



# Brand Compensation and Fair Dealership Laws

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Wisconsin's Brand Compensation and Fair Dealership Laws provide fermented malt beverage (beer) and intoxicating liquor (distilled spirits and wine, "liquor") wholesalers respectively, with certain rights regarding the brands of beer or liquor that they distribute. These laws are part of Wisconsin's three-tier system of regulating alcohol beverages and generally require a brewer, brewpub, out-of-state shipper, or distilled spirits manufacturer or rectifier to compensate a wholesaler for terminating an agreement to distribute a brand of beer or distilled spirits.

## BEER AND THE BRAND COMPENSATION LAW

Wisconsin's Brand Compensation Law requires that beer wholesalers be compensated for the fair market value of terminated rights to distribute a brewer's beer. The provision is particularly important because distribution rights for beer must be exclusive to one wholesaler for a particular sales territory.<sup>1</sup> Several other states have similar laws regarding the relationship between brewers and wholesalers, but differ as to whether the wholesaler has a right to cure any reason for which a brewer may seek to terminate a distribution agreement, whether there are circumstances in which distribution agreements may be terminated immediately, and whether a terminated wholesaler is entitled to compensation.

## Compensation of Terminated Beer Wholesaler

If a brewer, brewpub, or out-of-state beer shipper terminates, cancels, or fails to renew an agreement to supply a brand of beer to a beer wholesaler (or wholesalers) for sale to retailers, the beer wholesaler generally must be compensated. Generally, the successor beer wholesaler chosen by the brewer, brewpub, or out-of-state beer shipper must pay the terminated beer wholesaler the fair market value of the distribution rights for the brand in the same sales territory.<sup>2</sup>

A beer wholesaler, however, is not entitled to compensation if the agreement was terminated, cancelled, or not renewed because the beer wholesaler did any of the following:

- Engaged in material fraudulent conduct or made substantial misrepresentations in its dealing with the brewer, brewpub, or out-of-state beer shipper.
- Was convicted of a felony.
- Knowingly distributed any brand of the brewer, brewpub, or out-of-state beer shipper outside of the territory authorized for distribution of that brand.
- Became insolvent or liquidated the business.<sup>3</sup>

## Agreeing on "Fair Market Value"

The terminated beer wholesaler and successor beer wholesaler must agree upon the fair market value of the beer brand's distribution rights for a particular territory or enter into arbitration. The statutes do not specify the process for determining fair market value. According to one report, it is typically between three and seven times a brand's gross revenue in a sales territory.<sup>4</sup>

If the beer wholesalers agree, the successor beer wholesaler must pay the terminated beer wholesaler within 30 days of reaching an agreement. If the wholesalers do not agree, the dispute is settled through arbitration. The arbitration proceedings typically must begin within 90 days of the successor beer wholesaler receiving the rights to distribute the brand of beer previously distributed by the terminated beer wholesaler. Arbitration costs are split equally by the wholesalers.<sup>5</sup>

Additionally, the Brand Compensation Law does not apply if the terminated beer wholesaler is a dealer under Wisconsin's Fair Dealership Law, ch. 135, Stats., whose business relationship to any discontinued brand constitutes a dealership, as determined by a court.<sup>6</sup>

## DISTILLED SPIRITS AND THE FAIR DEALERSHIP LAW

While distilled spirits manufacturers, rectifiers, out-of-state liquor shippers, and liquor wholesalers are not subject to the Brand Compensation Law, they are generally subject to the state's Fair Dealership Law. Very generally, the Fair Dealership Law requires that a grantor of a dealership (such as a distilled spirits manufacturer) have good cause to terminate a dealership (such as a distribution agreement with a wholesaler). For distilled spirits, the law is intended to promote the best interest of the state by maintaining a "stable and healthy" tier of wholesalers, ensuring a "balanced and healthy" three-tier system, and ensuring efficient and effective tax collection.<sup>7</sup>

### Scope of the Fair Dealership Law

The Fair Dealership Law applies to contracts to sell or distribute a person's goods or services in which there is a "community of interest" in the business of offering, selling, or distributing those goods or services. As it relates to distilled spirits, the law does not require proof of a "community of interest" and applies to any agreement in which a wholesaler is granted the right to sell or distribute distilled spirits or use a trade name, advertising, or other commercial symbol relating to distilled spirits, unless either of the following exceptions exists:<sup>8</sup>

- The manufacturer or rectifier has never produced more than 200,000 gallons of distilled spirits in one year.
- The wholesaler's net revenues from all of the grantor's brands make up less than five percent of the wholesaler's total annual net revenue sales from liquor.

Unlike distilled spirits, agreements to sell or distribute wine are not automatically subject to the Fair Dealership Law. Instead, wine wholesalers must prove the existence of a "community of interest" for Fair Dealership Law restrictions to apply.<sup>9</sup>

### Ending or Changing Dealership Agreements

Once a grantor of a dealership (a manufacturer, rectifier, or out-of-state liquor shipper) and dealer (a liquor wholesaler) agree to a dealership, the agreement can be difficult to change. Grantors must have good cause to terminate, cancel, fail to renew, or substantially change the competitive circumstances of an agreement, and have the burden of proving good cause. A grantor that violates the Fair Dealership Law may be subject to damages, costs, attorney's fees, and injunctive relief.<sup>10</sup>

A grantor that wishes to terminate or change the terms of a dealership must provide the dealer with notice of termination, cancellation, nonrenewal, or substantial change in competitive circumstances. Generally, the grantor must provide the liquor wholesaler with at least 90 days of prior notice and provide the dealer with 60 days to fix any deficiency. If the dealer fixes the deficiency, the grantor may not terminate or change the dealership. If a grantor wishes to terminate or change a dealership, and does not want to risk the penalties associated with violating the Fair Dealership Law, the dealer may allow the grantor to repurchase all of the unsold inventory held by the dealer at fair wholesale market value.<sup>11</sup>

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<sup>1</sup> s. 125.34 (3)(a), Stats.

<sup>2</sup> s. 125.33 (10) (b), Stats.

<sup>3</sup> s. 125.33 (10) (c), Stats.

<sup>4</sup> Shawn Johnson, *History, Politics Shape Wisconsin's Alcohol Laws*, Wisconsin Public Radio (May 13, 2019) <https://www.wpr.org/history-politics-shape-wisconsins-alcohol-laws>.

<sup>5</sup> s. 125.33 (1) (d), Stats.

<sup>6</sup> s. 125.33 (10) (e), Stats.

<sup>7</sup> s. 135.066, Stats.

<sup>8</sup> ss. 135.02 (3) and 135.066 (5), Stats.

<sup>9</sup> ss. 135.02 (3) (b) and 135.066 (2), Stats., and *Winebow, Inc. v. Capitol-Husting Co., Inc.*, 2018 WI 60.

<sup>10</sup> ss. 135.03 and 135.06, Stats.

<sup>11</sup> ss. 135.04 and 135.045, Stats.