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## **LAWYERS BEWARE (DON'T GET TRAPPED BY THE WISCONSIN FAIR DEALERSHIP LAW)**

By Jordan B. Reich of Kohner, Mann & Kailas, S.C.

### **Introduction**

With many creditors their first contact with the Wisconsin Fair Dealership Law (Chapter 135, Wisconsin Statutes) arises when they attempt to collect monies owed to it by a Wisconsin based business. The issue of compliance with the statute is often presented after written or telephonic contact is commenced by the debtor or the debtor's attorney seeking payment of the debt. Unfortunately it can also be brought to the unsuspecting creditor's attention by either a lawsuit filed by the debtor alleging violation of the law or as a counterclaim in response to the creditor's action seeking recovery of the monies owed to it. **Given the significant consequences of a violation of the law, attorneys for creditors should be aware of the law, its purpose, its application, its requirements, its prohibitions, proper notices and the serious damages assessed in the event of a violation of its requirements.**

### **Specifics**

The WFDL was originally titled the "Wisconsin Fair Franchising Law" and was to apply to various small businesses such as gas stations, lumber yards, motels, farm implement dealers, restaurants and sports equipment stores. Although the word "franchise" was removed from the title of the statute, the statute's legislative history and plain language evidence that it applies to any business that, like a franchisee, makes substantial investments in its relationship with its grantor. The Act recognizes that termination of such a relationship would have a devastating impact on the business being terminated, requiring the need for very significant protections. The law's language is clear and concise. It states that the law's purposes are:



1. Promotion of the compelling interest of the public in fair business relations between dealers and grantors; and in continuation of dealerships on a fair basis.
2. Protection of dealers against unfair treatment from those organizations having superior economic and bargaining power.
3. Providing dealers with specific rights and remedies.

The Act also states unequivocally that it is to be "**liberally construed and applied to promote its underlying remedial purposes and policies.**" Although to be applied liberally, it does not protect every company or individual that sells another company's product or services. The most obvious question is whether the law applies to the specific business relationship that is presented. The answer to that question depends on a series of inquiries. First, it must be determined whether the "person who is the grantee of a dealership" is "situated" in Wisconsin. The test to make that determination is not whether the dealer is incorporated or physically located with Wisconsin, but whether the dealer is

“doing business” within Wisconsin. The concept of “doing business” equates to offering sales or services within Wisconsin.

After determining whether a person or entity is “situated” in Wisconsin, the second inquiry is whether the business relationship falls within the definition of a dealership. A “dealership” is defined as “(1) a contract or agreement, either expressed or implied, whether oral or written between 2 or more persons; (2) by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark logo type, advertising or other commercial symbol; (3) in which there is a community of interest in the business of offering, selling or distribution of goods or services at wholesale, retail, by lease, agreement or otherwise.” Independent sales agents and manufacturers generally do not fall within the act’s provisions because they fail to meet the requirement that they can commit the grantor to the sale of the product. Even where a distributor markets and services a product and resembles a dealer, if it does not have the authority to consummate a sale, it is not a dealer under the act.

The issue most litigated is whether a specific relationship meets the definition of “dealership.” Courts have applied an interpretation broad enough to cover many non-traditional business relationships, yet restrictive enough to avoid including every vendor-vendee relationship. When making the determination, several critical concepts are considered. There must be a right to sell. The dealer must have the right to commit the grantor to the sale, and there must be involvement by the grantor in the sale. A business may qualify as a dealer if it “distributes” a grantor’s product or services by delivering them to a final point of sale, enabling the customer to choose the grantor’s product or service. In addition to selling or distributing a product, a dealer may qualify to be covered by the act through the use of a grantor’s trade name, trademark, service mark or advertising through a substantial investment.



The law requires that the dealer and grantor have a “community of interest” or a “continuing financial interest between grantor and grantee in the operation of the business or the marketing of such goods and services.” To make this determination, ten facts are to be considered. These are:

1. What is the length of the relationship?
2. Are there specific minimum purchase or inventory requirements? Is there a best effort clause or specific sales quota?
3. Does the grantee sell the grantor’s products or services exclusively or nearly exclusively?
4. What is the percentage of the grantee’s gross profit which is derived from the grantor’s product or services?
5. Is the grantee’s territory exclusive or is the market critical to the grantee?
6. What are the extent and the nature of the grantee’s use of the grantor’s commercial symbols?
7. What are the extent and nature of the grantee’s financial investment in inventory?
8. Do any of the grantee’s personnel devote all of their time to the sale of the grantor’s products or services?
9. How much does the grantee spend on advertising the grantor’s product or services?
10. What supplementary services does the grantee provide after sale?

Making the determination of “community of interest” is critical in defining whether the typical vendor-vendee relationship is covered and protected by the Wisconsin Fair Dealership Law. Unfortunately, the courts have not made this determination easy for parties and their lawyers. The determination is further complicated because Wisconsin courts and the federal courts have developed different tests for the analysis as to when a “community of interest exists.”

Although the Wisconsin courts rely on the ten factors stated above, the federal courts, and specifically the Seventh Circuit Court of Appeals, emphasize two factors in determining whether the “community of interest” exists: the alleged dealer’s financial investment and the percentage of profits and revenues attributable to the grantor. Determining whether a dealership exists will often depend on what court takes up the issue and the test or tests used.

If it is determined that a WFDL relationship exists, the dealership can only be terminated, cancelled, refused renewal or have the competitive circumstances of the dealership changed upon the requirements of “good cause.” The concept of “good cause” is defined by both the statute and case law. “Good cause” may be the failure of the dealer to comply substantially with the essential and reasonable requirements imposed or sought to be imposed by the grantor. It includes the dealer’s bad faith, insolvency and/or failure of the dealer to pay monies owed to the grantor arising out of the relationship. “Good cause” may exist as the result of the grantor’s economic circumstances.

Written notice of ninety (90) days is required to terminate, cancel, or substantially change a dealership relationship. The written notice must state specifically all of the reasons for the grantor’s actions and how the dealer can correct those reasons. The notice must state specifically what action will be taken at the end of the 90 days. The dealer must be advised that it has sixty (60) days to correct the deficiencies. If the reason for the grantor’s termination of the relationship is the dealer’s failure to pay monies due to the grantor, the time for curing this specific deficiency is ten (10) days. If the debt is not paid within that time period, the dealership can be terminated eighty (80) days later. No notice of termination is required if the dealer becomes insolvent, files bankruptcy or makes an assignment for the benefit of creditors.



Should a grantor fail to comply with the WFDL by engaging in an improper termination, cancellation, or substantial change in the relationship, the dealer may seek an injunction to prevent the grantor’s action. The dealer can also recover its damages as the result of the grantor’s wrongful actions. Included as part of the dealer’s damage claim are the dealer’s actual costs including reasonable actual attorneys’ fees. Additionally, once a dealership has been terminated, at the dealer’s option, the grantor must repurchase at a fair wholesale market value *all* identifiable inventory sold by it to the terminated dealer.

Given the WFDL’s complexity and its serious consequences for violation, creditors should seek the advice of knowledgeable Wisconsin counsel prior to establishing a relationship with a distributor targeting Wisconsin markets or taking any action involving the termination, cancellation or substantial change in the relationship with a customer. **Proper determination as to whether a dealership may exist, and the prevention of a violation can spare a grantor from substantial damages and protect the grantor’s lawyer from much professional embarrassment.** Use of the Wisconsin Fair Dealership Law can also be a very effective collection tool in the hands of knowledgeable creditor’s counsel.

#### **About Jordan B. Reich**

Jordan is Head of Commercial Litigation at Kohner, Mann & Kailas, S.C. in Milwaukee, WI. A veteran commercial litigator, he has successfully defended many American and international companies against claims or counterclaims asserting violation of the WFDL before federal and state trial and appellate courts. For more information on the WFDL, call **Jordan Reich** at (414) 962-5110.

#### **About Kohner, Mann & Kailas, S.C.**

Founded in 1937, KMKSC is a business and commercial law firm listed in Martindale-Hubbell’s Bar Register of Preeminent Lawyers and a member of the International Society of Primerus Law Firms. KMKSC provides quality legal expertise across the areas of law encountered by businesses in the course of their operations and growth. Our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and expertly. Our purpose is to deliver excellent results for our clients, whether the issue is advice on the avoidance of legal disputes, closing a deal, protecting assets or winning in court. KMKSC is continually advancing the interests of its clients in negotiations, transactions, litigation and alternative dispute forums across North American and beyond. We help U.S. companies address the legal issues raised by trading across international borders and provide legal support and advice to foreign companies operating in American markets.