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SURVEY OF STATE DEALER LAW TOPICS

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# TABLE OF CONTENTS

I. OVERVIEW .................................................................................................................. 1

II. STATUTES OF GENERAL APPLICABILITY ................................................................. 3
   A. Franchise Statutes ..................................................................................................... 3
   B. Dealership Laws of General Applicability .............................................................. 5

III. INDUSTRY-SPECIFIC STATUTES ............................................................................. 11
   A. Equipment Dealer Statutes .................................................................................... 11
   B. Motor Vehicle Dealer Statutes .............................................................................. 15
   C. Motor Fuel Dealer Statutes ................................................................................... 16
   D. Alcoholic Beverage Distributor Statutes ................................................................. 17
   E. Miscellaneous Industry-Specific Dealer Statutes .................................................. 18
      1. Watercraft and Vessel Dealer Statutes ............................................................... 18
      2. Motorsport or Powersport Vehicle Dealer Statutes .......................................... 19
      3. Aircraft Dealer Statutes ..................................................................................... 21
      4. Office Machine Dealer Statutes ......................................................................... 21

IV. CHOICE OF LAW ....................................................................................................... 22
   A. Enforceability ......................................................................................................... 22
   B. Extraterritorial Application .................................................................................... 23
      1. Perspective of dealer counsel ............................................................................. 23
      2. Perspective of supplier counsel ......................................................................... 27
   C. Effect on State Dealer Laws .................................................................................. 31

V. CHOICE OF FORUM .................................................................................................. 35

VI. "CONSTRUCTIVE" TERMINATION AND NONRENEWAL ....................................... 38

VII. "SUBSTANTIAL CHANGES IN COMPETITIVE CIRCUMSTANCES" ....................... 40

VIII. "GOOD CAUSE" ..................................................................................................... 42
     A. Definitional Issues ............................................................................................... 42
     B. Market Withdrawal and Consolidation ............................................................... 44
        1. Perspective of dealer counsel ......................................................................... 44
        2. Perspective of supplier counsel ..................................................................... 48

APPENDIX A: State Dealer Protection Laws .................................................................. A-1
I. OVERVIEW

Virtually every state—along with the Commonwealth of Puerto Rico and the U.S. Virgin Islands—has enacted one or more statutes providing various forms of protection to “dealers” and “distributors.” In some industries and under some statutes, the terms “dealer” and “distributor” are synonymous. Sometimes, however, the term “dealer” refers only to retail outlets whereas “distributor” is a term of art used to identify wholesalers that supply dealers with manufacturers’ products.1 Many of these statutes are broad enough in scope to apply to dealers and distributors of virtually any conceivable good or service. These state dealer laws are analogous to franchise “relationship” laws of general applicability that define “franchise” broadly enough to include many dealershipships and distributorships without regard to the industry or product. Some state dealer laws apply only to broad categories of products—such as “equipment” of all types or, in two counties in Alabama, “liquid goods.”2 Other state dealer laws are quite narrow in scope—applying only to dealers of all-terrain vehicles, snowmobiles, or mobile homes, among other examples.

Complicating things further is the overlay of—and the interplay between—federal and state laws applicable to dealers. At the federal level, efforts to enact franchise and dealer relationship laws of general applicability have so far been unsuccessful. The FTC Franchise Rule,3 however, defines “franchise” broadly enough to apply to many purported “dealerships” and “distributorships” that are not within the scope of a regulatory exemption4 or informal FTC Staff Advisory Opinion. And in two industries—petroleum products and motor vehicles—dealers are protected by a federal relationship statute. The Petroleum Marketing Practices Act (the “PMPA”), contains detailed requirements with respect to the permissible grounds, procedures, and notice for termination and nonrenewal of a PMPA “franchise”5—while also preempting any state dealer law provision that is not “the same as” the applicable provision of the PMPA.6 In contrast, the auto industry is subject to a regime of “peaceful co-existence” between federal and state dealer laws. The federal Automobile Dealer’s Day in Court Act, 15 U.S.C. § 1221 et seq.

1 Many state motor vehicle dealer laws define “dealer” and “distributor” this way. For example, the Virginia Motor Vehicle Dealer Franchise Act defines “Distributor” as “a person who is licensed by the Department of Motor Vehicles … who sells or distributes new motor vehicles pursuant to a written agreement with the manufacturer, to franchised motor vehicle dealers in the Commonwealth.” Va. Code § 46.2-1500 (emphasis added).


(the “ADDA”), imposes upon manufacturers a general duty of “good faith”—defined as not engaging in “coercion.” The federal ADA does not preempt state motor vehicle dealer statutes, which are among the most restrictive applicable to any industry.

The purpose of this paper is not to give a detailed analysis of these scores of state and federal statutes. Rather, the goal here is to acquaint the reader with the breadth of legislation specifically affecting dealerships, to highlight the similarities and many differences among such statutes, and to address the issues that are most frequently disputed under these statutes.

Not surprisingly, these numerous statutes have one common denominator. All are intended to afford dealers certain rights and remedies that they would not necessarily possess if left with only the terms of their dealership agreements to turn to. These statutes are all, to one degree or another, protectionist legislation—created to compensate for the real or perceived lack of bargaining equality between dealers and their suppliers. Like the broad range of statutes themselves, the rights afforded under these statutes vary tremendously. Some of these rights are simply procedural—such as the right to receive written notice before the termination of a dealership. Some of these rights are more substantive (and substantial)—such as the requirement that the manufacturer-supplier have good cause to terminate, not renew, or substantially change the competitive circumstances of a dealership or dealership agreement. The remedies available to dealers under these statutes also vary widely. Some state dealer laws afford the dealer the right to have its inventory repurchased upon termination (but not necessarily any right to prevent the termination in the first place). Others specifically authorize injunctive relief to prevent termination, nonrenewal, or any “substantial change in competitive circumstances”—together with the recovery of damages, costs, and attorneys’ fees. Correctly identifying the dealership statute or statutes that may affect a particular dealer agreement is critical to understanding, and in turn counseling about, the full breadth of the parties’ rights and obligations.

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9 See, e.g., Wisconsin Fair Dealership Law, Wis. Stat. § 135.025(2):

The underlying purposes and policies of this chapter are:

(a) To promote the compelling interest of the public in fair business relations between dealers and grantors, and in the continuation of dealerships on a fair basis;

(b) To promote dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships;

(c) To provide dealers with rights and remedies in addition to those existing by contract or common law;

(d) To govern all dealerships, including any renewals or amendments, to the full extent consistent with the constitutions of this state and the United States.
II. STATUTES OF GENERAL APPLICABILITY

A. Franchise Statutes

When dealerships are involved, franchise statutes should simply be viewed as one form of dealership legislation. Granted, it is legislation devoted to a single type of dealership—i.e., a franchised dealership—but it is dealership legislation nonetheless. Statutory definitions of franchises are very clear on this point. While most discussions of statutory definitions of a “franchise” identify three key elements—i.e., (i) trademark use, (ii) the existence of either a “community of interest” between the parties or the presence of a “marketing plan” established by the franchisor, and (iii) the payment of a franchise fee—there is in fact a fourth necessary element. Essentially every statutory definition of a “franchise” begins with the following words: “Franchise” means a contract or agreement whereby “a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services.”11 In its most basic form, these words describe a dealership or a distributorship relationship. Everything that follows those words in any particular definition simply determines how broadly or narrowly that particular statute circumscribes the types of dealership agreements that fall within its particular definition of “franchise.”

Much has been written about the application of franchise laws to dealership and distributorship relationships.12 While that fulsome discussion is beyond the scope of this paper, any evaluation of a client’s rights and obligations under a dealership agreement must start with the determination of whether or not that relationship is governed by a franchise statute. If a franchise statute applies—in particular, a franchise “relationship” law addressing how a franchisee must be treated after the franchise agreement has already been entered into—it will typically give the franchisee/dealer the greatest array of extra-contractual rights, and will give the franchisor/manufacturer-supplier the greatest heartburn. A franchise relationship statute, if it applies, typically is the broadest of dealership statutes.

When evaluating potentially applicable franchise laws, one is well-advised not to get hung up on any pre-conceived notion of what a franchise is or is not, or what it should or should not be. A “franchise” is whatever the statute says it is.13 If that affronts one’s policy sensibilities, take it up with the legislature, not the courts.14

10 Fundamentals of Franchising. (Rupert M. Barkoff & Andrew C. Selden eds. 3d ed. 2008) at 188-89.
11 815 Ill. Comp. Stat. 705/3(1)(a) (emphasis added); see also Minn. Stat. § 80 C.01 Subdiv. 4(a)(1); Fla. Stat. § 817.416(b)(2).
13 See To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc., 152 F.3d 658, 659-60 (7th Cir. 1998) (“Legal terms often have specialized meanings that can surprise even a sophisticated party. The term ‘franchisee,’ or its derivative ‘franchisee,’ is one of those words.”). Mr. Leydig represented the plaintiff in this case.
14 Id. at 666 (“Like many manufacturers, MCFA simply did not appreciate how vigorously Illinois law protects ‘franchisees.’ ... While we understand MCFA’s concern that dealerships in Illinois are too easily categorized as statutory franchisees, that is a concern appropriately raised to either the Illinois legislature or Illinois Attorney General, not to this court.”).
The consequence of failing to recognize the applicability of a franchise statute to a dealership can be significant. For example, in *Pyramid Controls Inc. v. Siemens Industrial Automation, Inc.*, a dealer in industrial automation equipment was terminated by its manufacturer under the no-cause-for-termination provision in the parties’ dealer agreement. Failing to recognize the dealership relationship likely satisfied the definition of a “franchise” under the Illinois Franchise Disclosure Act, the dealer’s longtime personal and corporate lawyer advised his client he was “cooked” under the express terms of the parties’ contract. By the time the dealer received a second opinion from an attorney recognizing the potential application of the franchise statute, the statute of limitation had run and the dealer’s statutory franchise rights and remedies were barred.

Sixteen states, plus the U.S. Virgin Islands, have franchise relationship statutes. If the dealership satisfies the definition of “franchise” under these statutes, the dealer may be the beneficiary of numerous rights not typically contained in a manufacturer-drafted agreement, including the right to be terminated only for good cause, the right to have the dealership renewed except for good cause, the right to cure defaults before termination or nonrenewal, and the right to injunctive relief, damages, and attorneys’ fees if the franchise statute has been violated by the manufacturer-supplier.

Typically, any attempt by the manufacturer-supplier to contract around these or other rights created by the statute will be deemed void as against public policy.

In the first instance, therefore, a dealer looking to enhance or enlarge its rights beyond those found in the written dealership agreement will want to identify any state’s franchise statute

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15 *Pyramid Controls Inc. v. Siemens Indus. Automation, Inc.*, 172 F.3d 516 (7th Cir. 1999). Mr. Leydig represented the plaintiff-dealer in this action.

16 *Id.* at 517.

17 *Id.* at 520.


Idaho and Louisiana also have limited franchise relationship laws (Idaho Code § 29-110; LA Rev. Stat. Ann. 23:921(F)). Finally, as discussed *infra* at Section II.B., Wisconsin, Rhode Island, Alaska, and Puerto Rico have very broadly drafted dealership laws that typically get included in lists of franchise relationship laws. A chart identifying, on a state by state basis, these and all of the dealer statutes discussed in this paper is attached as *Appendix A*.


20 See, e.g., Iowa Code §523H.8; Minn. Stat. §80C.14 Subd. 4.

21 See, e.g., Ark. Code Ann. § 4-72-204(b); Iowa Code § 537A.10.7(b); Minn. Stat. § 80C.14 Subd. 3(a).


23 See, e.g., 815 Ill. Comp. Stat. §705/41 ("Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this Act or any other law of this State is void.").
that may be applicable. Typically, that will be the franchise statute for the state wherein the dealership is physically located or doing business.\textsuperscript{24} A dealership with a multi-state territory may have a different state’s franchise statute applying to its operations in each of the states of its operation. And, occasionally, a dealer may be able to convince a court to apply the franchise statute of the state where the franchisor’s business is located or the state whose laws have been contractually chosen by the parties, even if the dealer does not operate in those states.\textsuperscript{25} Because of the favorable treatment that can be afforded to a dealer under a franchise statute, this multi-state approach to identifying potentially applicable statutes is almost always warranted. Likewise, from the manufacturer-supplier’s side of the equation, all of these statutes need to be understood in order to appreciate the potential consequences of any particular action taken against a dealer.

B. Dealership Laws of General Applicability

As a general proposition, franchise statutes are not concerned with the type of goods or services that are the subject of the parties’ agreement. As discussed above, once one gets past the necessary condition established by essentially all definitions of “franchise”—i.e., the presence of a contract for the offering, selling or distributing of goods or services—certain key elements must also be met to satisfy the statutes’ definitions of a “franchise.” Statutory definitions focus on the presence of three or four (depending on the statute and how one counts) key elements: (i) the right to use the franchisor’s mark; (ii) the presence of, or the right to adopt, the franchisor’s marketing plan; (iii) a community of interest among the parties; and/or (iv) the payment of a franchise fee.\textsuperscript{26} Notably missing from these criteria is any requirement that the franchise be dedicated to any particular type of good or service.

With the exception of the handful of important statutes that are discussed below, dealership statutes are, in contrast to franchise laws, subject matter specific. The subject matter may be very broad—for example, any and all “equipment”—or it may be very narrow—just motorcycles—but there is a specific focus to the dealership statute. One is either in or out of the statute based on what is being sold. These subject matter dealership statutes are the subject of section III, infra.

To prove the general rule that dealership statutes are typically subject matter specific, there are, as always, some extremely significant exceptions to the rule. Wisconsin,\textsuperscript{27} Rhode Island,\textsuperscript{28} Puerto Rico,\textsuperscript{29} and Alaska\textsuperscript{30} have dealership laws of very broad application. These statutes are not subject matter specific and, in that sense, they closely resemble franchise statutes. Indeed, the Wisconsin, Rhode Island, and Puerto Rico dealer laws typically find their

\textsuperscript{24} For a thorough survey of choice of law jurisprudence, see Allan P. Hillman, Public Policy Versus Choice of Law – Is the Best the Enemy of the Good? 26 Franchise L.J. 180 (Spring 2007).

\textsuperscript{25} See discussion infra at Section IV.

\textsuperscript{26} See footnote 10, supra.

\textsuperscript{27} Wis. Stat. § 135.01 et seq.

\textsuperscript{28} R.I. Gen. Laws § 6-50-1 et seq.

\textsuperscript{29} P.R. Laws Ann. tit. 10 § 278.

\textsuperscript{30} Alaska Stat. § 45.45.700 et seq.
way onto most franchise commentators' lists of franchise relationship laws. They cover dealer agreements for the sale and distribution of all goods, not just one type or category. Further setting these laws apart from most dealership laws, these broadly drafted statutes apply to the sale of both goods and services. More typically, dealership laws are concerned with the sale and distribution of goods only. Also, the four broadly applicable dealership statutes addressed here, like their franchise statute counterparts, contain some heightened relational element that must be present for the statutes to apply. In Alaska, a "joint interest" between the dealer and the manufacturer must be present. In Wisconsin and Rhode Island, a "community of interest" between the parties must exist. And in Puerto Rico, the dealer must "actually and effectively take[] charge of the distribution."

The Wisconsin Fair Dealership Law ("WFDL") is one of the oldest and most litigated dealership statutes on the books. Accordingly, it is often looked to by courts trying to interpret other states' franchise and dealership statutes containing similar language. The definition of a "dealership" under the WFDL is:

A contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.

Like its franchise counterparts, the WFDL's definition begins with the same broad directive that it applies to a person who is "granted the right sell or distribute goods or services." It is the requirement that there be a "community of interest" that has given courts the most difficulty under the WFDL's definition. In the end, the Seventh Circuit's colloquial take on the term may express the concept the best:

The Wisconsin Act was designed to regulate the franchise relation, on the premise that the franchisor has the franchisee over a barrel after their business dealings begin. The franchisor (supplier) may be able to change the terms for the worse after the franchisee (dealer) has invested much of its capital in firm-specific

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32 See infra at Section III.

33 Alaska Stat. § 45.45.790(3).

34 Wis. Stat. § 135.02(3); R.I. Gen. Laws § 6-50-2(3).

35 10 L.P.R.A. § 278(b).

36 Wis. Stat. § 135.02(3). This section also contains a separate definition of dealers of intoxicating liquor. Id.

37 "The Wisconsin Fair Dealership Law, Wis. Stat. ch. 135, governs the relations between a supplier and its "dealers" but does not define "dealer" except by saying that a dealer is a distributor in a "community of interest" with the supplier, § 135.02(2), (3), which just pushes the lack of a definition to a new level of abstraction." Fleet Wholesale Supply Co. v. Remington Arms Co., 846 F.2d 1095, 1096 (7th Cir. 1988).
promotion, training, design, and other features. Once the dealer is locked into the supplier, the supplier may seek to extract what an economist would call a quasi-rent.\footnote{d. at 1097.}

Consistent with the WFDL’s stated purposes and policies,\footnote{See footnote 4, supra.} the law has been applied very liberally in the protection of dealers from overreaching by their “grantors.” For example, in \textit{Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.}\footnote{\textit{Girl Scouts of Manitou Council, Inc., v. Girl Scouts of the United States of America, 549 F.3d 1079 (7th Cir. 2008). Mr. Leydig represented the plaintiff in this case.}} the Seventh Circuit Court of Appeals recently found a local, nonprofit Girl Scout Council to be a dealer and the national nonprofit organization to be a grantor under the WFDL.\footnote{id. at 1090-94.}

In addition to prohibiting grantors from terminating, canceling, not renewing, or substantially changing the competitive circumstances of a dealership agreement without good cause,\footnote{Wis. Stat. § 135.03.} dealers are granted other substantial rights under the WFDL. Ninety days notice of any of the above enumerated actions by the grantor against the dealership, plus sixty days to cure, is mandated under the statute.\footnote{Wis. Stat. § 135.04. If the reason for the termination, etc. is insolvency, an assignment for the benefit of creditors or bankruptcy, the notice requirements are waived. \textit{id.} If the circumstances of the termination, etc., are non-payment of sums due under the dealership agreement, the dealer is entitled to notice but only a ten day cure period. \textit{id.}} A dealer is authorized under the WFDL to bring suit against the grantor for “damages sustained” as a consequence of the grantor’s violation of the WFDL, together with actual costs of the action, including attorneys’ fees.\footnote{Wis. Stat. § 135.06.} “Actual costs” has been interpreted by the courts to include most litigation expenses, including expert witness fees.\footnote{\textit{Bright v. Land O'Lakes, Inc.}, 844 F.2d 436, 444 (7th Cir. 1988) ("[T]he actual costs language [contained in the WFDL] authorize[d] a shift of the full cost of the expert witness fees from the successful plaintiff to the defendant."); \textit{Kealy Pharmacy & Homecare Service, Inc. v. Walgreen Co.}, 607 F.Supp. 155, 170 (W.D. Wis. 1984) (allowing recovery of expert fees as “actual costs” under WFDL), aff'd in part, vacated in part on other grounds, 761 F.2d 345 (7th Cir. 1985).} A dealer may also seek injunctive relief.\footnote{Wis. Stat. § 135.06.} A violation of the WFDL by the dealer “is deemed an irreparable injury to the dealer for determining if a temporary injunction should be issued.”\footnote{Wis. Stat. § 135.065.} Any term of a contract that attempts to vary the protections of the WFDL is void.\footnote{Wis. Stat. § 135.025(3).} The Wisconsin Fair Dealership Law is as broad as any franchise relationship statute.
Rhode Island’s Fair Dealership Act\(^49\) is of recent vintage; becoming effective June 14, 2007.\(^50\) It is suspiciously similar to the WFDL and has obviously borrowed heavily from it. Its stated purposes and policies, as well as its definition of “dealership” are essentially identical.\(^51\) The Rhode Island Fair Dealership Act is unclear, however, on whether or not a grantor needs good cause for termination, cancellation, or nonrenewal of the dealership. The statute contains a definition of “good cause,”\(^52\) but then omits the typical section that articulates when good cause is required.\(^53\) Instead, the Rhode Island Act jumps straight to notice requirements stating:

Notwithstanding the terms, provisions, or conditions of any agreement to the contrary, a grantor shall provide a dealer sixty (60) days prior written notice of termination, cancellation, or nonrenewal. The notice shall state all the reasons for termination, cancellation, or nonrenewal and shall provide that the dealer has thirty (30) days in which to cure any deficiency; provided that a dealer has a right to cure three (3) times in any twelve (12) month period during the period of the dealership agreement. ...\(^54\)

The question ripe for litigation is whether or not the stated “reasons for termination” must rise to the level of “good cause,” as defined earlier in the Act. Some hint to the answer is given in the section of the Act that addresses arbitration:

This chapter shall not apply to provisions for the binding arbitration of disputes contained in a dealership agreement, if the criteria for determining whether good cause existed for a termination, cancellation, or nonrenewal, and the relief provided is no less than that provided for in this chapter.\(^55\)

This language strongly suggests that good cause is in fact a prerequisite for a termination, cancellation, or nonrenewal. Regardless, violations of the Rhode Island Fair Dealership Act entitle the dealer to bring an action for the recovery of damages and attorneys’ fees.\(^56\) Injunctive

\(^{49}\) R.I. Gen. Laws § 6-50-1 et seq.


\(^{53}\) Comparing it to the WFDL, which it closely mimics, the Rhode Island Fair Dealership Act seems to omit § 135.03 of the WFDL, which provides: “No grantor, directly or through any officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause. The burden of proving good cause is on the grantor.” Wis. Stat. § 135.03.

\(^{54}\) R.I. Gen. Laws § 6-50-4(a).


\(^{56}\) Id. at § 6-50-7.
relief against wrongful termination and nonrenewal is also provided. The statute presumes irreparable injury.

The Puerto Rico Dealership Act of 1964, generally referred to as “Law 75,” provides broad protection to dealers of goods and services. The definitional scheme is different from other statutes of this type. A “dealer’s contract” is defined as follows:

Relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise or of the rendering of a service, by concession or franchise, on the market of Puerto Rico.

“Dealer,” in turn, is defined as a “[p]erson actually interested in a dealer’s contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service.

Terminations and nonrenewals are forbidden, as is “any act detrimental to the established relationship,” except for “just cause.” Law 75 expressly entitles a wrongfully terminated dealer to recover the good will of the lost business, and lists several factors that may be considered when determining the value of that lost good will. Reflecting its strong parochial intentions, Law 75 provides that the principal’s rules of conduct or its distribution quotas or goals must “adjust to the realities of the Puerto Rican market at the time of the violation or nonperformance by the dealer.”

Alaska’s distributorship legislation is also of fairly recent vintage, with an effective date of August 1, 2002. It has broad application to any “distributorship agreement” which is defined as:

[A]n agreement, whether express, implied, oral, or written, between two or more persons

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57 Id.
58 Id. at § 6-50-8.
59 P.R. Laws Ann. tit. 10 § 278 et seq.
60 Id. at § 278(b).
61 P.R. Laws Ann. tit. 10 § 278(a).
62 Id. at § 278a.
63 Id. at § 278b(c).
64 Id. at § 278a-1(c).
65 Alaska Stat. § 45.45.700 et seq.
(A) by which a person receives the right to

(i) sell or lease merchandise or services at retail or wholesale; or

(ii) use a trade name, trademark, service mark, logotype, advertising, or other commercial symbol; and

(B) in which the parties to the agreement have a joint interest, whether equal or unequal, in the offering, selling, or leasing of the merchandise or services.\textsuperscript{67}

As with the previously discussed dealership laws, there is no attempt to restrict the scope of the Alaska statute’s reach to any particular commodity, industry or service.

The protectionist approach taken by the Alaska Distributorship Law is quite different, however. It does not prohibit terminations or nonrenewals.\textsuperscript{68} Rather, it just makes terminations and nonrenewals—apparently, even if for cause—extremely expensive. In addition to having to buy back the dealer’s stock of merchandise,\textsuperscript{69} the statute provides that:

\begin{enumerate}
\item If a distributor terminates a distributorship agreement or makes substantial changes in the competitive situation of the distributor’s dealer with regard to distribution of the merchandise or services that are the subject of the distribution agreement, the distributor shall (1) purchase that portion of the dealer’s business directly affected by the distributorship agreement or the change, including assets and machinery, at commercially reasonable business valuations; and

\item reimburse the dealer for the expenses that were necessarily incurred by the dealer

\end{enumerate}

(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.\textsuperscript{70}

If the distributor—defined to include manufacturers, wholesalers and others—fails to make these required payments, then the dealer can recover damages and/or obtain an injunction.\textsuperscript{71}

\textsuperscript{67} Alaska Stat. § 45.45.790(3).

\textsuperscript{68} By definition, “terminate” includes failure to renew. Alaska Stat. § 45.45.790(5).

\textsuperscript{69} Alaska Stat. § 45.45.710.

\textsuperscript{70} \textit{id.} at § 45.45.740(a).

\textsuperscript{71} \textit{id.} at § 45.45.790(2).
The Alaska law also prohibits various forms of coercion, such as threatening the termination of the distributorship agreement to force the dealer to sell or dispose of a contract or property, or to make an expenditure that the dealer had not contracted to make.\(^{73}\) The law also prohibits certain contract provisions, such as waivers of a trial by jury, requirements that disputes be arbitrated unless agreed to when the dispute arises, requirements to pay the distributor’s attorneys’ fees, and choice of law provisions that provide for any law other than that of Alaska.\(^{74}\)

Because all of these dealer laws pull within their purview essentially all dealership agreements, they run the risk of duplicating or conflicting with coverage already provided to specific types of dealership agreements. Accordingly, all of these broad-based dealer laws expressly exempt from their coverage dealership agreements that are covered under other particularized statutes. Thus, excluded or exempted from these statutes are petroleum dealerships, motor vehicle dealerships, alcoholic beverage dealerships, insurance agencies and door to door sales.\(^{75}\) Alaska has a further interesting exemption, removing from its coverage “a distributorship agreement for the sale or distribution of, or other transaction involving, cigarettes, food, drink, or a component of food or drink[].”\(^{76}\) This language not only exempts food distribution networks, such as grocer distributors, but restaurant and food based franchises as well. Absent this exemption, it appears that the Alaska statute would be broad enough to include those franchises. Finally, the Alaska statute exempts “a manufacturer with 50 or fewer employees.”\(^{77}\)

III. INDUSTRY-SPECIFIC STATUTES

Once one moves past these broadly defined franchise and dealership statutes, one is faced with dealership statutes that are industry or product specific in their application. Even here, however, one must be extremely careful not to underestimate the reach of these statutes. Many of these statutes’ definitions of “equipment” draw within their coverage broad swaths of farm, industrial, commercial, construction, utility, forestry, and any number of other types of equipment, including consumer-oriented equipment. Other statutes are more narrowly drafted to cover more specific types of equipment or products.

A. Equipment Dealer Statutes

Besides being product or industry specific, equipment dealer laws are distinguishable, in part, from the franchise and quasi-franchise statutes discussed above due to the absence in their operative definitions of having to establish a trademark license and some special relationship between the parties. All that is typically required is the existence of a contract for the sale and distribution of the target product. “Dealer agreement” is defined in most statutes much like the definition found in Colorado’s law: “an oral or written contract or agreement of

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\(^{72}\) Id. at § 45.45.760(a) and (b).

\(^{73}\) Id. at § 45.45.700.

\(^{74}\) Id. at § 45.45.750(a).

\(^{75}\) See Alaska Stat. § 45.45.770; R.I. Gen. Laws § 6-50-9; Wis. Stat. § 135.07.

\(^{76}\) Alaska Stat. § 45.45.770(a)(7).

\(^{77}\) Id. at § 45.45.770(a)(8).
definite or indefinite duration between a supplier and an equipment dealer that prescribes the rights and obligations of each party with respect to the purchase or sale of equipment."78 A dealership agreement that meets this straightforward definition is covered. The dealer has no need to establish the grant of a trademark license, a marketing plan, a community of interest, the payment of a fee, or any of the other hallmarks associated with franchise laws. If there is a contract and the subject of that contract is the "equipment" identified in the statute, there is coverage.

As will be seen below, however, it is not always that easy to determine if the product being sold and distributed is the "equipment" that is the concern of the statute.

When approaching equipment dealership statutes, perhaps the best advice one can give is to ignore the actual names of the statutes. It often seems these statutes' given names are primarily intended to deceive the unsuspecting lawyer. For example, Kentucky's Retail Sales of Farm Equipment statute actually applies to dealers of "farm implements, tractors, farm machinery, consumer products, utility and industrial equipment, construction and excavating equipment, and any attachments, repair parts, or superseded parts for the equipment."79 "Consumer products," in turn, "means machines designed for or adapted and used for horticulture, floriculture, landscaping, grounds maintenance, or turf maintenance, including but not limited to lawn mowers, rototillers, trimmers, blowers, and other equipment used in both residential and commercial lawn, gardening, or turf maintenance, installation, or other applications."80 Arizona's expansively titled "Equipment Dealers" legislation, on the other hand, applies only to dealers of "machines designed for or adapted and used for agriculture, livestock, grazing, light industrial and utility purposes. Equipment does not include earthmoving and heavy construction equipment, mining equipment or forestry equipment."81 California's similarly titled "Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act," envisions a very different concept of "Equipment":

(1) "Equipment" means all-terrain vehicles and other machinery, equipment, implements, or attachments used for, or in connection with, any of the following purposes:

(A) Lawn, garden, golf course, landscaping, or grounds maintenance.

(B) Planting, cultivating, irrigating, harvesting, and producing agricultural or forestry products.

(C) Raising, feeding, or tending to, or harvesting products from, livestock and any other activity in connection with those activities.

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80 Id. at § 365.800(5).
81 Arizona Rev. Stat. § 44-6701(2).
(D) Industrial, construction, maintenance, mining, or utility activities or applications, including, but not limited to, material handling equipment.

(2) Self-propelled vehicles designed primarily for the transportation of persons or property on a street or highway are specifically excluded from the definition of equipment.\textsuperscript{82}

Minnesota's "Heavy and Utility Equipment Manufacturer and Dealer Act" sounds very specific and, at first glance, its definitions would seem consistent with the title:

"Heavy and utility equipment," "heavy equipment," or "equipment" means equipment and parts for equipment including but not limited to:

(1) excavators, crawler tractors, wheel loaders, compactors, pavers, backhoes, hydraulic hammers, cranes, fork lifts, compressors, generators, attachments and repair parts for them, and other equipment, including attachments and repair parts, used in all types of construction of buildings, highways, airports, dams, or other earthen structures or in moving, stock piling, or distribution of materials used in such construction;

(2) trucks and truck parts; or

(3) equipment used for, or adapted for use in, mining or forestry applications.\textsuperscript{83}

The introductory phrase to this definition, however, states rather clearly that any combination of the words "heavy and utility equipment" simply means "equipment." And, while the definition makes it clear that a heavy duty road grader is without question a piece of equipment, the same definition could arguably encompass a garage door opener. In the end, the courts will be forced to discern what the Minnesota legislature meant by its seemingly all-inclusive term "equipment."

Maine's "Franchise Laws for Power Equipment, Machinery and Appliances,"\textsuperscript{84} true to its title, covers essentially anything that is powered. The operative word in this statute is "goods" and it is defined to mean

residential, recreational, agricultural, farm, commercial or business equipment, machinery or appliances that use electricity, gas,

\textsuperscript{82} Cal Bus & Prof Code § 22901(j).

\textsuperscript{83} Minn. Stat. § 325E.068 Subdiv. 2. "Truck," in turn, is defined as "a motor vehicle designed and used for carrying things other than passengers, ... [and] does not include a pickup truck or van with a manufacturer's nominal rated carrying capacity of three-fourths ton or less." \textit{id.} at Subdiv. 6.

\textsuperscript{84} Me. Rev. Stat. tit. 10 § 1361 \textit{et seq}. 
wood, a petroleum product or a derivative of a petroleum product
for operation.\textsuperscript{85}

This sampling of equipment dealership statutes should make clear that any
preconceived notion of what constitutes "equipment" needs to be checked at the door.
Equipment means whatever a particular statute says it means. On top of that, it is often
extremely difficult to discern what exactly any given statute's definition of equipment means.

Another common characteristic of equipment dealer laws — in contrast to franchise
relationship laws and the broad dealership laws discussed supra — is that they typically apply
only to dealers engaged in retail sales.\textsuperscript{86} Some, however, provide protection to both retail
dealers and wholesale distributors,\textsuperscript{87} or just wholesale distributors.\textsuperscript{88}

The advantages to a dealer who qualifies under an equipment dealer law are typically
substantial. In place of contract provisions that will almost always heavily favor the
manufacturer-supplier, equipment dealer statutes may prohibit terminations and substantial
changes to a dealership's competitive circumstances absent "good cause."\textsuperscript{89} Similarly,
nonrenewal of the dealership agreement will require good cause.\textsuperscript{90} Manufacturers will usually
be required to give notice substantially in advance of a termination, nonrenewal or substantial
change to competitive circumstances, and to designate in the notice the specific good cause
upon which the manufacturer is relying.\textsuperscript{91} Coupled with the notice requirement will be the
dealer's right to cure the noticed deficiency. If cured, the notice will be deemed void.\textsuperscript{92} A
manufacturer's demand that the dealer undertake costly building expansions may require an
extended advance notice period and an even longer period for completion of the required
work.\textsuperscript{93}

Very typical of almost all equipment dealer statutes is their inclusion of extensive
provisions specifying the manufacturer's required repurchase of inventory following a
termination, nonrenewal or other contingency, such as the death of the dealer principal.\textsuperscript{94} If the

\textsuperscript{85} Id. at § 1361(8). The only exclusions from this broad definition are motor vehicles and recreational vehicles, which
are covered by other statutes. Id. Interestingly, not excluded from the definition of goods is farm machinery, which is
also covered in great detail in another statute. See Mo. Rev. Stat. tit. 10 § 1265 et seq. A dealer in farm machinery
would appear to be covered by both Maine statutes.


\textsuperscript{87} See, e.g., Minnesota Heavy and Utility Manufacturer and Dealer Act, Minn. Stat. § 325E.068 Subdiv. 4.

\textsuperscript{88} See, e.g., Maryland Fair Distribution Act, Md. Code Ann., Com. Law § 11-1301.

\textsuperscript{89} See, e.g., Colo. Rev. Stat. § 35-38-104(2); Mich. Comp. Laws § 445.1457a Sec. 7a(1).

\textsuperscript{90} Mich. Comp. Laws § 445.1457a Sec. 7a(1); Neb. Rev. Stat. § 87-705(1).

\textsuperscript{91} See, e.g., Colo. Rev. Stat. §35-38-104(1)(b); Mich. Comp. Laws § 445.1457a Sec. 7a(2).

\textsuperscript{92} See, e.g., Mich. Comp. Laws § 445.1457a Sec. 7a(2).


dealer agreement already contains an inventory buy-back provision, the dealer is generally given the right to choose the buy-back terms — statutory or contractual — that are best for the dealer.\textsuperscript{95} It is also not unusual in these statutes to find provisions mandating fair and prompt payment of a dealer's warranty work.\textsuperscript{96} Finally, most of these statutes address issues of succession; typically removing restrictions on succession and transfer that one might expect to find in an unregulated dealer agreement.\textsuperscript{97}

Violations of these provisions by the manufacturer-supplier will usually give rise to a cause of action for the recovery of damages, including costs of suit and attorney's fees.\textsuperscript{98} The threat of a wrongful termination, nonrenewal or substantial change to the competitive circumstances of the dealer agreement will entitle the dealer to injunctive relief.\textsuperscript{99}

While all of these protections may not be found in every equipment dealer statute, many of these provisions are found in most of the statutes. There are, however, states whose laws are far more manufacturer oriented. Illinois is a prime example. Illinois has the Equipment Fair Dealership Law.\textsuperscript{100} It covers retail dealers of "farm implements, farm machinery, attachments, accessories and repair parts, outdoor power equipment, construction equipment, industrial equipment, attachments, accessories and repair parts."\textsuperscript{101} Unlike the laws found in other states, the Illinois law limits itself essentially to a requirement that the manufacturer buy back the dealer's inventory upon termination.\textsuperscript{102} The law also takes the further and very unusual step of providing that dealers and manufacturers subject to the Equipment Fair Dealership Law are \textit{not} subject to Illinois' franchise relationship law; thereby depriving dealers who sell the wide range of products covered by the Equipment Fair Dealership Law from the protections dealers of other types of goods are entitled to under Illinois' franchise relationship, disclosure, and registration law.\textsuperscript{103}

\section*{B. Motor Vehicle Dealer Statutes}

Of the various state dealer laws, those applicable to motor vehicle dealers are perhaps the most restrictive. It is therefore not surprising that plaintiffs' lawyers representing dealers of products other than passenger cars and trucks frequently try to assert that other products—including trailers and even various forms of equipment—are actually "motor vehicles." The


\noindent \textsuperscript{96} See, \textit{e.g.}, Miss. Code Ann. § 75-77-6.

\noindent \textsuperscript{97} See, \textit{e.g.}, id. at § 75-77-13.

\noindent \textsuperscript{98} See, \textit{e.g.}, Ark. Code Ann. § 4-72-208; Minn. Stat. § 80C.17 Subdiv. 3.

\noindent \textsuperscript{99} See, \textit{e.g.}, Ariz. Rev. Stat. Ann. § 44-6708(B).

\noindent \textsuperscript{100} 815 Ill. Comp. Stat. 715/1 et seq.

\noindent \textsuperscript{101} Id. at 715/2.

\noindent \textsuperscript{102} Id. at 715/3.

\noindent \textsuperscript{103} Id. at 715/10.\textsuperscript{1} This rather draconian provision was added at the insistence of the manufacturer lobby following the decision in \textit{To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc.}, 152 F.3d 658 (\textsuperscript{7th} Cir. 1998). See 91st Gen. Assem., Senate Proceedings, May 7, 1999, at 87-89. \textit{To-Am} found an Illinois lift truck dealer was a "franchisee" and entitled to the protections of the Illinois Franchise Disclosure Act, 815 Ill. Comp. Stat. 705/1 et seq.
definition of “motor vehicle” varies quite a bit from state to state and is usually keyed to whether the vehicle is self-propelled and required to be licensed to be driven on highways (although this is not a universal requirement). A chart identifying the states with such statutes is attached as Appendix A.

Unlike most state dealer laws, many motor vehicle dealer laws require manufacturers and other suppliers to file their dealer agreements with the state and in some cases even obtain state approval. Many of the state motor vehicle laws also provide territorial exclusivity in terms of a protected geographic radius from dealer locations. Appointing another dealer in the territory or in proximity to pre-existing dealers may require approval from a state department of motor vehicles or even a board comprised of motor vehicle dealers.

In other industries, “going direct” is a viable alternative to the use of independent dealers. In many states, however, manufacturers cannot avail themselves of this option because of motor vehicle dealer laws. State motor vehicle dealer laws require that retail sales be handled by licensed dealers. Many states actually prohibit manufacturers from operating a dealership or having an ownership interest in a dealership. In this regard, the state of Texas was successful in blocking an internet sales effort by Ford Motor Company—even though the vehicles being sold were not new, but rather had been previously leased to car rental companies and even though the internet site referred all leads to motor vehicle dealers.104

Like the equipment dealer in many other industry-specific statutes, various state motor vehicle dealer laws require “good cause” for termination and non-renewal. Many of these statutes place the burden of proving “good cause” on the manufacturer and contain detailed requirements of what does and does not constitute good cause. Often, the determination of “good cause” must be made by a state department of motor vehicles that manufacturers may view as being beholden to the dealer community. In some states, dealer boards are involved in the fact finding process. Under a number of state statutes, the mere filing of a protest of a notice of termination automatically results in the equivalent of a preliminary injunction against termination pending the outcome of administrative and other proceedings.

C. Motor Fuel Dealer Statutes

Unlike the auto industry, where the federal statute is the “paper tiger” and the restrictions are largely imposed at the state level, the reverse is largely true when it comes to marketing motor fuel. To be sure, many states do have petroleum products franchise statutes that provide protections to service station dealers. A chart identifying states with such statutes is attached as Appendix A. Because the PMPA preempts state statutes that contain inconsistent provisions regarding termination and non-renewal, state regulation tends to focus on rights during the term of the dealership agreement. Many state laws specify provisions that can and cannot be contained in a dealer agreement. For example, the Virginia Petroleum Products Franchise Act prohibits waiver of jury trial, require participation in sweepstakes and other promotions, prohibits unreasonable disapproval of transfers and assignments, and addresses credit card processing fees.105 Like the motor vehicle dealer statutes, many state motor fuel dealer statutes protect dealers from competition from their suppliers and/or from other dealers. In the petroleum marketing world, prohibitions against refiner operation of retail outlets are

104 Ford Motor Co. v. Tex. DOT, 264 F.3d 493 (5th Cir. 2001).

105 See VA. Code § 59.1-21.11.
generally referred to as "divorcement." Maryland, for example, has complete divorcement—meaning that refiners cannot operate retail service stations at all. Because refiners typically have an incentive to have gas sold at a lower price than do dealers, studies have shown that retail gas prices in Maryland tend to be higher than in neighboring jurisdictions. Virginia has a somewhat unique "partial divorcement" provision whereby refiners cannot operate retail service stations within a mile and a half of pre-existing dealers of any brand—not just their own. By and large, most litigation involving termination and non-renewal of service station dealers arises under the PMPA, although there are frequently litigated issues about the extent to which various state law provisions are preempted.

D. Alcoholic Beverage Distributor Statutes

Along with regulation of motor vehicle dealers, the regulation of alcoholic beverage distribution relationship is about as restrictive as is found anywhere. Like motor vehicle dealer and other industry-specific statutes, the alcoholic beverage distributor statutes have a protectionist purpose. They also, however, reflect the legacy of Prohibition. The repeal of Prohibition was accompanied by enactment of the federal Alcohol Administration Act, which establishes a "three tier" system for the distribution of alcoholic beverages: (1) manufacturers (breweries, wineries, distilleries), (2) wholesalers a/k/a distributors, and (3) retailers (licensed on-premises and off-premises establishments). As a result, efforts to "cut out the middle man" that have occurred in many industries are generally simply not possible when it comes to the distribution of alcoholic beverages.

Like the motor vehicle dealer statutes, many of the state alcoholic beverage statutes require territorial exclusivity. As with the motor vehicle dealer statutes, most require "good cause" for termination and non-renewal. Often, the determination of good cause is made by a state agency that manufacturers perceive as being beholden to the distributor community. As with many of the motor vehicle dealer statutes, some of the alcoholic beverage statutes provide for the issuance of the equivalent of a preliminary injunction if the distributor contests its termination or non-renewal. See Appendix A for chart of states having alcoholic beverage statutes.


A. After July 1, 1979, no refiner of petroleum products shall operate any major brand, secondary brand, or unbranded retail outlet in the Commonwealth of Virginia with company personnel, a parent company, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the refiner; however, such refiner may operate such retail outlet with the aforesaid personnel, parent, person, firm, or corporation if such outlet is located not less than one and one-half miles from the nearest retail outlet operated by any franchised dealer, as measured by the most direct surface transportation route from the gas pump at the refiner's facility that is nearest a gas pump at the dealer's facility; and provided, that once in operation, no refiner shall be required to change or cease operation of any retail outlet by the provisions of this section.

(emphasis added).
E. Miscellaneous Industry-Specific Dealer Statutes

A number of states have dealer laws that address more specialized classes of products than those covered by the "equipment" dealer laws discussed above. But for the more restricted class of products, however, these statutes are structured like, and provide the same range of protections as, the previously discussed equipment dealer laws. Coverage under these statutes potentially provides a dealer with protection in the following areas: the requirement that terminations, nonrenewals, and substantial changes in competitive circumstances be based on good cause; mandatory inventory buy-back requirements upon termination or nonrenewal; ownership succession rights; freedom from certain forms of manufacturer coercion or unfair trade practices; mandatory choice of law and venue provisions favoring the dealer's state of operations; and the right to sue for damages, injunctive relief and to recover attorneys' fees and costs. Just as with the broader-based equipment statutes, the only thing that is uniform between all of these laws is that they are not uniform. All of the protections outlined above are certainly not guaranteed, and a review of any potentially available statute must be undertaken with care.

1. Watercraft and Vessel Dealer Statutes

Several states have statutes pertaining exclusively to the distribution of watercraft and vessels. The coverage varies widely. For example, the Maine and Virginia statutes only provide for warranty payment protection. The New York and Texas statutes also provide warranty payment protection; however, these two statutes go on to provide the full range of dealer protections.

As seen with regard to other dealer legislation, state legislatures are equally creative in their efforts to define watercraft and vessels. Virginia defines "watercraft" as "any vessel used or capable of being used for navigation or floatation on or through the water." New York's and Maine's definitions are comparable. Other states' statutes provide more limitations on the type of vessels they govern. For example, the Texas statute defines "boat" to mean "a motorboat" or "any other vessel that is more than 14 feet in length and is designed to be propelled by sail." Missouri, in turn, defines "personal watercraft" as "a class of a vessel, which is less than sixteen feet in length, propelled by machinery which is designed to be operated by a person sitting, standing or kneeling on the vessel, rather than ... inside the

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vessel." A "vessel" is defined as "every motorboat ... every ... motorized watercraft, and any watercraft more than twelve feet in length which is powered by sail alone or by a combination of sail and machinery, used or capable of being used as a means of transportation on water, but not any watercraft having as the only means of propulsion a paddle or oars." The Michigan and Texas statutes make it unlawful for any manufacturer to sell to a dealer, and for a dealer to buy from a manufacturer, in the absence of a written agreement that is in compliance with the specific terms of the statutes. The mandatory dealer agreements must include the dealership’s territory or market area, the length of the agreement, the performance and marketing standards, the notice provisions for termination, cancellation or nonrenewal, delivery and warranty obligations, buy-back provisions and dispute resolution procedures.

The Missouri, New York and Texas watercraft statutes all address termination of a dealership agreement, and each establish requirements for good cause and notice. The Maine, Michigan and Virginia statutes do not address termination.

Under the Missouri law, "[n]o boat, marine, vessel, or personal watercraft manufacturer ... may terminate, cancel or fail to renew a dealership agreement ... without good cause." The Texas law requires good cause for termination, but does not require good cause for nonrenewal. Carrying a competing line of boats or outboard motors does not constitute good cause under the Texas law.

The New York statute addresses termination, but only in a limited way. Terminations may proceed with or without cause, with the primary effect simply being the scope of the manufacturer’s inventory buy-back obligations after the termination.

2. Motorsport or Powersport Vehicle Dealer Statutes

Closely related to the watercraft dealership statutes, six states have motorsport or powersport vehicle dealership statutes. These statutes operate under various titles, such as motorsports (Montana and Washington), personal sports mobiles (Maine), recreational vehicles

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116 Id. at § 407.1360(12).
118 Mich. Comp. Laws § 445.544. Sec. 4(a) – (g); Tex. Occ. Code Ann. § 2352.052(a) – (b). The Texas statute includes the additional requirement that the dealership agreement establish standards for inventory, working capital, facilities and tools. Id.
120 Tex. Occ. Code Ann. § 2353.053(a) – (b).
121 Id. at § 2353.053(c).
As with other industry statutes, the scope of these statutes varies widely. The North Dakota statute is extremely limited, imposing only inventory repurchase obligations on the manufacturer. Montana’s law is spread out between several statutes, including the Cancelled Dealership and Contract Repurchase Requirements Act and the Sales and Distribution of Motor Vehicles statute, covering mostly definitions, and rights and limitations of succession. Another Montana statute, titled Motorsports Manufacturer Unfair Trade Practices Act, regulates business practices between dealers, distributors and manufacturers.

Again, definitions of the targeted products cover the spectrum. Washington’s definition of a “motorsports vehicle” includes motorcycles, mopeds, motor-driven cycles, personal watercraft, snowmobiles and four-wheel all-terrain vehicles. The Montana Motorsports Manufacturer Unfair Trade Practices Act’s definition of “motorsports vehicle” is similar but also includes “quadricycles” and “off-highway vehicles.” North Dakota’s statute covering “recreational vehicles,” covers most of the same vehicles, but adds as additional categories “trailers for transporting snowmobiles, travel trailers and motorboats.”

Colorado requires “just cause,” while Maine, Washington and Utah each require “good cause” to terminate, cancel or not renew a dealership agreement under their respective statutes. Under the Washington and Utah statutes, at the request of the dealer, an administrative law judge may determine whether or not good cause exists. The Montana legislation entitles a dealer to receive treble damages, court costs and attorneys’ fees for violations of its succession provisions.


124 N.D. Cent. Code § 51-20-01.


128 Mont Code Ann. § 30-14-2501(8).


3. Aircraft Dealer Statutes

Oklahoma has a dealership law affecting the sale of aircraft.\textsuperscript{133} “Aircraft” is defined as “any contrivance, now known or hereafter invented, used or designed for navigation of or flight in the air or airspace, manufactured by mass production or individually constructed or assembled, which are subject to registration with the Federal Aviation Administration.”\textsuperscript{134} This dealer protection law follows a format similar to what we have seen for other types of equipment, including prohibitions against termination, cancellation and nonrenewal of the dealership agreement without good cause.\textsuperscript{135} The remedies for a wrongfully terminated or not renewed dealer are quite liberal, allowing for “a private right of action against the manufacturer for the recovery of the fair market value of the business affected and to recover treble actual and special damages, and such other relief to which it might be entitled at law or in equity.”\textsuperscript{136} A prevailing dealer is also entitled to recover its reasonable attorneys’ fees and all expenses and costs incurred in the litigation.

More than anything, what makes this particular statute unusual is that it is strictly retroactive. By its terms, it “shall apply only to dealers of new or used aircraft ... which have agreements or contracts with manufacturers in effect prior to July 1, 2007, and all revisions, modifications, extensions, amendments and replacements of such agreements or contracts. ... [I]t shall not apply, except as provided in this section, to dealers which have agreements or contracts with manufacturers entered into on or after July 1, 2007.”\textsuperscript{137}

4. Office Machine Dealer Statutes

While certain equipment dealership statutes will likely pull within their coverage what one would normally think of as office machines — see, e.g., Maine’s Franchise Laws for Power Equipment, Machinery and Appliances\textsuperscript{138} — Hawaii would appear to be the only state that has a dealership statute dedicated exclusively to office machine dealers.\textsuperscript{139} The statute covers agreements whereby a dealer is granted the right “to sell products on behalf of a distributor to consumers and other end-users.”\textsuperscript{140} “Products” is defined to include, but not be limited to, “typewriters, copiers, electronic cash registers, dictating equipment, calculators, offset printers, letter openers, computers, or word processing equipment, but does not include such items as pencils, erasers, stationery, paperclips, or other such miscellaneous material normally used in

\textsuperscript{133} Okl. Stat. tit. 3 § 254.2 – 254.6.
\textsuperscript{134} Id. at § 252.
\textsuperscript{135} Id. at § 254.4.
\textsuperscript{136} Id. at § 254.5(A).
\textsuperscript{137} Id. at § 254.6 (emphasis added).
\textsuperscript{138} Me. Rev. Stat. tit. 10 § 1361 et seq.
\textsuperscript{140} Id. at § 481G-1.
an office."141 The Hawaii Office Machine Products Dealerships Law does not apply if the dealership is already covered under Hawaii’s Franchise Investment Law.142

IV. CHOICE OF LAW

A. Enforceability

The enforceability of choice of law provisions in dealer agreements is generally governed by the factors set forth in the Restatement (Second) Conflicts of Laws. In this regard, the “Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity.”143 Notwithstanding this presumption, a choice of law provision will not be enforced—pursuant to Section 187 of the Second Restatement—if either of the following two conditions is satisfied:

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue....144

As a practical matter, this may mean that the chosen state’s law will govern interpretation of the dealer agreement but that the state dealer statute of the dealer’s home state will also apply. From the dealer’s perspective, this is especially important to the extent that the statute “trumps” critical provisions of the dealer agreement such as “at will” rights of termination in favor of the supplier.145

141 Id.

142 Id. at § 4814G-2. The Hawaii Franchise Investment Law can be found at Haw. Rev. Stat. § 482E.


144 Second Restatement § 187 (emphasis added).

145 Minnesota’s Heavy and Utility Equipment Manufacturer and Dealer Act, for example, states: “A term of a dealership agreement either expressed or implied, including a choice of law provision, that is inconsistent with the terms of [the Act] or that purports to waive an equipment manufacturer’s compliance with [the Act] is void and unenforceable and does not waive any rights that are provided to a person by [the Act].” Minn. Stat. § 325E.0683. Comparable language is present in many dealer statutes. For a state by state discussion of the interplay between contractual choice of law clauses and statutory anti-waiver provisions, see Allan P. Hillman, Public Policy Versus Choice of Law—Is the Best the Enemy of the Good?, 26 Franchise L. J. 180 (Spring 2007).
B. Extraterritorial Application

1. Perspective of dealer counsel

A situation that often presents itself is when (i) the dealer is located in a state that does not have a controlling dealership statute, (ii) the manufacturer is located in a state that has a favorable dealer protection law, and (iii) the manufacturer's form contract contains a choice of law provision calling for the application of the law of the manufacturer's home state. Notwithstanding the manufacturer's inclusion of that choice of law provision, the manufacturer will more than likely insist that its home state's dealer law does not apply. While the resolution of the issue will often be sidetracked with arguments by the manufacturer that the "extraterritorial" application of the manufacturer's home state's law to a dealer in a distant state threatens the very fabric of federalism and the Commerce Clause of the Constitution of the United States, the issue is generally capable of being resolved by simply reading the express terms of the dealer law that the manufacturer is trying to avoid.

One of the earliest dealer protection laws is the Wisconsin Fair Dealer Law (the "WFDL").\(^{146}\) In a string of decisions from appellate courts in Illinois and in the Fifth and Sixth federal circuits, all arising under the WFDL and all addressing the identical contractual choice of law provision, these "extraterritorial" arguments have been well addressed.

In *Keller v. Brunswick Corp.*\(^{147}\), the plaintiff operated a Mercury Marine dealership in Illinois. The defendant, Brunswick Corporation, manufactured and sold Mercury Marine products to its dealers from its Wisconsin-based factory and office.\(^{148}\) The parties' dealership agreement fixed the term of the dealership at one year, and gave Brunswick the right to terminate "without cause at any time upon thirty (30) days written notice".\(^{149}\) The dealership contract further provided that Brunswick was "under no obligation, either express or implied, to refranchise Dealer upon expiration of this contract or in the event of termination prior to expiration."\(^{150}\) Critical to the discussion here, the dealership contract contained a choice of law provision which provided that "the agreement and all of its provisions are to be interpreted and construed according to the law of the State of Wisconsin."\(^{151}\)

On short notice and without any opportunity to cure its purported defaults, Brunswick notified the plaintiff that its dealership would be terminated and not renewed at the end of its term. The dealer sued Brunswick, asserting claims under the WFDL which prohibited terminations and nonrenewals without good cause, without giving notice of the dealer's purported deficiencies, and without giving a period of time to cure any claimed deficiency.\(^{152}\) Brunswick argued for the enforcement of the contract as written. It further argued,

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\(^{146}\) Wisconsin Fair Dealer Law, Wis. Stat. §135.01 et seq.


\(^{148}\) *Id.* at 328.

\(^{149}\) *Id.*

\(^{150}\) *Id.*

\(^{151}\) *Id.*

\(^{152}\) *Id.*
notwithstanding the Wisconsin choice of law provision in the dealership contract, that the WFDL should not be applied to the contract. The Illinois court of appeals rejected Brunswick's argument, stating:

[W]e reject that argument as not being in accordance with Wisconsin law.... While the parties may have intended to make a limited choice of Wisconsin law in this case, i.e., a choice of the Wisconsin law necessary to interpret only the ambiguous terms of their agreement, we cannot allow such an agreement to violate the clear requirements of the Wisconsin fair dealership law which was in effect when the parties entered their contract. Because theirs was a Wisconsin contract, we have no hesitation in enforcing the clear requirements of the Wisconsin statute.\textsuperscript{153}

The case was remanded to the trial court with directions “to reinstate plaintiff’s complaint and to enforce the provisions of the Wisconsin Fair Dealership Law, striking those provisions of the contract which are inconsistent with the Wisconsin law.”\textsuperscript{154}

The identical Brunswick dealership contract, containing the same Wisconsin choice of law provision, came before the Fifth and Sixth Circuit Courts of Appeal in \textit{C.A. May Marine Supply Co. v. Brunswick Corp.}\textsuperscript{155} and \textit{Boatland, Inc. v. Brunswick Corp.}\textsuperscript{156} In \textit{Boatland}, the Sixth Circuit concluded that

the parties intended Wisconsin law to apply to the contract. The Wisconsin law as applied to the contract includes the substantive laws of that state in determining the parties' rights and obligations. Since the Wisconsin Fair Dealership Law is part of the substantive law of Wisconsin it applies on its face to this contract.\textsuperscript{157}

Brunswick argued that the Wisconsin legislature never intended its statute to “have extraterritorial effect and apply to dealers like Boatland doing business outside of the state.”\textsuperscript{158}

The Sixth Circuit held:

There is no evidence the Wisconsin legislature intended to restrict the territorial application of the statute, or to prevent anyone, particularly a Wisconsin resident, from making Wisconsin law applicable to his contract. Since Brunswick, a Wisconsin resident, contracted to have Wisconsin substantive law applied to the


\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{C.A. May Marine Supply Co. v. Brunswick Corp.}, 557 F.2d 1163 (5\textsuperscript{th} Cir. 1977).

\textsuperscript{156} \textit{Boatland, Inc. v. Brunswick Corp.}, 558 F.2d 818 (6\textsuperscript{th} Cir. 1977).

\textsuperscript{157} \textit{Id.} at 821 (internal citations omitted).

\textsuperscript{158} \textit{Id.} at 822.
contract, it cannot be heard now to complain about the extraterritorial application of the Wisconsin law.\textsuperscript{159}

In \textit{C.A. May Marine Supply Co. v. Brunswick Corp.}, the Fifth Circuit rejected the same arguments that had been made to the Sixth Circuit in \textit{Boatland}. With regard to Brunswick’s argument that it was not the intention of the Wisconsin legislature to extend protection to out-of-state dealers, the court held:

The argument has surface appeal, but is decidedly a red herring. Obviously, the legislature passed the law to protect Wisconsin dealers, and had no concern for protecting the termination rights of dealers such as plaintiff. But that does not mean that parties, one or both of which have some reasonable contact with the State of Wisconsin, may not agree to clothe themselves with the rights and duties of citizens of that state when determining their respective rights under their contract. No state intends to govern the transactions of citizens of other states when it establishes laws governing contractual relations between parties. When, however, parties to a contract have contact with more than one state, the parties are expected, and encouraged, to stipulate which state’s substantive law will govern. Obviously, when such agreement occurs, both parties are bound as well as protected by the state law stipulated. The defendant seems to believe that it may receive the benefits of Wisconsin law, but that plaintiff may not, because it is not a Wisconsin corporation. It suffices to point out that such a notion would effectively emasculate all contractual choice of law provisions.\textsuperscript{160}

In each of the above cases, the manufacturer chose its home state’s laws for its dealership contracts’ choice of law provision, while the terminated dealers were operating in states other than the manufacturer’s home state. In each case the appellate court ruled that the contract’s choice of law provision entitled the dealer to the protection of the dealership statute in the manufacturer’s home state. The Wisconsin Fair Dealership Law contained no express limitation or exclusion which restricted its coverage to that state’s dealers only. Absent such a restriction, the Wisconsin law was held to form a part of the substantive law of the state contractually chosen by the parties.

After the above decisions were rendered, the WFDL’s definition of “dealer” was amended to limit the reach of the WFDL to “a person who is a grantee of a dealership situated in this state.”\textsuperscript{161} That express change in the articulated scope of the statute resulted in a completely different result when the WFDL and a Wisconsin choice of law clause once more came before Sixth Circuit. In \textit{Bimel-Walrhoth Co. v. Raytheon Co.},\textsuperscript{162} a terminated Ohio dealer sought protection under the Wisconsin Fair Dealership Law premised upon the parties’

\textsuperscript{159} Id.

\textsuperscript{160} \textit{C.A. May Marine Supply Co.}, 557 F.2d at 1166-67 (internal citations omitted).

\textsuperscript{161} Wis. Stat. § 135.02(2).

\textsuperscript{162} \textit{Bimel-Walrhoth Co. v. Raytheon Co.}, 796 F.2d 840 (6th Cir. 1986).
Wisconsin choice of law provision in the dealership agreement. The court noted the significant, and dispositive, change to the text of the WFDL subsequent to its decision in Boatland. The court held:163

The Wisconsin legislature, however, did amend the WFDL in 1977 by adding the language that is at issue in this case: "‘dealer’ means a person who is a grantee of a dealership situated in the State of Wisconsin." It is logical to assume that this amendment came about in response to the decision in Boatland. As analyzed by the Wisconsin court in Swan Sales [Corp. v. Jos. Schlitz Brewing Co., 126 Wis.2d 16, 374 N.W.2d 640 (Wis. Ct. App. 1985)], "This... [legislation] establishes the legislature’s intent to make the WFDL apply exclusively to dealerships that do business within the geographic confines of the State of Wisconsin." 374 N.W.2d at 644....

The intervening Swan Sales decision of the Wisconsin appellate court following the amendment to WFDL makes it plain... that the WFDL does not apply to a plaintiff located outside Wisconsin.

This same approach has been applied by courts evaluating the application of other states’ dealer (or franchise) laws that, pursuant to a contractual choice of law provision, are sought by dealers to be applied to their dealerships. In McDonald’s Corp. v. C.B. Management Co.,164 for example, an Ohio franchisee sought protection under the Illinois Franchise Disclosure Act based upon an Illinois choice of law provision in the franchise agreement. The district court first noted the critical language in the Illinois Franchise Disclosure Act that "[i]t shall be a violation of this Act for a franchisor to terminate a franchised business located in this state ... except for ‘good cause’..."165 The district court then concluded that "[i]n accordance with this manifestation of legislative intent, we will not apply the IFDA to the franchisees in this case."166 Further, the district court found that "where a contractual choice-of-law provision refers the parties to a state law, like the IFDA, which by its express terms does not apply to them, we think it is only by a strained analysis of the principles of choice-of-law that the law is nonetheless found to apply."167 The Seventh Circuit Court of Appeals has applied the same approach of looking to the express language of the dealer/franchise statute itself to determine if a contractual choice of law provision would require application of the statute.168

163 Id. at 842-43.


165 Id. at 713 (quoting 815 Ill. Comp. Stat. 705/19).

166 Id. at 714.

167 Id.

168 See Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 386 (7th Cir. 2003):

The plain language of the Illinois law that the Samsung Dealers seek to apply excludes those same dealers from its coverage because they are located outside of Illinois. Nothing in the Restatement suggests a contrary result. The Restatement excludes from "local law"
If a state has a dealer statute that does not limit itself to home-grown dealers, it remains possible to have that state’s dealer law applied against the wrongful conduct of the manufacturer even in the absence of a choice of law provision designating the law of the manufacturer’s home state. The focus on the location of the dealer or its dealership can often miss the point of the statute altogether. While dealer statutes plainly inure to the benefit of dealers, the focus of some statutes is not so much intended for the protection of dealers as to prevent bad behavior by manufacturers. Seen through that prism, the location of the dealer is irrelevant. It is the in-state location of the misbehaving manufacturer that matters.

The case of Mon-Shore Management, Inc. v. Family Media Inc.,\(^{169}\) brings this point home. There, the court applied the protections of New York’s Franchise Sales Act to out-of-state franchisees because, among others, New York has legitimate state interests in protecting out-of-state franchisees from unscrupulous New York franchisors and in “helping to protect and enhance the commercial reputation of the State which, in and of itself, is a legitimate state interest.”\(^{170}\) Accordingly, dealer legislation that is expressly, or by inference, intended to curtail the unfair or deceptive trade practices of a state’s manufacturer-suppliers would be appropriately applied by a court regardless of the location of the dealer and regardless of the absence of a choice of law provision.\(^{171}\)

2. Perspective of supplier counsel

Generally speaking, a contractual choice of law provision will not result in the extraterritorial application of state dealer law.\(^{172}\) Many state dealer laws expressly limit their

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Mr. Lockerby represented Volvo in this litigation.


\(^{170}\) Id. at 191. The three franchise agreements with the three different out-of-state franchisees that were at issue in this case included choice of law provisions designating New York as the operative law. Accordingly, the court concluded:

This provision is sufficient, without more, for New York’s Franchise Sales Act to be applied in this litigation. Under New York’s conflict of laws doctrine, which we are required to apply in this case, New York will honor a provision in an agreement stipulating that the law of a particular jurisdiction will govern the relations between the parties.

Id. (citations omitted). But the court would have applied New York law regardless of the choice of law provision. “Absent a choice of law clause we believe a New York court would apply New York law in light of the clearly expressed intention of the New York Legislature to exert its fullest power over franchises offered or accepted within its police jurisdiction.” Id.

\(^{171}\) Of course, if the statute expressly limits itself to in-state dealers, that intent would also have to be honored in the application of the statute.

\(^{172}\) See, e.g., McDonald’s Corp. v. C.B. Mgmt. Co., 13 F. Supp. 2d 705 (N.D. Ill. 1998) (the franchise agreement at issue contained an Illinois choice of law provision, but holding that the Illinois Franchise Disclosure Act did not apply
application to in-state dealers. Where the statute is silent, suppliers will often cite general presumptions that state statutes do not apply on an extraterritorial basis.\(^{173}\) As the Seventh Circuit has observed, the extraterritoriality principle is well established in Supreme Court precedent, dating at least to *Bonaparte v. Tax Court*, 104 U.S. 592 (1881) in which the Court held that “[n]o state can legislate except with reference to its own jurisdiction.”\(^{174}\) Such presumptions are particularly helpful where the statutory definition of “dealer” is not expressly limited to in-state dealers. Because of these statutory presumptions, suppliers can argue, any such limitation in the statutory definition would have been superfluous or gratuitous. Other provisions of the dealer statute may arguably support its limitation to in-state dealers. For example, the North Carolina Farm Equipment Act defines “good cause” as “failure by a dealer to comply with requirements imposed upon the dealer by the agreement if the requirements are not different from those imposed on other dealers similarly situated in this State.”\(^{175}\) N.C. Gen. Stat. § 66-180(6) (emphasis supplied).

Limiting the extraterritorial effect of a state dealer law may also be necessary to avoid Commerce Clause concerns because a “state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause”\(^{176}\) and may create “inconsistent obligations in different States.”\(^{177}\) Where an interpretation of a statute would render it unconstitutional, the court must interpret the statute to avoid the constitutional infirmity.\(^{178}\)

More often than not, courts will decide the issue of extraterritorial application based not on constitutional concerns but by looking at the language of the statute and/or the parties’ intent. For example, in *Cromens, Holloman, Sibert, Inc. v. AB Volvo*, the Seventh Circuit rejected the contention that an Illinois choice of law provision made the Illinois Franchise Disclosure Act—which “by its own terms ... applies only to franchisees located within the State of Illinois”—


\(^{173}\) See, e.g., *McCullough v. Scott*, 182 N.C. 865, 109 S.E. 789 (1921); *Graham v. General U.S. Grant Post No. 2665, V.F.W.*, 43 Ill. 2d 1, 6, 248 N.E.2d 657, 660 (1969) (“Our past decisions have established the rule that when a statute ... is silent as to extraterritorial effect, there is a presumption that it has none”).

\(^{174}\) *Dean Foods Co. v. Brancel*, 187 F.3d 609, 614-15 (7th Cir. 1999).


\(^{177}\) See *Dean Foods v. Brancel*, 187 F.3d 609, 614 (7th Cir. 1999) (“It would make little sense to read a law to regulate extraterritorial transactions ‘when the upshot is invalidity’”) (internal quotation omitted); *Morley-Murphy v. Zenith Elec. Corp.*, 142 F.3d 373, 379 (7th Cir. 1998) (“State courts are not more in the habit of construing state legislation in a way that would violate constitutional limitations than federal courts”).
applicable to dealers in Texas, Maine, Montana, New York, Alberta, and Saskatchewan. The parties' intent, the Cromens court concluded, was to make the contracts subject to Illinois law as enacted by the Illinois legislature—not to expand the scope of Illinois law. Absent any indication that the parties intended for the chosen state's "relationship" law to apply extraterritorially, the Seventh Circuit concluded in Cromens, a choice of law provision does not allow dealers in other states to invoke the protections of the statute.

Not all courts have agreed, however. As a result, there is precedent—although it is a distinct minority view—for the proposition that a contractual choice of law provision includes any "relationship" statute of the chosen state. For example, in a recent case in Mississippi, the court granted summary judgment in favor of the manufacturer, dismissing the dealer's claims under the statutes of various states in which it did business. Because the contract contained a Mississippi choice of law provision, however, the court held that the Mississippi dealer statute would apply extraterritorially to the dealer's operations in other states.

Both parties alternately assert and disclaim the contract that at least at one time governed the Pioneer dealership. Taylor has filed a motion for summary judgment with regard to Pioneer's multiple Dealer Act counter-claims under the laws of all the various states in which the Pioneer defendants have done business, and under Mississippi law, where it has not done business. While the record on this motion is also fraught with questions of fact to be resolved by the jury, the motion, the response and the reply raises questions of conflicts of law that should be resolved now. Again the parties want to have things both ways to suit their perceived interests. The original dealership contract provided that Mississippi law would govern the contract. Taylor wishes to have Mississippi law apply generally, to pre-empt the application of any dealer act from any other state. Taylor also urges the court to rule that Pioneer, as an out-of-state dealer does not enjoy the protections of § 75-77-1, et. seq., the Mississippi Retailer Act, arguing that it cannot be applied extra-territorially. Pioneer urges the court to apply Mississippi law, citing the contract choice of law provision, but largely continues to claim the right to also apply the laws of other states to the different dealership locations. Both are wrong.

Clearly by any choice of law analysis, the application of Mississippi law is entirely appropriate, and more appropriate than the application of the law of any other states. The Taylor plaintiffs drafted a contract that called for the application of Mississippi law

178 See 349 F.3d 376, 385 (7th Cir. 2003). Mr. Lockerby represented Volvo in this litigation.

179 Id.


181 Pursuant to a Final Judgment By Consent, the U.S. District Court for the Northern District of Mississippi later vacated that portion of its decision applying the Mississippi statute on an extraterritorial basis.
and brought this action in the federal court in Mississippi. Pioneer in its response has embraced this one choice of law provision of the contract and urged the court that Mississippi law clearly applies. The court finds that Mississippi law, and not the law of any other state, shall apply to the respective claims and defenses of the parties.

Is Pioneer entitled to the protections of the Mississippi statute? Nothing in the Mississippi statute explicitly prohibits the application of § 75-77-1, et. seq., to the Pioneer defendants. The case law of this circuit favors the election of applicable law by contract. C. A. May Marine Supply Company v. Brunswick, 557 F. 2d 1163 (5th Cir. 1977). With the application of the Mississippi statute and Mississippi law, claims under the laws of other states are not available. Therefore the motion for summary judgment seeking to dismiss Pioneer’s assorted claims under the dealer laws of South Carolina, Georgia, West Virginia, North Carolina, and Florida should be dismissed with prejudice. The counterclaim under the Mississippi Act shall be tried and resolved by the jury. 182

To avoid unintended consequences such as the ruling in Taylor Machine, the dealer agreement’s choice of law provision should be clear that it is specifically intended not to include the chosen state’s “relationship” law. Including such a provision ought not run afoul of any statutory anti-waiver provision because an out-of-state dealer typically would have no rights under the statute to waive. An example of such a contractual provision follows:

**Mutual Benefits of Uniform Interpretation.** This Agreement shall be governed by and interpreted according to the laws (exclusive of the conflicts of laws rules) of the State of [Forum] applicable to contracts entered into in the State of [Forum], except to the extent governed by the United States Trademark Act of 1946 (Lanham Act), the Copyright Act, and the Patent Act. By agreeing to the application of [Forum] law, the parties do not intend to make this Agreement or their relationship subject to any franchise, dealership, distributorship, business opportunity, or similar statute, rule, or regulation of the State of [Forum] to which this Agreement or the parties’ relationship would not otherwise be subject. Dealer and Manufacturer each acknowledges and agrees that the choice of applicable state law set forth in this paragraph provides each of the parties with the mutual benefit of uniform interpretation of this Agreement or the parties’ relationship created by this Agreement. Dealer and Manufacturer further acknowledge the receipt and sufficiency of mutual consideration for such benefit, and that each party’s agreement regarding applicable state law has been negotiated in good faith and is part of the benefit of the bargain reflected in this Agreement.

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182 *Id.* at **4-6* (footnote omitted).
C. Effect on State Dealer Laws

Like many franchise disclosure, registration, and relationship statutes, many state dealer laws expressly prohibit waiver of their protections. Notwithstanding such anti-waiver provisions, it is possible that a choice of law provision may displace the dealer protection statute of the dealer's home state. Whether it does depends upon the extent to which the dealer protection statute represents a "fundamental" policy of the dealer's home state. As a result, it is possible that the same choice of law provision may displace some dealer protection statutes but not others. In this regard, the presence of a statutory anti-waiver provision is one factor that may help establish that a dealer protection statute represents a "fundamental" policy of the dealer's home state. Conversely, the absence of an anti-waiver provision may indicate that a dealer protection statute is not a "fundamental" state policy and is therefore displaced by a choice of law provision.

This point is demonstrated by the Fourth Circuit's decision in CLM Equipment. In CLM Equipment, the Fourth Circuit held that a contractual choice of law provision displaced the application of a Louisiana dealer statute but not an Arkansas statute. In reaching this conclusion, the Fourth Circuit "beg[an] with the proposition that not every statutory provision constitutes a fundamental policy of a state," citing Cherokee Pump for the proposition that "[t]he law of a state and its public policy are not necessarily synonymous. Not every law enacted by the legislature embodies the 'public policy' of the state." In this regard, the Fourth Circuit noted that the Fifth Circuit had in Cherokee Pump & Equip. Inc. characterized as "ridiculous" the proposition that every statutory provision expresses a state's fundamental policy because "contracting parties would be entitled to apply the law of another state under the Second Restatement only when the law of the chosen state was the same as that of the state where the contract was made."

"In assessing whether a dealer protection statute expresses a state's fundamental policy," the Fourth Circuit stated, "we are guided by the language of the statute, relevant court decisions, and pertinent legislative history."

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183 Volvo Construction Equipment North America, Inc. v. CLM Equipment Co., 386 F.3d 581 (4th Cir. 2004). Mr. Lockerby represented Volvo in this litigation.

184 Cherokee Pump & Equip. Inc. v. Aurora Pump, 38 F.3d 246, 252 (5th Cir. 1994).

185 CLM Equipment, 386 F.3d at 607 n. 25.

186 CLM Equipment, 386 F.3d at 607-08. See also id. n. 26:

We note that, in assessing whether the Arkansas Act or the Louisiana Act embodies a fundamental state policy, we would be bound by any relevant precedent of the Arkansas or Louisiana courts. Because there is none, and because our Court has not heretofore addressed such an issue, we are constrained to examine the decisions of our sister circuits addressing these and similar dealer protection statutes.

Among the "several recent decisions of our sister circuits regarding similar controversies" upon which the Fourth Circuit relied were Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376 (7th Cir. 2003) (determining that Maine franchise statute evidenced strong public policy against contracts violating franchise law, and that protection under such statute may not be waived); Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990) (determining that Indiana franchise law expressed fundamental policy, and that protection under Indiana franchise law may not be waived); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734 (8th Cir. 1989) (en
Based upon its review of, *inter alia*, these other Circuit Court opinions, the Fourth Circuit in *CLM Equipment* found the presence of an anti-waiver provision to be instructive but not dispositive as to whether the state dealer statute represented a “fundamental” state policy:

The Sixth, Seventh, and Eighth Circuits have, in their analyses of similar issues, focused on whether state dealer protection statutes contain anti-waiver provisions. The Arkansas Act contains such a provision, and Clark maintains that its inclusion reflects that the Arkansas Act constitutes a fundamental policy of Arkansas. In espousing this proposition, Clark relies primarily on the Seventh Circuit’s decision in *Wright-Moore*. There, the court held that an Indiana franchise statute containing an anti-waiver provision constituted a fundamental policy of Indiana and barred contracting parties from opting out of its protection “whether directly through waiver provisions or indirectly through choice of law.” *Wright-Moore*, 908 F.2d at 132. As the Sixth and Eight Circuits have observed, however, the presence of a statutory anti-waiver provision does not necessarily mean that a statute embodies a state’s fundamental policy. *See Tele-Save*, 814 F.2d 1120; *Modern Computer*, 871 F.2d 734.\(^\text{187}\)

Unlike the Louisiana statute at issue in *CLM Equipment*, the Arkansas statute did contain an anti-waiver provision. The strength of this anti-waiver provision was the first step in the Fourth Circuit’s analysis of whether the Arkansas statute reflected a fundamental policy:

There is no established rule for determining whether a state policy is fundamental. Although the presence of an anti-waiver provision does not necessarily mean that a dealer protection statute embodies a fundamental policy, such a provision suggests the importance the legislature attached to the statute. The strength of anti-waiver provisions in dealer protection statutes, however, varies among the states. *Wright-Moore*, 908 F.2d at 134. Following the lead of our sister circuits, we will determine whether the Arkansas Act expresses fundamental policy by first assessing the strength of its anti-waiver provision. *See Wright-Moore*, 908 F.2d at 134; *Modern Computer*, 871 F.2d at 738; *Tele-Save*, 814 F.2d at 1122-23; *see also Jeffries v. State*, 212 Ark. 213, 205 S.W.2d 194, 196 (Ark. 1947) (observing that, in Arkansas, public policy is determined by examining constitution, statutes, and court decisions). We will also focus on any legislative history indicating whether the Arkansas Act was intended to embody a fundamental policy of Arkansas. *See Cromeens*, 376 F.3d 376, 2003 WL 22519825, at *9-10; *see also Jordan v. Atl. Cas. Ins. Co.*, 344 Ark. 81, 40 S.W. 3d 254, 257 (Ark. 2001) (observing that, in Arkansas, determination of public policy lies almost exclusively with

\(^{187}\) *Id.* (footnote omitted).
legislature, and courts should not interfere with that determination absent palpable error).\textsuperscript{188}

Because the Louisiana statute at issue did not have an anti-waiver provision, the Fourth Circuit observed, "we must, in seeking to determine whether the Act was intended to embody a fundamental policy of Louisiana, focus on its provisions and on any relevant court decisions."\textsuperscript{189}

In contrast, the Fourth Circuit found that the Arkansas statute did embody a fundamental state public policy. The Fourth Circuit so held based primarily upon the statement of legislative purpose contained in the statute's "emergency clause," including the statement that cancellations without good cause were "vitally affecting the ... public welfare." The anti-waiver provision was not dispositive of this issue:

Although the inclusion of an anti-waiver provision in the Arkansas Act is indicative of the importance the Arkansas legislature attached to the statute, we see nothing in the provision itself to indicate that the legislature intended the Act to embody the state's fundamental policy.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} \textit{Id.} See also \textit{id. at} 608-09:
\begin{itemize}
\item In assessing whether the Louisiana Act constitutes a fundamental policy of Louisiana, we look to pertinent Louisiana judicial and legislative authorities. Because the Louisiana courts have not addressed this issue, our analysis is limited to the text of the statute. \textit{Cherokee Pump}, 38 F.\textit{3d} at 253 (observing that court decisions fail to show that Louisiana Act reflects public policy of Louisiana). Unlike the dealer protection statutes of certain other states, the Louisiana Act does not contain an anti-waiver provision. More importantly, nothing in the Act indicates that it was enacted to foster or protect a fundamental policy of Louisiana. \textit{See Cherokee Pump}, 38 F.\textit{3d} at 253 (observing that Louisiana Act fails to indicate that "strongly held belief" or "public policy" of Louisiana was being fostered or protected by its enactment). In this regard, the Louisiana legislature clearly understood the significance of a statutory provision indicating that a statute represents important state policy. For example, in the Louisiana Oilfield Indemnity Act, the legislature indicated its intent "to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault ... on the part of the indemnitee...." La. Rev. Stat. \textsection 9:2780 (emphasis added). No such provision is found in the Louisiana Act.
\item In the absence of an anti-waiver provision in the statute, and there being no legislative finding that the Louisiana Act constitutes an important, much less a fundamental, state policy, we agree with the Fifth Circuit that the Act cannot override a choice-of-law contract provision precluding its application. \textit{Cherokee Pump}, 38 F.\textit{3d} at 252. Because the body of law selected in CLM's Choice-of-Law Provision does not fail the Fundamental Policy test, that law, rather than the Louisiana Act, governs the obligations of the parties.
\item \textsuperscript{190} \textit{Id. at} 609.
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Rather, it was "the anti-waiver provision of the Arkansas Act, considered in conjunction with the declarations made in the Emergency Clause," that "renders the termination of a dealer agreement, absent good cause, a violation of the fundamental policy of Arkansas."\textsuperscript{191}

The Fourth Circuit's decision in \textit{CLM Equipment} also raises the possibility that suppliers can obtain the practical effect of a waiver of state dealer law protections by use of a contractual provision requiring the dealer to assert that state law trumps the dealer agreement before a dispute arises. The dealer agreement at issue in \textit{CLM Equipment} contained such a clause known as the "Local Law Provision." The Local Law Provision stated as follows:

The rights and obligations of the parties hereto shall be subject to all applicable laws, orders, regulations, directions, restrictions and limitations of governments and government agencies having jurisdiction over the parties hereto. In the event that [a local] law, order, regulation, direction, restriction or limitation, appropriation, ... or interpretation thereof shall, in the judgment of either party hereto substantially alter the relationship between the parties under this Agreement or the advantages derived from such relationship, \textbf{either party may request the other hereto to modify this Agreement.}

(emphasis added). By failing to request such modification previously, the Fourth Circuit found, the dealers in \textit{CLM Equipment} had waived their right to later claim that they could be terminated only "for good cause":

The Local Law Provision provides a ready mechanism for the Dealers to request that the Dealer Agreements be modified. If the Dealers had viewed the State Statutes as substantially altering the relationships between the parties under the Dealer Agreements, they were entitled to request Champion (or Volvo) to modify the agreements; the Local Law Provision expressly provided them with this right. The Dealers did not, however, seek to modify the Dealer Agreements so that they could be terminated only "for good cause," and they cannot now maintain that, under the Local Law Provision, they are protected by the State Statutes.\textsuperscript{192}

The Fourth Circuit distinguished the Local Law Provision from the more typical contractual provisions making the dealer agreement subject to "applicable law":

In support of their contention that the Local Law Provision mandates that the State Statutes govern the Dealer Agreements, the Dealers rely on two decisions, \textit{Sutter Home Winery, Inc. v. Vintage Selections, Ltd.}, 971 F.2d 401 (9th Cir. 1992), and \textit{Lake Charles Diesel, Inc. v. General Motors Corp.}, 328 F.3d 192 (5th Cir. 2003). Their reliance on these decisions, however, is misplaced. The agreement at issue in \textit{Sutter Home} expressly provided that, "except as otherwise required by applicable law,

\textsuperscript{191} \textit{Id.} at 610.

\textsuperscript{192} \textit{Id.}
this Agreement shall be governed by the law of the State of California.” *Sutter Home*, 971 F.2d at 406 (emphasis added). This language is absent from the Dealer Agreements. The agreement at issue in *Lake Charles* provided that “any provision which contravenes the laws of any state or jurisdiction where this Agreement is to be performed will be deemed not a part of this Agreement in such state or jurisdiction.” *Lake Charles*, 328 F.3d at 197 n. 10. No such provision exists in the Dealer Agreements.193

V. CHOICE OF FORUM

Like franchise relationship laws, many state dealer laws invalidate forum selection clauses. Unlike franchise relationship laws, many state dealer laws also mandate dispute resolution in a particular forum. The prescribed forum is, in the case of some state laws — particularly those applicable to motor vehicle dealers and alcoholic beverage distributors — often a state administrative agency.

If the statute does not mandate a particular forum or invalidate forum selection clauses, supplier counsel may try to invoke a contractual forum selection clause to avoid a perceived “home court advantage” on the part of the dealer. Mandating dispute resolution where the supplier has its principal place of business may or may not afford a “home court advantage.” Whether it does may depend upon such factors as the size of the metropolitan area, the prominence of the supplier in the community, and the popularity of the supplier in the community. Even if the chosen forum does not confer a particular benefit on the supplier, avoiding the dealer’s “home turf” may in and of itself justify the forum selection clause.

With or without any “home court advantage,” a forum selection clause may offer other advantages. These can include convenience for the supplier’s witnesses in litigation and uniformity of contract interpretation. Uniformity can be a benefit if it helps eliminate uncertainty. It is important to remember, however, that — depending upon the chosen forum — uniformity may not be such a benefit if the forum’s contract interpretation is uniformly bad for the supplier.

There are times, however, when the state or federal courts of the supplier’s home state may — because of docket conditions, judicial climate, unfavorable precedents, or other factors — be less than ideal. Under those circumstances, the supplier may want to consider other options. One such option is to require dispute resolution in the state in which the supplier is incorporated (assuming that the state of incorporation is different and is otherwise a more favorable forum).

Other “practice pointers” for suppliers drafting forum selection clauses include the following lessons learned in litigation:

1. **Attempt to draft the forum selection clause so that it is not “trumped” by state dealer laws.** As previously discussed, some state statutes invalidate forum selection clauses expressly (or even provide that forum selection clauses violate the statute).194 In some

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193 *Id.* n. 20.

194 For example, the New Jersey Franchise Practices Act makes it a violation “for a motor vehicle franchisor to require a motor vehicle franchisee to agree to a term or condition in a franchise, which … [s]pecifies the jurisdictions, venues
cases, courts have found forum selection clauses invalid even if the state law does not express state that they are void as against public policy.\textsuperscript{195} Possible methods of avoiding this result can include requiring arbitration in the chosen forum and use of the so-called “Local Law Provision” described with respect to choice of law clauses.

2. \textbf{Draft the forum selection clause to minimize the likelihood of a change of venue pursuant to 28 U.S.C. § 1404(a).} Section 1404(a) provides that “[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”\textsuperscript{196} Although forum selection clauses are presumptively valid,\textsuperscript{197} the presence of a forum selection clause generally does not deprive a federal court of the discretion to transfer a case pursuant to 28 U.S.C. § 1404(a).

One notable exception is the Seventh Circuit, which has appellate jurisdiction over the U.S. district courts in the states of Illinois, Indiana and Wisconsin.\textsuperscript{198} In the Seventh Circuit, an exclusive venue provision means that—for purposes of the federal venue transfer statute, 28 U.S.C. § 1404(a)—there is no “other district or division where [the action] might have been brought.”\textsuperscript{199}

Elsewhere, the factors that may warrant transfer to another jurisdiction—such as the franchisee’s home court—include the following:

1. the convenience of witnesses (especially third party witnesses);
2. the convenience of the parties (although shifting the burden of inconvenience from one party to another is generally not grounds for transfer); and
3. the “interests of justice,” which may include case of access to sources of proof as well as other factors.\textsuperscript{200}

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\textsuperscript{195} \textit{See, e.g., Carlos v. Phillips Business Systems,} 556 F. Supp. 769, 774 (E.D.N.Y.), aff’d, 742 F.2d 1432 (2d Cir. 1983).

\textsuperscript{196} 28 U.S.C. § 1404(a).

\textsuperscript{197} \textit{M/S Bremen v. Zapata Off-Shore Co.,} 407 U.S. 1, 10 (1972) (forum selection clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances”). “A clause is unreasonable if (1) it was the result of ‘fraud or overreaching’; (2) ‘trial in the contractual forum [would] be so gravely difficult and inconvenient [for the complaining party] that he [would] for all practical purposes be deprived of his day in court’; or (3) enforcement would contravene a strong public policy in the forum in which the suit could have been brought. \textit{Pee Dee Health Care, P.A. v. Sanford,} 509 F.3d 204, 213 (4th Cir. 2007), quoting \textit{Bremen,} 407 U.S. at 15-18.

\textsuperscript{198} 28 U.S.C. § 41.

\textsuperscript{199} \textit{Paper Express, Ltd. v. Pfankuch Maschinen GmbH,} 972 F.2d 753 (7th Cir. 1992). \textit{See also Northwestern Nat’l Ins. Co. v. Donovan,} 916 F.2d 372, 378 (7th Cir. 1990) (“the signing of a valid forum selection clause is a waiver of the right to move for a change of venue on the ground of inconvenience to the moving party.”).

\textsuperscript{200} \textit{See 28 U.S.C. § 1404(a).}
The plaintiff’s choice of forum and the presence of a forum selection clause are factors that, under Section 1404(a), may weigh against transfer.201 Courts do, however, regularly ignore both the plaintiff’s choice of forum and the presence of a forum selection clause and transfer cases pursuant to Section 1404(a).

One way of trying to avoid transfer is to have an express waiver of the right to seek a venue transfer in the dealer agreement. With or without such a provision, the likelihood of a venue transfer is greater if the chosen forum is not particularly convenient for either the supplier or the dealer. That may be the case if the chosen forum is the state in which the supplier is incorporated if that state is not a place where witnesses and/or documents are located. Alternatively, a forum that may have been convenient for the supplier at the time the dealer agreement was signed may no longer be convenient if—as the result of a corporate relocation, merger, or acquisition—the supplier’s headquarters has moved. One way of avoiding this problem is to require dispute resolution in the state in which the supplier is incorporated or has its principal place of business at the time the dispute arises.

3. **To avoid the perception that the forum selection clause is one-sided and therefore “unfair” if not unenforceable, have the forum vary depending upon which party sues first.** In other words, if the dealer sues first, the required forum is the state in which the supplier is incorporated or has its principal place of business; if the supplier is the plaintiff, the required forum is the dealer’s “home turf.”

4. **If the chosen forum is a federal court, have a “failsafe” provision in case the federal court lacks subject matter jurisdiction.** It is hornbook law that subject matter jurisdiction cannot be conferred by consent. To the contrary, the subject matter jurisdiction of the federal courts may be challenged at any time during the course of the litigation—even *sua sponte* by the court itself. If the forum selection clause is therefore unenforceable, the dealer would then have the opportunity to choose the forum — unless the dealer agreement provides that, if the chosen federal court lacks diversity or federal question jurisdiction, the chosen forum is the state court where the dealer is incorporated or has its principal place of business. Such a provision will also address the situation in which no diversity jurisdiction is present, for example, because the dealer and supplier are citizens of the same state. For purposes of establishing diversity jurisdiction, a corporation is deemed to reside in both the state in which it is incorporated and the state in which it has its principal place of business.202

Dealers seeking to avoid diversity jurisdiction often join non-diverse defendants — such as other dealers—for that very purpose. It may be possible to nevertheless remove to federal court on grounds of fraudulent joinder. For example, the plaintiff in *Victor L. Phillips Co. v. Volvo Construction Equipment North America, Inc.*203 had brought suit in state court seeking a declaratory judgment under the Kansas Outdoor Power Equipment Dealer Act against both

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201 See, e.g., *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) ("[t]he presence of a forum selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's analysis."); *P&S Business Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) ("Thus, while other factors might 'conceivably' militate [in favor of] a transfer ... the venue mandated by a choice of forum clause rarely will be outweighed by 1404(a) factors.") (quoting *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989)).


Volvo Construction and one of its Kansas dealers. Volvo Construction had removed the case to federal court. The federal court denied the plaintiff’s motion to remand, holding that the plaintiff had improperly joined the dealer for the purpose of defeating diversity jurisdiction. That result was atypical, however. More often than not, the case may be remanded back to state court—with the supplier facing liability for the dealer’s attorneys’ fees associated with the remand.204

VI. “CONSTRUCTIVE” TERMINATION AND NONRENEWAL

Earlier this year, the Supreme Court issued its long-awaited decision in the case of Mac’s Shell Service, Inc. v. Shell Oil Products Co.205 Apart from its holding, the decision is noteworthy in at least two other important respects. First, it represents one of the rare occasions when the high court has spoken on an issue of dealership or franchise law. Second, the decision—authored by Justice Alito—was unanimous.

The Mac’s Shell Service decision involved the interpretation of the PMPA. As previously discussed, the PMPA is a federal statute that establishes uniform federal grounds and procedures for termination and nonrenewal of service station dealers licensed to use refiners’ trademarks. In terms of precedential value, the holding of Mac’s Shell Service is therefore limited to claims against suppliers brought by retail outlets of branded motor fuel. The issue before the Supreme Court in Mac’s Shell Service, however—whether changes to contract terms can be tantamount to “constructive” termination and “constructive” nonrenewal of a dealership—is one that is litigated frequently under various state statutes. Courts interpreting these statutes may find the Supreme Court’s Mac Shell Service decision instructive in deciding whether to allow plaintiffs to pursue claims for “constructive” termination or nonrenewal of franchises, dealerships, distributorships, and franchises.

This issue arises frequently when a manufacturer, franchisor, or other supplier proposes—or imposes—substantial changes to the terms and conditions of the dealership, distributorship, or franchise agreement. To address this situation, many state statutes require the same “good cause” for a “substantial change in competitive circumstances” or an “amendment” that they require for a termination or nonrenewal. Because many state statutes require “good cause” only for termination and nonrenewal, creative and aggressive dealer lawyers often allege that changes to contract terms or to the relationship are tantamount to a “constructive” termination or nonrenewal. In various states—including Connecticut,206 Arkansas,207 and New Jersey,208 among others—such efforts have been successful.

In Mac’s Shell Service, the plaintiffs alleged that changes to their rent subsidy were so material that they constituted a “constructive” termination or nonrenewal. Following a jury verdict and district court judgment in favor of the dealers, the First Circuit affirmed in part and reversed in part. With respect to constructive termination, the First Circuit held that the PMPA

204 28 U.S.C. § 1447(c).
206 Peterell v. S.B. Thomas, Inc., 63 F.3d 1169, 1183 (2d Cir. 1995).
permits recovery for constructive termination even without actual abandonment of the dealer's PMPA franchise if the alleged breach of contract resulted in "such a material change that it effectively ended the lease, even though the [franchisee] continued to operate [its franchise]." If the dealer agreed to renew the PMPA franchise on the disputed terms, however, it could not maintain an action for constructive nonrenewal, the First Circuit held.

The Supreme Court found that neither cause of action—constructive termination or constructive nonrenewal—was actionable. In so holding, the Supreme Court relied upon the statutory definition of PMPA "franchise," which includes:

any contract ... under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

Absent outright termination or nonrenewal of the trademark license and other essential elements of a PMPA "franchise," the Supreme Court held, a claim for termination or nonrenewal—"constructive" or otherwise—is not actionable under the PMPA.

Although the PMPA's definition of "franchise" is somewhat unique, most if not all of the other federal and state statutes that govern similar relationships define the protected franchise, dealership, or distributorship in terms of a trademark license. Indeed, it was on this very basis that the Seventh Circuit—in a landmark "market withdrawal" decision this time last year—held that a manufacturer had the requisite "good cause" for termination of a dealer protected by the Maine statute. If other courts—following the lead of the Supreme Court and the Seventh Circuit—construe other statutes in similar fashion, claims for "constructive" termination and nonrenewal may be relegated to where Mac's Shell Service says they belong: at best, a claim for breach of contract.

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209 See 524 F.3d at 45-47.


211 For example, under the FTC Franchise Rule, the mere possibility that a "distributor," "dealer," "licensee," "VAR," "sales representative," or "sales agent" could use the manufacturer's trademark suffices to establish a trademark license for purposes of the definition of "franchise." Informal FTC Staff Advisory Opinion to U.S. Marble, Inc., Bus. Franchise Guide (CCH) ¶ 6424 (Oct. 9, 1980). With respect to the trademark element of the definition, the Amended Franchise Rule Compliance Guide states that "a supplier can avoid Rule coverage of a particular distribution arrangement by expressly prohibiting the distributor from using its mark."


213 Mr. Leydig questions the expansive reading of Mac's Shell Service given by Mr. Lockerby in this section, and suggests the holding is strictly limited to the PMPA. Similarly, Mr. Leydig suggests the Seventh Circuit's decision in FMS v. Volvo Construction is of limited application beyond the facts of that case. Unlike most statutes of this type, the Maine statute at issue in FMS expressly provides that "[t]here is good cause when the manufacturer discontinues production or distribution of the franchise goods." Me. Rev. Stat. tit. 10 § 1363 (c)(4). Further, the Seventh Circuit's decision hinged on a narrow interpretation of the Maine statute's specific use of the term "franchise good" and the definition of "The Products" in the parties' dealer agreement. Broad application of the FMS decision beyond these particular terms is questionable.
VII. "SUBSTANTIAL CHANGES IN COMPETITIVE CIRCUMSTANCES"

The requirement of "good cause" for termination or nonrenewal of a dealership also—under many state laws—applies to a substantial changes in competitive circumstances. Frequently contested issues include:

- What is a "substantial change in competitive circumstances"?
- Does this requirement apply to the dealership agreement or the dealership relationship?

Both issues are most frequently presented in cases of so-called "encroachment."

The forerunner of many state relationship laws, the Wisconsin Fair Dealership Law ("WFDL"), requires "good cause" to "substantially change the competitive circumstances of a dealership agreement."214 The WFDL also requires ninety (90) days prior notice to the dealer of any "substantial change in competitive circumstances."215 The notice must "state all the reasons for ... substantial change in competitive circumstances" and "provide that the dealer has 60 days in which to rectify any claimed deficiency."216 As interpreted by the Wisconsin Supreme Court in Jungbluth,217 the notice requirements of Section § 135.04 apply to any "substantial change in competitive circumstances" of the dealership rather than the dealership agreement:

Judicial protection of the terms of the agreement, rather than the individual dealer, or his business, systematically elevates the rights of the grantor over those of the dealer. We find that this outcome runs contrary to the explicit purpose of the WFDL "[t]o protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships."

The defendant in Jungbluth had the requisite "good cause" for the substantial change in competitive circumstances of the dealership agreement. It was nevertheless held liable for damages resulting from violation of the notice provision of the WFDL.

There is authority under one or more state franchise and dealership statutes, however, finding that appointment of another dealer in the territory can constitute a "substantial[] change [in] the competitive circumstances of a dealership agreement" even if the dealership agreement expressly states that it is non-exclusive. For example, the Minnesota Heavy and Utility Equipment Manufacturer and Dealers Act ("MHUEMDA"),218 prohibits acts that "substantially

214 Wis. Stat. § 135.03 (emphasis added).
216 Id.
218 Minn. Stat. § 325E.068 et seq.
change the competitive circumstances of a dealership agreement" without "good cause." In Midwest Great Dane Trailers, the court rejected the defendant's contention that appointment of a new dealer—conduct that was expressly permitted by the dealership agreement—nevertheless could represent a substantial change in competitive circumstances prohibited by MHUEMDA:

[H]ad the legislature intended to limit causes of action under this part of the statute to changes in the agreement or contract itself, it would have had no need to include the phrase competitive circumstances and simply could have required good cause by manufacturers to 'substantially change a dealership agreement' or possibly, to substantially change the competitive circumstances in a dealership agreement.

The Midwest Great Dane Trailers court reasoned that MHUEMDA was intended to provide dealers with additional protections regardless of what the contract provides:

[To interpret the subdivision as does Defendant[,] would produce consequences contrary to the obvious motive of a statute which affords protection to dealers and distributors. For example, Defendant could appoint many new dealers and thus create market conditions — without actually terminating Plaintiff — that would render the dealer's business entirely unprofitable. If this Court accepts Defendant's interpretation of the provision in question, the MHUEMDA would actually provide no remedy for substantial changes above and beyond what a dealer would normally have were it to raise a contract claim. The statute requires good cause and notice for termination so that, for example, the superior bargaining position of manufacturers cannot be used to enforce terminable-at-will provisions in dealership agreements. The statute thus provides an extracontractual remedy for terminations by manufacturers, and it is consistent, therefore, to interpret the phrase 'substantial change in competitive circumstances' to permit remedies for substantial competitive changes beyond what was agreed upon by the parties in writing.

In Astleford Equipment, the Minnesota Supreme Court confirmed that the federal court's interpretation of MHUEMDA was correct. In addition, the Minnesota Supreme Court concluded that—although "the statute cannot be read to protect a dealer from nearly all new

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219 See Minn. Stat. § 325E.0681, subd. 1.


221 Id. at 1391-92 (emphasis in original).

222 Id. at 1393 (emphasis in original).

competition that threatens the dealer’s profits”—a change need not result in a constructive or de facto termination to rise to the level of a substantial change in competitive circumstances:

[S]ubstantial change in competitive circumstances is a change that has a substantially adverse although not necessarily lethal effect on the dealership. It is a change that is material to the continued existence of the dealership, one that significantly diminishes its viability, its ability to maintain a reasonable profit over the long term or to stay in business.224

VIII. “GOOD CAUSE”

A. Definitional Issues

“Good cause” is variously defined in the statutes, but they clearly have a common theme. The Wisconsin Fair Dealership Law (“WFDL”) defines good cause to mean:

(a) 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

(b) Bad faith by the dealer in carrying out the terms of the dealership.225

The Minnesota Heavy and Utility Manufacturer and Dealer Act (“HUEMDA”) uses a similar definition but then lists a number of specific conditions that constitute good cause:

"Good cause" means failure by an 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. In addition, good cause exists whenever:

(a) Without the consent of the equipment manufacturer who shall not withhold consent unreasonably, (1) the equipment dealer has transferred an interest in the equipment dealership, (2) there has been a withdrawal from the dealership of an individual proprietor, partner, major shareholder, or the manager of the dealership, or (3) there has been a substantial reduction in interest of a partner or major stockholder.

(b) The equipment dealer has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed

224 Id.

225 The Wisconsin Fair Dealership Law, Wis. Stat. § 135.02(4).
against it that has not been discharged within 30 days after the filing, or there has been a closeout or sale of a substantial part of the dealer’s assets related to the equipment business, or there has been a commencement of dissolution or liquidation of the dealer.

(c) There has been a change, without the prior written approval of the manufacturer, in the location of the dealer’s principal place of business under the dealership agreement.

(d) The equipment dealer has defaulted under a security agreement between the dealer and the equipment manufacturer, or there has been a revocation or discontinuance of a guarantee of the dealer's present or future obligations to the equipment manufacturer.

(e) The equipment dealer has failed to operate in the normal course of business for seven consecutive days or has otherwise abandoned the business.

(f) The equipment dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and manufacturer.

(g) The dealer has engaged in conduct that is injurious or detrimental to the dealer’s customers or to the public welfare.

(h) The equipment dealer, after receiving notice from the manufacturer of its requirements for reasonable market penetration based on the manufacturer's experience in other comparable marketing areas, consistently fails to meet the manufacturer's market penetration requirements.226

226 Minnesota Heavy and Utility Manufacturer and Dealer Act, Minn. Stat. § 325E.0681 Subdiv. 1. Closely linked to this definition is the following provision which establishes what is not good cause:

It is a violation of sections 325E.068 to 325E.0684 for an equipment manufacturer to:

... (4) attempt or threaten to terminate, cancel, fail to renew, or substantially change the competitive circumstances of the dealership agreement if the attempt or threat is based on the results of a natural disaster, a labor dispute, or other circumstance beyond the dealer’s control.

Id. at § 325E.0682(b).
Several dealer statutes follow this latter format. What these statutory definitions have in common however, is that most of them define "good cause" in terms of the conduct (or misconduct) of the dealer.

B. Market Withdrawal and Consolidation

1. Perspective of dealer counsel

The economic needs and motivations of the manufacturer or supplier have traditionally not been viewed by the courts as satisfying the statutory definitions of good cause. One of


228 See, e.g., Remus v. Amoco Oil Co., 794 F.2d 1238, 1240 (7th Cir. 1986):

Just as in the employment setting the term "good cause" refers to deficiencies in the employee's performance, so in the Wisconsin Fair Dealership Law "good cause" refers to the errors and omissions of the dealer. This is apparent from section 135.02(4), which defines "good cause" to mean either a "failure by a dealer to comply substantially with essential and reasonable requirements imposed upon him by the grantor ... which requirements are not discriminatory as compared with requirements ... imposed on other similarly situated dealers," or "bad faith by the dealer in carrying out the terms of the dealership." Any remaining doubt that "good cause" refers to deficiencies of the dealer is dispelled by the statutory provision for cure. Before the franchisor can terminate a dealer for good cause he must, as we have noted, give the dealer 60 days to mend his ways, which implies that good cause for terminating a dealer comes from something the dealer does or fails to do, such as not paying on time or not keeping the gas station's restrooms clean. There may be some forms of misconduct so grievous that cure is not possible despite the literal terms of the statute (see, e.g., Wisser Co. v. Mobil Oil Corp., 730 F.2d 54, 59 (2nd Cir. 1984); Lippo v. Mobil Oil Corp., 776 F.2d 706, 724-26 (7th Cir. 1985) (dissenting opinion)), but that is not something to worry about here. The only point here is that termination requires fault by the dealer.

229 See, e.g., Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 137-38 (7th Cir. 1990) (interpreting Indiana franchise statute):

We believe, however, that the language and structure of the Indiana law, along with the guidance provided by interpretation of franchise laws in other states, compel a conclusion that the internal economic reasons of the franchisor are not, by themselves, good cause for termination or non-renewal of a franchise. Primarily, Ricoh's suggested conclusion that the franchisor's economic reasons would constitute good cause directly contravenes the very purpose of franchise statutes and would render the statutes ineffective. As noted above, franchise statutes are designed to prevent franchisors from extracting quasi-rents from franchisees. They are designed to ensure fair dealing between the parties. If the business reasons of the franchisor were sufficient, the protections of the statute would be meaningless since it is in the franchisor's short term business interest (and therefore good cause) to act opportunistically. (While this may not be effective in the long term as the franchisor may lose reputation or good will, a court is unlikely to make this determination.) Even absent opportunistic behavior, a franchisor could virtually always claim a plausible business reason for termination. Without a smoking gun, it would be difficult, if not impossible, for a franchisee to prove that a particular action is not in the business interests of the franchisor. Ricoh's suggested reading would, therefore, allow franchisors to extract rents from franchisees, the very behavior the statutes are designed to prevent.

See also Carlos v. Philip Bus. Sys., 556 F. Supp. 769, 776 (E.D.N.Y. 1983), aff'd, 742 F.2d 1432 (2d Cir. 1983) (restructuring designed to "address the market place as it exists today" is not good cause under the New Jersey franchise act); Gen. Motors Corp. v. Gallo GMC Truck Sales, 711 F. Supp. 810, 816 (D.N.J. 1989) ("It is a violation of the [New Jersey franchise] Act, however, to cancel a franchise for any reason other than the franchisee's substantial
the more recent decisions to address the issue is Volvo Trademark Holding Aktiebolaget v. Clark Machinery Co.\textsuperscript{230} There, addressing a statutory listing of "good cause" like that quoted above, the Fourth Circuit affirmed the district court's entry of summary judgment in favor of the dealer and rejected the manufacturer's argument that good cause was not restricted to the eight enumerated grounds contained in the Arkansas Franchise Practices Act.\textsuperscript{231} The Arkansas Supreme Court subsequently weighed in on the same issue in Larry Hobbs Farm Equipment, Inc. v. CNH America, LLC,\textsuperscript{232} holding:

that the plain language of the statute, along with the canon of statutory construction expressio unius est exclusio alterius, prohibits an interpretation of the AFPA's list of circumstances constituting "good cause" for termination that includes circumstances not specifically listed in section 4-72-202. ... The market withdrawal of a product or of a trademark and a trade name for the product does not constitute "good cause" to terminate a franchise under Arkansas Code Annotated section 4-72-204(a)(1).

Inroads have been made by manufacturers, however, into this traditional interpretation of good cause. Leading the movement to allow a manufacturer's economic problems to form the basis of terminations or substantial changes to the competitive circumstances of a dealership agreement is the Wisconsin Supreme Court's decision in Ziegler Co., Inc. v. Rexnord, Inc.\textsuperscript{233} In that case, the court held there are limited circumstances that constitute good cause for changing an entire distribution system, even when the affected dealers have done nothing wrong. The scope of this form of "grantor-based" good cause, however, is quite narrow. The court articulated the issue, and its ultimate resolution of the issue, as follows:

The real issue is whether a grantor (as defined in the WFDL) may alter its method of doing business with its dealers (as defined in the WFDL) to accommodate its own economic problems, or whether it must subordinate those problems – regardless how real, how legitimate, or how serious – in all respects and permanently if the dealer wishes to continue the dealership. We find that the grantor's economic circumstances may constitute good cause to alter its method of doing business with its dealers,

\textsuperscript{230} Volvo Trademark Holding Aktiebolaget v. Clark Machinery Co., 510 F.3d 474 (4th Cir. 2007). Mr. Lockerby represented Volvo in this litigation.

\textsuperscript{231} Id. at 484 ("[T]he district court properly concluded that the enumerated occurrences in the Arkansas Act are the exclusive means by which a franchisor can terminate a franchise for "good cause.").

\textsuperscript{232} Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC, 291 S.W.3d 190, 196 (Ark. 2009). Mr. Lockerby represented CNH in this litigation.

\textsuperscript{233} Ziegler Co., Inc. v. Rexnord, Inc., 433 N.W. 2d 308 (Wis. 1988).
but such changes must be essential, reasonable and nondiscriminatory.\textsuperscript{234}

This form of "grantor-based" good cause was narrowly circumscribed by the court. First, it requires the manufacturer to be confronted with an "objectively ascertainable" need for change.\textsuperscript{235} Further, the court limited that need to, specifically, a grantor's economic circumstances.\textsuperscript{236} And those objectively ascertainable, economic circumstances must be substantial.\textsuperscript{237} By way of example, the substantial, objectively ascertainable economic crisis the manufacturer, Rexnord, was facing in Ziegler, and which the court found might constitute good cause, was an annual loss of $8,000,000, with continuing losses thereafter, in the two years before its complete restructuring of its distribution chain.\textsuperscript{238} In subsequent cases where manufacturers successfully applied Ziegler, and established grantor-based good cause, the manufacturer faced an otherwise insurmountable economic crisis.\textsuperscript{239}

The Seventh Circuit addressed Ziegler in Morley-Murphy Co. v. Zenith Electronics Corp.\textsuperscript{240} Initially, the court noted "that one must strain to interpret the WFDL" as allowing good cause to be based on anything other than the grounds articulated in the statute.\textsuperscript{241} The court then confirmed that "[T]he Wisconsin Supreme Court was careful to limit this kind of grantor-based good cause,..."\textsuperscript{242} and summarized the Ziegler holding as follows: "[T]he grantor must therefore show three things in order to justify its proposed change: (1) an objectively ascertainable need for change, (2) a proportionate response to that need, and (3) a nondiscriminatory action."\textsuperscript{243} The objectively ascertainable need shown by Zenith was a reported net operating loss in nine of the ten years preceding its complained-of change to its distribution scheme. Zenith suffered a loss of over $320 million in the five years preceding its

\textsuperscript{234} Id. at 314.

\textsuperscript{235} Id. at 320. ("The need for change sought by a grantor must be objectively ascertainable.").

\textsuperscript{236} Id. at 314. ("We find that the grantor's economic circumstances may constitute good cause to alter its method of doing business with its dealers....").

\textsuperscript{237} Id. at 316 ("If the grantor is demonstrably losing substantial amounts of money under the [dealership] relationship, it may constitute good cause for changes in the contract.").

\textsuperscript{238} Id. at 313.

\textsuperscript{239} See, e.g., Morley-Murphy Co. v. Zenith Elec. Corp., 142 F.3d 373 (7th Cir. 1998) (manufacturer experiencing financial losses of hundreds of millions of dollars); Wisconsin Music Network v. Muzak Ltd. P'ship., 5 F.3d 218, 224 (7th Cir. 1993) (undisputed fact that grantor was "having its brains beat out" by the competition). And see cases where grantor could not establish good cause, Builders World, Inc. v. Marvin Lumber & Cedar, Inc., 482 F. Supp. 2d 1065 (E.D. Wis. 2007) (grantor argued but provided no evidence that its dealers would move to a competitor, and provided no evidence as to what the financial effect of such moves, if made, would be on grantor).

\textsuperscript{240} Morley-Murphy Co., 142 F.3d at 373.

\textsuperscript{241} Id. at 377. (The court quoted favorably the dissenting opinion in Ziegler, stating "[t]hen-Justice Abrahamson (joined by then-Chief Justice Heffernan) pointed this out to her colleagues in her concurring opinion, where she said that 'the interpretation adopted by the majority opinion ignores the plain language of the statute and subverts the legislative intent and purpose underlying the Wisconsin Fair Dealership Law.' [Ziegler.] 147 Wis. 2d 308, 433 N.W.2d 8 at 14.").

\textsuperscript{242} Id.

\textsuperscript{243} Id. at 378.
termination of the plaintiff. In the first half of the year of the termination alone, Zenith reported net operating losses of $60.8 million.\textsuperscript{244}

In a recent decision, \textit{Girl Scouts of Manitou Council, Inc. v Girl Scouts of the USA},\textsuperscript{245} the Seventh Circuit once again stressed the need for substantial economic problems to be present before a grantor could terminate or substantially change the competitive circumstances of a dealer without the “good cause” expressly listed in the text of the WFDL.

In this case, unlike in \textit{Ziegler II} and \textit{Morley-Murphy}, we question both the objective need and the proportionate response of GSUSA’s attempt to unilaterally reduce Manitou’s jurisdiction. This is because the circumstances confronting GSUSA differ markedly from those facing Rexnord and Zenith, both of which were reacting to extended periods of substantial economic losses.

GSUSA arguably presents no objective economic need for its proposed action; at the very least, its financial circumstances are a far cry from the dire economic straits confronted by Rexnord, \textit{see Ziegler II}, 433 N.W.2d at 10-11, and Zenith, \textit{see Morley-Murphy}, 142 F.3d at 374-75. GSUSA’s financial statements indicate that GSUSA’s operating revenues exceeded its operating expenses in Fiscal Years 2005 and 2006, earning operating profits of $886,000 and $2.5 million, respectively. Further, we find little support for GSUSA’s argument that intangible concerns such as “fading brand image” and “waning program effectiveness,” without a tangible effect on the bottom line, present the types of concerns Wisconsin courts have contemplated by the “good cause” provision of the WFDL. \textit{See Ziegler II}, 433 N.W.2d at 12 (“If the grantor is demonstrably losing substantial amounts of money under the relationship, it may constitute good cause for changes to the contract.”).\textsuperscript{246}

Thus, while some courts have allowed terminations to occur based not on the express language of the dealer law but on the economic straits of the manufacturer, those cases represent a narrow exception to an otherwise established interpretation of dealer laws.

Finally, there are dealer laws that expressly allow for terminations, nonrenewals, and substantial changes to the competitive circumstances of a dealer agreement based on the manufacturer’s withdrawal from the market.\textsuperscript{247}

\textsuperscript{244} Id. at 375.

\textsuperscript{245} \textit{Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America}, 549 F.3d 1079 (7th Cir. 2008). Mr. Leydig represented the plaintiff in this matter.

\textsuperscript{246} Id. at 1099.

\textsuperscript{247} \textit{See, e.g.}, California Petroleum Distributors Law, Cal. Bus. & Prof. Code § 20999.1(c); Georgia Multiline Heavy Equipment Dealer Act, GA Code Ann. § 10-1-732(a); Maine Franchise Laws for Power Equipment, Machinery and Appliances, Me. Rev. Stat. tit. 10 § 1363(4) (“There is good cause when the manufacturer discontinues production or distribution of the franchise goods.”).
2. Perspective of supplier counsel

State statutes that require "good cause" for termination of a dealership or franchise and define "good cause" in terms of performance deficiencies on the part of the dealer or franchisee have nevertheless been held to permit termination based on economic considerations of the supplier. For example, the plaintiff in Ziegler248 contended that its supplier lacked the requisite "good cause" under the WFDL because the termination was not based upon any alleged performance deficiencies. Rather, the supplier had decided to terminate its existing relationships with all of its distributors and instead contract with them as sales agents selling on a commission basis. Even though the WFDL limits "good cause" for termination to dealer performance deficiencies, the Wisconsin Supreme Court held that the supplier's "economic circumstances" could justify the termination. According to the Wisconsin Supreme Court, adopting the dealer's contrary position would be "unjust and unreasonable."249 In the words of the Ziegler court, "the Wisconsin legislature could not have intended to impose an eternal and unqualified duty of self-sacrifice upon every grantor that enters into a distributorship-dealership agreement." Id. The holding and rationale of Ziegler are not limited to "hardship" cases in which the manufacturer's decision is intended to avoid further losses. To the contrary, state and federal courts have repeatedly held that the WFDL permits termination based on market withdrawal.

In St. Joseph Equipment v. Massey-Ferguson, Inc.,250 the issue before the court was whether the WFDL's "good cause" requirement prohibited the termination of all of Massey-Ferguson's construction machinery dealership agreements in Wisconsin. The court found no WFDL violation because the termination was based on a decision to withdraw from the construction machinery business in North America altogether. An important basis for the holding in St. Joseph Equipment was the court's finding that the WFDL was not intended to apply to non-discriminatory business decisions that affect all dealers.251 Rather, the WFDL was intended to deal with individual or isolated actions that affect only a particular dealer, the court found.252

Following the decision of the Western District of Wisconsin in St. Joseph Equipment, the Eastern District of Wisconsin decided Lee Beverage Co. v. ISC Wines.253 The termination at issue in Lee Beverage was pursuant to a market withdrawal that resulted from the sale of a product line rather than from economic losses. The court noted a potential conflict with the Commerce Clause if the WFDL were applied in such a way as to compel manufacturers to continue doing business against their will in Wisconsin. Ultimately, the Lee Beverage court held that market withdrawal was a complete defense to a WFDL action for wrongful termination.254

249 147 Wis.2d at 314, 433 N.W.2d at 11.
251 Id. at 1249.
252 Id.
254 Id. at 871.
The Seventh Circuit held in *Morley-Murphy*\(^{255}\) that a manufacturer’s decision to eliminate all independent distributors in favor of direct sales is “good cause” under the WFDL. The foregoing interpretation of the WFDL is consistent with the decisions of many other courts holding that market withdrawal is “good cause” for termination under other state franchise and dealer statutes. Several other federal appellate court decisions have recognized that market withdrawal and other legitimate business justifications can constitute “good cause” for termination of a franchise or dealership agreement. These include decisions of the First,\(^{256}\) Second,\(^{257}\) Third,\(^{258}\) and Ninth\(^{259}\) Circuits.

Under the foregoing precedents, a product line need not be actually unprofitable for its discontinuation to establish “good cause” for termination. Instead, “good cause” can include the desire to consolidate distribution or discontinue a product line. Concerns about potential conflicts with the Commerce Clause appear to have motivated at least some of these decisions.

For example, the issue before the Fourth Circuit in *Central GMC, Inc. v. General Motors Corp.*\(^{260}\) was whether market withdrawal was good cause for termination under a Maryland auto dealer statute. The statute at issue in *Central GMC* defined “good cause” solely in terms of dealer performance deficiencies. In *Central GMC*, the Fourth Circuit did not address whether market withdrawal could constitute “good cause” for termination notwithstanding the statutory definition. Instead, the Fourth Circuit held simply that discontinuation of one of the product lines that comprised the dealer’s “franchise” was not a termination prohibited by the Maryland statute. The court so held for two reasons.

First, the Fourth Circuit found that interpreting the termination of a franchise to include discontinuation of a product line would not serve the principal purposes of the Maryland statute at issue in *Central GMC*: “preventing ‘frauds, discrimination and other abuses’ in the manufacturer/dealer relationship and fostering ‘vigorous and healthy competition’ in the motor vehicle industry.”\(^{261}\) “We do not believe that economic restructuring of this sort is a form of

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\(^{255}\) *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 378 (7th Cir. 1998).

\(^{256}\) The First Circuit held in *Schott Motorcycle Supply, Inc. v. American Honda Motor Co.*, 976 F.2d 58 (1st Cir. 1992) that Honda’s withdrawal from the motorcycle market was not arbitrary, in bad faith, or unconscionable under the Maine Motor Vehicle Dealer Law.

\(^{257}\) The Second Circuit held in *Peteireit v. S.B. Thomas, Inc.*, 63 F.3d 1169 (2d Cir. 1995) that a manufacturer’s desire to realign its distribution network was “good cause” for termination under Connecticut Franchise Act.

\(^{258}\) The Third Circuit observed in *Consumers Oil Corp. of Trenton, New Jersey v. Phillips Petroleum Co.*, 488 F.2d 816, 819 (3d Cir. 1973) that it “would precipitate substantial constitutional questions” if the New Jersey Franchise Practices Act (the “NJFPA”) were interpreted as preventing market withdrawal. Following *Consumers Oil*, a district court in New Jersey held that a nondiscriminatory market withdrawal did not violate the NJFPA’s prohibitions against terminating a franchise without good cause. *Freedman Truck Ctr., Inc. v. GMC*, 784 F. Supp. 167, 172 (D.N.J. 1992).

\(^{259}\) The Ninth Circuit in *American Mart Corp. v. Joseph E. Seagram & Sons*, 824 F.2d 733, 734-75 (9th Cir. 1987) found “good cause” for termination pursuant to a nationwide plan of reorganization calling for consolidation of the manufacturer’s distribution network.


\(^{261}\) 946 F.2d at 332-33 (citation omitted).
abuse proscribed by the dealer protection statute; rather it is a legitimate response to changed market conditions.\textsuperscript{262}

The second basis for the Fourth Circuit's decision in Central GMC was the canon of statutory interpretation that statutes should be construed to avoid constitutional conflicts where possible.\textsuperscript{263} The constitutional conflict that the Fourth Circuit sought to avoid in Central GMC was with the Commerce Clause.\textsuperscript{264} By interpreting the Maryland statutory prohibition against termination of a franchise without "good cause" as not applying to market withdrawals, the Fourth Circuit was able to avoid the prospect of a state-imposed "exit toll" that would raise Commerce Clause concerns.\textsuperscript{265} The Commerce Clause issues were the same, the Fourth Circuit observed in \textit{Central GMC}, regardless of whether the manufacturer was enjoined to continue manufacturing the product for dealers in Maryland or was ordered to pay damages for failure to do so. "The Supreme Court ... has noted that impermissible state 'regulation can be as effectively exerted through an award of damages as through some form of preventive relief."\textsuperscript{266}

In a more recent decision involving the "good cause" requirement of the Arkansas Franchise Practices Act, the previously discussed \textit{CLM Equipment} case involving Volvo Construction, the Fourth Circuit rejected the contention that Central GMC stands for the proposition that market withdrawal is "good cause" for termination of a franchise.\textsuperscript{267} In that case, however, the Fourth Circuit affirmed a jury verdict and judgment finding no damages proximately caused by the termination at issue.\textsuperscript{268} As a result, the Fourth Circuit's observations about what the AFPA does and does not permit were arguably \textit{dicta}.\textsuperscript{269}

In the Volvo Construction market withdrawal litigation that has produced so many of the decisions discussed herein, the Seventh Circuit was the last to weigh in. The dealer statute at issue was Maine's "Franchise Laws for Power Equipment, Machinery and Appliances. In \textit{FMS,}

\textsuperscript{262} Id. at 333 (citations omitted).


\textsuperscript{264} Id. at 334, \textit{quoting Healy v. Beer Institute, Inc.}, 491 U.S. 324, 336 (1989).

\textsuperscript{265} Id.


\textsuperscript{267} \textit{Volvo Trademark Holding AB v. Clark Mach. Co.}, 510 F.3d 474 (4th Cir. 2007).

\textsuperscript{268} See, \textit{e.g.}, \textit{Volvo Trademark Holding AB v. CLM Equipment Co.}, 2006 U.S. Dist. LEXIS 64626 (W.D.N.C. Sept. 8, 2006) (denying dealer's motion for new trial following jury verdict that it suffered no damages as a result of termination in violation of Arkansas Franchise Practices Act); \textit{Volvo Trademark Holding AB v. CLM Equipment Co.}, 2006 U.S. Dist. LEXIS 75515 (W.D.N.C. Oct. 2, 2006) (denying dealer's motion for costs and attorneys' fees on the grounds that the dealer had not been harmed by the violation of the Arkansas Franchise Practices Act and on the grounds that a reasonable attorneys' fee for the recovery of zero damages was zero). Mr. Lockerby represented Volvo in this litigation.

\textsuperscript{269} \textit{FMS, Inc. v. Volvo Construction Equipment North America, Inc.}, 557 F.3d 758 (7th Cir. 2009), \textit{rev'ing} 2007 U.S. Dist. LEXIS 19577 (N.D. Ill. March 20, 2007). Mr. Lockerby represented Volvo in this litigation.
Inc. v. Volvo Construction Equipment North America, Inc., the Seventh Circuit held that the scope of a "franchise" protected from termination without "good cause" is limited to the trademark that the dealer, distributor, or franchisee has been authorized to use. In so holding, the Seventh Circuit rejected the notion that "franchise" protections extend to similar goods and services that manufacturers and franchisors offer under other trademarks.

# Appendix A

## State Dealer Protection Laws

<table>
<thead>
<tr>
<th>State</th>
<th>Franchise Relations Statutes and Dealer Statutes of Broad Applicability</th>
<th>Broadly Defined “Equipment” Statutes</th>
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</tr>
</thead>
</table>

1 This chart has been adapted in part from *The Franchise and Dealership Termination Handbook*. ABA Section of Antitrust Law, *The Franchise and Dealership Termination Handbook* 239-242, Appendix B (2004). The authors wish to thank the ABA and the Section of Antitrust Law for allowing us to use it here. Any errors that appear in this re-worked Appendix are the fault of the current authors only.

2 These statutes go beyond the statutes typically classified as “farm and industrial equipment” statutes. We have attempted to include all broadly defined equipment statutes.
<table>
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</thead>
<tbody>
<tr>
<td>District of Columbia</td>
<td></td>
<td>D.C. Code §§ 36-301.01 to 302.05; §§ 36-303.01 to 303.07; §§ 26-304.11 to 304.15</td>
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<td><strong>FRANCHISE RELATIONS STATUTES AND DEALER STATUTES OF BROAD APPLICABILITY</strong></td>
<td><strong>BROADLY DEFINED “EQUIPMENT” STATUTES</strong></td>
<td><strong>MOTOR VEHICLE STATUTES</strong></td>
<td><strong>PETROLEUM STATUTES</strong></td>
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<td>Ind. Code §§ 15-12-3-1 to 17</td>
<td>Ind. Code §§ 9-23-1-1 to 9-23-6-9</td>
<td>Ind. Code §§ 23-2-2.7-5 to 7</td>
<td>Ind. Code §§ 7.1-5-9-1 to 15</td>
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<td>Iowa Code §§ 523H.1 to 523H.17; §§ 573A.10-573A.17</td>
<td>Iowa Code §§ 322D.1 to 322D.7; 322F.1 to 322F.9</td>
<td>Iowa Code §§ 323A.1 to 323A.17</td>
<td>Iowa Code §§ 323A.1 to 323A.3; 323.1 to 323.14</td>
<td>Iowa Code § 322D.8 (Motorcycles); Iowa Code § 322D.9 (All-Terrain Vehicles); Iowa Code § 322D.10 (Snowmobiles)</td>
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<td>Minn. Stat. §§ 325E.05 to 325E.0684</td>
<td>Minn. Stat. §§ 80E.01 to 80E.18; § 80C.14</td>
<td>Minn. Stat. §§ 80F.01 to 80F.18; §§ 80C.144-47</td>
<td>Minn. Stat. §§ 325B.01 to 325B.17</td>
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<td>Mont. Code Ann. §§ 61-4-131 to 150;</td>
<td>Mont. Code Ann. §§ 61-4-201 to 223</td>
<td>Mont. Code Ann. §§ 16-3-217 to 226; §§ 16-3-401 to 421; § 16-2-101</td>
<td>Mont. Code Ann. § 61-4-131 to 150, §§ 30-11-701 to 713 (Motorcycles, Recreational and Off Highway Vehicles, Vessels, Snowmobiles); §§ 30-11-901 to 909 (Construction); 30-14-2501 to 2503 (Motorsports Vehicles)</td>
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<td>S.D. Codified Laws §§ 32-6B-1 to 84</td>
<td>S.D. Codified Laws §§ 37-2-34 to 38</td>
<td>S.D. Codified Laws §§ 35-8A-1 to 20</td>
<td>S.D. Codified Laws §§ 32-6E-1 to 14 (Snowmobiles)</td>
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A-9
Gary W. Leydig devotes his practice to commercial litigation, with particular attention given to dealership and franchise disputes. He has been on the winning end of several cases that have significantly enhanced the rights of dealers and franchisees across the country, including *To-Am Equipment Co. Inc. v. Mitsubishi Caterpillar Forklift America, Inc.*, 157 F.3d 516 (7th Cir. 1999); *Minnesota Supply Company v. The Raymond Corporation*, 472 F.3d 524 (8th Cir. 2006); and *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America*, 549 F.3d 1079 (7th Cir. 2008). Gary is also an arbitrator and mediator of commercial disputes.

Gary is “AV” rated by Martindale-Hubbard. He is listed in *Who’s Who Legal*, and has been named a “Super Lawyer” by *Law & Politics* magazine and a “Leading Lawyer” by the Law Bulletin Publishing Company.

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For the past 26 years as a trial lawyer, Mr. Lockerby has been at the cutting edge of intellectual property, antitrust, business tort, and franchise law. He has been lead counsel for franchisors and manufacturers in litigation and arbitration nationwide of various system-wide issues. These include the consolidation of overlapping distribution and franchise networks, the rebranding of trademarked products formerly distributed under another brand, the enforcement of exclusive dealing requirements, “encroachment claims” raised by direct sales and Internet marketing, implementing new franchise system standards, and issues raised collectively by franchisee and dealer associations. He is ranked nationally in the area of franchise law by Chambers USA, has been named a “Legal Eagle” by Franchise Times, is listed in the Who’s Who of International Franchise Lawyers, and has an “AV” rating from Martindale-Hubbell.

Mr. Lockerby obtained his B.A. from the University of North Carolina at Chapel in 1978 and his J.D. from the University of Virginia in 1984. Between college and law school, he worked as a legislative assistant for the late Senator John Heinz (R-PA).

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