



Novel Applications of the Wisconsin Fair Dealership Law

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A Quick WFDL Overview

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History of the WFDL

- Initially proposed in 1970, but languished.
- Passed in 1974 in response to oil embargo.
- Modeled on laws in New Jersey & Puerto Rico.
- Amended in 1978 to restrict geographic scope.
- Amended in 1999 to increase protections for alcohol distributors.

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► **Purposes of the WFDL** Wis. Stat. §135.025

Statute expressly identifies 4 purposes:

- To promote fair business relations;
- To protect dealers from grantors with greater economic power;
- To provide dealers rights and remedies beyond contract law;
- To govern all dealerships to full constitutional extent.

Statute instruct courts to interpret/apply WFDL liberally to achieve these purposes.

Parties cannot contract around the WFDL.



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► **What is a dealership?** Wis. Stat. §135.02(3)(a)

"An agreement, expressed or implied, oral or written, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, 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."



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► **Intoxicating liquor dealerships** Wis. Stat. §135.02(3)(b)

• Same core definition ("A contract or agreement... by which a wholesaler is granted the right to sell or distribute intoxicating liquor or use a trade name, trademark, or other commercial symbol related to intoxicating liquor.")

• Exceptions:

- (1) the producer makes < 200k gallons/yr
- (2) the brands totals <5% of dealer's net liquor revenue last FY.



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Who are the parties to a dealership? Wis. Stat. §135.02

Dealer: a grantee of a dealership situated in WI.

Grantor: a person who grants a dealership.

Person: includes natural person, partnership, joint venture, corporation, or other entity.



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Evolution of the WFDL in the Courts

- WFDL is short; written in broad, vague terms.
- Courts have defined what the statute means.
- Most litigation was in 1970s and 1980s—less emphasis on statutory text than today.
- Wisconsin courts and federal courts apply the WFDL differently.



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Community of interest Wis. Stat. §135.02(1)

- Defined as “a continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods or services.”
- This unclear and unhelpful definition is the most important part of the WFDL. It is where most WFDL cases are won or lost.



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Community of Interest—State Law

Ziegler Co. v. Rexnord, Inc. (1987)

TWO GUIDEPOSTS FOR FINDING A COMMUNITY OF INTEREST

"continuing financial interest"	"interdependence"
grantor & dealer must have a shared financial interest in operating the dealership or marketing the grantor's product	grantor & dealer must cooperate, coordinate activities, and share common goals more than in typical vendor-vendee relationship

Need both to extent that change would have significant adverse economic impact on dealer.



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Community of interest—State Law continued

Ziegler Court spelled out 10 facets to aid community-of-interest analysis.

There's no specific requirement or magic formula.

Courts can add other facets.

These 10 facets need not be considered at all; guideposts are the legal standard.



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Community of interest—Seventh Circuit test

- "[U]nless a large portion of the business is committed to a supplier, or the reseller has substantial assets specialized to that supplier's goods, there is no opportunity to exploit ... hence no 'community of interest.'" *Kenosha Liquor Co. v. Heublein* (1990)
- "significant adverse economic impact" → "severe economic consequences." *Freiburg Farm Equip. v. Van Dale, Inc.* (1992)
- Focuses primarily on whether grantor has dealer over a barrel. If not, no violation of "protectionist" and "vapid" WFDL.
- Dealers prefer state courts; grantors, federal courts.



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Changing a Dealership Wis. Stat. §135.03

Grantor cannot “terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause.”

Courts have held that a grantor can make change based on its own circumstances if change is (a) necessary, (b) reasonable, and (c) non-discriminatory.



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Good Cause Wis. Stat. §135.02(4)(a)

Can be one of two things:

1. Failure by a dealer to comply with essential and reasonable requirements imposed by the grantor.
2. Bad faith in carrying out the terms of the dealership.

Grantor bears burden of proving good cause.



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Notice Requirements Wis. Stat. §135.04

90-day advance written notice.
Notice must identify good cause.
60-day opportunity to cure.
If dealer cures within 60 days,
notice is void.



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► **Notice exceptions** Wis. Stat. §135.04

- 90-day notice requirement does not apply where grantor seeks to terminate due to dealer's insolvency, the occurrence of an assignment for the benefit of creditors, or bankruptcy.
- If dealer owes grantor money, notice and cure periods are reduced to 10 days.
- Does notice apply to bad-faith conduct?



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► **Damages & injunctions** Wis. Stat. §135.06

- Violation of WFDL can lead to damages and/or injunctive relief.
- Consequential damages (lost profits—for how long?), plus attorney's fees.
- Can get injunction prohibiting termination or change in terms. (Violating WFDL is an irreparable injury for injunction analysis.)



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► **Applying the WFDL to Municipal Grantors**

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Benson v. City of Madison, 2017 WI 65

- City is a “corporation,” thus can be “grantor.”
- Where city is grantor, it must follow WFDL.
- Courts need not consider all 10—or any—Ziegler facets in analyzing whether a community of interest is present.



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**JusticePoint, Inc. v. City of Milwaukee,
No. 23CV5026 (Milw. Cnty. Cir. Ct.)**

- JusticePoint is a nonprofit organization that contracts with the City to provide services to individuals facing forfeitures in municipal court.
- City notified JusticePoint of termination under contract clause allowing 10-day notice.



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JusticePoint, Inc. v. City of Milwaukee continued

- JusticePoint served notice of claim.
- When City didn't respond, JusticePoint filed suit.
- Circuit court granted a TRO on July 10, 2023.
- Parties currently briefing temporary injunction; hearing set for October 5, 2023.



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Using the WFDL to Seek Remedies Beyond Wisconsin's Borders

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Traditional view has limited WFDL remedies.

- *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373 (7th Cir. 1998), suggested—in dicta—that courts shouldn’t construe WFDL to authorize lost-profits damages arising from anticipated sales outside of Wisconsin, lest doing so raise constitutional concerns under the dormant Commerce Clause.
- No state or federal court has ever fully adjudicated this issue, but courts have continued to heed the *Morley-Murphy* warning.



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But Commerce Clause jurisprudence doesn’t support this view.

- Recent U.S. Supreme Court decision, *National Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023), clarifies that, absent purposeful discrimination against out-of-state businesses, dormant Commerce Clause shouldn’t prohibit enforcement of WFDL, even beyond Wisconsin’s borders.
- Ross analysis, and its necessary rejection of *Morley-Murphy* dicta, is underscored by decision applying NJ franchise law beyond state borders. *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3d Cir. 1994).



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Implications of rethinking Morley-Murphy.

- Forthcoming article in *Wisconsin Law Review Forward* (Oct. 2023) fleshes this argument out.
- Ross/CA3 approach supports damages that would fulfill WFDL's statutory purposes by providing full remedies to multi-state dealerships situated in Wisconsin.
- Also supports injunctive relief beyond Wisconsin borders, which some courts have already been granting.



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Questions?



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