CHAPTER 135

DEALERSHIP PRACTICES

135.01 Short title. This chapter may be cited as the "Wisconsin Fair Dealership Law".

History: 1973 c. 179

Ch. 135 was enacted for the protection of the interests of the dealer, whose economic livelihood may be imperiled by the dealership grantor, whatever its size. Rossow Oil Co. v. Heiman, 72 W (2d) 696, 242 NW (2d) 176.

This chapter covers only agreements entered into after April 5, 1974. Wipperfurth v. U–Haul Co. of Western Wis., Inc. 101 W (2d) 586, 304 NW (2d) 767 (1981).

This chapter is constitutional; it may be applied to out–of–state dealers where provided by contract. C. A. Marine Sup. Co. v. Brunswick Corp. 557 F (2d) 1163. See: Boatland, Inc. v. Brunswick Corp. 558 F (2d) 818.

Where dealer did not comply with all terms of acceptance of dealership agreement, no contract was formed and this chapter did not apply. Century Hardware Corp. v. Acme United Corp. 467 F Supp. 350 (1979).

Dealing with the dealers: Scope of the Wisconsin fair dealership law. Axe, WBB Aug. 1981.

The fair dealership law: Good cause for review. Riteris and Robertson, WBB March, 1986.

Changing Business Strategy Under the Wisconsin Fair Dealership Law. Laufer. Wis. Law. March 1991.

135.02 Definitions. In this chapter:

(1) "Community of interest" means 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.

(2) "Dealer" means a person who is a grantee of a dealership situated in this state.

(3) "Dealership" means 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.

(4) "Good cause" means:

(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.

(5) "Grantor" means a person who grants a dealership.

(6) "Person" means a natural person, partnership, joint venture, corporation or other entity.

History: 1973 c. 179; 1977 c. 171; 1983 a. 189; 1993 a. 482.

Cartage agreement between air freight company and trucking company did not create "dealership" under this chapter. Kania v. Airborne Freight Corp. 99 W (2d) 746, 300 NW (2d) 63 (1981).

Manufacturer's representative was not "dealership". Foerster, Inc. v. Atlas Metal Parts Co. 105 W (2d) 17, 313 NW (2d) 60 (1981).

This chapter applies exclusively to dealerships that do business within geographic confines of state. Swan Sales Corp. v. Jos. Schlitz Brewing Co. 126 W (2d) 16, 374 NW (2d) 640 (Ct. App. 1985).

Guideposts for determining existence of "community of interest" under (3) established. Ziegler Co., Inc. v. Rexnord, Inc. 139 W (2d) 593, 407 NW (2d) 873 (1987).

A substantial investment distinguishes a dealership from a typical vendee–vendor relationship; establishing loss of future profits is not sufficient. Gunderjohn v. Loewen–America, Inc. 179 W (2d) 201, 507 NW (2d) 115 (Ct. App. 1993).

Manufacturer's representative was not "dealer". Wilburn v. Jack Cartwright, Inc. 719 F (2d) 262 (1983).

"Dealer" under (2) must be geographically "situated" in state. Bimel–Walroth Co. v. Raythem Co. 796 F (2d) 840 (6th Cir. 1986).

"Situated in this state" language in (2) does not supersede choice of law analysis in determining whether ch. 135 applies. Diesel Service Co. v. Ambrose Intern. Corp. 961 F (2d) 635 (1992).

When otherwise protected party transfers protected interest to third party, "community of interest" is destroyed and party removed from WFDL protection. Lakefield Telephone Co. v. Northern Telecom, Inc. 970 F (2d) 392 (1992).

A community of interest exists when a large proportion of a dealer's revenues are derived from the dealership, or when the alleged dealer has made sizeable investments specialized in the grantor's goods or services. Frieburg Farm Equip. v. Van Dale, Inc. 978 F (2d) 395 (1992).

There is no "community of interest" in the sale of services not yet in existence when the availability of the services is dependent on the happening of an uncertain condition. Simos v. Embassy Suites, Inc. 983 F (2d) 1404 (1993).

Distinction between dealer and manufacturer's representative discussed. Al Bishop Agcy., Inc. v. Lithonia, etc. 474 F Supp. 828 (1979).

Sales representative of manufacturer was not "dealership". E. A. Dickinson, Etc. v. Simpson Elec. Co. 509 F Supp. 1241 (1981).

Manufacturer's representative was "dealership". Wilburn v. Jack Cartwright, Inc. 514 F Supp. 493 (1981).

Employment relationship in question was not "dealership". O'Leary v. Sterling Extruder Corp. 533 F Supp. 1205 (1982).

Manufacturer's representative was not "dealership". Quirk v. Atlanta Stove Works, Inc. 537 F Supp. 907 (1982).

Manufacturer's representative was not "dealer". Aida Engineering, Inc. v. Red Stag, Inc. 629 F Supp. 1121 (1986).

Plaintiff was not "dealer" since money advanced to company for fixtures and inventory was refundable. Moore v. Tandy Corp. Radio Shack Div. 631 F Supp. 1037 (1986).

It is improper to determine whether a "community of interest" under (3) exists by examining the effect termination has on a division of the plaintiff. U.S. v. Davis, 756 F Supp. 1162 (1990).

Plaintiff's investment in "goodwill" was not sufficient to afford it protection under ch. 135. Team Electronics v. Apple Computer, 773 F Supp. 153 (1991).

The "situated in this state" requirement under (2) is satisfied as long as the dealership conducts business in Wisconsin. CSS–Wisconsin Office v. Houston Satellite Systems, 779 F Supp. 979 (1991).

There is no "community of interest" under sub. (3) where there is an utter absence of "shared goals" or "cooperative coordinated efforts" between the parties. Cajan of Wisconsin v. Winston Furniture Co. 817 F Supp. 778 (1993).

Even if a person is granted a right to sell a product, the person is not a dealer unless that person actually sells the product. Smith v. Rainsoft, 848 F Supp. 1413 (1994).

In search of a dealership definition: The teachings of Bush and Ziegler. Carter and Kendall. WBB Apr. 1988.

135.025 Purposes; rules of construction; variation by contract. (1) This chapter shall be liberally construed and applied to promote its underlying remedial purposes and policies.

(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 protect 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.

(3) The effect of this chapter may not be varied by contract or agreement. Any contract or agreement purporting to do so is void and unenforceable to that extent only.

History: 1977 c. 171.

Choice of law clause in employment contract was unenforceable. Bush v. National School Studios, 139 W (2d) 635, 407 NW (2d) 883 (1987).

See note to 135.05 citing Madison Beauty Supply v. Helene Curtis, 167 W (2d) 237, 481 NW (2d) 644 (Ct. App. 1992).

Forum–selection clause in dealership agreement was not freely bargained and so was rendered ineffective by (2) (b). Cutter v. Scott & Fetzer Co. 510 F Supp. 905 (1981).

Relinquishment of territory and signing of guaranty agreement were changes insufficient to bring relationship under this law. Rochester v. Royal Appliance Mfg. Co. 569 F Supp. 736 (1983).

135.03 Cancellation and alteration of dealerships. No grantor, directly or through any officer, agent or employe, 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.

History: 1973 c. 179; 1977 c. 171.

Grantor may exercise options if dealer refuses to accept changes that are essential, reasonable and not discriminatory; dealer's failure to substantially comply with such changes constitutes good cause. Ziegler Co., Inc. v. Rexnor, 147 W (2d) 308, 433 NW (2d) 8 (1988).

Drug supplier violated this section by terminating without good cause all dealership agreements with independently owned pharmacies in state. Kealey Pharmacy & Home Care Serv. v. Walgreen Co. 761 F (2d) 345 (1985).

Where grantor's action was due to business exigencies unrelated to dealer and was done in nondiscriminatory manner, this chapter did not apply. Remus v. Amoco Oil Co. 794 F (2d) 1283 (7th Cir. 1986).

Change in credit terms was change in dealer's "competitive circumstances". Van v. Mobil Oil Corp. 515 F Supp. 487 (1981).

This section did not apply where grantor withdrew nondiscriminatorily from product market on large geographic scale; 90–day notice was required. St. Joseph Equipment v. Massey–Ferguson, Inc. 546 F Supp. 1245 (1982).

Franchisees failed to meet their burden of proof that their competitive circumstances would be substantially changed by new agreement. Bresler's 33 Flavors Franchising Corp. v. Wokosin, 591 F Supp. 1533 (1984).

Good cause for termination includes failure to achieve reasonable sales goals. L.O. Distributors, Inc., v. Speed Queen Co. 611 F.Supp. 1569 (1985).

Federal law preempts ch. 135 in petroleum franchise cases. Baker v. Amoco Oil Co., 761 F Supp. 1386 (1991).

135.04 Notice of termination or change in dealership. Except as provided in this section, a grantor shall provide a dealer at least 90 days' prior written notice of termination, cancellation, nonrenewal or substantial change in competitive circumstances. The notice shall state all the reasons for termination, cancellation, nonrenewal or substantial change in competitive circumstances and shall provide that the dealer has 60 days in which to rectify any claimed deficiency. If the deficiency is rectified within 60 days the notice shall be void. The notice provisions of this section shall not apply if the reason for termination, cancellation or nonrenewal is insolvency, the occurrence of an assignment for the benefit of creditors or bankruptcy. If the reason for termination, cancellation, nonrenewal or substantial change in competitive circumstances is nonpayment of sums due under the dealership, the dealer shall be entitled to written notice of such default, and shall have 10 days in which to remedy such default from the date of delivery or posting of such notice.

History: 1973 c. 179.

Grantor must give 90–day notice when termination is for nonpayment of sums due. White Hen Pantry v. Buttke, 100 W (2d) 169, 301 NW (2d) 216 (1981).

Steps that grantor requires dealer to take in order to rectify deficiency must be reasonable. Al Bishop Agcy., Inc. v. Lithonia, etc. 474 F Supp. 828 (1979).

Notice requirement does not impermissibly burden interstate commerce. Designs in Medicine, Inc. v. Xomed, Inc. 522 F Supp. 1054 (1981).

Remedies for termination should be available only for unequivocal terminations of entire relationship. Meyer v. Kero–Sun, Inc. 570 F Supp. 402 (1983).

Insolvency exception to notice requirement did not apply where insolvency was not known to grantor at time of termination. Bruno Wine & Spirits v. Guimarra Vineyards, 573 F Supp. 337 (1983).

135.045 Repurchase of inventories. If a dealership is terminated by the grantor, the grantor, at the option of the dealer, shall repurchase all inventories sold by the grantor to the dealer for resale under the dealership agreement at the fair wholesale market value. This section applies only to merchandise with a name, trademark, label or other mark on it which identifies the grantor.

History: 1977 c. 171.

135.05 Application to arbitration agreements. This chapter shall not apply to provisions for the binding arbitration of disputes contained in a dealership agreement concerning the items covered in s. 135.03, if the criteria for determining whether good cause existed for a termination, cancellation, nonrenewal or substantial change of competitive circumstances, and the relief provided is no less than that provided for in this chapter.

History: 1973 c. 179.

Federal law required enforcement of arbitration clause even though that clause did not provide the relief guaranteed by ch. 135, contrary to this section and 135.025. Madison Beauty Supply v. Helene Curtis, 167 W (2d) 237, 481 NW (2d) 644 (Ct. App. 1992).

135.06 Action for damages and injunctive relief. If any grantor violates this chapter, a dealer may bring an action against such grantor in any court of competent jurisdiction for damages sustained by the dealer as a consequence of the grantor's violation, together with the actual costs of the action, including reasonable actual attorney fees, and the dealer also may be granted injunctive relief against unlawful termination, cancellation, nonrenewal or substantial change of competitive circumstances.

History: 1973 c. 179; 1993 a. 482.

In action for termination of dealership upon written notice not complying with ch. 135 and without good cause, statute of limitations starts running upon receipt of termination notice. Les Moise, Inc. v. Rossignol Ski Co., Inc. 122 W (2d) 51, 361 NW (2d) 653 (1985).

Term "actual costs of the action" includes appellate attorney's fees. Siegel v. Leer, Inc. 156 W (2d) 621, 457 NW (2d) 533 (Ct. App. 1990).

Measure of damages discussed. C. A. May Marine Supply Co. v. Brunswick Corp. 649 F (2d) 1049 (1981).

Cause of action accrued when defective notice under 135.04 was given, not when dealership was actually terminated. Hammil v. Rickel Mfg. Corp. 719 F (2d) 252 (1983).

This section does not restrict recovery of damages with respect to inventory on hand at time of termination to "fair wholesale market value". Kealey Pharmacy v. Walgreen Co. 761 F (2d) 345 (1985).

Accountant fees were properly included under this section. Bright v. Land O' Lakes, Inc. 844 F (2d) 436 (7th Cir. 1988).

There is no presumption in favor of injunctive relief and against damages for lost future profits. Frieburg Farm Equip. v. Van Dale, Inc. 978 F (2d) 395 (1992).

Determination of damages and attorney fees discussed. Esch v. Yazoo Mfg. Co., Inc. 510 F Supp. 53 (1981).

Punitive damages are not available in what is essentially an action for breach of contract. White Hen Pantry, Div. Jewel Companies v. Johnson, 599 F Supp. 718 (1984).

135.065 Temporary injunctions. In any action brought by a dealer against a grantor under this chapter, any violation of this chapter by the grantor is deemed an irreparable injury to the dealer for determining if a temporary injunction should be issued.

History: 1977 c. 171.

Four factors considered in granting preliminary injunction discussed. Loss of good will constituted irreparable harm. Reinders Bros. v. Rain Bird Eastern Sales Corp. 627 F (2d) 44 (1980).

Court did not abuse discretion in granting preliminary injunction notwithstanding arguable likelihood that defendant will ultimately prevail at trial. Menominee Rubber Co. v. Gould, Inc. 657 F (2d) 164 (1981).

Although plaintiff showed irreparable harm, failure to show reasonable likelihood of success on the merits precluded preliminary injunction. Milwaukee Rentals, Inc. v. Budget Rent A Car Corp. 496 F Supp. 253 (1980).

A presumption of irreparable harm exists in favor of a dealer where a violation is shown: for presumption to apply, a dealership relationship must be shown to exist. Price Engineering Co., Inc. v. Vickes, Inc. 774 F Supp. 1160 (1991).

135.07 Nonapplicability. This chapter does not apply:

(1) To a dealership to which a motor vehicle dealer or motor vehicle distributor or wholesaler as defined in s. 218.01 (1) is a party in such capacity.

(2) To the insurance business.

(3) Where goods or services are marketed by a dealership on a door to door basis.

History: 1973 c. 179; 1975 c. 371.

Where ch. 135 "dealer" is also a "franchisee" under ch. 553, commissioner of securities may deny, suspend or revoke a franchisor's registration or revoke its exemption if the franchisor has contracted to violate or avoid provisions of ch. 135. Ch. 135 expresses public policy and its provisions may not be waived. 66 Atty. Gen. 11.