

Novel Applications of the Wisconsin Fair Dealership Law

September 27, 2023
Jeff Mandell & Erin Deeley



1

A Quick WFDL Overview

2

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.



3

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.



4

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."



5

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.



6

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.



7

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.



8

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.



9

Community of Interest—State Law

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

TWO GUIDEPOSTS FOR FINDING A COMMUNITY OF INTEREST

"continuing financial interest"

grantor & dealer must have a shared financial interest in operating the dealership or marketing the grantor's product

"interdependence"

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.



10

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.



11

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.



12

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.



13

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.



14

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.



15

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?



16

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.)



17

Applying the WFDL to Municipal Grantors

18

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.



19

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.



20

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.



21

Using the WFDL to Seek Remedies Beyond Wisconsin's Borders

22

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.



23

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).



24

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.



25

Questions?



26

140 YEARS *Of* EXCELLENCE

 **StaffordRosenbaum**LLP
Attorneys

27
