

2769 WISCONSIN FAIR DEALERSHIP LAW: EXISTENCE OF DEALERSHIP

Question _____ of the special verdict asks whether a dealership [was established] [existed] between (_____) and (_____).

To find that a dealership existed between (_____) and (_____) you must determine that two elements were present:

- A contract or agreement existed in which (dealer) was given the right by (grantor) to [sell or distribute (a product) (a service)] [or] [use a trade name, trademark, service mark, logotype, advertising or other commercial symbol]. The contract or agreement may be written or oral; and
- A community of interest existed between (grantor) and (dealer). This means the parties shared a continuing financial interest in which the parties cooperated and coordinated their activities in operating the dealership business or marketing the dealership's (goods) (or) (services) and share common goals in their business relationship.

In determining if a community of interest existed between (dealer) and (grantor), among the things you should consider are:

- How long the parties dealt with each other;
- The extent and nature of the obligations imposed on the parties in any contract or agreement between them;

The percentage of time or revenue the (dealer) devoted to (grantor)'s products or services;

- The percentage of the gross proceeds or profits (dealer) derived from (grantor)'s products or services;

- The extent and nature of (grantor)’s grant of territory to (dealer);
- The extent and nature of (dealer)’s uses of (grantor)’s proprietary marks (such as trademarks or logos);
- The extent and nature of (dealer)’s financial investment in inventory, facilities, and good will of the alleged dealership;
- The personnel which (dealer) devotes to the alleged dealership;
- How much (dealer) spent on advertising or promotional expenditures for the (grantor)’s products or services;
- The extent and nature of any supplementary services provided by (dealer) to consumers of (grantor)’s products or services.

SPECIAL VERDICT

See Wis JI-Civil 2772.

COMMENT

This instruction was approved in 2002. The comment was updated in 2004, 2009, 2010, and 2020.

Wis. Stat. § 135.02(2); Ziegler Co., Inc. v. Rexnord, Inc., 139 Wis.2d 593, 407 N.W.2d 873 (1987); Baldewein Co. v. Tri-Clover, Inc., 233 Wis.2d 57, 606 N.W.2d 145 (2000); Central Corp. v. Research Products Corp., 2004 WI 76, 272 Wis.2d 561, 681 N.W.2d 178; Moe v. Benelli U.S.A. Corp., 2007 WI App 254, 306 Wis.2d 812, 743 N.W.2d 691, fn. 5.

In Baldewein Co. v. Tri-Clover, the court said the definition of “dealership” in Wis. Stat. § 135.02(2) is both “extremely broad and highly nuanced.” The court also remarked that “community of interest” has been the most vexing phrase in the “dealership definition for courts faced with applying the law.”

Determining Whether a Community of Interest Exists; Factors. The list of factors in paragraph 3 can be modified based on the evidence. This list is taken from Ziegler, supra. In Central Corp., supra, the Wisconsin Supreme Court said that while the list of factors set forth in Ziegler does not recite every factor that may be considered, it does provide questions that are useful in determining whether a community of interest exists. In Central Corp. v. Research Products Corp., supra, the court said several facts of the parties’ business relationship led to the conclusion that summary judgment should not

have been granted. The supreme court listed the following factors and the alternative inferences that may be drawn from them in determining whether a dealership relationship existed:

1. the parties' 20-year business relationship;
2. the significant financial investment by the dealer in the construction of a warehouse based, in part, on the amount of the grantor's product in inventory;
3. the dealer's practice of keeping a substantial amount of the grantor's product in inventory;
4. the grantor's desire to limit the dealer's sales to a specific territory; and
5. the dealer's practice of keeping spare parts for grantor's products, on hand, at cost to its customers.

The supreme court in Ziegler, supra, established a multiple factor test for determining whether a community of interest exists. The community of interest concept serves to limit the application of the Fair Dealership Law and requires a person "seeking the protections of the law to demonstrate a stake in the relationship large enough to make the grantor's power to terminate, cancel or not renew a threat to the economic health of the person (thus giving the grantor inherently superior bargaining power). Ziegler, supra, p. 605; Baldewein, supra.

In Baldewein, the court stated that a dealership is a "symbiotic relationship." It said:

The dealer benefits by generating income through sales, without having to undertake the expense of manufacturing. The grantor benefits by having the dealer undertake important marketing functions through investment in inventory, receivables and facilities, and by applying its efforts and experience in merchandising and selling the product.

The WFDL protects dealers who have made a substantial investment in the dealership and who are substantially dependent on the grantor's product line. Ziegler, 139 Wis. 2d at 605. The statute's requirement of a "community of interest" between the parties captures this concept and ensures that the WFDL's protections apply only to those business relationships that involve a higher level of financial interdependence than the typical vendor-vendee relationship.

When a dealer sinks substantial resources into its relationship with a particular grantor-time, money, employees, facilities, inventory, advertising, training-or derives substantial revenue from the relationship (as a percentage of its total), or some combination of the two, the grantor's power to terminate, cancel, or not renew the relationship becomes a substantial threat to the economic health of the dealer and a community of interest can be said to exist.

Modifying the Factors. While the trial court has discretion in deciding how to instruct the jury and thus can modify these instructions, the ten factors used to determine whether a community of interest exists as set forth in Ziegler Co., Inc. v. Rexnord, Inc., 139 Wis.2d 593, 407 N.W.2d 873 (1987), remain appropriate instructions. Water Quality Store v. Dynasty Spas, Inc., 2010 WI App 112, ¶¶44-45. The standard for determining a community of interest as set forth in Home Protective Services, Inc. v. ADT

Security Services, Inc., 438 F.3d 716, 720 (7th Cir. 2006), is not the law in Wisconsin even though it interpreted Wisconsin law. Water Quality Store, at ¶2.

Where no factual dispute exists, including those arising from the existence of reasonable alternative inferences drawn from otherwise undisputed facts, the community of interest question is one of law for the court. Moe v. Benelli U.S.A. Corp., 2007 WI App 254, 306 Wis.2d 812, 743 N.W.2d 691, fn. 5.

Logo/Commercial Symbol: Even if a party lacks the right to sell, it may still qualify as a dealer if the party makes substantial use of a commercial symbol. However, mere permission to utilize a manufacturer's commercial symbol does not create a dealership. A dealer must instead show considerable investment in promoting a trademark or logo such that the dealer has tied its fortunes to the manufacturer. As the Wisconsin Supreme Court stated in Foerster, Inc. v. Atlas Metal Parts Co., 105 Wis.2d 17, 313 N.W.2d 60 (1981), "[T]here must be more than the mere use of a calling card identifying a manufacturer's representative as an agent for a company." See also, PMT Machinery Sales, Inc. v. Yama Seiki USA, Inc., 941 F.3d 325, 331, (7th Cir. 2019) where the Seventh Circuit Court of Appeals held that the plaintiff's use of the defendant's logos on its website did not involve a substantial investment that would in turn create an imbalance of power between the two parties.