

2003 SENATE BILL 489

February 24, 2004 – Introduced by Senators S. FITZGERALD, DARLING, ZIEN, BROWN, WELCH, KANAVAS, LEIBHAM, ROBSON, WIRCH, PLALE and DECKER, cosponsored by Representatives J. FITZGERALD, MUSSER, GARD, STONE, NASS, VAN ROY, GUNDERSON, JOHNSRUD, KREUSER, HUNDERTMARK, HEBL, J. LEHMAN, STEINBRINK, TOWNSEND, WEBER, TOWNS, SUDER, PETROWSKI, NISCHKE, MONTGOMERY, GRONEMUS, HINES, SCHOOFF, KREIBICH, D. MEYER, FRISKE and BLACK. Referred to Committee on Homeland Security, Veterans and Military Affairs and Government Reform.

1 **AN ACT** *to create* 125.33 (10) of the statutes; **relating to:** compensation of
2 fermented malt beverages wholesalers for termination of distribution rights.

Analysis by the Legislative Reference Bureau

Under current law, a brewer or out-of-state shipper may sell fermented malt beverages (beer) only to a wholesaler. A wholesaler is a person who holds a license to sell beer to retailers and to other wholesalers.

Currently, under the Wisconsin Fair Dealership Law (WFDL), which applies to most types of product distributors, a distributor who operates under a contract or agreement, expressed or implied, with a product supplier (known as the “grantor”) for distribution of the grantor’s products, and that maintains a sufficiently close continuing financial interest (“community of interest”) with the grantor, is considered a “dealer.” A dealer may not have its distribution rights terminated, cancelled, not renewed, or substantially changed in terms of competitive circumstances without good cause. The burden of establishing good cause lies with the grantor. “Good cause” means failure by the dealer to comply substantially with essential and reasonable requirements imposed, or sought to be imposed, upon the dealer by the grantor, which requirements are not discriminatory as compared to their application by the grantor to other similarly situated dealers. “Good cause” also means bad faith by the dealer in carrying out the grantor’s distribution business. A grantor must also provide a dealer with notice of an intent to terminate, cancel, fail to renew, or substantially change the competitive circumstances of the dealer’s distribution rights, and the dealer is entitled to an opportunity to cure any deficiency alleged by the grantor. A grantor that terminates, cancels, fails to renew, or

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substantially changes the dealer's distribution rights without good cause may be held liable, and injunctive relief preventing the grantor's actions may be obtained. Under the WFDL, there is a special category of dealerships for wholesalers of intoxicating liquor and, for this special category, the intoxicating liquor wholesaler does not need to show a "community of interest" with the grantor to be considered a dealer. There is no special category of dealership under the WFDL for beer wholesalers, but beer wholesalers who qualify under the general provisions of the WFDL may obtain relief under the WFDL.

This bill provides beer wholesalers with certain protections of distribution rights in addition to those afforded under the WFDL. With limited exceptions, the bill provides wholesalers with compensable and perpetual rights to the brands of beer they currently distribute within the territory of current distribution. Under the bill, with the exceptions described below, if a brewer or out-of-state shipper terminates an agreement for distribution of a brand of beer within a territory and chooses to have its brand of beer distributed in the same territory by a different wholesaler, the successor wholesaler must compensate the terminated wholesaler for the fair market value of the distribution rights for the territory without time limitation on projected future value. If the terminated wholesaler and successor wholesaler cannot agree on the amount of compensation to be paid to the terminated wholesaler, upon written demand of either party, the dispute must be submitted for binding arbitration, which must generally be commenced within 90 days after the successor wholesaler obtains its distribution rights. Any award of compensation by the arbitrator must be paid within 30 days of the arbitrator's decision, and the parties must each pay an equal share of the costs of arbitration. Under the exceptions, a successor wholesaler is not required to compensate a terminated wholesaler if the brewer or out-of-state shipper terminated the wholesaler's agreement for material fraudulent conduct or substantial misrepresentations, conviction of a felony crime, knowing distribution of products outside the terminated wholesaler's authorized territory, or insolvency or liquidation of the terminated wholesaler's business. The amount of compensation due to the terminated wholesaler from the successor wholesaler must also be reduced by any amount paid to the terminated wholesaler by the brewer or out-of-state shipper for the discontinued brand.

The provisions of the bill do not apply if a court determines that the terminated wholesaler qualifies under the criteria for seeking relief under the WFDL. Any arbitration proceeding for relief under the provisions of the bill must be stayed pending a court determination on this issue.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

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1 125.33 (10) COMPENSATION FOR TERMINATION OF WHOLESALER DISTRIBUTION
2 RIGHTS. (a) In this subsection:

3 1. “Brand” means any word, name, group of letters, symbols, or combination
4 thereof, including the name of the brewer if the brewer’s name is also a significant
5 part of the product name, adopted and used by a brewer to identify a specific
6 fermented malt beverage product and to distinguish that product from other
7 fermented malt beverages produced by that brewer or other brewers.

8 2. “Discontinued brand” means, with respect to a terminated wholesaler, any
9 brand of fermented malt beverages for which a brewer, brewer’s agent, or holder of
10 an out-of-state shipper’s permit has terminated, cancelled, or failed to renew an
11 agreement, whether oral or written, with the wholesaler to supply that brand.

12 3. “Successor wholesaler” means any wholesaler who enters into an agreement,
13 whether oral or written, to obtain a supply of a brand of fermented malt beverages
14 from a brewer, brewer’s agent, or holder of an out-of-state shipper’s permit after the
15 brewer, brewer’s agent, or holder of an out-of-state shipper’s permit has terminated,
16 cancelled, or failed to renew an agreement, whether oral or written, with a
17 terminated wholesaler to supply that same brand of fermented malt beverages.

18 4. “Terminated wholesaler” means a wholesaler with whom a brewer, brewer’s
19 agent, or holder of an out-of-state shipper’s permit has terminated, cancelled, or
20 failed to renew an agreement, whether oral or written, to supply a brand of fermented
21 malt beverages to that wholesaler.

22 (b) Except as provided in par. (c) and subject to pars. (d) and (e), a successor
23 wholesaler shall compensate a terminated wholesaler for the fair market value of the
24 terminated wholesaler’s distribution rights to any discontinued brand of fermented
25 malt beverages assumed by the successor wholesaler for the same territory, less any

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1 amount paid to the terminated wholesaler by the brewer, brewer's agent, or holder
2 of an out-of-state shipper's permit for the discontinued brand. If the terminated
3 wholesaler's distribution rights to any discontinued brand of fermented malt
4 beverages are divided among 2 or more successor wholesalers, each successor
5 wholesaler shall compensate the terminated wholesaler for the fair market value of
6 the distribution rights to any discontinued brand of fermented malt beverages
7 assumed by that successor wholesaler for the applicable part of the same territory,
8 less any amount paid to the terminated wholesaler by the brewer, brewer's agent, or
9 holder of an out-of-state shipper's permit for the discontinued brand. A terminated
10 wholesaler may not receive under this paragraph total compensation from the
11 successor wholesaler and brewer, brewer's agent, or holder of an out-of-state
12 shipper's permit that exceeds the fair market value of the terminated wholesaler's
13 distribution rights specified under this paragraph.

14 (c) A successor wholesaler is not required to compensate a terminated
15 wholesaler under par. (b) if the terminated wholesaler's agreement was terminated,
16 cancelled, or not renewed for any of the following reasons:

17 1. The wholesaler or a principal of the wholesaler engaged in material
18 fraudulent conduct or made substantial misrepresentations in its dealings with the
19 brewer, brewer's agent, or holder of an out-of-state shipper's permit or with others
20 regarding any brand of the brewer, brewer's agent, or holder of an out-of-state
21 shipper's permit.

22 2. The wholesaler or a principal of the wholesaler was convicted of, or pleaded
23 no contest to, a felony crime.

24 3. The wholesaler or a principal of the wholesaler knowingly distributed any
25 brand of the brewer, brewer's agent, or holder of an out-of-state shipper's permit

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1 outside the territory authorized by the brewer, brewer's agent, or holder of an
2 out-of-state shipper's permit for distribution of the brand.

3 4. The wholesaler or a principal of the wholesaler became insolvent or
4 instituted bankruptcy proceedings, dissolved or liquidated the wholesaler's
5 business, or assigned or attempted to assign the assets of the wholesaler's business
6 for the benefit of creditors.

7 (d) If a terminated wholesaler and a successor wholesaler agree to the fair
8 market value of the terminated wholesaler's distribution rights to any discontinued
9 brand of fermented malt beverages assumed by the successor wholesaler for the
10 same territory, the successor wholesaler shall pay the agreed upon sum to the
11 terminated wholesaler within 30 days of the date on which the parties reach the
12 agreement. If the parties cannot agree on the compensation due to the terminated
13 wholesaler, upon written demand of either party, the parties shall submit their
14 dispute for binding arbitration, subject to ch. 788, under the commercial arbitration
15 rules of the American Arbitration Association if possible or, if not possible, by a
16 nationally recognized arbitration association. The arbitration shall be conducted on
17 an expedited basis to the extent an expedited proceeding is available. The
18 arbitration shall commence within 90 days after the successor wholesaler obtains
19 rights to receive a supply of a brand of fermented malt beverages, that is a
20 discontinued brand of fermented malt beverages, of the terminated wholesaler,
21 unless this time period is extended by mutual agreement of the parties or by the
22 arbitrator. If the arbitrator awards compensation to the terminated wholesaler
23 under this paragraph, the successor wholesaler shall pay the awarded compensation
24 to the terminated wholesaler within 30 days of the date of the arbitrator's decision.

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1 The terminated wholesaler and the successor wholesaler shall each pay an equal
2 share of the costs of arbitration.

3 (e) This subsection does not apply if the terminated wholesaler is a dealer, as
4 defined in s. 135.02 (2), whose business relationship as to any discontinued brand
5 constitutes a dealership, as defined in s. 135.02 (3) (a), as determined by a court of
6 competent jurisdiction. Any arbitration proceeding under par. (d) shall be stayed
7 pending this determination.

8 **SECTION 2. Initial applicability.**

9 (1) This act first applies to agreements terminated, cancelled, or not renewed
10 on the effective date of this subsection.

11 (END)