death or
disability of a dealer, transfers by a proprietorship dealer to a corporation, and transfers of
equity within an existing ownership group, among others, do not require the consent of the
manufacturer.

B. Consent

Franchise relationship laws, which, as previously discussed, may also apply to the
dealership relationship, usually permit the franchisor to impose reasonable conditions upon a
transfer. These may include the transferee’s satisfaction of the franchisor’s qualifications to be
a franchisee, payment of a transfer fee, and execution of a release, forum selection clause, or
other contractual provision. Many franchise and dealership agreements also provide that the
franchisor/manufacturer has a right of first refusal to acquire the franchise or dealership being
sold.

Most states require that the manufacturer must consent before a dealer can lawfully
transfer the dealership. However, the manufacturer must have legitimate reasons for refusing
to allow a transfer. For example, in North Dakota, a manufacturer must allow the transfer of a
retail farm implement, lawn and garden equipment, or vehicle dealership whenever the
proposed transferee “meets the written, reasonable, and uniformly applied standards of
qualifications of the franchisor relating to the financial qualifications of the transferee and
business experience of the transferee.” The refusal of the franchisor to accept such a
transferee is unreasonable and entitles the dealer to sue for violation of the statute.

Where there is no statutory provision to the contrary, though, prohibitions against
degregation of duties of dealership agreements have been upheld.

202 See, e.g., N.J. STAT. ANN. § 56:10-7; NEB. REV. STAT. § 87-405.
(franchisor’s refusal to approve the transfer of a retail franchise was reasonable, and thus enforceable, where
proposed purchaser had little retail experience, would not work full-time in the business, did not have adequate
financing, and would not complete the franchisor’s generally-required training program).
204 Refer to footnote 2.
205 Id.
206 N.D. CENT. CODE § 51-07-02.2.
207 Id.
VII. REMEDIES FOR IMPAIRMENT, TERMINATION OR NONRENEWAL

The consequence of running afoul of certain relationship statutes can be dire. Some relationship laws enumerate the remedies a dealer may seek in the event of wrongful termination or nonrenewal. One interesting example is the Maryland Fair Distributorship Act, which provides that “on cancellation or nonrenewal of an agreement by a grantor for any reason, including a distributor’s failure to cure . . . , the grantor shall have the right to, and must at the option of the distributor, repurchase all merchandise sold . . . .”\textsuperscript{208} The Maryland relationship statute also says that:

“This subtitle shall be construed to provide the minimum terms and conditions applicable to grantors and distributors . . . . This subtitle does not limit or restrict the rights of a grantor or distributor at any time to seek in the state all legal and equitable remedies for any violation of this subtitle or any material breach of an agreement.”\textsuperscript{209}

The Maryland statutory remedy is available to both dealers and manufacturers, and applies even if the termination or nonrenewal is not wrongful.\textsuperscript{210}

Relationship laws provide legal and equitable remedies in the event of improper or threatened termination or nonrenewal. These remedies generally include the recovery of damages, including the recovery of lost profits and good will. Some relationship laws expressly afford dealers additional remedies such as inventory or asset repurchase. Other remedies include litigation costs, including attorney’s fees. Furthermore, in some jurisdictions, authorities are empowered to seek punitive damages or criminal sanctions against noncompliant manufacturers.

A. Damages

Several general dealer relationship laws and two federal industry-specific dealer relationship statutes expressly entitle dealers to sue manufacturers to recover damages caused by unlawful termination or nonrenewal.\textsuperscript{211} As further discussed in this section, some of these statutes specify how damages must be calculated, but most leave the formulation of damages to the courts.

\textsuperscript{208} MD. CODE ANN. COMMERCIAL LAW § 11-1304(a).

\textsuperscript{209} Id. at §§ 11-1307(a) and (b).

\textsuperscript{210} The Alaska relationship law establishes a repurchase remedy in case of termination, nonrenewal or statutorily defined impairment. See ALA. STAT. §§ 45.45.710 and 45.45.740. Like the Maryland statute, the language of the Alaska law does not require that the actions of the manufacturer be wrongful in order to grant a remedy. North Dakota has enacted a statute that specifically establishes the repurchase of merchandise as the only remedy for termination or nonrenewal of a distribution agreement without requiring that the manufacturer’s actions be wrongful.

\textsuperscript{211} See Automobile Dealer Franchise Act, 15 U.S.C. §1222; Petroleum Marketing Practices Act, 15 U.S.C. § 2805; Alaska Distributorships Law, ALA. STAT. § 45.45.760; Arkansas Franchise Practices Act, ARK. CODE ANN. § 4-72-208(b); Delaware Franchise Security Law, DEL. CODE ANN. tit. 6 § 2553(c); Hawaii Franchise Investment Law, HAW. REV. STAT. ANN § 482E-6(5); Minnesota Franchises Law, MINN. STAT. ANN. § 80C.17, subd. 3; Mississippi Franchises Law, MISS. CODE ANN. § 75-24-57; Missouri Franchise Act, MO. REV. STAT. § 407.410.2; Nebraska Franchise Practices Act, NEB. REV. STAT. § 87-409; New Jersey Franchise Practices Act, N.J. STAT. ANN. § 56:10-10; Wisconsin Fair Dealership Law, WIS. STAT. ANN. § 135.06; Puerto Rico Dealers’ Act, P.R. LAWS ANN. tit. 10 § 278b; Virgin Islands Consumer Protection Law, V.I. CODE ANN. tit. 12-A § 135.
New Jersey affords comprehensive protection to dealers under its New Jersey Franchise Practice Act. Westfield Centre Service, Inc. v. Cities Service Oil Co.\textsuperscript{212} held that absent bad faith, a manufacturer who wrongfully terminates the dealership relationship “is liable to the franchisee for the loss occasioned thereby, namely, the reasonable value of the business less the amount realizable on liquidation.”\textsuperscript{213} The court explained:

Reasonable value would be that price upon which willing parties, buyer and seller, would agree for the sale of the franchisee’s business as a going concern . . . . There should, of course, be deducted from the reasonable value the net liquidating worth of the assets retained by the franchisee, since otherwise the franchisee would be compensated for more that its loss.\textsuperscript{214}

Some jurisdictions allow for application of remedies provided by other laws. In Delaware, for example, damages recoverable pursuant to its relationship statute include any “damages allowed under the law of [the] State.”\textsuperscript{215}

1. Lost Profits

Many relationship statutes permit recovery for lost profits, but fail to provide any guidance regarding how to calculate them. Thus, courts must fill in the gaps.\textsuperscript{216} Some jurisdictions, including Delaware and Puerto Rico, provide some guidance. The Delaware Franchise Security Law provides that lost profits “shall be presumed to be no less than 5 times the profit obtained by the franchised distributor by virtue of the terminated franchise, in the most recently completed fiscal year.”\textsuperscript{217} Under Puerto Rico’s Law 75, dealers are allowed to recover “the amount of the profit obtained in the distribution of the merchandise or in the rendering of the services [pursuant to the dealership], as the case may be, during the last five years, or if less than five years, five times the average annual profit obtained during the years the parties have been doing business.”\textsuperscript{218}

The amount of lost profits when a dealer carries only one line of products is often obtained by subtracting the administrative expenses or overhead incurred in the operation from

\textsuperscript{212} 432 A.2d. 48 (N.J. 1981).
\textsuperscript{213} Id. at 57.
\textsuperscript{215} DEL. CODE ANN. tit. 6 § 2553(c).
\textsuperscript{216} For a pointed discussion of recovery by franchisors of lost future royalties, see Joseph Schumacher & Kimberly Toomey, Recovering Lost Future Royalties in a Franchise Termination Case, 20 Franchise L.J. 116 (2001).
\textsuperscript{217} DEL. CODE ANN. tit. 6 § 2353(c). The Supreme Court of Delaware has held that it would be unconstitutional for a court to award the dealer the mandatory statutory damages without proof of actual loss. See Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 1167 (N.J. Super. 1981).
\textsuperscript{218} P.R. LAWS ANN. tit. 10, § 278b. The damages criteria set forth in the Law 75 need not be mechanically applied, but often are. In Marina Indus. v. Brown Boveri Corp., 114 D.P.R. 64, 90 (P.R. 1983), translated in 14 P.R. Offic. Trans. 86, 118 (1983), the Supreme Court of Puerto Rico held that the factors that Law 75 lists in section 278b are “only guidelines for the fixing of the damages and do not bind the court to automatically award indemnity applying each and every factor.
the gross profits generated by the product’s sales. When dealers carry several lines of products from different manufacturers, calculating lost profits is more complicated. It is necessary to allocate the expenses among the different product lines carried by the distributor. In *Ballester Hermanos, Inc. v. Campbell Soup Company*, the Court outlined the competing damage theories of the manufacturer and distributor:

The plaintiff [distributor Ballester Hermanos] has advanced a method called the “streamline” or “contribution” approach. It deducts from gross profits only those expenses which will no longer be incurred after the withdrawal of the terminated lines—that is, the expenses directly related to the sale by Ballester Hermanos of Campbell [defendant manufacturer] products. This method seeks to reflect the loss suffered by Ballester Hermanos by focusing on the loss of the contribution made by the Campbell lines to the capital of Ballester Hermanos. It reflects the fact that the fixed expenses of Ballester Hermanos, which will still be incurred as the company continues to distribute the products of his other manufacturers, are absorbed by the other lines. As a result, the company suffers a serious decline in efficiency and profitability.

The defendant advances a method through which all expenses directly related to the distribution of Campbell lines and 12 percent of all expenses indirectly related to the distribution of the Campbell lines are deducted from gross profits to determine net profits. The defendant contends that this “straight” method is the only one that accurately reflects the true profit obtained by Ballester Hermanos in the distribution of the Campbell lines. This method is advantageous for the defendant because it deducts a greater range of expenses, thereby reducing the amount of the plaintiff's net profit and consequently its recovery under the [Puerto Rico’s relationship law].

Puerto Rico Law 75 uses the term “benefits” to refer to profits, but does not offer any formula to calculate them. The Ballester Hermanos Court chose to steer away from defining “benefits” as a matter of law, and instead submitted the issue to the jury. On the other hand, in *A.M. Capen’s Co. v. American Trading and Production Corporation*, a different judge from the same court ruled that both types of expenses, direct and indirect, must be allocated to determine what the “benefits” are. Thus, “benefits” were actually calculated as “net profits” in *A.M Capen’s*.

The U.S. Court of Appeals for the Seventh Circuit also faced a problem of expense allocation in *Morley-Murphy Co. v. Zenith Electronics Corp.* Morley-Murphy, a distributor of Zenith products as well as those of other manufacturers, sued Zenith for wrongful termination. The jury awarded Morley-Murphy a specific sum of money that compensated Morley-Murphy for

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220 Id. at *13-14 (footnotes omitted).

221 See id. at *17.


223 Id. at 225-229.

224 142 F.3d 373 (7th Cir. 1998).
the expenses it would continue to incur despite the termination. Zenith argued that allowing Morley-Murphy to be reimbursed for those expenses, in addition to lost profits, would amount to double compensation. Morley-Murphy contended that, under Wisconsin law, recovery of both lost profits and overhead was allowed. In interpreting the Wisconsin Fair Dealership Law, the Seventh Circuit concluded that a distributor is not entitled to recover, in addition to lost profits, fixed expenses that should simply be considered to reduce the gross profit of the terminated product line.

Another recurring damages issue is whether the distributor’s evidence supports the compensation sought. Dealers are frequently required to rely on expert opinion that can then be scrutinized under the standards established for both “scientific” and “soft” experts in Daubert v. Merrell Dow and Kumho Tires v. Carmichael, and the codification of those standards in the amendments to Rules 701 and 702 of the Federal Rules of Evidence. Expert evidence of economic loss predicated upon arbitrary factual conclusions or unsupported speculation that fail to take relevant data into account do not pass muster under those standards. In Ileana Irvine v. Murad Skin, the U.S. Court of Appeals for the First Circuit excluded an expert opinion that calculated lost profits insofar as the expert’s estimate of lost income from sales of Murad products was based on the erroneous assumption that the sale of those products constituted all of the distributor’s sales. The expert testified that he had assumed this based on information provided by the dealer’s management, but that he did not consider any of the dealer’s purchase and sales records to verify if this was the case. The court held that the basic premise of the expert’s opinion to justify the compensation for damages under Puerto Rico’s relationship statute was excluded because “[a]bsent adequate factual data to support the expert’s conclusions, his testimony was unreliable.”

Under Kumho Tires, all experts, including economic experts, are expected to “use the same level of intellectual rigor in the court room as is used in his or her profession.” In A.M. Capen’s Co. v. American Trading and Production Corporation, the court admitted plaintiff’s

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225 Id. at 381-382.

226 509 U.S. 579, 592-93 (1993) (holding that, in deciding the admissibility of scientific expert testimony, the trial court must decide “whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue”).

227 526 U.S. 137, 149 (1999) (the court’s role in ensuring the reliability and relevancy of expert testimony extends to both scientific and non-scientific expert testimony).

228 See Kevin M. Kennedy, The Use of Daubert and Its Progeny to Attack Lost-Profit Claims, 20 Franchise L.J. 167 (2001) (discusses challenges to the admission of expert calculations of lost-profits).

229 194 F. 3d 313 (1st Cir. 1999).

230 See id. at 321. See also Club Car, Inc. v. Club Car (Quebec) Imp., Inc., 362 F.3d 775 (11th Cir. 2004) (upholding grant of Daubert motion barring expert testimony on lost profits based solely on gross sales and gross profit figures without any reduction for the allocable overhead to arrive at net lost profits); Lithuanian Commerce Corp. Ltd. v. Sara Lee Hosiery, 179 F.R.D. 450, 460-61 (D.N.J. 1998) (finding that the expert’s opinion basing calculations of distributor’s loss on the unsupported and arbitrary assumption that plaintiff’s terminable at will dealership would have survived for 20 years).


expert report into evidence, but implied that some parts of it might not pass the Daubert standard. For instance, the Court cautioned that it was refraining “from engaging in the analysis urged by Plaintiff” because “even in infringement cases, it would definitely be speculative to presume, without sufficient and valid proof to substantiate said assumption, that all the sales made by other dealers would have been made by the plaintiffs.” Thus, the court essentially adopted defendant’s expert report.

2. **Goodwill**

Some relationship statutes specifically provide for compensation for loss of goodwill. Some allow for goodwill compensation only in the event of nonrenewal. The Hawaii relationship statute, for example, provides for recovery of lost goodwill only “[i]f the franchisor refuses to renew a franchise for the purpose of converting the franchisee’s business to one owned and operated by the franchisor.”

Compensation for goodwill may also be recoverable under general statutory provisions mandating recovery of any damages “sustained” as a consequence of the wrongful termination or nonrenewal. Under the Wisconsin Fair Dealership Act, for instance, which provides that a dealer “may bring an action . . . for damages,” granting compensation for goodwill would be appropriate in most cases.

Goodwill has been calculated in several different ways. One formula that plaintiff dealers use is known as the Excess Earnings or Treasury Valuation Method, defined as “the expectation of earnings in excess of a fair return on the capital invested in tangibles or other means of production.” Generally, “good will” damages compensate the dealer for loss of future profits.

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233 12 F. Supp. 2d at 229.

234 See P.R. LAWS ANN. tit. 10, § 278 b (c); DEL. CODE ANN. tit. 6, § 2553(c); HAW. REV. STAT. § 482E-6(3); MISS. CODE ANN. § 75-24-57; MO. REV. STAT. § 407.410.2.

235 HAW. REV. STAT. § 482E-6(3).

236 Id.

237 WIS. STAT. ANN. § 135.06.

238 Id.


3. **Punitive Damages**

Several jurisdictions allow punitive damages when their deterrent effect would serve the public interest. In *Ridings v. Thoele, Inc.*, however, the Supreme Court of Missouri declined to award punitive damages for a manufacturer’s failure to provide timely notice of termination because “the remedial language [of the relationship statute] does not . . . suggest an intent to punish or make example of a recalcitrant franchisor,” and “Missouri common law never has recognized the availability of punitive damages for failure to notify a franchisor of impending termination.” Other violations by a manufacturer, however, may entitle a dealer to punitive damages under Missouri law. In Puerto Rico, punitive damages are never awarded to dealers under any circumstances.

**B. Equitable Remedies**

Many jurisdictions provide for preliminary injunctive relief against improper termination or nonrenewal. One interesting issue in this context is whether only preliminary injunctions are available to reverse a termination: Permanent injunctions may not be constitutionally permissible because they may violate either the Commerce Clause or the Due Process Clause. In *VW Credit v. Coast Auto. Group*, the Court stated that:

Although our Supreme Court recognized that the issuance of a permanent injunction against termination, cancellation or non-renewal would raise constitutional questions of due process, and in the case of franchisor owned real property, taking of property for public use without just compensation, the Court limited that recognition to cases where the franchisor had bona fide reasons and refused, in good faith, to approve the transfer or renewal.

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244 739 S.W. 2d 547 (Mo. 1987).

245 Id.


248 See, e.g., *ALA. STAT. § 45.45.760(b); ARK. CODE ANN. § 4-72-208(1); DEL. CODE ANN. tit. 6 § 2553; MINN. STAT. ANN. § 80C.17, subd. 1; MISS. CODE ANN. § 75-24-61; MO. REV. STAT. § 407.410.2; NEB. REV. STAT. ANN. § 87-409; N.J. STAT. ANN. § 56:10-10; S.D. CODIFIED LAWS § 37-5A-51; WIS. STAT. ANN. § 135.06 (“[T]he dealer also may be granted injunctive relief against unlawful termination, cancellation, nonrenewal or substantial change of competitive circumstances.”), and see also § 135.065 (“[A]ny violation of this chapter by the grantor is deemed an irreparable injury to the dealer for determining if a temporary injunction should be issued.”); *P.R. LAWS ANN. tit. 10 § 278b-1; 15 U.S.C. § 2805(b).*


250 Id.
In other words, the Court concluded that, if the manufacturer does not act “in good faith” or with “bona fide” reasons to terminate or fail to renew, a permanent injunction would be constitutionally permissible.

In some jurisdictions, irreparable harm need not be shown to obtain injunctive relief. In O.T. Industries, Inc. v. OT-tehdas OY Santasalo-Sholberg AB, the court identified the test for a *pendente lite* injunction blocking a dealer termination, which included the balance of interests between the parties, the impact upon the public interest, probabilities of success on the merits of the claim, nature of the relationship between the parties and administrative burdens in enforcing the injunction, but the Court presumed irreparable harm.252

Jerry V. De Moss v. Kelly Services, Inc. also held that a showing of irreparable harm was not required to obtain an injunction *pendente lite*. The Puerto Rico Supreme Court ruled, in Systema de Puerto Rico, Inc. v. Interface International, Inc., that irreparable harm is not required for Law 75 injunctions as it would be in other cases, because the traditional criteria for the issuance of temporary injunctive relief must be tempered by the legislative purpose behind the Puerto Rico relationship statute. One very important consideration is whether, absent an injunction, the distributor would be unable to finance the litigation or to mitigate its damages by pursuing other business activities. [imprt to them? the Courts? cite?]

Like all injunction inquiries, probabilities of success on the merits, and whether the issuance of an injunction would severely harm the distribution of the product or service or cause economic injury to third parties, are also factors that may enter into the analysis. Recently, in Tatan Management v. Jacfran Corp., a federal court reaffirmed that while injunctive relief under a franchise and dealer protection statute may be somewhat easier to obtain than in other circumstances, a statute does not automatically entitle a terminated dealer to preliminary injunctive relief.

Some jurisdictions provide equitable remedies that go beyond an injunction *pendente lite* in the case of nonrenewals. For example, Delaware’s dealer law mandates that “[i]f a franchisor . . . unjustly fails or refuses to renew a franchise . . . or gives notice that it intends to attempt to unjustly refuse to renew a franchise, then the franchised distributor . . . shall be entitled to . . . subject to equitable principles . . . a mandatory order for renewal of the franchise.”

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251 346 N.W.2d 162 (Minn. App. 1984).
253 493 F. 2d 1012 (1st Cir. 1974).
254 See id. at 1015.
255 123 D.P.R. 379 (P.R. 1989).
256 See id. at 387.
257 Id.
259 DEL. CODE ANN. tit. 6 § 2553.
C. Return of Merchandise and Other Remedies

In most industry-specific laws, a dealer or distributor has the right to expect repurchase of inventory affected by termination. For instance, North Dakota has enacted an issue-specific statute on merchandise return upon nonrenewal or termination of dealerships. Whenever a distributor discontinues a distribution agreement in North Dakota, “the dealer may recover from the distributor the net cost to the dealer of all new and unused merchandise, and parts for such merchandise, held by the dealer at the time of cancellation or discontinuance of the contractual arrangement.”

The Alaska dealer protection statute is typical of this type of protection. An Alaskan dealer may compel payment for inventory held by the dealer on the date of termination or nonrenewal equal to “the fair market value for merchandise that is unused and for which the . . . [dealer] has paid the . . . [manufacturer], plus 100 percent of the transportation charges paid by the dealer to return the merchandise . . . .” Payment is to be made not later than three months after the date the distribution agreement is terminated or is not renewed. The statute compels the manufacturer to:

1. purchase that portion of the dealer’s business directly affected by the distributorship agreement . . . including assets and machinery, at commercially reasonable business valuations; and

2. reimburse the dealer for the expenses that were necessarily incurred by the dealer

   (A) for that portion of the dealer’s business covered by the distributorship agreement; and

   (B) during the 12 months before the termination or change.

Jurisdictions vary in their treatment of issues such as whether the obligation to repurchase arises in the event of both termination and nonrenewal or in only one of those situations; whether the obligation arises even when the termination or failure to renew is lawful; and what must be repurchased and at what price.

For instance, in Hawaii and Maryland, repurchase is mandatory in cases of both termination and nonrenewal. In Delaware and Hawaii, manufacturers must repurchase certain items regardless of whether there is good cause for termination. The Maryland

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260 N.D. CENT. CODE, § 51-20.2-02.

261 ALA. STAT. § 45.45.710. Although the relevant sections of the Alaska statute refer to “terminates a distributorship agreement”, “terminates” is defined by the statute as “includes failing to renew”. Id. at § 45.45.790(5).

262 Id. at § 45.45.720.

263 Id. at § 45.45.740 (a)(1).

264 See ALA. STAT. §§ 45.45.710, 45.45.740, 45.45.790(5); HAW. REV. STAT. § 482E-6(3); MD. CODE ANN. COMMERCIAL LAW § 11-1304(a); P.R. LAWS ANN. tit. 10 § 278b (b).

265 See ALA. STAT. § 45.45.710; DEL. CODE ANN. tit. 6 § 2553 (c)(1); HAW. REV. STAT. § 482E-6(3).
statute establishes repurchase of merchandise as a right of both the manufacturer and the dealer.\textsuperscript{266}

The Arkansas statute requires the manufacturer, at the option of the dealer, to “repurchase at franchisee’s net cost, less a reasonable allowance for depreciation or obsolescence, the franchisee’s inventory, supplies, equipment, and furnishings purchased by the franchisee from the franchisor or its approved sources,” providing, however, that “no compensation shall be allowed for the personalized items which have no value to the franchisor.”\textsuperscript{267} The laws of Delaware, Hawaii, Maryland, and Puerto Rico contain similar provisions.\textsuperscript{268}

Alaska, Delaware, Hawaii, and Puerto Rico expressly authorize the dealer to recover capital investment in the dealership.\textsuperscript{269}

Also, in most jurisdictions, the prevailing party may recover costs and attorney’s fees.\textsuperscript{270} Additionally, the relationship law of Puerto Rico and the federal PMPA expressly allow the prevailing party to recover expert fees.\textsuperscript{271}

Finally, some jurisdictions allow for the imposition of criminal penalties. Minnesota law allows the imposition of fines of up to $2,000.00 for notice provision violations, and up to $10,000.00 and/or five years imprisonment for willful violations.\textsuperscript{272} Under Mississippi law, a manufacturer who willfully violates the statutory termination provision “is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than . . . $500 or by imprisonment . . . for a term not to exceed six months or by both.”\textsuperscript{273} In Missouri, willfully violating the statute’s termination provision may be prosecuted as a felony.\textsuperscript{274}

VIII. CONCLUSION

The purpose of this paper is to provide an outline for practitioners to follow in counseling dealer-distributor, and manufacturer clients. When counseling or litigation is required for disputes involving termination, nonrenewal, transfers, remedies, and damages, it is important for

\textsuperscript{266} MD. CODE ANN. COMMERCIAL LAW § 11-1304(a) (repurchase available to the manufacturer “on cancellation or nonrenewal of an agreement by a grantor for any reason, including a distributor’s failure to cure”).

\textsuperscript{267} ARK. CODE ANN. § 4-72-209.

\textsuperscript{268} See DEL. CODE ANN. tit. 6 § 2353 (c)(1); HAW. REV. STAT. § 482E6(3); MD. CODE ANN. COMMERCIAL LAW § 11-1304(b); P.R. LAWS ANN. tit. 10 § 278b (b).

\textsuperscript{269} See ALA. STAT. § 45.45.740; DEL. CODE ANN., tit. 6 § 2553 (c) (1); HAW. REV. STAT. § 482E-6(3); P.R. LAWS ANN. tit. 10 § 278b (a).

\textsuperscript{270} See, e.g., 15 U.S.C. 2805(d)(1)(C); ARK. CODE ANN. § 4-72-208(1); DEL. CODE. ANN. tit. 6 § 2553 (c); MINN. STAT. § 80C. 17, subd. 3; MISS. CODE ANN. §75-24-57; MO. REV. STAT. §407.410.2; NEB. REV. STAT. § 87-409; N.J. STAT. ANN. § 56:10-10; WIS. STAT. ANN. §135.06; P.R. LAWS ANN. tit. 10, § 278e; V.I. CODE ANN. tit. 12A, § 135.

\textsuperscript{271} See 15 U.S.C. 2805(d)(1)(C); P.R. LAWS ANN. tit. 10 § 278e.

\textsuperscript{272} See MINN. STAT. § 80C.16, subd. 2, 3 (a).

\textsuperscript{273} MISS. CODE ANN. § 75-24-61.

\textsuperscript{274} MO. REV. STAT. § 407.420. See also ARK. CODE ANN. §§ 4-72-207, 4-72-208(a) (classifying fraudulent schemes in the context of distributorships as a felony and imposing treble damages on violators).
practitioners to remember that the dealership relationship may be defined by the dealership agreement itself, state franchise and dealer relationship statutes, and even the common law. The statutes, case law, and other authorities discussed and cited above are all excellent sources to consult when faced with issues arising from dealer and distributor relationships.
BIOGRAPHY

Rossell Barrios

Rossell Barrios is a partner in the Litigation Department of Goldman, Antonetti & Córdova. He graduated, magna cum laude, from the University Of Puerto Rico School Of Law in 1982 whereupon he commenced his career. He received the Puerto Rico Bar Award as the law student with the highest grade point average and the West Publishing Company Award for the highest grade average in Anglo-Saxon law.

Rossell handles commercial and products liability litigation, dedicating most of his time to Dealer Act (Act 75) litigation and counseling and Franchise law. He has litigated for 24 years in both Federal and Commonwealth courts. He is admitted to practice in the Commonwealth of Puerto Rico, the United States District Court for the District of Puerto Rico, the United States Court of Appeals for the First Circuit, the United States Supreme Court and the District of Columbia.

Rossell is also an active member of the Franchising and Litigation Sections of the American Bar Association. He has represented corporations such as Marriott International; Glaxo SmithKline; Metromedia Steakhouses, L.P.; Snap On, Inc.; Dunkin Brands; Panasonic Puerto Rico, Inc.; Southland Corporation; Cottman Transmissions; Meineke Car Care Center, Inc.; MAACO Enterprises; Romacorp; Rockwell Automation and Kohler Co.

Rossell’s publications include: “Effect of Arbitration and Choice of Law Clauses on the Application of the Puerto Rico Dealer’s Act”, Franchise Law Journal; Vol. 16, No. 1 (Summer 1996). Rossell was also a speaker at the 2001 Forum in San Francisco.
KERRY L. BUNDY

Kerry Bundy is a partner in the business litigation department at Faegre & Benson LLP in Minneapolis, Minnesota. She specializes in franchise and distribution litigation, trade secret litigation and counseling, and complex commercial matters. Kerry has represented manufacturers, franchisors, dealers, and distributors in federal and state proceedings as well as in national and international arbitrations.


Kerry received her law degree from Northwestern University School of Law, where she was Editor-in-Chief of the Northwestern Journal of International Law and Business. She graduated from Colorado State University, magna cum laude, Phi Beta Kappa, with a B.A in political science.
RONALD K. GARDNER, JR.

Ronald K. Gardner is the managing partner of Dady & Garner, P.A., and limits his practice to the representation of franchisees, dealers and distributors when they are in disputes with their franchisors, manufacturers and suppliers. Ron, along with the rest of his colleagues at Dady & Garner, P.A., prides himself on the fact that the firm has a national reputation for effectively and efficiently helping their franchisee, dealer and distributor clients to resolve their disputes through litigation, negotiation, mediation and arbitration. More specifically, Ron has helped clients in dozens of industries, including fast food, automobile, trucking, construction equipment and agricultural implements. He was co-counsel and the principal brief writer in the widely discussed trilogy of Fiat cases (See e.g. Coelho & Bacchetti v. Ford New Holland, Bus. Fran Guide (CCH) 10,924 (AAA 1996)), and the frequently cited case of Dunafon v. Taco Bell, Bus Fran. Guide (CCH) 10,919 (W.D. Mo. 1996) and Bus. Fran. Guide (CCH) 11,239 (W.D. Mo. 1997). More recently, Ron was lead counsel in the widely publicized decision Pool Concepts, Inc. v. Watkins, Bus. Fran. Guide (CCH) 12,249 (D. Minn. 2002)(finding that payment of funds into a co-op ad fund was an indirect franchise fee under the Minnesota Franchise Act, entitling the franchisee to the protections of the Act, including a preliminary injunction against termination).

Ron is a member of the American, Minnesota, Hennepin County and Rice County Bar Associations. He is an active member of the ABA Forum on Franchising, is a past Division Director of the Forum’s Litigation and Alternative Dispute Resolution Division, and is currently serving as the Forum’s Membership Officer on the Governing Committee of the Forum on Franchising. Ron was a Co-Chair of the Orlando Forum and is an active participant in the American Association of Franchisees and Dealers.

Ron is a frequent speaker at various gatherings on franchise and distribution-related topics, such as the Annual Forum on Franchising, the National Convention of the American Association of Franchisees and Dealers and the International Franchise Association. He also speaks regularly to various franchise and industry groups about their rights. Ron is a former author of the widely cited treatise Franchising: Realities and Remedies, published by Law Journal Seminars Press and distributed nationally, as well as being a co-author of the “Annual Franchise and Distribution Law Developments 2002” volume published by the American Bar Association.

Ron has represented businesses of all sizes, including multi-unit franchisees, as well as single owner operations. He has handled disputes ranging from unlawful terminations to encroachment to cases regarding franchisor’s failure to comply with registration and disclosure requirements of the FTC and state governments. He has represented or counseled clients in virtually all 50 states. Ron has also been named as a “Super Lawyer” by Law & Politics magazine, a "Legal Eagle" by the Franchise Times, and recently in the Best Lawyers in America.

Ron graduated magna cum laude in 1991 from Mankato State University, and is a 1994 cum laude with honors graduate of the Hamline University School of Law. He and his wife Becky are also the proud parents of Devyn and Zach.